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

CEESAY,

Petitioner-Plaintiff,

v.

BROPHY, et. al.,

Respondents-Defendants.

Civil Action No.: 1:25-cv-00267-LJV

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Petitioner Sering Ceesay ("Petitioner" or "Mr. Ceesay"), respectfully submits this opposition to Respondents' ("Respondents" or "government" or "ICE") motion to dismiss and memorandum of law (ECF Nos. 9, 9-1, 9-2 and 9-3) (collectively "Resp'ts' Mot. to Dismiss"). The Court should deny Resp'ts' Mot. to Dismiss.

Respondents concede that Mr. Ceesay—a man with severe medical disabilities—never violated the terms of his supervision and was not a danger to the community nor a flight risk. Yet, instead of providing Mr. Ceesay with the process he was due, including an orderly departure, Mr. Ceesay was redetained—approximately fourteen (14) years after he was released from ICE detention—at a regularly scheduled ICE check-in according to the unilateral decision of one ICE officer. *See* ECF No. 7, Amended Petition ("Petition") and Exh. 1, Declaration of Sering Ceesay, ("Ceesay Decl."), ¶6.

Resp'ts' Mot. to Dismiss requests that the Court dismiss Mr. Ceesay's case pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Seeking to evade review of the unlawful and discriminatory actions of ICE, the government argues that this Court does not have jurisdiction over the claims raised by Mr. Ceesay, that he has failed to state claims for relief, and that this case is nonjusticiable because the relief requested will not redress Mr. Ceesay's injuries. Each of these arguments fails.

The government offers myriad misappraisals of Mr. Ceesay's claims and the relief he seeks, including a misstatement that Petitioner is seeking a stay of his removal in this case. But this Court can grant the relief Mr. Ceesay's seeks: his release from his current unlawful detention by ICE. The government argues that this Court should follow *Westley v. Harper*, No. 25-229, 2025 WL 592788, at *2 (E.D. La. Feb. 24, 2025). While Petitioner respectfully disagrees with the reasoning adopted by the Court in *Westley,* the facts of that case—as discussed *infra*—are distinct from Mr.

Ceesay's case. Mr. Ceesay instead respectfully requests that this Court follow the reasoning of *Rombot v. Souza*, 296 F. Supp. 3d 383 (D. Mass. 2017), which has facts and circumstances that bear stark similarities to those here.

Like the Petitioner in *Rombot,* the release notification that was prepared by ICE and filed by the government in this proceeding, ECF No. 9-2 at 7,[1] states unequivocally that "[o]nce a travel document is obtained, you will be required to surrender to ICE for removal. You will, at that time, be given an opportunity to prepare for an orderly departure." ECF No. 9-2 at 7. Also like the Petitioner in *Rombot*, as the Respondents readily concede, Mr. Ceesay has always complied with his OSUP. As the Court in *Rombot* found, ICE "never asserted that Rombot is a danger to the community or a flight risk, or that he violated the conditions of his [OSUP]. . . . The Supreme Court has recognized that an 'alien may no doubt be returned to custody upon a violation of [supervision] conditions,' but it has never given ICE a carte blanche to re-incarcerate someone without basic due process protection." *Rombot*, 296 F. Supp. at 388–89 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001)).

While the government argues that Mr. Ceesay has conflated the regulatory scheme applicable to the revocation of an OSUP, this is not correct. The government has failed to submit a Declaration from anyone who has personal knowledge of Mr. Ceesay's detention on February 19, 2025, and there is no evidence that the person who signed the notice of revocation (ECF No. 9-2 at 11) had the authority to do so. The government also does not offer any argument as to why it did not, as was required by the release notification (ECF No. 9-2 at 7), provide Mr. Ceesay with an orderly departure. While the release notification (ECF No. 9-2 at 11) states that "in light of the

[1] Petitioner references the ECF number pagination in Resp'ts' Mot. to Dismiss throughout this reply.

fact that ICE was able to obtain a valid travel document to affect your repatriation," this is simply not true. Rather, as the government's motion to dismiss openly admits, there currently is not a travel document in place. In fact, as is set forth in Mr. Ceesay's Petition, ICE required him to meet with the Gambian Consulate while in detention for the sole purpose of obtaining a travel document. As is set forth in Mr. Ceesay's Petition, his detention on February 19, 2025, was the result of an ICE Officer who, for reasons that are not clear, became enraged at him and unilaterally decided to put Mr. Ceesay in handcuffs and put him in jail for two months. ECF No. 7 Petition, ¶32 and Exh. 1, Ceesay Decl., ¶31.

Mr. Ceesay respectfully requests that the Court deny the government's motion to dismiss. Mr. Ceesay has *never* violated the terms of his OSUP and therefore he could be released while this case proceeds before the Court.

ARGUMENT

Dismissal at this stage of the proceeding is not warranted. Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to challenge the court's subject matter jurisdiction by means of a motion to dismiss. In reviewing a motion to dismiss under Rule 12(b)(1), however, a court must "accept as true any facts plausibly alleged in a complaint, and must draw all inferences in favor of the [non-moving party]." *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 44 (2d Cir. 2017). In considering a motion to dismiss, courts may look to documents referenced in the complaint, documents that the plaintiff relied on in initiating the lawsuit, and matters of which judicial notice may be taken. *See Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (citing *Concord Assocs., L.P. v. Entm't Props. Tr.*, 817 F.3d 46, 51 n.2 (2d Cir. 2016); *Chambers v. Time Warner, Inc*., 282 F.3d 147, 153 (2d Cir. 2002)). As discussed *infra,* dismissal is not warranted because this Court has jurisdiction and Mr. Ceesay has sufficiently set forth that his rights have been violated and that this Court can provide a remedy.

The government also argues that Mr. Ceesay has failed to state a claim with respect to the Section 504 of the Rehabilitation Act. Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to move for dismissal on the basis for failure to state a claim. "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Id*. at 678. "[A] court at this stage of our proceeding is not engaged in an effort to determine the true facts. The issue is simply whether the facts the plaintiff alleges, if true, are plausibly sufficient to state a legal claim." *Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016). "In assessing a motion to dismiss, a court must view the evidence—and interpret any allegations—in the light most favorable to the plaintiffs, and must draw reasonable inferences in plaintiffs' favor." *Gamm v. Sanderson Farms, Inc.,* 944 F.3d 455, 458 (2d Cir. 2019). But, as is discussed *infra,* Mr. Ceesay has—at this stage of the proceeding—sufficiently pled his claims for relief and the decision in *Yearwood v. Barr*, 391 F. Supp. 3d 255 (S.D.N.Y. 2019) is not applicable to this case.

I. THIS COURT SHOULD ENJOIN TRANSFER OF MR. CEESAY PENDING THE ADJUDICATION OF THIS CASE.

The Court should enjoin the transfer of Mr. Ceesay because given his complex medical needs, the danger of transfer implicates his ability to pursue his claims in this case. Contrary to the assertions of Respondents, here, Petitioner is not seeking a stay of removal. And it does not appear that Respondents are contesting this Court's venue or jurisdiction beyond citing to 8 U.S.C. §1252(g). *See* ECF Resp'ts' Mot. to Dismiss, ECF No. 9-3 at 6. Instead, the government cites several cases from this District that denied enjoining the transfer of a petitioner. *Id.* at 4. But

Respondents do not argue that it would be prejudicial to them to enjoin transfer during the pendency of this proceedings and offer no argument in opposition to transfer other than citing to 8 U.S.C. § 1231(g)(1). *Id.*

This Court has jurisdiction under 28 U.S.C. § 1651 (the All-Writs Act) to enjoin transfer, and under the facts and circumstances here, including substantial risks to Mr. Ceesay's health, that request should be granted. *See SEC v. Vision Communs.*, 74 F.3d 287, 291 (D.C. Cir. 1996) (All Writs Act "empowers a district court to issue injunctions to protect its jurisdiction"); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 54 (D.D.C. 2004) (federal courts "may and should take such action as will defeat attempts to wrongfully deprive parties" of their right to sue in federal court) (internal citation omitted); *Lindstrom v. Graber*, 203 F.3d 470, 474–76 (7th Cir. 2000) (All Writs Act permits a court to stay extradition pending appeal of habeas corpus petition).

Courts retain their inherent equitable authority to enjoin transfers pending a habeas petition, and courts regularly exercise that authority. *See, e.g.*, *Santos Garcia v. Wolf*, No. 1:20-cv-821 (LMB/JFA), 2020 WL 4668189 (E.D. Va. Aug. 11, 2020); Order, *Campbell v. U.S. Immigr. & Customs Enf't*, No. 1:20-cv-22999-MGC (S.D. Fl. July 26, 2020), ECF No. 13; Order, *Sillah v. Barr*, No. 19-cv-1747 (S.D.N.Y. Feb. 25, 2019), ECF No. 3; Order, *Joshua M. v. Barr*, No. 3:19-cv-00770-MHL (E.D. Va. Dec. 19, 2018), ECF No. 37; *see also Zepeda Rivas v. Davis*, 504 F. Supp. 3d 1060, 1077 (N.D. Cal. 2020); *Dorce v. Wolf*, No. 20-CV- 11306, 2020 WL 7264869 (D. Mass. Dec. 10, 2020); 28 U.S.C. § 2243 (habeas courts authorized to order relief "as law and justice require").

As is detailed in Mr. Ceesay's Petition, RFK Human Rights met Mr. Ceesay for the first time on March 4, 2025, at the Buffalo Federal Detention Facility (BFDF). *See* ECF No. 1, Petitioner, ¶¶37-38. On that date, Mr. Ceesay was in visible medical distress and was, at the request

of RFK Human Rights, sent to the medical unit. However, the medical unit could not address his medical needs on that date, and he was thereafter sent to an outside of medical provider. As is set forth in the Shin Medical Letter, Mr. Ceesay suffered "a transient ischemic attack (a temporary stroke-like syndrome due to atherosclerotic plaque in the blood vessels of the brain)." ECF No.7-1 at 1-2. At the time of his unnoticed detention on February 19, 2025, Mr. Ceesay did not have his medication. Therefore, there was a disruption in Mr. Ceesay receiving his medication because he was taken to two different facilities prior to the BFDF.

As the Shin Medical Letter explains, Mr. Ceesay's "medications serve an important role in decreasing the risk of stroke and stroke-like conditions which can lead to chronic disability and death. Even while on these medications, Mr. Ceesay suffered from a transient ischemic attack which further reflects his especially high risk of complications if he were to be taken off his medications." *Id.* As someone who cannot read or write, Mr. Ceesay is dependent on consistency with health care providers that can help organize and advise on his medication. Currently, he is receiving the medication he requires and has to carry nitroglycerin with him at all times which BFDF has provided to him. Any transfer, as was the case when he was detained, would result in a disruption to his medical care and current medical providers.

If this Court does not enjoin transfer during the pendency of this case, Mr. Ceesay respectfully requests that the government be ordered to provide at least seventy-two (72) hours' notice prior to any transfer to Mr. Ceesay's counsel. *See e.g., Mei Ying Fong v. Ashcroft,* 317 F. Supp. 2d 398, 402-403 (2004); Order, *Joshua M.,* No. 3:19-cv-00770-MHL, ECF No. 37. Given Mr. Ceesay's medical issues and inability to read and write, providing at least 72 hours' notice to Petitioner's counsel of transfer and the name of the facility would ensure that Petitioner is not being transferred to a facility that is unable to provide him with medical care and would preclude

his access to counsel. *See* Order, *Joshua M*, No. 3:19-cv-00770-MHL, ECF No. 37. Moreover, it would ensure that Mr. Ceesay is not being moved to a facility outside of the United States.

II. THIS COURT HAS JURISDICTION OVER MR. CEESAY'S CLAIMS.

Respondents argue that this Court does not have jurisdiction to stay removal and does not have jurisdiction over this case pursuant to 8 U.S.C. §1252(g). *See* Resp'ts' Mot. to Dismiss, ECF No. 9-3 at 7-9. As an initial matter, Mr. Ceesay does not seek an Order from this Court that stays his removal from the United States. Rather, in his prayer for relief, he requests that his transfer outside of the Court's jurisdiction and the United States be enjoined pending the adjudication of this Petition. *See* ECF No. 7, Petition. Mr. Ceesay addresses the request to enjoin *supra.*

Congress amended 8 U.S.C. §1252(g) after *I.N.S. v. St. Cyr*, 533 U.S. 289, 314 (2001), to explicitly bar habeas and other federal claims whenever a matter falls within the scope of the 1252(g) bar. *See Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 105 (2d Cir. 2008). But the Supreme Court teaches that 1252(g) must be read *narrowly*, to only apply to the three actions listed in that statute: including, as pertinent here, the decision to "execute" removal orders. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 (1999) (hereinafter "AADC"). The Supreme Court, consistent with the presumption in favor of judicial review and Section 1252(g)'s text and purpose, has stressed that the "discretion-protecti[on]" of Section 1252(g) was not crafted to bar non-final-order review of "*all* claims arising from deportation proceedings." *Id.* at 482, 487 (emphasis added). Instead, as Justice Scalia, writing for the Court, explained, Section 1252(g) does not contain a broad application, but rather one that is "much narrower." *Id.* at 482. Based on the Court's guidance, Section 1252(g) thus applies only to a discrete areas over which the Executive may exercise its "prosecutorial discretion" to "initiat[e]. . . prosecut[e] . . . [or] abandon" removal proceedings. *Id.* at 482-83, 485 n.9. As Justice Scalia noted, "[t]here are of course many other

decisions or actions that may be part of the deportation process" that do not fall within those three acts, "such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order." *Id.* at 482.

In *Jennings v. Rodriguez*, a plurality of the Supreme Court reiterated that although Section 1252(g) by its terms covers claims "*arising from*" the "decision or action" by the Executive to "commence proceedings, adjudicate cases, or execute removal orders," the "arising from" language "refer[s] to just those three specific actions themselves." 583 U.S. 281, 294 (2018). It does not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General." *Id*. Similarly, in *Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, the Supreme Court again emphasized that Section 1252(g) is "narrow" and does not cover "all claims arising from deportation proceedings" or impose "a general jurisdictional limitation." 591 U.S. 1, 19 (2020) (internal quotations omitted).

In arguing that this Court does not have jurisdiction pursuant to 8 U.S.C. §1252(g), the government relies primarily upon two cases out of this Circuit.[2] The government first relies upon *Tazu v. Att'y Gen. U.S.*, 975 F. 3d 292, 298 (3d Cir. 2024).[3] In *Tazu,* the government argued that it

[2] The government also references 8 U.S.C. §1252(b)(9) and (b)(5) and argues that both sections strip the jurisdiction of the Court. However, this argument should be rejected by the Court. In *Michalski v. Decker*, the Court considered jurisdictional arguments and concluded that the language relied upon by the government did not support a finding that the Court did not have jurisdiction. The Court explained that "[t]his language simply provides that if a petitioner fails to consolidate a question of law or fact in a petition for review of an order of removal by the court of appeals, he cannot seek review by habeas or otherwise. *Michalski v. Decker,* 279 F. Supp. 3d 487*,* 493-494 (S.D.N.Y. 2018).

[3] The government also relies upon S*ingh v. Napolitano*, 500 F. App'x 50, 52 (2d Cir. 2012) but that case is not applicable. In *Singh,* the Court made clear that the Petitioner was seeking to challenge a final order of removal through a habeas petition and had not exhausted his administrative appeals. From a review of the case, it appears that *Singh* had an avenue to challenge

had obtained a passport for a non-citizen it wished to deport and detained him three days later. The Third Circuit reasoned that "to perform or complete a removal, the Attorney General must exercise his discretionary power to detain an alien *for a few days*." *Id.* at 298 (emphasis added). In that context, the Third Circuit held that "[r]e-detaining Tazu was simply the enforcement mechanism the Attorney General picked to execute his removal." *Id*. at 298-99. The decision to detain someone after the removal order was entered is a decision about custody, not purely a decision about executing removal orders. Courts treat detention and the "execution" of a removal order as distinct action points. *See, e.g., Kong v. United States*, 62 F.4th 608, 618 (1st Cir. 2023) (distinguishing *Tazu* which "held that judicial review was barred because the challenge was to 'brief door-to-plane detentions' that are 'integral to the act of executing a removal order,' from detention "before deportation was certain") (internal alterations removed); *Michalski,* 279 F. Supp. 3d at 495 (finding none of 1252(g)'s "discrete actions are implicated by [petitioner's] challenge to his detention").

The factual record before this Court clearly indicates that Mr. Ceesay's redetention was not the "execution" of a removal order. At the time of his unnoticed detention on February 19, 2025, ICE's notice of revocation of release claimed that it had a travel document. *See* ECF No. 9-2 at 11. But ICE's actions and Respondents' own assertions have since clarified that this was false. *See* ECF No. 7, Petition, ¶41. Unlike in *Tazu,* here, the government did not have the travel documents needed to actually effectuate Mr. Ceesay's removal at the time of his redetention. Instead, Mr. Ceesay's detention on February 19, 2025, was based upon one ICE Officer's unilateral and unlawful decision that Petitioner should "go to jail for two months." *See* ECF No. 7, Petition, ¶31

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the agency action in an administrative forum and for reasons that are not clear from the decision decided not to do so.

and Ceesay Decl., ¶¶6-12. As such, Mr. Ceesay has been detained by ICE for seven weeks—a far cry from the mere *days* long, brief detention contemplated by *Tazu.* 975 F. 3d at 298.

The government also relies upon *Westley*, No. 25-229, 2025 U.S. Dist. LEXIS 32981, another case outside of this Circuit that is factually distinguishable. Unlike the Petitioner in *Westley*, as is discussed *supra* the government release notification specifically grants Mr. Ceesay an orderly departure from the United States—a fact distinct from *Westley.* In *Westley*, the Petitioner had been ordered removed in 2010 and was deported to her country of origin twice and then returned both times. It was not until July of 2024 that the Petitioner was granted an OSUP and the government argued—and the Court accepted—that the purpose of her release in July 2024 had been satisfied. *Id.*

Meanwhile, courts in this Circuit have found jurisdiction over similar claims challenging the legality of detention, despite §1252(g). *See, e.g., Michalski* 279 F. Supp. 3d at 495 (finding none of 1252(g)'s "discrete actions are implicated by [petitioner's] challenge to his detention"); *Xiu Qing You v. Sessions*, No. 18-CV-5392 (GBD) (SN), 2019 U.S. Dist. LEXIS 130786, *18 (S.D.N.Y. Aug. 2, 2019) *adopted by Xiu Qing You v. Nielsen,* No. 18-CV-5392 (GBD) (SN), 2020 U.S. Dist. LEXIS 96124, **14-16 (S.D.N.Y., June 1, 2020) (finding that §1252(g) did not strip the Court of jurisdiction to determine if detention was unlawful and found that "that Petitioner's detention was unlawful" under the INA); *accord Rombot v. Souza*, 296 F. Supp. 3d at 388 (granting habeas petition and ordering alien's release after finding that ICE never determined that the petitioner was "a danger to the community or a flight risk, or that he violated the conditions of his Order of Supervision."); *Prado v. Perez*, 451 F. Supp. 3d 306, 312 (S.D.N.Y. 2020) (collecting cases) ("[C]ourts in this district have found that there is no deprivation of jurisdiction to hear claims

arising from unlawful arrest or detention, because those claims are too distinct to be said to 'arise from' the commencement of removal proceedings.").

Even if this Court finds that the government had decided to "execute" Mr. Ceesay's removal, his claims do not "aris[e] from" that decision. *Jennings*, 583 U.S. at 294 ("arising from" language should not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General"). This is because "Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *AADC*, 525 U.S. at 485 n.9 (1999). Thus, where a Petitioner is "not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined," jurisdiction lies. *Jennings*, 583 U.S. at 294.

Justice Alito's opinion in Jennings cautions courts to reject an "expansive interpretation" of § 1252(g) that would lead to "staggering results . . . that no sensible person could have intended." *Id.* at 293-4 (internal quotation removed). The test to determine whether a claim is "arising from" execution of a removal order "is not whether *detention* is an action taken to remove a [noncitizen] but whether *the legal questions* in this case arise from such an action." *Id.* at 295 n.3 (emphasis in original). Where "those legal questions are "too remote from the actions taken," jurisdiction is proper. *Id. Jennings* identified a non-exhaustive list of legal issues "too remote" to trigger § 1252(g), including unconstitutional detention claims. *Id.* at 293. Here, too, the legal questions before this Court as to whether ICE's unilateral revocation of Mr. Ceesay's OSUP despite clear requirements for an orderly departure violated his due process rights and ICE's own regulations, are too remote from a decision or action to execute a removal order to trigger 1252(g). As is discussed *supra* and admitted by the government, ICE did not have a travel document on February

19, 2025 nor on March 19, 2025, when Mr. Ceesay was first required to meet with the Gambian Consulate. *See* ECF No. 7, Petition, ¶¶41-43. Thus, his challenge to his detention on February 19, 2025, does not "arise from" a decision or action to "execute" a removal order because Mr. Ceesay was practically unremovable on that date (and remains so as of the date of this filing).

While the government cites to Mr. Ceesay's Petition in support of its argument, the full paragraph does not support the arguments that the government makes because it reads "Mr. Ceesay brings this action to seek injunctive, habeas and declaratory relief ordering Respondents to release him. Mr. Ceesay's ongoing detention-the purpose of which is to remove him from the United States-flow from his unlawful detention or about February 19, 2025." *Id.* at ¶13. Mr. Ceesay's claims in his Petition all challenge his unlawful detention on February 19, 2025, and all actions by the government flow from that unlawful detention.

III. MR. CEESAY'S DETENTION VIOLATES THE ADMINISTRATIVE PROCEDURE ACT (APA), THE IMMIGRATION AND NATIONALITY ACT (INA), THE REGULATIONS THEREUNDER, AND THE FIFTH AMENDMENT DUE PROCESS CLAUSE.

The government argues that even if this Court has jurisdiction, Mr. Ceesay's claim under the APA fails. Resp'ts' Mot. to Dismiss, ECF No. 9-3 at 7-9. This Court should reject the government's argument and follow the reasoning of the court in *Rombot,* with respect to the unlawful revocation of his OSUP, and the court in *You,* with respect to the violation of the INA.

A. Mr. Ceesay's right to due process was violated.

First, Respondents do not address the fact that Mr. Ceesay was entitled to an orderly departure prior to any decision to take him back into custody. *See* ECF No. 9-2, Release Notification, at 7. In *Rombot,* the Court found, *inter alia,* that ICE violated Mr. Rombot's right to due process and rejected the government's arguments to the contrary. 296 F. Supp. 3d at 388 ("ICE also violated the Due Process Clause of the Fifth Amendment when it detained Rombot on August

1, 2017."). In its order denying ICE's motion to dismiss, the court found that Rombot did not violate any condition of his release, "but was not given 'an opportunity to prepare for an orderly departure' as specifically provided in the Release Notification. . .When ICE ignored that condition and placed Rombot in shackles, it did so without advance notice, a hearing, or an interview." *Id.* at 388.

So too here. The government's own paperwork made clear that Mr. Ceesay was entitled to an orderly departure prior to his redetention. Yet, that condition was ignored, and Mr. Ceesay, who was in full compliance with his OSUP, was placed in shackles without advance notice, a hearing, or an interview. On the date of his redetention, an ICE officer expressed his desire to subject Mr. Ceesay to detention because he "did not have a passport," despite the fact that Mr. Ceesay had never been directed by ICE to produce a passport. Instead of affording him the process due and following its own regulations, the government—through the unilateral actions of one enraged ICE officer—deprived Mr. Ceesay of his liberty.

As the Court in *Rombot* found "the Supreme Court has made it clear that 'the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, permanent." *Id.* at 386 (citing to *Zadvydas,* 533 U.S. at 693). "The Due Process Clause 'imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning' of the Fifth Amendment." *Barrows v. Burwell*, 777 F.3d 106, 113 (2d Cir. 2015) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). It is not disputed that Mr. Ceesay did not leave the United States after being granted voluntary departure but it is also not disputed that with this full knowledge, the government granted him an OSUP in 2011 and that he would be afforded an orderly departure once a travel document was obtained. Mr. Ceesay—relying upon the actions of ICE for 14 years—did not believe—with good reason—that

he would be rearrested and deported by ICE. Why would he? He relied upon the representations of ICE for 14 years.[4]

When ICE abruptly revoked Mr. Ceesay's supervised release after he had complied with his OSUP for 14 years—shackling and imprisoning him without warning or lawful basis, and in violation of its own statute and regulations—ICE deprived him of the most precious aspects of liberty.

B. The government violated its' own regulation and the INA in detaining Mr. Ceesay and revoking his OSUP.

Beyond the due process violation, despite Respondents' arguments to the contrary, in redetaining Mr. Ceesay, the government also violated its own regulations. Resp'ts' Mot. to Dismiss, ECF No. 9-3 at 9-11. First, to the extent the government was invoking § 241.4(*l*)(2), that regulations confers revocation authority on two individuals: (a) the Executive Associate Commissioner and (b) where "circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner" the regulation authorizes a district director revoke release, though only on a finding that it "is in the public interest." *Id.*[5] Yet the Field Office Director did not purport to revoke Mr. Ceesay's OSUP. Rather, the revocation order was signed by a Darius L. Robinson—who upon information and belief—is not the Field Office Director. *See* ECF No. 9-2, Notice of Revocation of Release at 11. This alone is enough to demonstrate agency failure to comply with the regulation. *See Rombot,* 296 F. Supp. 3d at 387.

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[4] The Notice of Revocation of Release (ECF No. 9-2 at 11) states, *inter alia,* that Mr. Ceesay does not have any applications pending. Mr. Ceesay has since retained undersigned pro bono counsel who determined his eligibility to move to reopen his proceedings. He filed a motion to reopen on March 31, 2025, that remains pending. *See* ECF No. 7, Petition, ¶¶50-51.

[5] The reference to the district director means, in this context, the ICE field office director. 8 C.F.R. § 1.2 ("district director" defined to include, inter alia, "field office director").

Second, the regulations require the district director to consider whether revocation of supervision is "in the public interest." The revocation decision nowhere even purports to consider that question—the regulations require a finding that it is in the public interest to *revoke* release. To the contrary, the Notice of Revocation of Release falsely states that ICE had a travel document—which it did not—and that Mr. Ceesay will "remain in ICE custody," not even acknowledging that Petitioner had been out of custody for 14 years, reported faithfully as ordered, for those years and that he had a medical conditions for which he must take medication. *See* ECF No. 7-1 at 1-2, Shin Medical Letter.

Third, the agency failed to follow its own rules in affording Mr. Ceesay an "informal interview". *See* ECF No. 9-2, Notice of Revocation of Release at 11. Mr. Ceesay never received an "informal interview" and ICE never addressed the most significant question—whether revocation was "in the public interest". *See* Exh. 1, Ceesay Decl., ¶¶4-10.

As the Court in *Rombot* explained, "ICE, like any agency, 'has the duty to follow its own federal regulations.' To be sure, not every procedural misstep raises a constitutional issue. However, where an immigration 'regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute,' like the opportunity to be heard, 'and [ICE] fails to adhere to it, the challenged [action] is invalid.'" *Rombot,* 296 F.Supp. at 388 (internal citations omitted); *see also Montilla v. I.N.S.*, 926 F.2d 162, 169 (2d Cir. 1991). Drawing on the doctrine set forth by the Supreme Court in another immigration case, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954), the Second Circuit held that where an agency has promulgated a regulation impacting individual rights, "fundamental notions of fair play underlying the concept of due process" require that the agency adhere to that regulation. *Montilla,* 926 F.2d at 167.

As is set forth in his Petition, the government has also violated the INA. *See* ECF No. 7, Petition, ¶¶75-77. In *You,* a court in this Circuit found that ICE had violated the INA when it detained Mr. You without any prior notice or warning when he appeared at an appointment with an immigration government office. As is discussed *supra,* the Court in *You* found that it had jurisdiction to review the claim brought pursuant to the INA. The Court found that at the time of his unnoticed detention, Mr. You "long ago became an alien outside of the removal period" and that "[t]here is no indication that anyone ever determined that Petitioner was a risk to the community or of flight." *You,* 2019 U.S. Dist. LEXIS 130786 at **23-24. In this case, Mr. Ceesay like Mr. You, long ago became a person outside of the removal period. But, in taking Mr. Ceesay back into custody, ICE never determine that he was a danger to the community or a flight risk. In fact, the facts proved otherwise—Mr. Ceesay had been in compliance with the terms of his OSUP for 14 years when he was detained on February 19, 2025.

IV. RESPONDENT HAS STATED A CLAIM PURSUANT TO THE REHABILITATION ACT.

The Court should not dismiss this the Rehabilitation Act claim because Mr. Ceesay has sufficiently pled this claim in his Petition. *See* ECF No. 7, Petition, ¶¶67-69. Respondents argue that the government was not required to provide any notice or warning prior to detention and therefore ICE was not required to considered Mr. Ceesay's disability prior to taking him into custody. *See* ECF Resp'ts' Mot. to Dismiss, ECF No. 9-3 at 9-10.

First, Mr. Ceesay submitted an expert medical opinion (ECF No. 7-1, Shin Medical Letter) that establishes he suffers from a physical disability that—as is clear from the fact that he has already been hospitalized once since being detained-is a qualifying disability because his physical medical impairment "substantially" impairs life activities. *See also* Exh. 1, Ceesay Decl., ¶9 ("If I

do not my medications, I feel sick, I do not feel steady on my feet or even sitting down and I feel like I remember feeling when I had my heart attacks.")

Next, Mr. Ceesay's complaint sufficiently sets forth that he was not afforded a reasonable accommodation and that the reasonable accommodation—not to detain him—would not have been a "fundamental altercation" of the OSUP program which conferred upon Petitioner rights—as is discussed *supra*—including, but not limited to, an orderly departure process. ECF No. 7, Petition, ¶¶87-91. In exchange for their compliance, immigrants on OSUPs can apply for employment authorization, and with it obtain social security numbers and state identification. 8 CFR § 241.5; *see also* 8 U.S.C. § 1231(a)(7). The extension of this kind of formal "nonstatus" has expanded as a "means to authorize the presence of undocumented immigrants without providing them the panoply of benefits and rights that go with full status." *See* Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U. L. Rev. 1115*,* 1149 (2015).

ICE was on notice that Mr. Ceesay suffered from medical issues and that he did not even have his medication when he checked-in on February 19, 2025, because he did not have any reason to suspect that he would be arrested. *See* Exh. 1, Ceesay Decl., ¶¶23-25. It appears that ICE was not even able to accommodate a proper detention facility placement to accommodate Mr. Ceesay because he was taken to two different jails before BFDF.

Moreover, even assuming, *arguendo*, that ICE was not required—which it is—to provide Mr. Ceesay an orderly departure, it would have been a reasonable accommodation to not detain him on February 19, 2025. See *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 212 (E.D.N.Y. 2000), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003). Therefore, affording Mr. Ceesay an accommodation would not have been a fundamental alteration to the OSUP program.

Given that Mr. Ceesay was granted an orderly departure and never—even when he was initially detained by ICE in 2010 or 2011—sought to evade the government ICE could have not detained Mr. Ceesay and permitted him time to return for another check-in appointment.

V. THE RELIEF SOUGHT BY MR. CEESAY IS JUSTICABLE.

The government argues that the relief that Mr. Ceesay seeks is not justiciable because even if granted, ICE can just arrest him again. *See* Resp'ts' Mot. to Dismiss, ECF No. 9-3 at 12-14.

The government's reliance on *Yearwood v. Barr*, 391 F. Supp. 3d 255 (S.D.N.Y. 2019), is misplaced. At issue in *Yearwood,* was whether the government violated the law in the process it employed—a process that resulted in the Petitioner having a cardiac event while on the airplane—in removing Mr. Yearwood from the United States. The claims that Mr. Ceesay raises here were not at issue in *Yearwood* and the court decided that returning Mr. Yearwood to the United States—a point contested by Petitioner—would not "provide redress". *Id.* at 264.

As is discussed *supra,* Courts have held in cases that are analogous to Mr. Ceesay's case that the claims and relief sought are justiciable. Moreover, the government's assertion that ICE could just arrest Petitioner again is without merit and ignores the fact that Respondent must provide him with an orderly departure, at which time his legal counsel would be able to present the facts of circumstances that would have to be considered prior to taking him back into custody. Finally, as is clear in this case, Mr. Ceesay was not detained because the government has an interest in enforcing removal orders but rather because one ICE Officer became enraged at Petitioner for reasons that strain credulity but that do not support—at this stage of the proceeding—dismissing the Petition.

CONCLUSION

For all the foregoing reasons, the Court should deny the government's motion to dismiss.

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Respectfully Submitted,

DATED: April 8, 2025
New York, NY

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

CEESAY,

Petitioner-Plaintiff,

v.

BROPHY, et. al.,

Respondents-Defendants.

Civil Action No.: 1:25-cv-00267-LJV

DECLARATION OF SERING CEESAY UNDER PENALTY OF PERJURY UNDER 28 USCA §1746

Sering Ceesay, declares under penalty of perjury under the laws of the United States of America:

1. My name is Sering Ceesay. I was born on January 15, 1962, in the Gambia.
2. I learned English in the United States. I am able to speak and understand English, but I have never learned to read or write in English. I can recognize most numbers and some letters. I taught myself to place my name signature. I cannot read or write in any other language including my native Wolof and Poular. I never attended school in either the Gambia or in the United States.
3. On the day I was detained by ICE-I had trouble remembering the exact date when my attorney prepared the papers for the Court but she read me the paperwork submitted by the government that says it was February 19, 2025-I got up very early in the morning and left my home in the Bronx, New York to take the number five (5) train to downtown Manhattan. I believe I left my house at about 5:30am and arrived downtown at 6:30am. I walked from the subway station

downtown to the front of 26 Federal Plaza and waited on a line to get into the building. I remember that it was cold that day.

4. After waiting on the line for a while, I entered the first floor of 26 Federal Plaza and waited on another line until I was called up to a window by an ICE Officer. When I got to the window, the ICE Officer asked for my paperwork-this is the paperwork that I have been showing since I was released by ICE from the Monmouth County Jail in New Jersey. I thought I was released in 2010, but my attorney read me the paperwork the government submitted that says it was 2011.

5. The ICE Officer at the window asked me if I had a passport and I said I did not. The last time I checked in with ICE, which was the year before, ICE did not tell me to bring my passport-they just told me to come back on February 19, 2025.

6. As the ICE Officer at the window was talking to me, another ICE Officer started yelling at me. He said to the other ICE Officer to put me in handcuffs and take to me to jail for two months. I remember I was trying to answer the question about the passport and then the ICE Officer just started yelling at me and said that I was going to be put in handcuffs. The ICE Officer, while yelling at me, motioned with his two hands to I guess show me I was going to be put in handcuffs. He was yelling loud enough that everyone in the room could hear him.

7. Then two other ICE Officers came out from behind the counter, and they took me to another floor at 26 Federal Plaza. On that other floor, I was put in a room with some other ICE Officers-I do not know their names-and they were looking at their computer and talking. The ICE Officers showed me some paperwork to sign but I said I could not read the paperwork and did not want to sign it because I could not understand what it said.

8. I was then taken to another floor at 26 Federal Plaza.

9. During the time that ICE had me at 26 Federal Plaza I told ICE that I have medical problems with my heart, and I take medications. I could not spell or say the names of the medications, but I told them that I did not have them with me because I did not know that they were going to arrest me. If I do not my medications, I feel sick, I do not feel steady on my feet or even sitting down and I feel like I remember feeling when I had my heart attacks.

10. After a while, I was taken by ICE Officers to a van, placed in the back of the van in handcuffs and taken to Orange County Jail. I knew it was the Orange County Jail because the people at the Orange County Jail told me I was at Orange County Jail, and I asked him if it was still in New York, and they said yes. I stayed overnight at the Orange County Jail in a room by myself. In the morning, I was picked up ICE Officers, placed in a van and taken to another jail in Nassau County New York. I knew it was Nassau County New York because I heard the ICE Officers in the front of the van saying they were taking me to Nassau County.

11. I was at the jail in Nassau County New York for approximately twenty-four (24) hours. The medical person at the jail told me that I could not be medically okay at the jail. I remember they put my chest on a machine-it was a machine where I had to stand up and stretch my arms out and put my chest on the machine. After this test, I was put in a room to wait for ICE to pick me up. Eventually ICE came and picked me up but I do not know what time that was.

12. I was then taken from the jail in Nassau County back to 26 Federal Plaza where the same ICE Officer who yelled at me and told the other ICE Officers to put in handcuffs and take to me to jail for two months, was angry to see me back. I remember I was taken to I think the tenth (10^{th}) Floor and the ICE Officer who yelled at me on February 19, 2025 was there. He started yelling at me that I was going to jail and asked the other ICE Officers why I was brought back. The other ICE Officers said they were taking me to another jail. Then after that I was put in

handcuffs again and a chain was put around my waist and I was taken to the van. The ICE Officers did not tell me where the van was going. We drove for a long time and the ICE Officers stopped to pick up other people, but I do not know where we were stopping. I had not had my mediation at this point. I was really feeling sick-like I did when I had my heart attacks.

13. When we arrived at the jail that I am in now they told me at the jail that it was Buffalo. I had never been to Buffalo in my life. My lawyer has since explained to me that the jail I am in is located in a town called Batavia, New York and that Batavia, New York is in the area of Bufalo. This is the farthest I have ever been from New York City because before when ICE took me it was in New Jersey, so it was closer.

14. Because I expected to go home after checking in at 26 Federal Plaza as I had done for so many years since after I was released by ICE and given the OSUP papers I did not have any of my medications. I go to doctors at the Jacobi Medical Center that is in the Bronx, New York. I see three doctors there for my medical conditions and those doctors give me the medication that I take.

15. Because I do not read or write the medical people at the hospital give me my medications and my friend will help me put the medication in a pill box that has all the days of the week. I know that one side of the pill box is for morning, and one is for evening. I cannot spell the name of my medications, and I do not know the names of all the medicines. I just know that I must take them every day and follow the directions of the three doctors at the Jacobi Medical Center in the Bronx.

16. Because my appointment with ICE was so early on February 19, 2025, I planned to take my medications when I got home and ate my breakfast. I take my morning and evening medication with food because if I do not take with food, the medications hurt my stomach. For my check-

ins with ICE I usually get home in the morning time because all that has happened before at 26 Federal Plaza is I hand in my paper, the ICE Officer write another date on the paper for to check-in and then tells me the date and gives me back my paper and I leave. I have never been yelled at before February 19, 2025, and was never threatened with being put in jail.

17. I did not get any of my medications until I got to the jail where I am now. But I think it was hard for the jail to get all my medications at first because I did not have a list of the medications and did not have any of my papers or medication bottles with me because I did not know that ICE was going to arrest me on February 19, 2025.

18. When I met my current lawyer, it was because other people in my dorm at the jail told me that there were lawyers coming to speak with us. So, someone in the dorm showed me where to place my name on the paper to sign up to see the lawyers. I really was not feeling well but I wanted to talk to a lawyer because I did not understand what was happening to me. I had been at the jail for a number of days, and nothing was happening, and I had no way to call anyone because you need money on your account to make phone calls. I did not have any money on my account.

19. I was feeling very weak and my entire body just hurt. I felt like when I had my heart attacks. But, I really wanted to speak to the lawyers because I thought maybe they could help me.

20. When I met with RFK Human Rights, the lawyer asked me if I was feeling okay. I told her I was not feeling good at all. She then told the Officer in the jail that was in the area where I was meeting with the lawyer, and I was sent to the medical unit. At the medical unit the people there said I had to go to the hospital. I went to the hospital, and I had to stay overnight.

21. Now, at the jail, I must always have one of my medications because the medical people told me that if I feel like I am going to have a heart attack or a stroke I need to take the medicine.

The medical people said I need to take one of the pills and put it under my tongue and if after five (5) minutes I do not feel better then I have to take another one and if after two of the pills I still feel sick I have to the hospital.

22. The other medications that I take the jail gives them to me the bottles of the medications and told me the ones I take in the morning and the ones I take in the night. I take the medicines with food at the mealtimes in the jail, so I do not have an upset stomach.

23. I remember one time one of the ICE Officers at 26 Federal Plaza told me that I had been here a long time and so I was not going to be deported. I do not remember the year, but it was after my first heart attack.

24. I still do not understand why that ICE Officer got so angry with me on February 19, 2025. I always followed everything that ICE told me to do, and I believed the ICE Officer who told me after my first heart attack that I would not going to be deported.

25. I had no idea that I was going to be detained on February 19, 2025. Since the time I was released by ICE, I was told by ICE to check-in, and I did so. During all the years that I was checking in with ICE, I was never yelled at or arrested.

Pursuant to the provisions of 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. I confirm that my attorney, Sarah T. Gillman, read this Declaration to me word-by-word during a video legal visit on April 8, 2025, and that I understood the foregoing. Executed on this 8th day of April 2025.

x SERING CEESAY
Sering Ceesay

Pursuant to the provisions of 28 U.S.C. §1746, I declare under penalty of perjury that I read the foregoing Declaration to Sering Ceesay word-by-word during a video legal visit on April 8, 2025. Executed on this 8th day of April 2025.

X
Sarah T. Gillman