No. _____

In the
Supreme Court of the United States

OWOLABI SALIS,
Petitioner,

v.

ALEJANDRO MAYORKAS, Secretary, United States Department of Homeland Security,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[ENTERED DECEMBER 13, 2021]

MANDATE

E.D.N.Y.-Bklyn
19-cv-5153
Vitaliano, J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of October, two thousand twenty-one.

Present:

Guido Calabresi,
Rosemary S. Pooler,
Barrington D. Parker,
Circuit Judges.

Owolabi Salis,

Plaintiff-Appellant,

v. 21-590

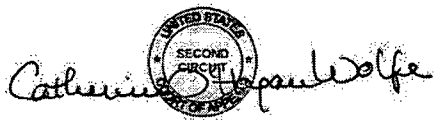
Alejandro Mayorkas, Secretary, United States Department of Homeland Security,

Defendant-Appellee.

Appellee moves for summary affirmance. Upon due consideration, it is hereby ORDERED that the motion is GRANTED. *See United States v. Davis*, 598 F.3d 10, 13 (2d Cir. 2010). Appellant has waived any challenge to the district court's judgment by filing a brief that does not address the rationale for the judgment. *See Norton v. Sam's Club*, 145 F.3d 114,

117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."); *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995) (treating as abandoned an issue not raised in appellant's brief). Additionally, further briefing would not cure the deficiency, as arguments may not be raised for the first time in a reply brief. *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.").

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



[ENTERED FEBRUARY 23, 2021]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
OWOLABI SALIS,
Plaintiff,

JUDGMENT
19-cv-5153 (ENV)

v.

ALEJANDRO MA YORK.AS, Secretary,
Department of Homeland Security,
Defendant.
----------X

A Memorandum and Order of Honorable Eric N. Vitaliano, United States District Judge, having been filed on February 17, 2021, granting defendant's motion to dismiss; and dismissing plaintiffs complaint for want of subject matter jurisdiction; it is

ORDERED and ADJUDGED that defendant's motion to dismiss is granted and that plaintiffs complaint is dismissed for want of subject matter jurisdiction.

Dated: Brooklyn, New York
February 23, 2021

Douglas C. Palmer
Clerk of Court

By: */s/Jalitza Poveda*
Deputy Clerk

[ENTERED FEBRUARY 23, 2021]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X
OWOLABI SALIS,
Plaintiff,

MEMORANDUM & ORDER
19-cv-5153 (ENV)

-against-

ALEJANDRO MA YORK.AS, Secretary,
Department of Homeland Security, [1]
Defendant.
---------- X
VITALIANO, D.J.

On September 10, 2019, *pro se* plaintiff Owolabi Salis filed this action against defendant Kevin McAleenan in his official capacity as Acting Secretary of the Department of Homeland Security (DHS). Salis alleges violations of his Fifth Amendment protection against double jeopardy, his civil rights and his rights under the Paperwork Reduction Act. Defendant moves to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, the motion is granted, and the case is dismissed for lack of subject matter jurisdiction.

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[1] Alejandro Mayorkas became Secretary of Homeland Security on February 2, 2021. Accordingly, pursuant to Fed. R. Civ. P. 25(d), Alejandro Mayorkas is substituted for Acting Secretary Kevin McAleenan as the defendant in this action. The Clerk of Court is directed to amend the caption to reflect this change.

Background[2]

Salis is a Brooklyn-based immigration attorney who was indicted by the Manhattan District Attorney's office in July 2014. Compl., Dkt. 1, at 4-5. The 20-count indictment alleged that Salis falsely told clients they were eligible for immigration status and benefits when they were not, charged them extra fees and filed fraudulent immigration petitions on their behalf. *See id.;* Indictment, Dkt. 1-1, at 1-2. Salis was charged with engaging in a scheme to defraud, grand larceny, attempted grand larceny and falsifying business records. Compl. at 4-5; Indictment at 3-12.

On July 24, 2014, a team of DHS Special Agents and New York Police Department officers arrested Salis and, pursuant to a search warrant, seized numerous electronics and files from his office. Compl. at 6; Search Warrant Aff., Dkt. 1-2; Trial Tr., Dkt. 1-4, at 236: 17-23. In March 2016, following a three-week trial in New York County Supreme Court, Salis was acquitted of all charges. Compl. at 7; Cert. of Disposition, Dkt. 1-9. Salis alleges that, in retaliation, he was placed on a terrorist watch list and questioned when travelling internationally in 2017 and 2018, though he says this has since stopped. Compl. at 7.

In December 2016, the New York field office of U.S. Citizenship and Immigration Services (USCIS) sent a memorandum to DHS, requesting that DHS seek disciplinary sanctions against Salis. DHS Letter, Dkt. 1-12, at 5-8. The memorandum raised similar

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[2] The facts are drawn from the complaint and its many exhibits, and taken as true for the purposes of this motion. *See Cohen v. Rosicki, Rosicki & Assocs., P.C.,* 897 F.3d 75, 80 (2d Cir. 2018) ("A complaint is also deemed to include any written instrument attached to it as an exhibit. . .. ") (citation omitted).

issues as the 2014 indictment, alleging that Salis had engaged in unethical and unprofessional conduct such as filing frivolous immigration petitions and charging clients unnecessary fees. *Id.* Seeking state law relief in aid of its mission, in January 2017, DHS referred its concerns to the Attorney Grievance Committee of the Appellate Division, First Department for investigation and, if appropriate, disciplinary sanctions. *Id.* at 1-4; Compl. at 8, 13.

In May 2017, Salis filed a complaint against New York City in Kings County Supreme Court, alleging malicious prosecution and other claims related to his earlier arrest and trial. Compl. at 7- 8; N.Y. Compl., Dkt. 1-11. On September 10, 2019, while that case was pending, Salis filed the instant case against Kevin McAleenan, then Acting Secretary of DHS, in his official capacity. Compl. at 4. Although the complaint does not delineate separate claims, it alleges that McAleenan 1) violated Salis's Fifth Amendment double jeopardy protections by referring his case to the Grievance Committee after his acquittal in state court; 2) violated his civil rights pursuant to 42 U.S.C. § 1983 and 18 U.S.C. §§ 141 and 142; and 3) violated the Paperwork Reduction Act by requiring him to file Form G-28 with his immigration petitions. *See* Com pl. at 3, 8-10. The complaint seeks only declaratory relief. *Id.* at 1, 9-10.

Legal Standard

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000). "The plaintiff bears the burden of proving subject matter jurisdiction by a

preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635,638 (2d Cir. 2005). Although a court "must accept as true all material factual allegations in the complaint," it must not draw inferences favorable to the party asserting jurisdiction, *JS. ex rel. NS. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004), and it may consider evidence outside the pleadings, *Makarova,* 201 F.3d at 113. Subject matter jurisdiction is a threshold issue, so when a defendant moves to dismiss under both Rules 12(b)(l) and 12(b)(6), the court must address the 12(b)(l) motion first. *See Polera v. Bd. of Educ. Of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 481 (2d Cir. 2002).

Assuming subject matter jurisdiction has been established, to survive a Rule 12(b)(6) motion, the 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, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). This "plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). Then, when considering a Rule 12(b)(6) motion, a court must accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the nonmoving party. *Vietnam Ass 'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d Cir. 2008).

While courts ordinarily construe *pro se* plaintiffs' pleadings liberally, reading them to raise the strongest arguments possible, "a lawyer representing

himself ordinarily receives no such solicitude at all." *Tracy v. Freshwater,* 623 F.3d 90, 102 (2d Cir. 2010). Nor are *prose* litigants of any sort exempted from compliance with substantive and procedural law. *See Rene v. Citibank NA.,* 32 F. Supp. 2d 539, 541 (E.D.N.Y. 1999) (citing *Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir. 1983)). Last, while *prose* plaintiffs should typically be given the opportunity to amend their pleadings at least once, courts need not provide such leave where amendment would be futile. *See Hill v. Curcione,* 657 F.3d 116, 123-24 (2d Cir. 2011).

Discussion

I. Constitutional Claims

First, the government contends that Salis's constitutional claims, which allege that defendant violated his Fifth Amendment protection against double jeopardy and unspecified other "civil rights," are barred by sovereign immunity. *See* Compl. at 3, 8-10; Gov't Mem., Dkt. 19, at 7-13. Because "[s]overeign immunity is jurisdictional in nature," *F.D.I.C. v. Meyer,* 510 U.S. 471, 476, 114 S. Ct. 996, 1000, 127 L. Ed. 2d 308 (1994), the Court analyzes this argument first, under Federal Rule of Civil Procedure 12(b)(l).

Elementally, sovereign immunity renders the United States absolutely immune from suit absent its consent. *Ade/eke v. United States,* 355 F.3d 144, 150 (2d Cir. 2004). Because "any lawsuit against an agent of the United States in [his] official capacity is an action against the sovereign itself," it is likewise barred by sovereign immunity absent governmental consent. *Perez v. Hawk,* 302 F. Supp. 2d 9, 18 (E.D.N.Y. 2004) (citing *Kentucky v. Graham,* 473 U.S. 159, 165, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985)). Incontestably, the United States has not

consented to suit on constitutional tort claims, so sovereign immunity bars plaintiffs from seeking money danlages from federal employees in their official capacities for alleged violations of constitutional rights. *See Castro v. United States,* 34 F.3d 106, 110 (2d Cir. 1994); *see also Meyer,* 510 U.S. at 478; *Perez,* 302 F. Supp. 2d at 18.

Critically, however, "[w]hile sovereign immunity bars suits against federal officers in their official capacities for money damages, it does not bar claims brought against federal officials in their official capacities for injunctive relief." *Crespo v. Hurwitz,* No. 17-CV-6329 (RRM) (PK), 2020 WL 7021658, at *4 (E.D.N.Y. Nov. 30, 2020); *see also Armstrong v. Exceptional Child Ctr. , Inc. ,* 575 U.S. 320, 326-27, 135 S. Ct. 1378, 1384, 191 L. Ed. 2d 471 (2015) ("[W]e have long held that federal courts may in some circumstances grant injunctive relief against ... violations of federal law by federal officials."); *Conyers v. Rossides,* 558 F.3d 137, 150 (2d Cir. 2009) ("[C]laims for prospective equitable relief, such as the declaratory judgment sought by [plaintiff] here, are not so barred" by sovereign immunity); *Zielinski v. DeFreest,* No. 12-CV-1160 (JPO), 2013 WL 4838833, at *15 (S.D.N.Y. Sept. 10, 2013) ("Individuals' right to seek injunctive and declaratory relief against state or federal officers in their official capacities for alleged constitutional violations is well established.").

Though Salis sues McAleenan "in his official capacity as the Acting Secretary of [DHS]," Compl. at 4, he seeks only a declaratory judgment, not money damages. *Id.* at 1, 9-10. His complaint raises Fifth Amendment and unspecified "civil rights" claims; which his briefing describes, for the first time, as arising under the First, Fourth, Seventh and Eighth

Amendments. *See id.* at 3-4, 9-10; Pl.'s Opp'n Mem., Dkt. 20, at 13-14. Consequently, sovereign immunity does not, as defendant would have it, bar Salis' s constitutional claims.[3]

Yet before the Court can assert jurisdiction over these claims, Salis faces another hurdle. Simply stated, "[e]ven where equitable relief is properly sought, however, a plaintiff must nevertheless comply with Article Ill's standing requirements." *Zielinski,* 2013 WL 4838833, at *15. To meet this "irreducible constitutional minimum," a plaintiff bears the burden of establishing three elements:

> (1) "[T]he plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest"; (2) "there must be a causal connection between the injury and the conduct complained of," meaning "the injury has to be fairly . . . trace(able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and (3) "it must be likely, as

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[3] Salis also cites a grab bag of statutes that-with the exception of the federal-question jurisdiction statute, 28 U.S.C. § 1331-are irrelevant to this Court's jurisdiction over his claims. *See Perez,* 302 F. Supp. 2d at 18 (42 U.S.C. § 1983 provides a cause of action only against state actors, and federal analog, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), only authorizes suits for money damages against federal employees in individual capacities); *Maier v. Phillips,* 205 F.3d 1323, 1323 (2d Cir. 2000) (18 U.S.C. §§ 241 and 242 "are criminal statutes that afford no private right of action"); *Saleh v. Holder,* 84 F. Supp. 3d 135, 140 (E.D.N.Y. 2014) (Declaratory Judgment Act, 28 U.S.C. § 2201, creates a remedy, not jurisdiction); *Khanom v. Kerry,* 37 F. Supp. 3d 567, 575 (E.D.N.Y. 2014) (Immigration and Nationality Act contains no applicable private right of action).

> opposed to merely speculative, that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (internal citations and quotation marks omitted).

Salis lacks standing to bring each of his constitutional claims. He first requests a declaration that defendant violated his Fifth Amendment double jeopardy protections by referring his case to the Attorney Grievance Committee after his acquittal of related crimes in state court. Compl. at 8-10. But, his desire for a declaration that his Fifth Amendment rights or privileges have been breached presents no cognizable case or controversy. Stating it in practical terms, a favorable decision against DHS would do Salis no good, as his disciplinary proceedings are in the sole control of the Attorney Grievance Committee. These proceedings are independent and confidential. *See* N.Y. Jud. Law§ 90(10). Salis thus cannot establish redressability and, as a result, lacks standing to bring this Fifth Amendment claim.[4]

As to Salis's unspecified "civil rights" claim, he alleges that DHS violated his rights by participating in the New York State prosecution, in which "several gross misconduct were committed," and by placing him on a terrorist watch list in retaliation for his acquittal. Compl. at 7-8. Without deciding that any civil rights claim is properly stated but assuming so for purposes of argument, to establish the requisite

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[4] Additionally, attorney discipline does not implicate the Double Jeopardy Clause given its remedial, non-punitive nature, *In re Jaffe,* 585 F.3d 118, 121 (2d Cir. 2009), which prefigures his likely fate had Rule 12(b)(6) been reached.

injury-in-fact, Salis "cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he . . . will be injured in the future." *Shain v. Ellison,* 356 F.3d 211, 215 (2d Cir. 2004); *see also City of Los Angeles v. Lyons,* 461 U.S. 95, 111, 103 S. Ct. 1660, 1670, 75 L. Ed. 2d 675 (1983) ("The equitable remedy is unavailable absent a showing of . . . any real or immediate threat that the plaintiff will be wronged again. "). Salis makes no claim that he is likely to face future prosecutions involving DHS cooperation, and expressly states that his questioning at airports "has now stopped." Compl. at 7; *see also* Gov't Mem. at 9 n.3. Without a showing of likely future injury, Salis lacks standing to bring his civil rights claim as well. Accordingly, in the absence of standing, both of these sets of claims are dismissed pursuant to Rule 12(b)(1).

II. Paperwork Reduction Act Claim

Salis appears to bring a third claim alleging violations of the Paperwork Reduction Act, 44 U.S.C. § 3501, which aims to minimize the burden of government paperwork on the public. Compl. at 9. He complains that defendant required him to submit Form G-28, "Notice of Entry of Appearance as Attorney or Accredited Representative," along with his clients' immigration petitions. *Id.* This claim, too, is brought against McAleenan in his official capacity as DHS Acting Secretary. Salis must therefore point to a specific, unequivocal statutory waiver of sovereign immunity, or equitable exception to it. *See Ade/eke,* 355 F.3d at 150; *Perez,* 302 F. Supp. 2d at 18. The Paperwork Reduction Act does not waive sovereign immunity; to the contrary, it prevents judicial review of Salis's claim. *See* 44 U.S.C. § 3507(d)(6); *Tozzi v. E.P.A.,* 148 F. Supp. 2d 35, 48

(D.D.C. 2001) (holding Act contains no applicable sovereign immunity waiver and dismissing claim for lack of subject matter jurisdiction); *see also Perry v. Wright,* No. 12-CV-721 (CM), 2013 WL 950921, at *6 (S.D.N.Y. Mar. 8, 2013) (same). This claim is therefore barred by sovereign immunity and dismissed for lack of subject matter jurisdiction.

III. Leave to Amend

Although leave to amend should be freely given, especially to *pro se* parties, it is not warranted "where it is clear from the face of the complaint that the Court lacks subject matter jurisdiction or that a claim cannot be stated as a matter of law." *Steele v. Soc. Sec. Admin.,* No. 14-CV-7104 (ENV) (MDG), 2016 WL 4688850, at *3 (E.D.N.Y. Sept. 7, 2016); *see also Omansky v. United States,* No. 14-CV-1674 (GHW), 2014 WL 2153812, at *2 (S.D.N.Y. Apr. 7, 2014) (denying amendment by *prose* attorney as futile "since there is no basis for concluding that the jurisdictional defect at issue could be cured by an amended pleading"). That is the case here. Leave is denied.

Conclusion

For the reasons discussed above, defendant's motion to dismiss is granted and plaintiffs complaint is dismissed for want of subject matter jurisdiction.

The Clerk of Court is directed to mail a copy of this Order to the *pro se* plaintiff, to enter judgment accordingly and to close this case.

So Ordered.

Dated: Brooklyn, New York
February 7, 2021

/s/ Eric N. Vitaliano
ERIC N. VITALIANO
United States District Judge

[ENTERED APRIL 6, 2021]

Owolabi Salis, Esq., (Pro Se)
1179 Eastern Parkway
Brooklyn, NY 11213
9174030566

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------X

OWOLABI SALIS

The Appellant

Docket No: 21-590

FORM C-ADDENDUM B

-against-

Aleyandro Mayorkas

Secretary

DEPARTMENT OF HOMELAND SECURITY

The Respondent

----------X

ISSUES FOR DETERMINATION

The issues for determination in this Appeal are as follows:

1. Whether the Court has subject matter jurisdiction over this petition or appeal
2. Whether the complaint of the Respondent DHS, as a respectable, cherished and revered agency of the United States, to the Grievance Committee of the First Judicial Department, is appropriate in light of the Double Jeopardy Clause of the Fifth Amendment to the U.S Constitution.

3. Whether any rule or regulations can override the provisions of the US Constitution. The Appellant believes that the Respondent officers actions and the collaborators are guided by certain internal rules unknown to the Appellant, whether such rules allow the breach of the Constitutional Guarantees or Constitutionally Protected Rights of the Appellant.
4. Whether the actions of the Respondent and the collaborators in this petition or appeal violated the Civil Rights of the Appellant.
5. Whether the Respondent violated Constitutionally Protected Rights of the Appellant to wit the First Amendment.
6. Whether the Respondent violated Constitutionally Protected Rights of the Appellant to wit the Fourth Amendment.
7. Whether the Respondent violated Constitutionally Protected Rights of the Appellant to wit the Eight Amendment.
8. Whether the Respondent violated Seventh Amendment by presenting the same facts that have been tried by the jury to be re-examined by the Grievance Committee of the First Judicial Department in New York.

Respectfully submitted.
Dated: April 6, 2021

/s/

Owolabi Salis, Esq.,
1179 Eastern Parkway
Brooklyn, NY 11213
9174030566

[ENTERED May 20, 2021]

PRELIMINARY STATEMENT

The Appellant is a licensed attorney in the State of New York whose principal practice is immigration law. The Appellant was also the publisher of the defunt Immigrant Guide and News - a monthly newspaper reporting on immigration issues.

Sometimes in 2012, the Immigrant Guide and News published a headline on the trend of deportations titled: "OBAMA DEPORTS MORE THAN BUSH, WHO IS NEXT". In the publication, the deportation statistics from Immigration and Customs Enforcement (ICE) of the Department of Homeland Security (DHS) was published. Upon information and belief, this publication triggered investigation into the activities of the Appellant.

While the investigation of the Appellant was ongoing, the Respondents, DHS, cooperated with the New York City District Attorney and the Grievance Committee of the First Judicial Department. A Grand Jury hearing was held with active participation of the three in New York court bypassing the federal court despite that immigration laws is a federal law.

On or about July 24, 2014, the Appellant was arrested after an indictment by the Grand Jury in New York court. The team of law enforcement agents was led by the Respondent, DHS, and the Appellant was detained for 14 days before securing bail.

Upon information and belief, the Respondent with active participation of the District Attorney of New York City aggressively opposed the Appellant being released on bail by first demanding $1 million for bail and aggressively opposing and harassing the

guarantors. The bail was later set for $250, 000 after hearing.

The Appellant used to maintain an office in New York City and moved to Brooklyn around October 2012. The Appellant was arrested in Brooklyn in July 2014. The Respondent seized all the files and computers of the Appellant based on the warrant affidavit of the Respondent which the Respondent later admitted at trial that the content of the affidavit was wrong.

The Respondent also placed a Federal Civil Forfeiture in the United States District Court, Southern District of New York (14 Civ. 5681) against the retirement property of the Appellant seeking to seize the property if the Appellant is convicted.

After about 3 weeks trial of which the Respondent was a key witness, the Appellant was discharged and acquitted of the charges.

On or about Jan 27, 2017, the Respondent, unsatisfied with the discharge and acquittal of the Appellant, submitted a complaint against the Appellant to the Grievance Committee of the First Judicial Department based on the same facts of the indictment which has been tried by the jury seeking that the Appellant be sanctioned.

At the time the complaint was submitted, the Appellant had left the First Judicial Department to the Second Judicial Department on or about October 2012.

One of the administrators of the Respondent complaint already concluded (a predetermination) in an email message that the Appellant must face disciplinary charges.

The Grievance Committee sanction ranges from disbarment, censure, admonition and so on.

This triggers the Appellant to file a Defensive petition in the US District Court seeking declaration that the actions of the concerned officers of the DHS violated the constitutional and civil rights of the Appellant.

Appellant continues to maintain utmost respect and honor to the Department of Homeland Security and is not the ordinary intention of the Appellant to initiate the Petition, but this is born out of extreme necessity.

The Respondent moved for dismissal of the Appellant petition in the District court for lack of subject matter jurisdiction. The prayers of the Respondent were upheld, hence, this appeal.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal of judgment/order of the District Court dismissing for lack of subject matter jurisdiction the petition for declaratory concerning civil and constitutional matters filed by the Appellant. The date of the Judgment/Order was February 26, 2021 and the case was appealed on March 12, 2021.

This Court has jurisdiction over the present action because it concerns Civil Rights and Constitutional matters and pursuant to 28 U.S.C. § 2201, the Declaratory Judgment Act; 28 U.S.C. § 1331, 42 U.S.C. § 1983. general federal question jurisdiction; and Immigration and Nationality Act, INA.

The right of the Sovereign to be sued is presumed or assumed based on the circumstances of this case because this case started as a defensive lawsuit against encroachment on the constitutional protected rights of the Appellant by certain officials of the Respondent acting under color of federal authority by bringing a petition for declaratory judgment to the lower court to declare that the actions of those officials and their collaborators is unconstitutional.

STATEMENT OF THE ISSUES PRESENTED

The issues for determination in this Appeal are as follows:

1. Whether the Court has subject matter jurisdiction over this petition or appeal

2. Whether the complaint of the Respondent DHS, as a respectable, cherished, and revered agency of the United States, to the Grievance Committee of the First Judicial Department, is appropriate in light of the Double Jeopardy Clause of the Fifth Amendment to the U.S Constitution.

3. Whether any rule or regulations can override the provisions of the US Constitution. The Appellant believes that the Respondent officers' actions and the collaborators are guided by certain internal rules unknown to the Appellant, whether such rules allow the breach of the Constitutional Guarantees or Constitutionally Protected Rights of the Appellant.

4. Whether the actions of the Respondent and the collaborators in this petition or appeal violated the Civil Rights of the Appellant.

5. Whether the Respondent violated Constitutionally Protected Rights of the Appellant to wit the First Amendment.

6. Whether the Respondent violated Constitutionally Protected Rights of the Appellant to wit the Fourth Amendment.

7. Whether the Respondent violated Constitutionally Protected Rights of the Appellant to wit the Eight Amendment.

8. Whether the Respondent violated the Seventh Amendment by presenting the same facts that have been tried by the jury to be re-examined by another body to wit: the Grievance Committee of the First Judicial Department in New York.

STATEMENT OF THE CASE

This case involves violation of civil rights and constitutional issues touching on the 4th, 5th, 6th and 8th amendments among others. The case started at the court below for declaratory judgment which was dismissed by the Hon. Vitaliano of the Eastern District of New York for lack of subject matter jurisdiction.

The Appellant is a licensed attorney in the State of New York and previously had his practice based in Manhattan, New York until about October 2012 when the practice moved to Brooklyn, New York.

The Appellant was arrested by the Respondent in July 2014 in Brooklyn, Kings County, in cooperation with the New York District Attorney after a warrant and an indictment charging the Appellant for two counts of Scheme to Defraud in the First

Degree P.L. § 190.65(1)(a) and P.L. § 190.65(1)(b), nine counts of Grand Larceny in the Third Degree, P.L. § 155.35(1), one count of Attempted Grand Larceny in the Third Degree P.L. § 110/155.35(1), and eight counts of Falsifying Business Records in the First Degree, P.L. § 175.10. *See* Ex. 1 and 2 attached to the complaint.

The Respondent was a witness at the grand jury proceedings as well as at the trial and cooperated with the Grievance Committee of the First Judicial Department.

The Grievance Committee of the First Judicial Department was also a witness at the grand jury and at the trial of the Appellant where the issues of professional ethics were tried and credibility was given to the actions of the Respondent.

Both the Respondent and the Grievance Committee of the First Judicial Department participated actively in the prosecution and trial of the Appellant. The transcripts of the grand jury and of the trial on file will reveal the deep cooperation.

The Appellant was accused by the Respondent for filing discretionary petitions and applications including requests for deferred action (using form I-360) on behalf of illegal immigrant parents of US citizens and those immigrants who are experiencing some form of hardship or the other.

The principal accusation against the Appellant was that the Appellant inappropriately used certain form I-360 to make a request for deferred action on behalf of clients.

This I-360 petition and the related discretionary applications were however accepted by the Respondent adjudicators.

The contention of the Appellant was that form I-360 is a general-purpose form which has an open section m for users to explain their request.

In the past, the Respondent had directed users to use section m of the same form I-360 to make requests for deferred action which prompted the Appellant to use the same.

The Respondent adjudicators also determined that the said I-360 petition is governed by the privilege and confidentiality laws, but these privilege and confidentiality provisions continue to be breached by another team of DHS officers.

The Deferred Action request is controversial. The United States Citizenship and Immigration Service (USCIS) Ombudsman investigated the general request for deferred action and submitted a controversial report that

> Stakeholders lack clear and consistent information
>
> No national procedure for handling request
>
> There is confusion on what to expect
>
> USCIS processes two types of deferred action requests: 1) those submitted by individuals who qualify based on a USCIS decision to use deferred action as a pre-adjudication form of temporary relief for those who have filed certain petitions or applications and 2) those submitted by individuals in exigent circumstances. *See* Ex. 8 attached to the complaint.

The Respondent pursuant to the Immigration and Nationality Act has discretionary powers in the processing of petitions and applications submitted to it.

At the arrest of the Appellant, the Respondent took about 168 boxes from the office of the Appellant, took all the computers, electronic storage devices and left the office in a damage condition.

The Respondent carried out the arrest and seizure following a search warrant signed by a judge of the New York State. The truthfulness of the content of the search warrants were later denied by the representative of the Respondent upon cross examination at the trial.

All the information and documents used in making the discretionary petitions and applications are true and correct with full disclosure to the Respondent. At a point, the representative of the Respondent placed a call to the Appellant for further explanation which the Appellant gave and the discretionary petitions and applications were accepted and granted for work permit.

After approving about 500 work permits over 4 years or so, the Appellant was now indicted on the discretionary petitions and applications. The Appellant was not accused of submitting fraudulent documents or information only that certain forms were used on true information.

After about 3 weeks trial, the Appellant was discharged and acquitted.

After being discharged and acquitted, the Respondent took the following actions that amount to retaliation against the Appellant:

Delay in releasing Appellant passport through security clearance blockage.

The Appellant was the only passenger targeted for search on a British Airways flight from New York to London in 2017.

The Appellant was the only passenger targeted for search on a KLM flight from New York to Amsterdam in 2017.

The Appellant was consistently stopped for secondary search and questioning on arrival from foreign trips. This happened about 10 times in 2017 and 2018 but has now stopped.

The Respondent also documented a report on the Appellant's record putting the Appellant on terrorist watch as an Arab terrorist even though the Appellant is not of Arabian origin and never a terrorist. Upon information and belief, this was done so that the Appellant will be stopped for secondary questioning and searches. Ex. 11 attached to the complaint.

In prosecuting the Appellant by the District Attorney in cooperation with the Respondent, several gross misconduct were committed against the Appellant which led to initiation of a lawsuit in Kings County Supreme Court for prosecutorial misconduct. The case is still pending.

After the initiation of the Notice of Claim against the New York City and 50 H hearing, the Respondent wrote a complaint to the Grievance Committee on the same facts that were used to prosecute the Appellant in New York City criminal court requesting that the Appellant be sanctioned.

The Grievance Committee disciplined attorneys by imposing civil sanctions that are punitive in nature.

There is a predisposition email dated July 5, 2018, from one Angela Christmas to one Diana Kearse that stated: "... we extensively cooperated with the Manhattan DA prosecution of him (he was acquitted). Currently we have 2 matters from 2016 and 2017 open against Salis, who will undoubtedly face charges. Would you like to keep the matter *nunc pro tunc*?"

The Respondent also submitted a complaint that Appellant failed to submit G28, (a notice of attorney representation), for certain clients. This Respondent complaint, (even though, flows from delays to the Appellants work with G28,) is against the form of Paperwork Reduction Act and Federal Court precedent decision which struck down similar complaint on G28.

Paperwork Reduction Act of 1980 - Established within the Office of Management and Budget (OMB), the Office of Information and Regulatory Affairs (OIRA). Requires the Director of OMB to appoint an Administrator as head of OIRA. Makes the Director responsible for any functions delegated to such Administrator. Requires the Director to develop and implement Federal information policies and standards including policies concerning: (1) the reduction of the Government paperwork burden on the public; (2) records management activities; and (3) the privacy of records pertaining to individuals; and (4) the review of information collection requests. The Act further requires an agency, before collecting any information, to: (1) eliminate reporting requirements which seek information which is available through another Government source; (2) minimize compliance burden

on respondents; (3) plan the tabulation of the information in a manner which maximizes its usefulness to other agencies; (4) obtain the Director's approval of such collection; and (5) obtain a control number for each information collective request.

SUMMARY OF ARGUMENT

Federal officers acting under color of federal authority should not be allowed to violate constitutionally protected rights of citizens. Facts that have been examined by a jury cannot be reexamined by another body. Double Jeopardy attaches against a remedial body that participates fully in criminal prosecution of a member. The First Amendment allows for freedom of speech and of the press, the right of the people to peaceably assemble and the right to petition the Government for a redress of grievances. The Eight Amendment stated that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARGUMENTS

From the factual allegations, it is the belief of the Appellant that certain officials of the Respondent, DHS, acting under color of federal authorities have violated the constitutionally protected rights of the Appellant.

One of the issues for court determination is whether the complaint of the Respondent, DHS, to the Grievance Committee of the First Judicial

Department in New York implicated The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb..."

The Supreme Court incorporated the Double Jeopardy clause against the states in *Benton v. Maryland*, 395 U.S. 784 (1969).

In *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), the Supreme Court held that the prohibition on double jeopardy extends to civil sanctions which are applied in a manner that is punitive in nature.

The complaint of the Respondent, DHS, to the Grievance Committee and the prosecution of the Appellant by the New York City District Attorney which was also based on complaint by the Respondent, DHS, were of the same issues and conduct.

The Appellant agreed and cherished the mandate of the Grievance Committee to uphold the trust of the legal profession, but this mandate was aggressively discussed during the prosecution of the Appellant. The Grievance Committee participated in discussing the mandate both at the grand jury and at the trial of the Appellant. The complaint of the Respondent, DHS, to the Grievance Committee implicates the double jeopardy in this circumstance because the Grievance Committee participated in the prosecution and the mandate was discussed at the

single jeopardy prosecution of the Appellant. Besides, the complaint is not *sua sponte*. In determining the applicability of the double jeopardy prohibition in a particular situation, the court must primarily examine the substance of what occurred and not simply the procedural form.

Attorney disciplinary proceedings are primarily remedial but, in this circumstance, the disciplinary proceeding was brought to the prosecution of the Appellant through the participation of the Grievance Committee in the grand jury and in the trial.

When the Respondent, DHS, developed the complaint against the Appellant, the Respondent, DHS, had several options, to submit to the federal court through the United States Attorney, submit to the Grievance Committee for Disciplinary Proceeding, submit to the State Attorney General, or submit to the District Attorney. For reasons best known to the Respondent, DHS, they bypassed the federal court, recruited the Grievance Committee and the New York District Attorney, and manipulated the New York Court system including making the judge sign a search and seizure warrant that was later denied as not true.

In double jeopardy analysis, it will not be out of place for the court to consider the totality of the circumstance and specific issues involved. In *U.S. v. Morgan*, the court noted: "we are firmly persuaded that the shield of double jeopardy remains in place regardless of the happenstance of whether the civil proceeding or

criminal prosecution arising from the same offense comes first * * * In short, double jeopardy protection may be claimed by a defendant whose indictment follows the imposition of a punitive civil sanction for the same offense." *U.S. v. Morgan*, 51 F.3d 1105 (2d Cir. 1995).

A defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as deterrent or retribution, without violating the double jeopardy clause. *U.S. v. Halper*, 490 U.S. 435 109 S. Ct. 1892. Based on the circumstance of this petition, the complaint of the Respondent, DHS, to the Grievance Committee is not remedial but an act taken in bad faith. It is also not *sua sponte*.

The Respondent, DHS, is a cherished and all-important organization that must not only demonstrate good faith but also discourage prejudice.

The Appellant was not accused of submitting false documents or information. The Respondent complaint against the Appellant was that the Appellant filled up certain immigration forms to request work permits or employment authorizations for his clients which was approved by the same Respondent. These forms are discretionary and what that means is that the Respondent, DHS, can give or refuse to give. All the potential beneficiary has to do is to apply.

The Respondent, DHS, has a lot of discretionary powers when processing petitions and applications. INA § 242(g) recognizes the Respondent legal authority to exercise discretion. Another statutory provision, INA § 274A(h)(3), recognizes

Respondent discretionary power to authorize employment for noncitizens who do not otherwise receive it automatically by virtue of their particular immigration status.

The Board of Immigration Appeals, (BIA) had decided that false statements that appear in an application, even if the application bears a statement of oath, do not constitute testimony within the meaning of the immigration adjudication *See Matter of L-D-E-*, 8 I&N Dec. 399 (BIA 1959). *See also* Supreme court decision in *Kungys v. U.S.*, 485 U.S. 759, 780-81 (1988).

It is believed that the Appellant Civil Rights have been violated particularly 42 U.S.C. § 1983, 18 U.S.C. §§ 241 and 242 among others.

While claims under 18 U.S.C. §§ 241 and 242 are criminal provisions that provide no basis for civil liability. This petition is not about requesting civil liability but seeking declaration on the conduct of certain officials of the Respondent, DHS.

42 U.S.C. § 1983 provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity,

injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia".

42 U.S.C. § 1983 allows claims alleging the "deprivation of any rights, privileges, or immunities secured by the Constitution and [federal laws]." It also allows defendants to be found liable when they have acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."

42 U.S.C. § 1983 is one "mechanism that may provide for personal capacity damages actions in the constitutional context against federal and state officers" *See Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015).

In 42 U.S.C. § 1983, Congress has created a cause of action whereby plaintiffs may sue a defendant "who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]." 42 U.S.C. § 1983 ; *see also Giordano v. City of New York*, 274 F.3d 740, 750 (2d Cir. 2001).

While 42 U.S.C. § 1983 mostly creates cause of action against state and local officers, federal officers may still be culpable if they act under color of any

statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia to deprive any person of any rights, privileges or immunities secured by the Constitution and Laws of the United States. The phrase used under 42 U.S.C. § 1983 is "every person". Besides, federal officers can also be liable under Bivens which create subject matter jurisdiction. Under the facts of this case, the defendant bypassed the federal law, recruited the New York District Attorney's office, and used the state and local laws to deprive the Appellant the rights, privileges, or immunities secured by the Constitution and laws of the United States.

The First Amendment may have been implicated by the Respondent, DHS. The First Amendment allows for freedom of speech and of the press, the right of the people to peaceably assemble and the right to petition the Government for a redress of grievances. During the trial of the Appellant, evidence was presented pointing to the fact that the Respondent, DHS, started investigating the Appellant because of the Appellant's Newspaper publication "Immigrant Guide and News". One of the publications detailed out the statistics of deported aliens carried out by the Respondent, DHS. This publication was brought as documentary evidence at the trial.

The Fourth Amendment was violated by the Respondent, DHS. The Fourth Amendment states the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The Respondent, DHS, wrote an affidavit for the search and seizure of the Appellant based on facts that were inaccurate and admitted at trial that the facts were inaccurate. This will be observed in the trial transcription facts of cross examination of Respondent, DHS. It is the belief of the Appellant that the Respondent, DHS, bypass the federal courts to avoid the federal scrutiny. There was manipulation of the judicial system of the New York courts leading to a lawsuit in Kings County Supreme Court. The Appellant was deprived of life, liberty, or property, without due process of law.

The prosecution of the Appellant was before the jury and the Appellant was discharged and acquitted. The facts developed by the Respondent, DHS, against the Appellant was tried by the jury. The Respondent, DHS, being a cherished and respectable agency of the government should not have presented the same facts to be tried or re-examined again in another court or proceeding. The presentation of the same facts to the Grievance Committee appears to violate the Seventh Amendment which states no facts tried by a jury shall be reexamined.

The Eight Amendment stated that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. The Respondent, DHS, collaborated with the New York District Attorney to seize the person of the Appellant. At the arraignment, $1million was demanded as bail. It is the belief of the Appellant that the stringent bail was set to punish the Appellant as not so many obligors can afford the high bail. Even when friends

come up as obligors to stand for the bail, they have to be subjected to unnecessary scrutiny and hearing. Transcripts of the arraignment and bail hearing are part of the Appeal record.

A federal judge in Seattle, Western District of Washington in *NWIRP v. Sessions* (Suite No. 2:17-cv-00716) ruled that attorneys can provide limited representation without G28 and that requiring G28 is a violation of freedom of speech.

The Paperwork Reduction Act requires an agency, before collecting any information, to: (1) eliminate reporting requirements which seek information which is available through another Government source; (2) minimize compliance burden on respondents. The Appellant believes the G28 is material at appearance not at the submission of forms to the DHS because anyone including non-attorneys can assist immigrants to prepare and submit forms but not anyone can appear to represent immigrants at appearance in DHS offices or courts.

RELIEFS SOUGHT

Wherefore, the Appellant respectfully ask for declaration and reliefs as follows:

Assume jurisdiction over this matter;

Declare that in the circumstance of this case, the complaint of the Respondent, DHS, to the Grievance Committee of the First Judicial Department violated the Double Jeopardy clause of the US Constitution for participating in the criminal prosecution of the Appellant and because it was not a remedial presentation.

Declare that in the circumstance of this appeal, the Respondent violated Constitutionally Protected

Rights of the Appellant to wit the First, Fourth and the Eight Amendments.

Declare that in the circumstance of this appeal, the Respondent violated Seventh Amendment by presenting the same facts that have been tried by the jury to be re-examined by the Grievance Committee of the First Judicial Department in New York.

Declare that in the circumstance of this petition, the Respondent violated Civil Rights of the Appellant and

Grant such further relief as the Court deems just and proper.

Dated: May 20, 2021
Respectfully submitted.
/s/ Owolabi Salis
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