LYTTLE v. The UNITED STATES OF AMERICA et al Doc. 48

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Case No. 4:10-cv-142-D

MARK DANIEL LYTTLE,	)
Plaintiff,	) **ICE DEFENDANTS' MOTION TO DISMISS**
v.	)
UNITED STATES OF AMERICA, et al.,	)
	) **Fed. R. Civ. P. 12(b)(6)**
Defendants.	)

THE ICE DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Dashanta Faucette, Dean Caputo, and Robert Kendall (collectively referred to as the "ICE defendants") move to dismiss Counts 1-3 in their entirety. In support of this motion, the ICE defendants rely upon the attached memorandum of law and accompanying exhibits.

Respectfully submitted this 24th day of June 2011,

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IN THE UNITED STATES DISTRICT COURT
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Case No. 4:10-cv-142-D

MARK DANIEL LYTTLE,	)	
Plaintiff,	)	**MEMORANDUM IN SUPPORT OF ICE DEFENDANTS' MOTION TO DISMISS**
v.	)	
UNITED STATES OF AMERICA, et al.,	)	**Fed. R. Civ. P. 12(b)(6)**
Defendants.	)	

MEMORANDUM IN SUPPORT OF THE ICE DEFENDANTS' MOTION TO DISMISS

Plaintiff, Mark Daniel Lyttle, seeks to hold three individually-named Federal defendants,[1] among others, personally liable for initiating removal proceedings against him despite being a U.S. citizen. But as the non-conclusory allegations in the complaint reveal, Lyttle represented to various defendants in this case – on at least two separate occasions – that he was *not* a citizen of the United States. Instead, plaintiff indicated that he was a citizen of Mexico. Based on his own claims of foreign citizenship, the ICE defendants reasonably concluded that Lyttle was an alien, and thus acted reasonably when they commenced removal proceedings against him. Because controlling precedent does not subject government officials to personal liability unless they violate "clearly established" law, the ICE defendants are entitled to qualified immunity, and this Court should dismiss Lyttle's constitutional tort claims.

[1] Dashanta Faucette, Dean Caputo, and Robert Kendall (collectively referred to as the "ICE defendants") are sued solely in their individual capacity. First Amended Complaint ("FAC") ¶¶ 9-11.

Lyttle has filed two separate but related lawsuits regarding his detention and removal from the United States, one in this Court and another in the Northern District of Georgia. In the case before this Court, plaintiff has sued the United States, the ICE defendants, and two employees of the North Carolina Department of Correction ("NCDOC"). This motion focuses solely on the three constitutional tort claims for damages that plaintiff brings against the ICE defendants under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).[2] Those claims involve alleged violations of the Fifth Amendment's Due Process Clause (Count 1) and the Equal Protection Clause (Count 2), and the Fourth Amendment (Count 3). *See* FAC ¶¶ 126-146.

As a threshold matter, there is no viable constitutional tort remedy in this case because Congress has established an alternative, existing, and comprehensive statutory scheme to address claims arising from immigration proceedings. But even if that was not the case, the ICE defendants are nevertheless entitled to qualified immunity, because the actions they took in reliance upon plaintiff's repeated claims of foreign citizenship were reasonable. In light of these representations, plaintiff has not pled sufficient facts to state plausible violations of any clearly established constitutional rights. Thus, the Court should dismiss Counts 1-3 in their entirety.

BACKGROUND[3]

On August 14, 2008, plaintiff was sentenced to a term of 100 days in the custody of the NCDOC for violating the terms of his probation on an underlying conviction for criminal assault.

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[2] The United States has filed a separate motion to dismiss on this same date.

[3] Unless otherwise noted, the facts recited *infra* are derived from the non-conclusory allegations in the complaint, which are accepted here solely for the purpose of this motion.

See FAC ¶ 27; Exh. A.[4] A week later, on August 22, 2008, he was admitted to the Neuse Correctional Institution ("Neuse") to begin serving that sentence. *Id.* ¶ 28. During the criminal booking process, state officials asked Lyttle a series of biographical questions, including one about his birthplace. *Id.* ¶ 32. Although Lyttle now alleges that he said he was born in North Carolina, *id.*, Defendant Marilyn Stephenson, an Admissions Technician with NCDOC, noted on plaintiff's intake form that his birth country was "Mexico" and that his citizenship was "alien," *id.* ¶ 33. Then, "as a direct and proximate result" of the information gathered during the intake interview, NCDOC "notified" the Raleigh unit of U.S. Immigration and Customs Enforcement ("ICE"), which subsequently investigated Lyttle's immigration status. *Id.* ¶ 36.

Lyttle was interviewed at Neuse on September 2, 2008, by Dashanta Faucette, an ICE immigration enforcement agent and defendant in this action. *Id.* ¶ 39. Lyttle's statements to Faucette were documented in a "Record of Sworn Statement in Affidavit Form" that Lyttle signed. *Id.* ¶¶ 44-45; Exh. B.[5] In this sworn statement, Lyttle affirmed that he was born in and was a citizen of Mexico, that his correct name was Jose Thomas, and that he entered the United

[4] A copy of the judgment of plaintiff's probation violation and sentencing order is attached to this memorandum as Exhibit A. The Court may consider this document when ruling on a motion to dismiss without converting it into one for summary judgment because it is a public record. *Philips v. Pitt County Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (noting that when considering Rule 12(b)(6) motions, courts "may properly take judicial notice of matters of public record").

[5] A copy of the sworn statement is also attached to this memorandum as Exhibit B. The Court may consider this document when ruling on a motion to dismiss without converting it into one for summary judgment because plaintiff refers to it in ¶¶ 41-45 of his FAC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *accord Cozzarelli v. Inspire Pharmaceuticals Inc.*, 549 F.3d 618, 625 (4th Cir. 2008). Likewise, the Court may consider Exhibits C-H, which are also attached to this motion, because plaintiff specifically refers to them in the complaint. *See* FAC ¶¶ 46, 49-52, 70 (incorporating documents by reference).

States without permission when he was three years old. FAC ¶¶ 41, 43; Exh. B. Faucette's notes from the interview also make reference to "mental illness – bipolar." Exh. C; FAC ¶ 46.

Over the next few days, ICE agents performed computer database searches on Lyttle's criminal history. FAC ¶¶ 47-48. Lyttle alleges that these background checks revealed "evidence of [his] citizenship." *Id.* ¶ 51. Relying instead on Lyttle's sworn statement, however, on September 5, 2008, ICE Supervisory and Detention and Deportation Officer Dean Caputo (another defendant in this action) executed several legal documents to "commence" removal proceedings against Lyttle. *Id.* ¶ 50. One of those documents, a "Notice of Intent to Issue Final Administrative Removal Order" (the "Notice of Intent"), initiated expedited removal proceedings under section 238(b) of the Immigration and Nationality Act (the "INA"), 8 U.S.C. § 1228. *Id.*; Exh. D. According to the Notice of Intent, Lyttle was "a native of Mexico and a citizen of Mexico" who was removable based on his criminal record. FAC. ¶ 50; Exh. D. In addition to this charging document, Caputo issued a "Warrant for Arrest of Alien" (the "Arrest Warrant") and a "Notice of Custody Determination" (the "Notice of Custody"). FAC ¶¶ 49, 51; Exhs. E, F. Also on September 5, ICE Immigration Enforcement Agent Robert Kendall (another defendant in this case) issued an "Immigration Detainer." FAC ¶ 52; Exh. G. The first three of these documents were served on Lyttle personally on September 8, 2008. FAC ¶¶ 53-55; Exhs. D, E, F. Lyttle also signed his name to the "Notice of Intent" and "Notice of Custody;" by doing so, he confirmed the representations he had made to Agent Faucette of being a Mexican citizen illegally inside the United States, agreed to be voluntarily deported to Mexico, and waived his rights to a hearing before an immigration judge. FAC ¶¶ 54-55, Exhs. D, F. The immigration detainer notified NCDOC that Lyttle was to be transferred to ICE custody upon completion of his criminal sentence. *See* FAC ¶ 52; Exh. G.

That occurred approximately six weeks later, as Lyttle was scheduled to be released from NCDOC custody on October 26, 2008. FAC ¶ 63. Two days after that, in compliance with the immigration detainer, ICE took custody of Lyttle and transported him to the Stewart Detention Center in Lumpkin, Georgia pending removal proceedings. *Id.* Shortly after arriving at Stewart, ICE Deportation Officer David Collado (who is not a defendant in this case) took another sworn statement from Lyttle, who this time indicated that he was a U.S. citizen. *Id.* ¶ 65. Collado thus "reclassified" plaintiff's case "from an administrative removal to Notice to Appear" ("NTA"), meaning that Lyttle's immigration status would be decided by an immigration judge. *Id.* ¶ 68. On December 9, 2008, an immigration judge heard plaintiff's case and issued an order of removal. *Id.* ¶¶ 82-83. Lyttle was then transported across the Mexican border on December 18, 2008, and spent the next four months in Central America. *See id.* ¶¶ 95-111.

On April 22, 2009, Lyttle returned to the United States on a plane bound for Nashville, Tennessee, which stopped first in Atlanta, Georgia. *See id.* ¶¶ 112-13. While passing through customs in Atlanta, Lyttle was detained as an illegal alien based on his prior immigration proceedings. *See id.* ¶ 113. Nevertheless, he was released two days later on April 24, 2009. *Id.* ¶ 122. Then, on April 28, 2009, the Department of Homeland Security ("DHS") filed a motion with the immigration court to terminate removal proceedings against Lyttle. *Id.* ¶ 123; FAC Exh. C.[6] In ultimately determining that plaintiff was a U.S. Citizen, DHS identified the source of the confusion: Lyttle had been "ordered removed from the United States based on his representation to [the immigration court . . .] and to immigration officials that he was a Mexican citizen who had illegally entered the United States without inspection or parole." FAC Exh. C.

[6] A copy of a document attached to a pleading "is a part of the pleading for all purposes," Fed. R. Civ. P. 10(c), including a motion to dismiss. *See Fayetteville Investors v. Commercial Builders, Inc.,* 936 F.2d 1426, 1465 (4th Cir. 1991).

DISCUSSION

I. THERE IS NO *BIVENS* REMEDY FOR A TORT RELATED TO THE GOVERNMENT'S IMMIGRATION ACTIONS

As a threshold matter, this Court should decline to infer a *Bivens* remedy in this case. In *Bivens*, the Supreme Court took the extraordinary step, absent congressional authorization, of creating a private cause of action for money damages under the Constitution. 403 U.S. at 395-98. But since that decision, the Court has "in most instances . . . found a *Bivens* remedy unjustified," *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007), and "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *accord Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 409 (4th Cir. 2004) ("In the more than thirty years since *Bivens*, the Court has been very hesitant to imply other private actions for money damages."); *Holly v. Scott*, 434 F.3d 287, 289 (4th Cir. 2006) (collecting cases). Because a *Bivens* remedy is "not an automatic entitlement," but instead "a subject of judgment" by courts, judges must refrain from inferring a *Bivens* cause of action when there either is an (1) "alternative, existing process for protecting" the constitutional interests at issue, or when there are (2) "'special factors counselling [sic] hesitation'" against a judicially created remedy. *Wilkie*, 551 U.S. at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)); *accord Holly*, 434 F.3d at 290. Here, the INA provided an alternative, existing, and exclusive process to vindicate Lyttle's constitutional interests. Moreover, the political branches' plenary power over immigration is an additional "special factor" counseling against a *Bivens* remedy.

A. The INA's Comprehensive Scheme Precludes A *Bivens* Remedy

The existence of a deliberately crafted statutory scheme precludes a *Bivens* remedy because it demonstrates that Congress did not intend to allow a separate private right of action for damages. *Schweiker v. Chilicky*, 487 U.S. 412, 421-25 (1988). A key consideration is

whether recognizing a *Bivens* cause of action would implicate "policy questions in an area that ha[s] received careful attention from Congress." *Id.* at 423. Indeed, "the Court's refusal to extend *Bivens* has been especially apparent in cases involving complex statutory schemes in which Congress has considered and created meaningful avenues for redress." *Rossotti*, 317 F.3d at 409 (refusing to imply a *Bivens* remedy against IRS employees since the Internal Revenue Code provided a comprehensive remedial scheme). For example, in *Bush v. Lucas*, the Supreme Court declined to infer a *Bivens* remedy involving federal personnel disputes "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies." 462 U.S. at 368.

Furthermore, a *Bivens* remedy should not be created even when the comprehensive framework established by Congress "fail[s] to provide for 'complete relief.'" *Schweiker*, 487 U.S. at 425. To be sure, "[t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed." *Bush*, 462 U.S. at 388; *accord Rossotti*, 317 F.3d at 411 (Congress's decision "not to create certain remedies as part of the complex statutory scheme" lends "little support" to the extension of a *Bivens* remedy). Rather, the question "is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy." *Bush*, 462 U.S. at 388; *see also, e.g., Schweiker*, 487 U.S. at 429 (declining to infer a *Bivens* remedy because, despite the shortcomings of the statutory remedy under the Social Security Disability Act, Congress "is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program"). In other words, the critical inquiry is whether "the design of a Government program *suggests* that Congress has provided what *it considers* adequate remedial mechanisms for constitutional violations." *Chilicky*,

487 U.S. at 423 (emphasis added). The Fourth Circuit has thus recognized that the remedy that Congress establishes need not be "perfect." *Rossotti*, 317 F.3d at 413; *see also Zimbelman v. Savage*, 228 F.3d 367, 371 (4th Cir. 2000) (observing that the Supreme Court has "refused to allow a *Bivens* action in cases where it agreed that the remedies made available by Congress were not *complete* and that some hardships would go uncompensated"). Because Congress is "so well-suited" to determine the types of remedies that should be available, "neither the absence nor the incompleteness of such a scheme represents an invitation for a court to step in and correct what it may perceive as an injustice toward an individual litigant." *Holly*, 434 F.3d at 290.

In this case, Lyttle's detention and subsequent removal proceedings were governed by such a scheme: the INA. The Supreme Court has characterized the INA as "the comprehensive federal statutory scheme for regulation of immigration and naturalization." *DeCanas v. Bica*, 424 U.S. 351, 353 (1976). For example, the INA provides that certain classes of criminal aliens must be arrested and detained pending a decision on whether the alien is to be removed. *See* 8 U.S.C. § 1226(c). It includes detailed provisions governing removal proceedings before an immigration judge, and sets forth numerous procedural safeguards for those proceedings. *See, e.g.,* 8 U.S.C. § 1229a. The INA also provides specific procedures for detention as well as requirements for relief from detention. *See, e.g.*, 8 U.S.C. §§ 1225, 1226, 1231.

Most pertinent to this case, the INA allows individuals to raise *constitutional* challenges in their removal proceedings and on a petition for review in a court of appeals. *See* 8 U.S.C. §§ 1252(a)(2)(D), 1252(b)(9). And it specifically allows suspected aliens claiming to be U.S. citizens to seek review of that determination in the appellate courts as well. *See* 8 U.S.C. § 1252(b)(5). But Congress has strictly limited judicial review of immigration decisions, including claims to U.S. citizenship, beyond those expressly allowed in the INA. *See* 8 U.S.C. §§

1252(b)(9), 1252(g), 1252(a)(2)(B)(ii), 1252(b)(5)(C). Indeed, the INA provides that a petition filed in the appropriate *court of appeals* is the "sole and exclusive" means for judicial review of constitutional claims arising from immigration enforcement operations. 8 U.S.C. §§ 1252(a)(2)(D) & (a)(5); *see also Nken v. Holder,*129 S. Ct. 1749, 1755 (2009) (explaining that amendments to the INA have "limited the availability of judicial review and streamlined all challenges to a removal order into a single proceeding: the petition for review"). Thus, apart from the channels of review specified by Congress, the Court has recognized that "the theme of the legislation" was expressly "aimed at protecting the Executive's discretion from the courts." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) ("*AADC*").

Congress's decision to limit judicial review was no accident. It was designed to streamline decision-making in the immigration field, which in turn promotes the congressional goal of efficiency in removal proceedings. *See Kucana v. Holder*, 130 S. Ct. 827, 838 (2010) (explaining that amendments to the INA were designed to "expedite" removal proceedings); *AADC*, 525 U.S. at 486-87 (explaining that Congress limited judicial review of decisions to commence and adjudicate removal proceedings because it was concerned with the "deconstruction, fragmentation, and hence prolongation of removal proceedings"). Simply put, multitudinous judicial review of immigration-related claims could lead to both contradictory rulings and delay that would upend the carefully crafted congressional scheme. But that's what Lyttle essentially seeks to do – to make this Court a *de facto* court of review over alleged constitutional violations arising out of his immigration proceedings, despite Congress's decision that district courts have no role to play in such proceedings. Rather, Lyttle should have raised his constitutional claims in the immigration courts or in a petition to the court of appeals (irrespective of any entitlement to damages). *See, e.g., Schweiker*, 487 U.S. at 425 (statutory

scheme need not provide for "complete relief"); *Zimbelman*, 228 F.3d at 371 (recognizing that courts may decline *Bivens* relief even though "some hardships would go uncompensated"). Accordingly, the Court should dismiss all of plaintiff's *Bivens* claims (Counts 1-3) because he had an adequate remedy under the INA.

B. The Political Branches' Plenary Power Over Immigration Precludes A *Bivens* Remedy

In addition to the presence of the INA as a comprehensive statutory framework, "'courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling [sic] hesitation before authorizing a new kind of federal litigation.'" *Wilkie*, 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378); *accord Holly*, 434 F.3d at 290. One such factor that precludes the creation of a *Bivens* remedy is when Congress has plenary power over the subject matter for which a *Bivens* remedy is sought. *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 298-99 (1983) (Congress's plenary power over military matters counseled against implying a *Bivens* remedy).

That factor applies here because the Supreme Court "has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal quotations and citations omitted). By way of analogy, "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." *Mathews v. Diaz*, 426 U.S. 67, 81-82, (1976)). The Fourth Circuit therefore recognizes that "judicial review over federal immigration legislation has always been limited." *Appiah v. INS*, 202 F.3d 704, 710 (4th Cir. 2000) (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). To be sure, the power to remove suspected aliens is a "'fundamental sovereign attribute exercised by the Government's political departments largely immune from

judicial control.'" *Id.* (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)). Because Congress has plenary power over immigration matters and the Executive Branch is charged with implementing the nation's immigration laws, federal courts generally afford the political branches substantial deference in this area. *See INS v Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (deference is "especially appropriate" because "officials 'exercise especially sensitive political functions that implicate questions of foreign relations'") (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)). In light of Congress's plenary control over immigration issues, the Court should "stay its *Bivens* hand" in cases like this and dismiss Counts 1-3. *Wilkie*, 551 U.S. at 554.

II. THE ICE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE PLAINTIFF FAILS TO PLEAD A VIOLATION OF HIS CONSTITUTIONAL RIGHTS

Even if Lyttle has a potential *Bivens* remedy, the ICE defendants are nevertheless entitled to qualified immunity. Government officials are generally immune from civil liability so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The need for such immunity arises because personal liability lawsuits against government officials exact "substantial social costs," *Anderson v. Creighton*, 483 U.S. 635, 638 (1987), including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. Qualified immunity, therefore, is intended to minimize these significant costs by creating "'ample room for mistaken judgments'" and shielding "'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley v. Briggs*, 475 U.S. 335, 343 (1986)); *accord Short v. Smoot*, 436 F. 3d 422, 426 (4th Cir. 2006) (explaining that qualified immunity protects officials from "'bad guesses in gray areas' and ensures that they are liable only 'for transgressing bright lines'") (quoting *Maciariello*

v. Sumner, 973 F. 2d 295, 298 (4th Cir. 1992)). Because it is "an immunity from suit rather than a mere defense to liability," the Supreme Court "repeatedly ha[s] stressed" that qualified immunity should be raised and resolved "at the earliest possible stage of litigation." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (internal quotations and citations omitted).

The Fourth Circuit applies qualified immunity on behalf of federal officials "either if the facts do not make out a violation of a constitutional right or if the right was not clearly established." *Snider v. Lee*, 584 F.3d 193, 198 (4th Cir. 2009), *cert. denied,* 130 S. Ct. 2073 (2010). Liability may be imposed only if "'a reasonable officer would know that the specific conduct at issue was impermissible.'" *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 273 (4th Cir. 2004) (quoting *Rogers v. Pendleton*, 249 F.3d 279, 285 (4th Cir. 2001)). The purported constitutional right must be defined "'at a high level of particularity'" and is "'clearly established'" only if it has been "specifically adjudicated" or it is "manifestly apparent from broader applications of the constitutional premise in question." *Id.* at 279 (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999)). Simply put, "the contours of the right must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional." *Edwards*, 178 F.3d at 251 (internal quotation marks omitted).

To overcome qualified immunity at the pleading stage, a plaintiff must therefore provide "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *accord Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (adopting *Iqbal*'s pleading standards and explaining that "plaintiffs may proceed into the litigation process only when their complaints are justified by both law and fact"). Thus, a complaint "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."

Iqbal, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). First, courts determine which allegations are entitled to the presumption of truth. *Id.* Claims that simply provide "labels and conclusions" or other "naked assertion[s] devoid of further factual enhancement" are not adequate. *Id.* (internal quotations and citations omitted). Likewise, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; *Barcliff v. North Carolina League of Municipalities*, No. 5:10-cv-244-D, 2011 WL 285559, at *1 (E.D.N.C. Jan. 25, 2011) (Dever, III, J.) ("a court need not accept a complaint's legal conclusions drawn from the facts").

After stripping the complaint of its bare allegations, courts then consider whether the remaining non-conclusory allegations, taken as true, give rise to a "plausible" claim. *Iqbal*, 129 S. Ct. at 1949. This requires a plaintiff to allege "factual content" demonstrating "more than a sheer possibility" of unconstitutional conduct and is satisfied only when the complaint includes more than "facts that are merely consistent with a defendant's liability . . . ." *Id.* (internal quotations and citations omitted). "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

As discussed below, Lyttle's complaint is devoid of *factual* allegations stating a cause of action based on either the Fourth or Fifth Amendments. It is instead replete with legal and conclusory statements, formulaic restatements of the elements of the causes of action, and broad, unspecific allegations that do not show a plausible claim for relief. After stripping the complaint of these "labels and conclusions," what remains are allegations showing that the ICE defendants reasonably concluded that Lyttle was a removable criminal alien. In light of plaintiff's failure to

aver sufficient facts to support the violation of any clearly established constitutional right, the ICE defendants are entitled to qualified immunity. *Iqbal*, 129 S. Ct. at 1945-47.

A. Lyttle Has Not Stated A Clearly Established Violation Of His Fourth Amendment Rights (Count 3)

Lyttle alleges that the ICE defendants violated his Fourth Amendment rights when they caused his detention to be "continued well beyond the scheduled release date of October 26, 2008," even though he had already completed his underlying criminal sentence for assault. FAC ¶ 141. But there was nothing "unlawful and unconstitutional" (to borrow plaintiff's conclusory language) about extending Lyttle's detention. *Id.* Instead, it is undisputed that ICE, as the enforcement branch of DHS, has the legal authority to charge, arrest, and detain certain classes of criminal aliens for the duration of removal proceedings. *See* 8 U.S.C. §§ 1226(c), 1228; 8 C.F.R. § 1238.1. The ICE defendants in this case exercised that authority when they issued the Notice of Intent (among other legal documents, including the Arrest Warrant), thereby charging Lyttle as a removable criminal alien. FAC ¶¶ 49-52. Once they commenced removal proceedings against Lyttle under section 238(b) of the INA, 8 U.S.C. § 1228, *see* FAC ¶ 50, ICE was expected – pursuant to statute – to take custody of him following the completion of his criminal sentence, 8 U.S.C. § 1226(c); *Demore v. Kim*, 538 U.S. 510, 517-18 (2003) (explaining that § 1226(c) "*mandates* detention during removal proceedings" for certain classes of criminal aliens) (emphasis added).

Because the ICE defendants charged Lyttle as a criminal alien and extended his detention pursuant to valid legal process, what Lyttle's Fourth Amendment claim apparently amounts to – if anything at all – is an alleged constitutional violation premised upon the malicious use of legal process. *See Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion) (explaining that a constitutional claim of malicious prosecution, if it even exists, must be grounded in the Fourth

Amendment). To be clear, a constitutional tort remedy for malicious prosecution "remedies detention accompanied, not by the absence of legal process, but by *wrongful institution* of legal process."[7] *Wallace v. Kato*, 549 U.S. 384, 390 (2007) (citing W. Keeton, et al., *Prosser and Keeton on Law of Torts* 54, 885-86 (5th ed.1984)). As the Fourth Circuit has cautioned, however, it "is not entirely clear" whether a malicious use of process claim even exists as a freestanding constitutional claim. *Snider*, 584 F.3d at 199; *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000) (noting that the Supreme Court has expressed a "fairly strong sentiment against constitutionalizing malicious prosecution") (internal quotations and citations omitted). Because the Fourth Circuit has not established a cognizable *Bivens* cause of action for malicious prosecution, Count 3 should be dismissed in its entirety.

Even if malicious prosecution were available under the Fourth Amendment, Lyttle would nevertheless be required to allege elements of the common law tort claim, including that the ICE defendants *lacked probable cause* when they initiated removal proceedings against him. *See Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005) (a constitutional malicious process claim requires the defendant to have "seized [plaintiff] pursuant to legal process that was not supported by probable cause . . . .") (internal quotations and citations omitted); *see also Hartman v. Moore*, 547 U.S. 250, 266 (2006) (absence of probable cause must be "pleaded and proven" to support retaliatory prosecution claims under *Bivens*).[8] And because qualified immunity "gives ample room for mistaken judgments," *Malley*, 475 U.S at 341, Lyttle must go one step further to show

[7] On the other hand, a constitutional tort claim alleging "detention without legal process" is based on a theory of false imprisonment. *Wallace*, 549 U.S. at 389. But a false imprisonment claim "ends once the [plaintiff] becomes held *pursuant to such process*-when, for example, he is bound over by a magistrate or arraigned on charges." *Id.* at 391.

[8] Probable cause exists "when the facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Burrell*, 395 F.3d at 514 (internal quotations and citations omitted).

that there was an *unquestionable* absence of probable cause when the ICE defendants charged him as a removable criminal alien. *See Hunter v. Bryant*, 502 U.S. 224, 226 (1991) ("Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity.") (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)); *accord Smith v. Reddy*, 101 F.3d 351, 356 (4th Cir. 1996) ("[A]n officer is not denied qualified immunity for making a mistake, as long as that mistake is reasonable under the circumstances.") Lyttle's pleadings do just the opposite; after stripping the complaint of its bare legal conclusions, what remains are non-conclusory factual allegations showing that the ICE defendants had probable cause to initiate removal proceedings against Lyttle.

1. North Carolina Officials Determined That Lyttle Was A Citizen Of Mexico

The ICE defendants did not make the original determination that Lyttle was an alien. Rather, NCDOC employees were the first agents to question plaintiff during the criminal booking process and identify him as a foreign citizen. FAC ¶¶ 30-37. In fact, based on Lyttle's responses to "a series of biographical questions," North Carolina Defendant Stephenson specifically noted on plaintiff's "intake form" that Lyttle was an "[a]lien" who was born in "Mexico." *Id.* ¶¶ 32-33. Only at that point did NCDOC "notif[y]" ICE of its determination that Lyttle was an alien. *Id.* ¶ 36. Because ICE may establish alienage based on "routine booking information" gathered by local law-enforcement officials, *Puc-Ruiz v. Holder*, 629 F.3d 771, 781 (8th Cir. 2010), the ICE defendants could have established Lyttle's foreign citizenship based solely on the facts first provided by NCDOC.

2. Lyttle Told Faucette That He Was Not A United States Citizen

Not only did NCDOC employees identify Lyttle as a possible alien and notify ICE of that finding, but Lyttle then admitted – in a *sworn statement* taken during an interview with ICE

Agent Faucette – that he was in fact a citizen of Mexico. *See* Exh. B. This admission, standing alone, established the probable cause the ICE defendants needed to charge plaintiff as a removable alien and detain him pending removal proceedings. Indeed, the Supreme Court has recognized that "an admission of illegal alienage or other strong evidence" may justify an arrest. *INS v. Lopez-Mendoza*, 468 U.S. 1042, 1045 (1984). To be sure, recorded confessions of foreign citizenship are "inherently trustworthy and reliable to prove alienage or deportability." *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999) (citing *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988)); *see also In re Luz Lemus-Cruz*, File: A98 950 012, 2008 WL 2783025 (BIA June 25, 2008) ("[I]t has long been established that an admission . . . of birth abroad is sufficient to establish a presumption of alienage . . . .") (citing *Murphy v. INS*, 54 F.3d 605, 609 (9th Cir. 1995)); *Sint v. INS*, 500 F.2d. 120, 122 (1st Cir. 1974) (admissions of foreign citizenship are "persuasive evidence of alienage"); *United States v. Galindo-Gallegos*, 244 F.3d 728, 732 (9th Cir. 2001) (explaining that a *U.S. citizen's* repeated admissions of alienage could be relied on to establish that he was an alien even though he was known to be a "proven liar"); *United States v. Sotelo*, 109 F.3d 1446, 1449 (9th Cir. 1997) (admissions of Mexican citizenship to immigration officials during arrest provided evidence of alienage); *United States v. Lopez-Guerrero*, No. EP-00-CR-1498-DB, 2000 WL 33348233 (W.D. Tex. Nov. 30, 2000) (finding that a Border Patrol agent "clearly had probable cause to arrest Defendant based on his admission at that time that he is a Mexican citizen . . . ."). In light of the information provided in his own sworn statement, it is fair to say that Lyttle himself was "the author of the indictment" that led to his extended detention pending removal proceedings. *Rawls v. Bennett*, 19 S.E.2d 126, 128 (N.C. 1942) (holding that confession established probable cause and barred a malicious prosecution claim).

Although Lyttle attempts to minimize the impact of his own admission by now alleging that the sworn statement (which Faucette recorded by hand) was "erroneous[]" and that it "assumed" incorrect information about his identify and citizenship, FAC ¶¶ 41, 43, 45, such bare assertions are contradicted by what plaintiff in fact told her.[9] After stripping the complaint of these labels and adjectives, what remains are the raw facts that Faucette recorded from plaintiff's answers to the biographical questions she asked him – i.e., that plaintiff was a Mexican citizen, also known as Jose Thomas, who entered the United States, without permission, when he was three years old. *Id.* ¶¶ 41, 43; Exh. B.

To be clear, Lyttle's vague allegations that the sworn statement was "erroneous" and "assumed" incorrect information are not entitled to the presumption of truth. Indeed, there are no *factual* allegations whatsoever that Faucette (or any ICE defendant) physically harmed, pressured, or threatened Lyttle to sign – and thus approve – the admissions that she documented in the sworn statement. *Cf. Colorado v. Connelly*, 479 U.S. 157, 164 n.1 (1986) (collecting cases that describe coercive tactics used to extract involuntary confessions). Although Lyttle also implies that Faucette did something wrong when she "failed and refused to have a witness present" during his interview, FAC ¶ 44, the statement specifically states that the person signing the form was "willing to make a statement without anyone else being present."[10] Exh. B.

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[9] This is not to say that plaintiff was actually a citizen of Mexico. But the suggestion that the sworn statement itself was erroneously recorded lacks any factual support.

[10] Plaintiff similarly alleges that he was not "offered an opportunity to review the contents of the entries" recorded by Faucette on the sworn statement. FAC ¶ 45. But the sworn statement specifically states, directly above the signature block, that Lyttle has "read (or ha[s] had read to me) the foregoing statement" and "affirm[s] that the answers attributed to me herein are true and correct to the best of my knowledge and belief . . . ." Exh. B. In any event, such allegations would still not show that Faucette coerced Lyttle to sign and approve the contents of the sworn statement by means of physical force or verbal threats. And if all Lyttle can muster here is that Faucette allegedly departed from typical ICE procedures, the Supreme Court is clear that an official remains immune from suit even if her conduct violated other non-constitutional

Rather than leaping to the factually unsupported and implausible inference that Faucette doctored Lyttle's sworn statement in a deliberate effort to further detain and deport an individual that she knew to be a U.S. citizen – as Lyttle suggests with his conclusory pleadings – the "'obvious alternative explanation'" for Faucette's conduct is that she merely documented, word for word, what plaintiff told her about his identity and citizenship.[11] *Iqbal*, 129 S. Ct. at 1951 (quoting *Twombly*, 550 U.S. at 567). And while Lyttle seems to suggest that Faucette should have discredited his inculpatory answers because he was apparently "cognitively impaired," FAC ¶ 40, the non-conclusory allegations only show her knowledge of plaintiff's alleged bipolar mood disorder – nothing more. *Id.* ¶ 46; Exh. C. In fact, Faucette's handwritten notes from September 2, 2008, (taken the same day as his sworn statement) document his alleged "bipolar" condition alone, but do not refer to any additional *cognitive* deficiency or related inability to read, reason, or comprehend. *See id*. To be sure, the fact that Lyttle proclaimed to be bipolar, by itself, did not mean that he could not understand and intelligently respond to the *basic* questions that Faucette asked him regarding his name, place of birth, and country of citizenship. *See* Vol. 3, *Lawyers' Medical Cyclopedia*, § 17.16[C] (Matthew Bender 2011) ("The mere existence of mental disorder or a psychiatric diagnosis in any patient gives little clue to the degree of mental impairment . . . ."); *Brown v. Harris*, 240 F.3d 383, 387 (4th Cir. 2001) (referencing medical opinion that "people suffering from bipolar disorder can be sane and competent"). Without further knowledge of mental *impairment*, Faucette would have no reason to doubt Lyttle's sworn admission of foreign citizenship when formulating the probable cause to charge plaintiff as a

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standards such as internal guidelines, ethical principles, or regulations. *See Davis v. Scherer*, 468 U.S. 183, 194-196 & n.12 (1984).

[11] We can only speculate as to why Lyttle misrepresented his citizenship. At any rate, the qualified immunity analysis turns not on plaintiff's motive, but instead on the reasonableness of the ICE defendants' actions in light of the information that was then available.

removable alien. It is no surprise, therefore, that the "obvious" explanation for Faucette's actions (e.g., that she simply recorded plaintiff's testimony with the reasonable belief that it was true) is exactly what DHS concluded was the cause of plaintiff's removal: that Lyttle was "ordered removed from the United States based on *his representation* to [the immigration court . . .] and to immigration officials that he was a Mexican citizen who had illegally entered the United States without inspection or parole." *See* FAC Exh. C (emphasis added).

3. Lyttle Admitted The Charges In The Notice Of Intent

Not only did Lyttle's sworn statement (which directly corroborated the information first gathered by NCDOC) provide the ICE defendants with probable cause to initiate removal proceedings against him,[12] plaintiff confessed to being a citizen of Mexico yet again when he signed the Notice of Intent, thereby "waiving his legal rights to a removal hearing before an immigration judge" and "agree[ing] to be voluntarily deported to Mexico." FAC ¶ 54. Although Lyttle claims that he was "coerced and manipulated" into signing the Notice of Intent, thus admitting the charges contained therein, *id.*, these labels and conclusions are again not afforded the assumption of truth, *see Monroe v. City of Charlottesville, VA*, 579 F.3d 380, 387 (4th Cir. 2009), *cert denied,* 130 S. Ct. 1740 (2010) (allegations that plaintiff was "coerced" were merely "legal conclusions" and therefore "insufficient" under the *Twombly* pleading standard). As with his prior sworn statement to Faucette, the most Lyttle provides to support this otherwise baseless claim of "coercion" is when he alleges that ICE officials ignored "medical and criminal records show[ing] that [plaintiff] was unable to execute a knowing, voluntary, and intelligent waiver of his legal rights." FAC ¶ 93. But plaintiff, tellingly, does not specify even one medical or

[12] In fact, evidence of alienage uncovered "during the booking process . . . tends to bolster the reliability" of an admission of foreign citizenship that is subsequently made to federal agents. *United States v. Hernandez*, 105 F.3d 1330, 1332 (9th Cir. 1997).

criminal record to substantiate this claim. *See id.* That is because an actual examination of Lyttle's prior criminal records reveals the exact opposite.

As a matter of background, the Supreme Court has made clear that a criminal defendant may not stand trial or plead guilty "unless he does so 'competently and intelligently.'" *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)). Thus, a defendant must possess both a "'reasonable degree of rational understanding'" and "'a rational as well as factual understanding of the proceedings against him.'" *Id.* (quoting *Dusky v. United States,* 362 U.S. 402 (1960)); *accord Simpson v. Polk*, 129 F. App'x. 782, 794 (4th Cir. 2005). Indeed, trial courts in North Carolina have "a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. Heptinstall*, 306 S.E.2d 109, 112 (N.C. 1983) (internal quotations and citations omitted); *accord State v. Staten*, 616 S.E.2d 650, 654-55 (N.C. Ct. App. 2005). Pursuant to statute, moreover, a criminal defendant in North Carolina may not be "tried, convicted, sentenced, or punished" if he is "unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." N.C. Gen. Stat. § 15A–1001(a).

In this case, plaintiff was convicted of assault on February 21, 2008, placed on probation, and later sentenced on August 14, 2008, to spend 100 days at Neuse (following a violation of that probation). FAC ¶ 27; Exh A. Therefore, the criminal courts in North Carolina necessarily found Lyttle competent to undergo his criminal proceedings on at least two occasions – the day of his conviction and the day of his sentencing. Equally telling, the sentencing judge specifically decided *not* to recommend that Lyttle undergo "[p]sychiatric and/or psychological counseling." Exh. A. Because plaintiff was found competent by the trial court, he clearly had the "capacity to

comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed." *State v. Jackson*, 273 S.E.2d 666, 669 (N.C. 1981).

Plaintiff's global allegation regarding the contents of his own criminal history (unsupported by one single fact), *see* FAC ¶ 93, is thus betrayed by the actual record. If anything, the ICE defendants' familiarity with that record would have only bolstered the veracity of Lyttle's confessions of foreign citizenship – which, again, occurred on separate occasions (September 2, 2008; September 8, 2008) just three weeks after his probation revocation/sentencing hearing (August 14, 2008). Regardless of whether Lyttle actually has been diagnosed with bipolar mood disorder, the complaint "does not show, or even intimate," *Iqbal*, 129 S. Ct. at 1952, how the ICE defendants would have *known* that Lyttle was allegedly unable to "comprehend" the "consequences" of the immigration forms that he signed, thereby agreeing to removal without a hearing, FAC ¶ 59.

On the non-conclusory facts that Lyttle himself alleges, the initiation of removal proceedings against him was "more likely explained" by the ICE defendants reasonably determining that probable cause existed in light of plaintiff's multiple admissions rather than by some unconstitutional or malicious purpose. *Iqbal*, 129 S. Ct. at 1950 (citing *Twombly*, 550 U.S. at 567). At the very least, the non-conclusory facts show that the ICE defendants could have been "satisfied that there [wa]s sufficient evidence" to charge Lyttle as a removable criminal alien. 8 C.F.R. § 1238.1(b) (providing the basis for issuing a Notice of Intent). That is, NCDOC's original determination and Lyttle's signed sworn statement of Mexican citizenship both demonstrate that the ICE defendants had probable cause – or at least *arguable* probable cause – to extend plaintiff's detention pending removal proceedings. *See, e.g., Smith*, 101 F.3d

at 356 (the reasonableness of an officer's conduct, and thus his entitlement to qualified immunity, "does not turn on whether probable cause was, in fact, present").

On the other hand, plaintiff's version of the story requires the conclusion that several NCDOC officials, a dozen ICE and customs officials located in North Carolina or Georgia, and an immigration judge *all* deliberately ignored plaintiff's assertions of U.S. citizenship and repeatedly coerced and manipulated him into admitting alienage even though they each apparently knew he was a U.S. citizen with serious mental impairment. This is implausible on its face. In any event, "[i]t is the conclusory nature" of Lyttle's allegations, "rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Iqbal*, 129 S. Ct. at 1951. The ICE defendants are thus entitled to qualified immunity from Count 3.[13]

B. Plaintiff Fails To State A Clearly Established Equal Protection Claim (Count 2)

1. Lyttle Does Not Plead The Existence Of Discriminatory Policies

Lyttle also fails to sufficiently plead a Fifth Amendment equal protection claim. In *Iqbal*, the Court rejected petitioner's conclusory assertions that Attorney General Ashcroft and FBI Director Mueller "knew of, condoned, and willfully and maliciously agreed" to torture him "as a matter of policy, solely on account of [his] religion, race, and/or national origin . . . ." *Iqbal*, 129

[13] Plaintiff also alleges that unidentified ICE personnel performed background searches that revealed indicia of his U.S. citizenship, *see* FAC ¶¶ 47-48, and that he "continued to tell" the ICE defendants that he was born in North Carolina, FAC ¶ 60. This, of course, is contradicted by the admissions in Lyttle's sworn statement and again by the Notice of Intent that he signed. At any rate, inconsistent indications of U.S. citizenship would not negate the (arguable) probable cause established by Lyttle's documented admissions to the ICE defendants, which in turn corroborated the initial determination made by NCDOC officials that plaintiff was a possible citizen of Mexico. *See Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (explaining that probable cause "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt"); *United States v. Fisher*, 97 F.3d 1449, 1996 WL 558366, at *4 n.4 (4th Cir. 1996) ("[P]robable cause is not a finely tuned standard comparable to the standard of proof by a preponderance of the evidence.") (citing *Ornelas v. United States*, 517 U.S. 690, 695 (1996)).

S. Ct. at 1951 (internal quotations and citations omitted). That was simply a "formulaic recitation of the elements" of an equal protection claim – i.e., that defendants acted "because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.* (internal quotations and citations omitted). Likewise, Lyttle's global allegations here that the ICE defendants "deliberately and unconstitutionally discriminated" against him "on the basis of his race and ethnicity," FAC ¶ 135, are strikingly similar to those "bald assertions" rejected in *Iqbal*, 129 S. Ct. at 1951. As such, Lyttle merely recites the elements of a constitutional discrimination claim, and such allegations are not entitled to the assumption of truth.

Furthermore, Lyttle provides vague allegations in the complaint's "Factual Background" that are equally conclusory: Lyttle merely alleges that the ICE defendants acted "pursuant to policies, patterns, practices or customs" to "detain, interrogate and deport [inmates] based on their race or ethnicity." FAC ¶ 87. These bare allegations, again, are a simple rewording of the tort's elements, devoid of any specific factual allegations. Lyttle does not identify a single *specific* practice, policy, or regulation that allegedly led the ICE defendants to discriminate against Lyttle based on his perceived race or any other illegitimate factor. *See id.* ¶¶ 87-95. Moreover, Lyttle has not provided any facts whatsoever to establish the so-called "pattern, custom, and habit" of the ICE defendants "to presume foreign citizenship of inmates based on their race, ethnicity, appearance and/or surname." *Id.* ¶ 88.

To the contrary, the only specific policies that plaintiff actually points to in the complaint – those in the "Hayes Memo" and the "Morton Memo" – were enacted *after* the purported events in North Carolina, and these alleged memoranda ironically provide safeguards *against* discriminatory inquiries regarding suspected alienage.[14] *See id.* ¶¶ 70-76. Accordingly, Lyttle's

[14] The Hayes Memo, for example, recommended the use of sworn statements that "'include probative questions designed to elicit information sufficient to allow an investigation

bald allegations of the existence of discriminatory policies are fatally "without elaboration" and lacking any "basis of their inference or the justification for their presumption." *Walker v. Prince George's County, Maryland*, 575 F.3d 426, 431 (4th Cir. 2009) (holding that the complaint failed to sufficiently allege the existence of policies, customs, or practices as required by *Iqbal*).

2. Plaintiff Does Not Plead A Discriminatory Purpose

Not only does Lyttle fail to provide any factual support for the existence of these discriminatory policies, but he also cannot show that the ICE defendants acted based upon any discriminatory purpose. *See Iqbal*, 129 S. Ct. at 1949 ("[P]urpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination."). Indeed, Lyttle merely alleges – without any factual enhancement – that the ICE defendants "deliberately discriminated . . . on the basis of his perceived race and/or ethnicity in violation of his constitutional rights." FAC ¶ 91. And the only support Lyttle provides for this bare conclusion is another bare conclusion – i.e., that the ICE defendants "failed to undertake a reasonable and diligent inquiry into his citizenship based upon readily available documentation." *Id.*; *see also id.* ¶ 94 (alleging that the failure of ICE defendants to "adequately" examine Lyttle's criminal history and other records was "a direct consequence of their intentional discrimination"). But such claims, even when assumed to be true for the purpose of this motion, amount to at most negligent conduct which does not rise to the level of a constitutional deprivation. *Daniels v. Williams*, 474 U.S. 327, 333 (1986) ("[I]njuries inflicted by governmental negligence are not addressed by the United States Constitution."); *Lovelace v. Lee*,

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of the person's claim of citizenship [including] vital records, family interviews, and other appropriate investigative measures.'" FAC ¶ 72 (quoting the Hayes Memo). It also encouraged greater communication among various ICE personnel to ensure "the most appropriate course of action" concerning specific removal cases. *Id.* ¶ 73. Apart from these safeguards, there are absolutely no policies in the Hayes Memo that direct officials to target individuals based upon their perceived race, ethnicity, or apparent mental illness. *See* Exh. H.

472 F.3d 174, 202 (4th Cir. 2006) ("negligent deprivations are not actionable" as constitutional tort claims); *Pierce v. Davis*, 820 F.2d 1220, No. 87-6527, 1987 WL 37672 at *2 (4th Cir. June 8, 1987) (finding it "clear that negligence alone is an insufficient basis for individual liability" under the Constitution). Thus, mere allegations that the ICE defendants conducted an investigation that was not "diligent" or "adequate" fail to show that they purposefully discriminated against Lyttle.

Rather than initiating removal proceedings against Lyttle because of some discriminatory purpose, the "'obvious alternative explanation'" for the ICE defendants' conduct is two-fold – first, that NCDOC originally identified plaintiff as a removable alien from Mexico, and second, that Faucette corroborated this finding when Lyttle subsequently told her that he was a citizen of Mexico and signed the sworn statement. *Iqbal*, 129 S. Ct. at 1951 (quoting *Twombly*, 550 U.S. at 567); *see also id.* at 1952 (allegation that officials detained plaintiffs based on race or religion was "not a plausible conclusion" given a more likely non-discriminatory reason). Because courts afford "official conduct a presumption of legitimacy," *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991); *accord Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988), the Court should presume here that the ICE defendants did not select Lyttle for removal proceedings solely because of his race, ethnicity, or apparent mental illness; instead, they detained him because of the facts provided by NCDOC officials and the corroborating admissions he made to Faucette.[15] In sum, the complaint "does not contain any factual allegation sufficient to plausibly suggest . . . [the ICE defendants'] discriminatory state of mind," and the ICE defendants are entitled to qualified immunity from Count 2. *Iqbal*, 129 S. Ct. at 1952.

[15] To be clear, the ICE defendants did not initiate their inquiry into Lyttle's immigration status because of his perceived race, but because he had already been identified as a possible citizen of Mexico by NCDOC. FAC ¶ 36; *cf. Monroe*, 579 F.3d at 388 (no equal protection violation where officers investigated an African-American suspect based on a racial description of the perpetrator first provided by the victim).

C. <u>Plaintiff Fails To State The Violation Of A Clearly Established Due Process Right (Count 1)</u>

1. The ICE Defendants Did Not Deport Lyttle

Plaintiff posits three legal theories for holding the ICE defendants liable for a violation of due process (Count 1). Each fails. First, Lyttle vaguely states that the ICE defendants violated his due process rights "[b]y illegally, arbitrarily, and capriciously deporting Mr. Lyttle." FAC ¶ 127. Conclusory language aside, the undisputed facts refute this claim. As the complaint acknowledges, the ICE defendants merely "commence[d]" removal proceedings against plaintiff under § 1228 of the INA. *Id.* ¶ 50. In the end, it was an *immigration judge* in Georgia – not the ICE defendants here in North Carolina – who ultimately ordered Lyttle's removal. *Id.* ¶ 83.

2. The ICE Defendants Did Not Coerce Lyttle Into Admitting That He Was A Citizen Of Mexico

Lyttle next states that the ICE defendants violated his due process rights "by coercing him into signing false statements, by intimidating Mr. Lyttle during the interrogation process, and by willfully disregarding or covering up Mr. Lyttle's mental disabilities." *Id.* ¶ 128. But these bare legal conclusions, as previously explained, must be discarded. *See, e.g., Monroe*, 579 F.3d at 387 (holding that terms such as "coerced," "objectively reasonable," and "consensual" are merely "legal conclusions, not facts, and are insufficient" to survive a motion to dismiss); *see also Francis*, 588 F.3d 186 at 193 (explaining that courts should "'not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions'") (quoting *Iqbal*, 129 S. Ct. at 1950). And Lyttle offers no new factual support here showing that he was "coerced" or "intimidated" into signing the statements. He alleges no facts that could plausibly show that the ICE defendants subjected Lytle to physical abuse, verbal threats, or pressure of any kind to

extract the admissions that he made (and which he repeated on multiple occasions) that he was a citizen of Mexico. *See* FAC ¶¶ 27-33, 39-45, 54.

At best, all Lyttle can show is that Faucette knew that he had "[b]ipolar" disorder, as she documented on the same day as Lyttle's sworn statement. *Id.* ¶ 46; Exh. C. But even if the ICE defendants were aware of this mental condition, Lyttle fails to allege with any facts that Faucette, Caputo, or Kendall actually knew (or how they could possibly have known) of plaintiff's further alleged inability to "read or understand" the documents that he signed.[16] *See id.* ¶ 54; ¶ 40 (baldly claiming, without further elaboration, that Faucette knew that plaintiff was "cognitively impaired" when she recorded his sworn statement). Thus, absent specific allegations that the ICE defendants actually harmed, pressured, or threatened him, the mere fact that Lyttle was bipolar would not mean that his admissions of foreign citizenship were involuntarily given or coerced in violation of due process. *See United States v. Cristobal*, 293 F.3d 134, 141 (4th Cir. 2002) (holding that "a deficient mental condition," which includes "a pre-existing mental illness . . . is not, without more, enough to render a [statement] involuntary") (citing *Colorado v. Connelly*, 479 U.S. 157, 164-65 (1986)). Put simply, no facts show that the ICE defendants purposely "exploited" Lyttle's bipolar condition with "coercive tactics." *Id*. Finally, plaintiff fails to allege any facts that could show that the ICE defendants "willfully" ignored his mental disabilities. FAC ¶ 128. If anything, the fact that Faucette documented his bipolar disorder, *id.* ¶ 46, Exh. C, shows that she was not deliberately "disregarding" or "covering up" any known mental condition, FAC ¶ 128. Lyttle has alleged bare legal conclusions that are "consistent"

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[16] And as explained *supra* section II(A)(3), the ICE defendants' familiarity with Lyttle's recent criminal conviction would actually reveal that Lyttle was found competent to undergo such proceedings, not to mention the fact that the sentencing judge decided against recommending psychiatric counseling.

with liability, but he does not "plausibly suggest" an entitlement to relief based on any hard factual allegations. *Iqbal*, 129 S. Ct. at 1950.

3. Plaintiff's Due Process Claim Merely Replicates His Fourth Amendment Claim

Lacking a factual basis for any such coercion, Lyttle finally resorts to pleading that the ICE defendants violated his "constitutional rights" when they "caused Mr. Lyttle to be deported without reasonable basis or lawful authority." FAC ¶ 129. Because these allegations are merely "[t]hreadbare recitals of the elements" of a due process claim, they are "not entitled to the assumption of truth." *Iqbal*, 129 S. Ct. 1949-50.

In any event, what these allegations amount to, if anything at all, is a mere duplication of Lyttle's Fourth Amendment malicious prosecution claim – i.e., that his detention was "continued well beyond the scheduled release date" and that he was therefore detained in violation of his "right to be free from unreasonable seizures." FAC ¶¶ 141-42. Because constitutional tort claims must be "judged by reference to the specific constitutional standard which governs that right," however, plaintiff's due process claim must be dismissed for the same reasons that his Fourth Amendment claim (Count 3) fails. *Graham v. Connor*, 490 U.S. 386, 394 (1989) (explaining that excessive force claims during arrest should be analyzed under the Fourth Amendment rather than the Due Process Clause). Indeed, the Supreme Court has made clear that the Due Process Clause can afford "no relief" for claims of constitutional malicious prosecution, which are instead decided under the Fourth Amendment. *Albright*, 510 U.S. at 275.

Nevertheless, the ICE defendants had a "reasonable basis" to initiate removal proceedings against Lyttle, thereby causing his detention pending a final resolution of his immigration status. Based on NCDOC's findings and Lyttle's sworn statement to Faucette, the ICE defendants had probable cause (or at least an arguable basis) to commence removal

proceedings against him. And Lyttle confirmed that reasonable belief, yet again, when he signed the Notice of Intent, agreeing to being deported without a hearing. FAC ¶ 54; Exh. D. Because Lyttle's third theory under the Due Process Clause closely tracks his Fourth Amendment claim for malicious prosecution, the ICE defendants are entitled to qualified immunity from Count 1.

D. Plaintiff Has Not Alleged A Violation Of Clearly Established Law (Counts 1-3)

In closing, and as a final matter with respect to all of Lyttle's *Bivens* claims, it bears repeating that plaintiff must plead the violation of *clearly established* constitutional rights. *See Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, No. 10–98, 2011 WL 2119110, at *9 (May 31, 2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."); *Hunter*, 502 U.S. at 224. To be "clearly established," courts in the Fourth Circuit normally "need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose . . . . " *Edwards,* 178 F.3d at 251 (internal quotations and citations omitted). Moreover, "the contours of the right must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional." *Id.* In sum, even if this Court concludes that the ICE defendants made an error in judgment, there is no controlling precedent that the alleged actions taken in the context of this case violated any of the plaintiff's "clearly established" rights. The ICE defendants are thus entitled to qualified immunity from Counts 1-3.

CONCLUSION

The ICE defendants respectfully request that the Court dismiss Counts 1-3.

Respectfully submitted this 24th day of June 2011,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on June 24, 2011, I electronically filed the foregoing "Motion to Dismiss" using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

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