UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

CASE NO. 4:10-CV-142-D

MARK DANIEL LYTTLE, Plaintiff, v. THE UNITED STATES OF AMERICA, et al., Defendants.	)	**MEMORANDUM OF LAW IN OPPOSITION TO ICE DEFENDANTS' MOTION TO DISMISS** Local Civil Rules 7.1, 7.2

Plaintiff Mark Daniel Lyttle ("Plaintiff" or "Mr. Lyttle") files this Memorandum of Law Opposition to ICE Defendants' Motion to Dismiss [ECF Doc. No. 48].

INTRODUCTION

Mark Lyttle is a mentally disabled U.S. citizen who, despite his repeated protests and overwhelming evidence of his citizenship, was detained for nearly two months and ultimately deported to Mexico. (Amended Complaint "Am. Compl.," ¶¶ 7, 30-63, 91-95.) In their Motion, ICE Defendants admit that they knew Mr. Lyttle had mental disabilities, that they nevertheless subjected Mr. Lyttle to numerous interrogations, that they discredited Mr. Lyttle's claims to citizenship, and that following his extended detention, he was forcibly expelled from the United States. Yet ICE defendants argue that Mr. Lyttle's Complaint should be dismissed and Mr. Lyttle denied any remedy for the injuries he suffered on the basis of a coerced statement from a United States citizen with a known mental impairment. Plaintiff opposes ICE Defendants' Motion, and relies on the well-pleaded allegations of his Amended Complaint, which, taken as true, demonstrate a series of constitutional violations.

ARGUMENT AND CITATION OF AUTHORITY

I. *Bivens* Remedies Are Wholly Appropriate In Immigration-Related Constitutional Tort Claims.

Ignoring numerous cases acknowledging the existence of a *Bivens* remedy for violations of constitutional rights in the context of immigration proceedings,[1] ICE Defendants contend on pp. 6-11 that this Court should decline to recognize Mr. Lyttle's *Bivens* claims on the grounds that the Immigration and Nationality Act, 8 U.S.C. § 1228, presents the "'sole and exclusive' means for judicial review of constitutional claims arising from immigration enforcement operations." (ICE Defs' Br. at 9.) ICE Defendants are wrong, and their argument distorts the intent and application of the INA and the well-settled body of case law construing it.

ICE Defendants' argument fails in the first instance because a *Bivens* action is available to remedy constitutional violations unless "defendants show that Congress has provided an alternative remedy which it ***explicitly*** declared to be a ***substitute for recovery*** directly under the Constitution and viewed as equally effective," or there exist "special factors counseling hesitation in the absence of affirmative action by Congress." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (emphases added). ICE Defendants have not and cannot make either required showing. To the contrary, Congress did not provide, through the INA or otherwise, for an alternative remedial scheme to address the unconstitutional actions of ICE agents, nor is there any evidence that Congress sought to foreclose damages actions against government officials

[1] *E.g., Mancha v. Immigration and Customs Enforcement*, 2009 U.S. Dist. LEXIS 27620 (N.D. Ga. Mar. 31, 2009); *Pelayo v. U.S. Border Patrol Agent #1*, 82 Fed. Appx. 986 (5th Cir. 2003); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006); *Chavez v. United States*, 226 Fed. Appx. 732 (9th Cir. 2007); *Argueta v. United States Immigration & Customs Enforcement*, 2009 U.S. Dist. LEXIS 38900 (D.N.J. May 6, 2009); *Diaz-Bernal v. Myers*, 2010 U.S. Dist. LEXIS 132908 (D.Conn. Dec. 16, 2010).

who unlawfully coerce, manipulate, detain and initiate deportation proceedings against United States citizens with obvious mental handicaps.

Moreover, contrary to ICE Defendants' erroneous presumption, Mr. Lyttle does not seek judicial review of the immigration judge's decision or the order of removal. Even the United States government has conceded that the removal order was in error due to the undisputed fact that Mr. Lyttle is a native-born United States citizen. (Am. Compl., ¶ 129, Ex. C.) Mr. Lyttle has no need to resort to the sections of the INA referenced by ICE Defendants because he does not seek through this action to reverse or overturn the removal order or to challenge the removal proceedings that were formally terminated. (*See id.* Ex. C.) Rather, Mr. Lyttle asserts his *Bivens* claims in this action for redress of constitutional violations arising out his unconstitutional treatment and unlawful detention, claims that are incidental to and inherently outside of the scope of the INA's regulatory scheme. *Compare Argueta*, 2009 U.S. Dist. LEXIS 38900, at *40 (D.N.J. May 6, 2009) (endorsing *Bivens* action, in part, because plaintiff's "constitutional claims could not be brought before an immigration court because he does not seek to challenge his removability. … [and therefore plaintiff's] claims are outside the ambit of the administrative process.").

A. The Regulatory Scheme Prescribed By The INA In No Way Precludes A *Bivens* Remedy.

ICE Defendants first contend that the mere "existence of a deliberately crafted statutory scheme precludes a *Bivens* remedy." (ICE Defs' Br. at 14.) ICE Defendants are mistaken. First, ICE Defendants cite not a single case to support their argument that the INA's regulatory scheme bars the existence of a *Bivens* remedy for the unconstitutional conduct of federal actors, such as Mr. Lyttle has described in this case. To the contrary, courts that have addressed this issue have

repeatedly held that the INA's regulatory scheme is *not* a "special factor" precluding a *Bivens* claim.[2]

For example, in *Turnbull v. United States*, 2007 U.S. Dist. LEXIS 53054, (N.D. Ohio July 23, 2007), the plaintiff sought damages and injunctive relief under *Bivens* and the Federal Tort Claims Act against individual ICE officers who unlawfully deported him subsequent to the stay of a removal order from a U.S. Magistrate Judge. *Id.* at *5-6. There the United States argued, much as ICE Defendants do here, that a *Bivens* remedy was unavailable because certain provisions in the INA, namely 8 U.S.C. §§ 1252(b)(9) & (g), demonstrated that "the failure to create a remedy against individual [ICE agents] was not an oversight." *Id.* at *34. The district court rejected the government's arguments, however, holding that the plaintiff's *Bivens* claims arose out of the violation of the plaintiff's rights that occurred "incident to the administration of the removal process," and were therefore not properly considered a challenge to the removal decision itself. *Id.* at *35. Moreover, the court found no evidence to point to any special factors that counseled hesitation in considering a *Bivens* claim in that context. *Id.*

Similarly, in *Turkmen v. Ashcroft*, 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006), a New York district court found that "[a]lthough . . . the INA provides a comprehensive *regulatory* scheme for managing the flow of immigrants in and out of the country, it is by no means a comprehensive *remedial* scheme for constitutional violations that occur incident to the administration of that regulatory scheme." *Id.* at * 91. Thus, the mere existence of the INA's comprehensive regulatory scheme cannot amount to a bar to the remedy afforded by *Bivens*. *See id.* (pointing to lack of evidence that Congress ever considered what remedies are adequate for constitutional violations committed in the course of immigration procedure enforcement and

[2] *See, e.g.*, *Diaz-Bernal*, 2010 U.S. Dist. LEXIS 132908, at *52-53 (D.Conn. Dec. 16, 2010); *Argueta*, 2009 U.S. Dist. LEXIS 38900, at *48-49 (D.N.J. May 6, 2009).

stating that "Congress should not lightly be presumed to contemplate that constitutional violations by executive branch officials should be left without a remedy."). *See also Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1074 (D. Ill. 2007) ("While [the INA] is comprehensive in terms of regulating the in-flow and outflow of aliens, it is not comprehensive in terms of providing a remedy for [constitutional violations]."); *Arar*, 414 F. Supp. 2d at 280-81 (holding that the INA's thorough coverage of the admission, exclusion and removal of aliens "does not automatically lead to an adequate and meaningful remedy" for alleged constitutional violations); *see also id.* at 280 ("[T]o argue that the INA precludes federal jurisdiction and, at the same time, affords [Plaintiff] a 'comprehensive scheme' for review has a certain dissonance, even under the most liberal construction of alternative pleading.").

Here, the INA provides *no* compensatory remedies whatsoever for the violations suffered by Mr. Lyttle, and therefore cannot be a comprehensive *remedial* scheme. *See Diaz-Bernal*, 2010 U.S. Dist. LEXIS 132908, at *52-53 (D.Conn. Dec. 16, 2010) (finding that INA affords no remedy to alleged constitutional violations and stating "because the immigration judge could not have afforded the plaintiffs relief for the constitutional claims raised in this action, those claims do not arise out of the order of removal, and jurisdiction is not barred by [the INA]"). The complete lack of a compensatory remedy afforded under the INA precludes the INA from being considered a remedial scheme sufficient to address constitutional violations.

Moreover, ICE Defendants profoundly misunderstand the scope and application of the INA when they argue that this Court "ha[s] no role to play" in deciding Mr. Lyttle's constitutional claims because the INA regulates the detention and removal of "certain classes of criminal aliens" and because the statute "allows suspected aliens claiming to be U.S. citizens to seek review of [an immigration judge's] determination." (ICE Defs' Br. at 16.) First, Mr. Lyttle

is a U.S. born citizen – not a member of a "class[] of criminal aliens" subject to removal for their crimes. Nor is Mr. Lyttle an alien falsely claiming to be a U.S. citizen. Accordingly, the statutes governing the situations described by ICE Defendants are of little significance to a U.S. citizen's claim that his constitutional rights were violated by the intentional and willful actions of ICE agents.

Furthermore, ICE Defendants' argument that Mr. Lyttle should have availed himself of the administrative channels of review prescribed by the INA ignores to undisputed realities: (1) Mr. Lyttle was never afforded any meaningful opportunity to be heard or present his case to the immigration judge who ordered his deportation (see Am. Compl., ¶ 78); and (2) Mr. Lyttle has a long history of mental health problems, of which ICE Defendants were aware, that prevented Mr. Lyttle from appreciating the gravity of his situation and availing himself of any legal redress mechanisms. (*Id.*, ¶¶ 2, 35, 50). Federal regulations prohibit an immigration judge from accepting an admission of alienage from unrepresented, incompetent individuals, and DHS is not permitted to serve charging documents upon a mentally incompetent person. 8 C.F.R. §§ 1240.10(c), 103.5a(c)(2). Yet, despite their knowledge of Mr. Lyttle's mental health conditions, ICE Defendants made no effort to provide safeguards or accommodations for Mr. Lyttle during the removal proceedings; instead, with actual knowledge of Mr. Lyttle's mental disabilities, ICE Defendants interrogated Mr. Lyttle, coerced Mr. Lyttle into waiving important, fundamental rights, and commenced deportation proceedings of a U.S. citizen. (Am. Compl., ¶¶ 34-56.) ICE Defendants interrogated and accepted the sworn statement of an individual whom they knew to be incompetent, and commenced removal proceedings that they knew or should have known would lead to his removal. (*Id.*, ¶¶ 34-56, 77-90.) ICE Defendants' conduct violated Mr. Lyttle's constitutional rights, for which a *Bivens* remedy should lie.

Finally, ICE Defendants' "floodgate" argument -- i.e., that permitting a U.S. citizen to challenge the constitutionality of his detention and removal will somehow result in "multitudinous judicial review of immigration-related claims … that would upend the carefully crafted congressional scheme" -- is specious and strains credibility. Suffice it to say that where a U.S. citizen with mental disabilities is interrogated and coerced into signing documents that waive important, fundamental rights, then unlawfully detained and later removed from the country of his birth, his recourse lies with the federal courts, and he should have a remedy through a *Bivens* action.[3] And if the circumstances leading to Mr. Lyttle's detention and deportation are such a common occurrence that to permit this action and others like it would open the proverbial floodgates, then the "comprehensive statutory scheme" set forth in the INA has obviously failed and affords no one a remedy, much less the sort of meaningful relief that could substitute for a *Bivens* action.

B. *Bivens* Suits Are Available to Challenge Unconstitutional Conduct in Fields Over Which Congress Has Plenary Power.

ICE Defendants' reliance on the "political branches' plenary power over immigration" as a factor in determining the existence of a *Bivens* remedy is a non-starter. ICE Defendants have not pointed to a single case holding that *Bivens* suits are per se unavailable in fields over which Congress has plenary power, because no such case exists. To the contrary, federal courts have found *Bivens* remedies available in many such areas, including immigration.

For instance, in *Velasquez v. Senko*, the district court denied qualified immunity to field agents of the INS and Border Patrol, as well as the district director, chief patrol agent, and patrol

[3] Indeed, other federal Courts have already opened the proverbial floodgates by permitting just such a claim, *see, e.g.*, *Guzman v. Chertoff*, https://ecf.cacd.uscourts.gov, Case No. 2:08-cv-1327, District Court for the Central District of California, without disturbing the statutory scheme set forth in the INA.

agents-in-charge. 643 F. Supp. 1172 (N.D. Cal. 1986), *appeal dismissed* 813 F.2d 1509 (9th Cir. 1987) (Kozinski, J.). Similarly, in *Castillo v. Skwarski*, 2009 U.S. Dist. LEXIS 115169 (W.D. Wa. Dec. 10, 2009) the plaintiff, a naturalized U.S. citizen who was unlawfully detained, was permitted to continue to pursue his *Bivens* claims against federal ICE agents notwithstanding "Congress's plenary control over immigration issues." (Defs' Br. at 20.) Indeed, the cases are legion that have permitted the invocation of *Bivens* in the immigration context, and ICE Defendants suggestion to the contrary is wholly without merit. *See*, fn. 2, *supra* (listing cases).

Other areas where Congress possesses plenary power have likewise seen federal courts craft *Bivens* remedies. For example, in *Goldstein v. Moatz*, 364 F.3d 205 (4th Cir. 2004), the Fourth Circuit found that Patent and Trademark Office officials were not absolutely immune to *Bivens* suits, despite Congress's long-established plenary power over patents. *Id.* at 210, n.8; *see also McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843) ("[T]he powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution."). Congress's failure to establish a damages remedy for constitutional violations presented no obstacle to the *Goldstein* court, which allowed the plaintiff's *Bivens* claim after acknowledging that such claims lie entirely outside of the law established by Congress to govern the field. *Goldstein*, 364 F.3d at 210 n.8. *See also, e.g.*, *Wilkinson v. United States*, 440 F.3d 970 (8th Cir. 2006) (noting availability of *Bivens* actions against officials of the Bureau of Indian Affairs); *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994) (allowing claim against officials of the Federal Aviation Administration); *Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984) (en banc) (allowing a *Bivens* suit against District of Columbia Officials where the incident predated the inclusion of such claims under 42 U.S.C. § 1983).

Ultimately, Mr. Lyttle's *Bivens* claims have little to do with Congress' legislative power "over the admission of aliens" (Defs' Br. at 19.), because Mr. Lyttle is not an alien -- he is an American-born U.S. citizen who asserts *Bivens* claims against federal agents who violated his constitutional rights. The proper vehicle for vindicating Mr. Lyttle's rights is the Bivens claim, not an administrative challenge to the federal immigration scheme. Yet, ICE Defendants contend that the Executive Branch should be left to wield "the power to expel or exclude aliens … largely immune from judicial control." (*Id.*) ICE Defendants' argument is both inapposite under these facts and belied by a growing body of case law that demonstrates the willingness of Article III courts to investigate immigration claims. *See, e.g., Lopez v. Gonzales*, 127 S. Ct. 625, 629-30 (2007) (curtailing executive authority to deport non-citizens based on mere drug possession and not distribution); *Clark v. Martinez*, 543 U.S. 371, 386 (2005) (rejecting executive claims that judicial restriction on indefinite detention of undocumented immigrants would "compromise" "the security of our borders"); *St. Cyr*, 533 U.S. at 298 (finding a "strong presumption in favor of judicial review of administrative action" in the field of immigration); *Zadvydas*, 533 U.S. at 687 (finding that -- despite elaborate field-specific legislation -- "the primary federal habeas corpus statute confers jurisdiction upon the federal courts to hear these cases") (internal citations omitted); *see also* 8 U.S.C. § 1252(a)(2)(D) (supporting review of constitutional claims related to removal). The Courts of Appeals have taken on an increased role in this field, as recent executive branch action "has fallen below the minimum standards of legal justice." *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.); *see also Ba v. Gonzales*, 228 Fed. Appx. 7, 11 (2d Cir. 2007) (noting that the immigration judge's demeanor and remarks "erode the appearance of fairness and call into question the results of the proceeding" and recommending that the BIA "closely reexamine[] all of his cases that are still

pending on appeal") (quoting *Islam v. Gonzales*, 469 F.3d 53, 56 (2d Cir. 2006)); *Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (holding that an immigration judge's findings were "grounded solely on speculation and conjecture").

The issues presented by Mr. Lyttle's Complaint -- whether his erroneous classification and subsequent interrogation, detention, and processing for removal were unjustified, unconstitutional, unlawful, and without probable cause -- require only the application of settled law to the conduct of federal and state officials. Such assessments are routinely conducted by courts. To do so here would not hamper or intrude upon federal policy; rather, to refuse the application of established law to such situations would endorse an unprecedented *de facto* absolute immunity in favor of federal immigration enforcement officers, who would then be free to violate the constitutional rights of U.S. citizens without consequence.

II. The ICE Defendants Are Not Entitled to Qualified Immunity Because Plaintiff Has Adequately Pled a Violation of His Constitutional Rights.

ICE Defendants are not entitled to qualified immunity because the Mr. Lyttle has pled sufficient facts to establish that ICE Defendants violated his clearly established Fourth and Fifth Amendment rights. Under clearly established Fourth Amendment law, probable cause was required in order to commence removal proceedings against Mr. Lyttle and issue a warrant and detainer for his arrest. Yet, the sole basis for ICE Defendants' contention that they had such probable cause is Mr. Lyttle's alleged "admission" that he was not a U.S. citizen, an admission that Mr. Lyttle flatly denies ever having made. (Am. Compl., ¶¶ 41, 43.) For the purpose of a motion to dismiss, the facts alleged in the complaint must be taken as true, *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). Because Defendants' motion to dismiss hinges on facts directly at odds with those alleged in the complaint, the motion must fail.

Likewise, ICE Defendants' motion to dismiss Mr. Lyttle's Fifth Amendment claim similarly rests on its refusal to accept the facts as pled in this complaint detailing how ICE Defendants acted with a discriminatory purpose in arresting and detaining him.

A. Plaintiff Has Stated a Violation of a Clearly Established Fourth Amendment Rights.

1. Mr. Lyttle's Fourth Amendment Claim Should Not Be Dismissed At This Early Stage Of The Litigation Because Significant Facts Are In Dispute.

Dismissal of Mr. Lyttle's Fourth Amendment claim at this stage of the litigation is inappropriate because significant facts are in dispute. At this stage of the proceedings, the facts alleged in the complaint must be taken as true. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). Here, the sole basis for ICE Defendants' contention that they had probable cause to arrest and detain Mr. Lyttle is his alleged "admission" that he was not a U.S. citizen. In his Amended Complaint, however, Mr. Lyttle denies ever admitting to being a non-citizen. (Am. Compl., ¶¶ 41, 43.) As this factual dispute is central to Mr. Lyttle's Fourth Amendment claim and ICE Defendants' defense, dismissal of his Fourth Amendment claim at this time is inappropriate.

2. Mr. Lyttle's Complaint Sufficiently Alleges that ICE Defendants Violated His Fourth Amendment Rights By Arresting and Detaining Him Without Probable Cause.

Contrary to what ICE Defendants argue, Mr. Lyttle has alleged sufficient facts to establish that his arrest and detention by ICE Defendants violated his Fourth Amendment rights. ICE Defendants' authority to "charge, arrest, and detain certain classes of criminal aliens" (Defs.' Br. at 14.) is limited by the Fourth Amendment and its requirement of probable cause. *See*, e.g., *United States v. Torres-Lona*, 491 F.3d 750, 756 (8th Cir. 2007) (upholding legality of detention by ICE where there was probable cause that suspect violated immigration laws); *United States v. Aragon-Ruiz,* 551 F. Supp. 2d 904, 914 (D. Minn. 2008) (requiring probable

cause for ICE officers to detain suspected non-citizen); *Guardado v. United States*, 744 F. Supp. 2d 482, 482 (E.D. Va. 2010) (ICE officers violate Fourth Amendment when they execute a warrant of removal "so lacking in indicia of probable cause as to render official belief in its existence unreasonable").[4] To determine whether probable cause exists, courts look to the "totality of circumstances known to the officer at the time of the arrest." *Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996); *see also Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000) ("officer must consider the totality of the circumstances, *recognizing both the inculpatory and exculpatory evidence*") (emphasis added).

In this case, the totality of circumstances clearly indicates that a reasonable officer would not have had probable cause to arrest and detain Mr. Lyttle, a U.S. citizen with a known cognitive impairment and mental illness (Am. Compl., ¶ 40)[5], based solely on his signature on two forms – the Record of Sworn Statement in Affidavit Form and the Notice of Intent to Issue a Final Administrative Removal Order, which were neither read to or explained to him (*Id.*, ¶¶ 45, 54,) [6] – purporting to admit that he was born in Mexico and that his true name was Jose Thomas.

[4] Similarly, in order to issue a Notice of Intent to Issue a Final Administrative Deportation Order, the serving officer must be "satisfied that there is sufficient evidence" to find the individual is an alien and deportable. 8 C.F.R. § 1238.1(b)(1).

[5] Am. Compl., ¶ 40 ("At the time of the interrogation, Defendant Faucette was aware that Mr. Lyttle was cognitively impaired and that he had, among other things, bipolar disorder")

[6] *Id.* at ¶ 45 ("When Defendant Faucette's interview was concluded, Mr. Lyttle was not offered an opportunity to review the contents of the entries written on the form by Defendant Faucette, nor was Mr. Lyttle informed of what Defendant Faucette had written. Instead, Mr. Lyttle was simply instructed to sign his name on a certain line. Despite Defendant Faucette's unfounded and erroneous assumption that Mr. Lyttle's name was "Jose Thomas," Mr. Lyttle signed his true name, "Mark Lyttle."") and ¶ 54 ("Despite his serious and acknowledged mental disabilities, Mr. Lyttle received no assistance from ICE agents—or anyone else—in attempting to read or understand the form that he was coerced and manipulated into signing.")

(*Id.* at 45, 56.)[7] Reliance on these forms to establish probable cause was particularly unreasonable given that (1) Mr. Lyttle signed both of these forms with his true name, Mark Lyttle, rather than the invented name, Jose Thomas, that was referenced in the forms (Am. Compl., ¶¶ 45, 54; ICE Defs.' Brief, Exhs. B and D) [8] (2) the forms' assertion of Mr. Lyttle's Mexican alienage was contradicted by "numerous records" produced as a result of Defendants' computerized database searches which "revealed that Mr. Lyttle was a U.S. citizen" (Am. Compl., ¶ 47)[9] as well as his own statements to ICE Defendants Faucette and Caputo that he was born in North Carolina (Am. Compl., ¶ 60). Consequently, ICE Defendants are not entitled to qualified immunity on Mr. Lyttle's Fourth Amendment claim.

Instead of accepting and addressing these facts, ICE Defendants either ignore or dispute them. [10] Their entire argument hinges on their mischaracterization of the two documents Mr. Lyttle signed —the Record of Sworn Statement in Affidavit Form, and Notice of Intent to Issue a Final Administrative Removal Order — as "admissions" of alienage, and therefore sufficient to establish probable cause. (Defs.' Br. at 16-19, 20 ("plaintiff confessed to being a citizen yet again when he signed the Notice of Intent"),22, 23 fn.13, 26 (citing "corroborating admissions he made to Faucette"), 28 (citing "admissions" made and "repeated on multiple occasions"); Defs.'

[7] *Id.* at ¶45 and ¶56 ("Even where Mr. Lyttle was coerced, intimidated or deceived into signing a form acknowledging that his name was "Jose Thomas," Mr. Lyttle signed his name, "Mark Lyttle." ")

[8] *Id.*

[9] *See also* ¶ 48 ("numerous entries and notations indicating that Mr. Lyttle was a U.S. citizen"), ¶57 ("the records available to the ICE Defendants contained . . . numerous references to Mr. Lyttle being an American citizen by birth), ¶60 ("When efforts were made to search records and databases, the information and personal data retrieved contained numerous references to Mr. Lyttle's U.S. citizenship.")

[10] At the same time they attempt to sidestep the question of probable cause entirely by mischaracterizing Mr. Lyttle's Fourth Amendment claim as one for malicious prosecution. But this is simply not the case. Mr. Lyttle's Fourth Amendment claims against ICE Defendants are based not on ICE Defendants' prosecution of him pursuant to a valid legal process but rather target ICE Defendants' actions in arresting and detaining him without probable cause.

Exh. B, D.).[11] But the mere fact that Mr. Lyttle signed these documents – without understanding what they said and without receiving any assistance from ICE agents in reading and understanding them (Am. Compl. ¶ 54) – does not convert them into "admissions" of his alienage. As stated repeatedly in the Amended Complaint, Mr. Lyttle never admitted to being a non-citizen. (Am. Compl., ¶¶ 32-33, 38-61.) On the contrary, he repeatedly claimed to be born in North Carolina. (*Id.*, ¶ 60.) Indeed Mr. Lyttle's signature on these forms (as "Mark Lyttle") directly contradicts ICE Defendants' claims that he was "admitting" his true identity as a Mexican national named "Jose Thomas."

Moreover, Mr. Lyttle has alleged that his signature on the two forms was a product of coercion, and that he had no idea of what he was signing. (*Id.*, ¶ 45.) Courts have widely recognized that law enforcement officers cannot rely upon coerced testimony to establish probable cause. *See Wilson v. Lawrence County*, 260 F.3d 946,954 (8th Cir. 2001) ((finding no probable cause for the arrest of an individual based on incriminating statements coerced from an individual with mental disabilities); *see also* 2 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 3.2 (4th ed. 2010) ("[P]robable cause cannot be grounded in a confession obtained under circumstances making it inherently untrustworthy.") (internal citation and quotations omitted). Relatedly, courts have invalidated waivers of rights where the waivee could not read the form or did not understand the waiver. *See, e.g., Cooper v. Griffin*, 455 F.2d 1142, 1144-45 (5th Cir. 1972) (holding that in view of armed robbery defendants' mental disabilities, poor reading comprehension, and no prior experience with the criminal

[11] ICE Defendants argue that they had probable cause to arrest and detain Mr. Lyttle based on the NCDOC booking sheet, which referred Mr. Lyttle to ICE as an "alien" in their custody. (Defs.' Br. at 16.) However, the booking sheet does not establish probable cause to arrest and detain Mr. Lyttle; NCDOC merely cooperated with ICE by indentifying inmates "*believed* to be foreign born and non-US citizens." (Am. Comp. ¶ 29.) At most, the booking sheet provided ICE with sufficient cause to investigate Mr. Lyttle's citizenship status.

process, confessions obtained after defendants orally waived right to counsel and signed written waiver forms were inadmissible); *U.S. v Garibay*, 143 F.3d 534, (9th Cir. 1998) (finding an English waiver signed by a Spanish-speaking defendant involuntary).[12]

ICE Defendants do not dispute that an involuntary admission cannot justify probable cause.[13] Instead, they argue that Mr. Lyttle does not adequately allege coercion, because he does not allege that the Defendants "physically harmed, pressured, or threatened him to sign," ICE

[12] Further supporting the position that in light of Mr. Lyttle's mental disabilities, any admission he allegedly made would not have supported probable cause, federal regulations governing immigration proceedings prohibit the of admissions of alienage made by unrepresented, mentally incompetent respondents. 8 C.F.R. § 1240.10(c) ("The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent.").

[13] While Defendants cite a string of cases in which courts relied on an admission of alienage by a defendant (MTD. at 17), in none of the cases did a court uphold the use of a disputed admission at the motion to dismiss stage. *See In Re Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999) (upholding immigration court's reliance on an admission that was entered during a deportation hearing); *In re Luz Lemus-Cruz*, File: A98 950 012, 2008 WL 2783025 (BIA 2008) (upholding immigration court's reliance on an admission that was entered during a deportation hearing); *Sint v. INS*, 500 F.2d 120, 122 (1st Cir. 1974) (upholding immigration court's reliance on an admission that was entered during a deportation hearing); *United States v. Galindo-Gallegos*, 244 F.3d 728, 732 (9th Cir. 2001) (upholding immigration court's reliance on an admission that was entered during a deportation hearing); *United States v. Sotelo*, 109 F.3d 1446, 1449 (9th Cir. 1997) (upholding admission entered as evidence in criminal trial); *United States v. Lopez-Guerrero*, No. EP-00-CR-1498-DB, 2000 WL 33348233 (W.D. Tex. Nov. 30, 2000) (admission accepted as voluntary on motion to suppress in a criminal case); *INS v. Lopez-Mendoza*, 468 U.S. 1042 (1984) (upholding admissions entered during deportation proceedings that were not challenged by non-citizen). Further, none of the cases involved the mix of mental disability, coercion, and facial unreliability alleged here. In *Ponce-Hernandez*, for example, the court upheld an admission after finding that the non-citizen "waived his opportunity to claim that the Form I-213 contains information which was incorrect or obtained by coercion or duress. Further, there is nothing facially deficient about this Form I-213." 22 I. & N. Dec. 784 (BIA 1999). In contrast, Mr. Lyttle vigorously disputes that he ever made an admission, argues that the form Defendants cite was coerced, and that the form is facially deficient. In fact, Defendants can cite to no case involving an individual with mental disabilities or coercion. (IC Defs.' Br. at 18); *see, e.g., Sotelo*, 109 F.3d at 1449 (admission of alienage accepted into evidence but no allegation that admission was unreliable, coerced, or that individual suffered from mental disabilities).

Defs.' Br. at 18, and further that Defendant Faucette had no knowledge of Mr, Lyttle's cognitive impairment, only his bipolar diagnosis. *Id*. However, in making this argument they completely ignore Mr. Lyttle's allegations not only that he was "manipulated and coerced" into signing the forms (Am. Compl., ¶ 54), but also discount the more specific allegations that "[a]t the time of the interrogation, Defendant Faucette was aware that Mr. Lyttle was cognitively impaired" as well as being bipolar (*Id.*, ¶ 40), and that "[d]espite his serious and acknowledged mental disabilities, Mr. Lyttle received no assistance from ICE agents -- or anyone else -- in attempting to read or understand" the forms presented to him (*Id.*, ¶¶ 54, 59, 155.) Thus, this case is wholly distinguishable from the one case Defendants rely upon, *Monroe v. City of Charlottesville*, 579 F.3d 380, 387 (4th Cir. 2009), in which the court found that a mere allegation of "coercion" was insufficient where the only fact Plaintiff alleged was that he subjectively believed he could not terminate a police encounter. In *Monroe*, and significantly unlike in Mr. Lyttle's complaint, there was no allegation of intimidation, deception, mental disability, and certainly no allegation that officers aware of plaintiff's mental disability forced him to sign a form he did not understand. (Am. Compl., ¶¶ 54, 56.) Thus, while Mr. Lyttle does not dispute that "coercion" is a legal conclusion, Defendants have not disputed the string of factual allegations that establish that Mr. Lyttle was coerced into signing a form he did not understand. (*Id.*, ¶¶ 40, 45, 54, 56, 59.)[14]

[14] Defendants also attempt to defeat Mr. Lyttle's coercion claim by offering his recent criminal conviction as proof that he was competent to waive his legal rights during the interrogation by ICE and when signing the relevant forms. But this assertion is wholly unfounded. The mere fact that the criminal courts in North Carolina did not find Mr. Lyttle incompetent to stand trial on two instances does not mean he was in fact competent. Moreover, the cited federal and North Carolina standards for competence to stand trial refer to the competence of a defendant in a criminal proceeding who is represented by counsel. The Supreme Court has recognized that a different standard of competence is relevant for competence to proceed pro se as opposed to

Finally, the ICE Defendants ignore the affirmative evidence that Mr. Lyttle was indeed a U.S. citizen – evidence which should have led a reasonable officer to conclude that probable cause to arrest and detain Mr. Lyttle did not exist. Mr. Lyttle has alleged that he repeatedly told ICE Defendants that he was born in North Carolina. (Am. Compl., ¶ 60.) Moreover, Mr. Lyttle has alleged that soon after his initial interrogation, ICE Defendant Faucette, or another ICE agent acting on behalf of or at her direction, performed a search of the United States Department of Justice Federal Bureau of Investigation Criminal Justice Information Services Division (the "CJISD") and other databases. (*Id.*, ¶ 47.) As a result of these computerized database searches, Mr. Lyttle has alleged that numerous records revealed that he was a U.S. citizen with a valid Social Security number. (*Id.*) [15]

Because ICE Defendants have no authority to arrest or detain a U.S. citizen, a reasonable officer in possession of information that contradicts an alleged admission of alienage (an "admission" that was on its face unreliable) would not have concluded that there was probable

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competence to stand trial with the assistance of counsel. *See Indiana v. Edwards*, 554 U.S. 164, 175 (2008) (warning "against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself."). Even if Mr. Lyttle was, at the time of his criminal proceedings, competent to proceed in court with an attorney, this does not mean that he was competent to waive his rights in an interrogation by ICE at which he did not have the assistance of a lawyer. Indeed, as Mr. Lyttle alleges in his complaint, he was not provided with any assistance.

[15] Contrary to erroneous information on the records prepared by the ICE Defendants during the course of Mr. Lyttle's arrest and detention stating that Mr. Lyttle's "real" identity was "Jose Thomas," none of the records produced as a result of the CJISD database search mentioned this name or revealed any history of Mr. Lyttle ever having used or been known by that name previously. (Am. Compl., ¶ 47.) Mr. Lyttle has also alleged that on or about September 5, 2008, the ICE Defendants performed additional database searches on Mr. Lyttle's criminal history that revealed numerous entries and notations indicating that he was a U.S. citizen with a valid social security number. (*Id.*, ¶ 48.) Minor variants of Mr. Lyttle's true name, "Mark Lyttle," appeared, while the name "Jose Thomas" appeared nowhere. (*Id.*)

cause to arrest and detain Mr. Lyttle and would have instead conducted a further investigation verifying an individual's alienage. *See U.S. ex rel. Leong v. O'Rourke*, 125 F. Supp. 769, 774 (W.D. Mo. 1954) ("an admission against interest is [not] conclusive of the fact admitted under all conditions. . . . [O]ther evidence in a case may render an admission against interest wholly insufficient to establish the fact for which it was offered in evidence."). Consequently, ICE Defendants' issuance of the Warrant for Arrest of Alien, the Notice of Intent to Issue Final Administrative Removal order, the Notice of Custody Determination, and the Form I-247 Immigration Detainer were without probable cause.

B. Plaintiff's Complaint Sets Forth Detailed Factual Allegations In Support Of His Equal Protection Claims.

Mr. Lyttle also states a claim for Equal Protection under the Fifth Amendment. ICE Defendants argue at pp. 23-27 of their Brief that they are entitled to qualified immunity on the grounds that Mr. Lyttle's Complaint fails to adequately plead the existence of discriminatory policies or conduct taken pursuant to a discriminatory purpose. In an effort to support their argument, ICE Defendants cite select paragraphs from Plaintiff's Complaint but ignore the ample factual details set forth throughout the body of Mr. Lyttle's pleading. Ultimately, even a cursory review of the allegations in Plaintiff's Complaint reveals more than enough facts to state a clearly established Equal Protection claim, and ICE Defendants are not entitled to qualified immunity on the Second Claim for Relief in the Amended Complaint. (Am Compl., ¶¶ 134-139.)

1. Mr. Lyttle Has Sufficiently Alleged The Existence of Discriminatory Policies.

A plaintiff bringing claims under *Bivens* for equal protection violations must plead, and eventually prove, that federal officials acted with discriminatory purpose. *Iqbal*, 129 S. Ct. at

1948. In *Iqbal*, the Supreme Court found that respondent's complaint lacked any factual allegation sufficient to plausibly show that the petitioners possessed a "discriminatory mind," and therefore did not meet the federal pleading standard for an equal protection claim. *Id.* at 1952; *Boykin v. KeyCorp.*, 521 F.3d 202, 213 (2d Cir. 2008). By contrast, here Mr. Lyttle details ICE Defendants' repeated and persistent efforts to disregard overwhelming evidence of Mr. Lyttle's citizenship to process Mr. Lyttle for removal on the mere basis that he looked Hispanic. (Am. Compl., ¶¶ 2, 37, 87, 88, 90-94.) ICE Defendants took this deliberate "course of action because of, not merely in spite of, [its] adverse effects upon an identifiable group." *Iqbal*, 129 S. Ct. at 1948 (quotation marks and citation omitted). Based upon the facts currently known to Mr. Lyttle – which he expects will be buttressed by discovery – these ICE Defendants ignored Mr. Lyttle's repeated claims to U.S. citizenship, with racial animus at every step of the way. Mr. Lyttle's allegations are sufficiently specific to make his equal protection claims plausible, rendering dismissal inappropriate.

Nevertheless, ICE Defendants contend that Mr. Lyttle has not successfully plead the existence of any discriminatory policies that could establish an equal protection claim. ICE Defendants are mistaken, and have ignored the substantial factual allegations contained in Mr. Lyttle's Amended Complaint that describe both the racial motivations of ICE Defendants, and the catalyst for and effect of the Hayes Memo.[16]

[16] The ICE Defendants argue that the Hayes Memo and the Morton Memo cannot be relied upon by Mr. Lyttle to bolster allegations of the existence of discriminatory policies in place at the time of his detention. (ICE Defs.' Br. at 24-25.) However, as Defendants concede, these Memos were "enacted *after* the purported events in North Carolina, and . . . ironically provide safeguards *against* discriminatory inquiries regarding suspected alienage." *Id.* (emphasis in original). Defendants appear to make Mr. Lyttle's argument for him – if there were no need to "provide safeguards *against* discriminatory inquiries," such as the ones alleged in this case, what would be the purpose of the Memos?

First and foremost, then-Director of DRO, Defendant James T. Hayes, issued a memorandum to all ICE Field Office Directors, to address ongoing problems and deficiencies within ICE in its agents' handling affirmative claims to U.S. citizenship ("the Hayes Memo"). (Am. Compl., ¶ 70.) That the Hayes Memo was issued at all is an indictment of the "policies patterns, practices and customs" of ICE -- policies that Mr. Lyttle's Complaint adequately demonstrates were intended to "deliberately and unconstitutionally discriminate[] against Mr. Lyttle on the basis of his race and ethnicity . . . . (Am. Compl., ¶¶ 87-90, 135, 138.)

Moreover, the conduct of ICE Defendants demonstrates the need for the corrective action intended by the Hayes Memo. For instance, ICE Defendant Faucette failed and refused to have a witness present at the interrogation of Mr. Lyttle and when the interview was concluded, ICE Defendant Faucette did not offer Mr. Lyttle an opportunity to review the contents of the entries written by Faucette. Instead, Mr. Lyttle was instructed to sign his name on a certain line. Despite Defendant Faucette's unfounded and erroneous assumption that Mr. Lyttle's name was "Jose Thomas," Mr. Lyttle signed his true name, "Mark Lyttle." (Am. Compl., ¶¶ 44-45).

Further, the Amended Complaint clearly sets forth allegations that ICE Defendants Faucette, Caputo and Kendall performed computer database searches on Mr. Lyttle's criminal history, revealing numerous entries and notations indicating that Mr. Lyttle was a U.S. citizen with a valid Social Security number affiliated with several minor variants of the name "Mark Lyttle" having been used, but no mention of the name "Jose Thomas." (*Id.*, ¶ 48.) This is a violation of Mark Lyttle's constitutional right as a citizen of the United States not to be detained or deported.

Further, all three ICE Defendants, Faucette, Caputo and Kendall, signed warrants and notices that directed federal agents to take Mr. Lyttle into custody and to commence removal

proceedings against him, despite the fact that there was no reasonable basis to conclude that Mr. Lyttle was not a United States citizen. (*Id.*, ¶¶ 49-53). Indeed, even where ICE Defendants coerced, intimidated or deceived Mr. Lyttle into signing a form acknowledging that his name was "Jose Thomas," Mr. Lyttle signed his name, "Mark Lyttle." (*Id.*, ¶¶ 54-56). And even though Mr. Lyttle responded to questions by stating that he was born in North Carolina, the ICE Defendants made no attempt to verify his citizenship or to contact Mr. Lyttle's family, despite numerous references to his citizenship in various records and databases. (*Id.*, ¶¶ 60-61).

The publication of the Hayes Memo in November 2008 to provide corrective guidance to ICE Defendants like those here more than adequately suffices to establish conduct pursuant to ICE practices and customs to systematically discriminate on the basis of race or ethnicity. (*Id.* ¶ 135.)

2. Mr. Lyttle Has Adequately Alleged The Existence of Discriminatory Purpose.

Mark Lyttle is a native-born U.S. citizen who, while he may appear Hispanic, speaks no Spanish and, until he was forcibly deported to Mexico, had never been outside the U.S. The only factor that is even remotely relevant to ICE Defendants erroneous identification of Mr. Lyttle as "Jose Thomas," a "native of Mexico" is the color of his skin. Every other piece of evidence either pointed to Mr. Lyttle's U.S. citizenship (*see* Am. Compl., ¶¶ 20, 21, 32, 46-48, 57-58, 60), and/or should have given ICE Defendants reason to question Mr. Lyttle's mental competence and to ensure appropriate safeguards during his interrogation, given that he was unrepresented (*see id.*, ¶¶ 24-26, 40, 42, 45-46, 54-56, 59).

Instead, ICE Defendants repeatedly ignored the overwhelming evidence demonstrating that Mr. Lyttle is a U.S. citizen. ICE Defendants paid lip service to protocol by running numerous background checks on Mr. Lyttle, yet disregarded the results of those checks or, in

some instances, flatly contradicted them in their own subsequent reports to justify their predetermined outcome. (*Id.*, ¶¶ 47-48, 50-51, 58.) ICE Defendants' argument that the conduct identified by Mr. Lyttle is "at most negligent conduct" (ICE Defs' Br. at 25) defies logic. This is not a case where one ICE agent missed a reference to a detainee's citizenship amidst voluminous conflicting records of various aliases and nationalities. To the contrary, here all ICE Defendants repeatedly ignored voluminous and consistent evidence of Mr. Lyttle's citizenship. None of the records searches for Mr. Lyttle produced a single reference to ICE Defendants' prescribed alias, "Jose Thomas," nor was there a single mention in any of the many pages of records in ICE Defendants' possession that indicated anything but U.S. citizenship. ICE Defendants cannot prevail in recasting their unified, discriminatory campaign as some random act of negligence.

C. Plaintiff Has Stated a Violation of a Clearly Established Due Process Rights.

On pages 27-30 of their Brief, ICE Defendants contend that Plaintiff's Fifth Amendment Due Process claim fails and "merely replicates" Plaintiff's Fourth Amendment claim. (ICE Defs' Br. at 29.) On the contrary, the Supreme Court has held that deporting a U.S. citizen is a deprivation of liberty in violation of the Fifth Amendment. *See Ho*, 259 U.S. at 284-85 ("To deport one who so claims to be a citizen obviously deprives him of liberty . . . . It may result also in loss of both property and life, or of all that makes life worth living."). Furthermore,

> As the Supreme Court has often emphasized, deportation is a drastic measure that may inflict the equivalent of banishment or exile . . . and result in the loss of all that makes life worth living. When such serious injury may be caused by INS decisions, its officials must be held to the highest standards in the diligent performance of their duties.

Sun Il Yoo v. Immigration & Naturalization Service, 534 F.2d 1325, 1329 (9th Cir. 1976) (cits. omitted); *see also Acosta v. Gaffney*, 413 F. Supp. 827, 832 (D.N.J. 1976) (reversed on other grounds) (". . . no act of any branch of government may deny to any citizen the full scope of

privileges and immunities inherent in United States citizenship. Central to all of those rights, of course, is the right to remain."). Therefore, it is clearly established that the government has no authority to deport a United States-born citizen, and the Amended Complaint alleges with particularity the ICE Defendants' substantial participation in Mr. Lyttle's unlawful deportation.

Mr. Lyttle has alleged ample facts to state a claim for violation of his Fifth Amendment Due Process rights. These allegations amount to much more than "the mere possibility of misconduct," as suggested by Defendants in their reference to *Francis v.Giocomelli*, 588 F.3d 186, 193 (4th Cir. 2009). As set forth in the Amended Complaint, the ICE Defendants conspired with the North Carolina Defendants to set in motion deportation proceedings against a known United States citizen. Specifically, the ICE Defendants unlawfully maintained custody of Mr. Lyttle despite ample knowledge of Mr. Lyttle's U.S. citizenship. (Am. Compl., ¶¶ 39, 40, 45, 47-48, 49-58, 60-61.) Further, the ICE Defendants manipulated and coerced Mr. Lyttle into signing false statements, (Am. Compl., ¶¶ 40, 44-46, 54-56, 59-61), and by intimidating Mr. Lyttle in the interrogation process. (Am. Compl., ¶¶ 44-45, 54-56, 59-60). Finally, the Amended Complaint specifically alleges that the ICE Defendants willfully disregarded and/or covered up Mr. Lyttle's mental disabilities. (*See id.* ¶¶ 40, 42, 45-46, 54-55, 59).

Mr. Lyttle has also stated that he was never afforded an opportunity to review the contents of the entries written by Defendant Faucette on the "Record of Sworn Statement in Affidavit Form." (*Id.*, ¶¶ 44-45.) Inasmuch as the Immigration Judge relied upon that record as part of the basis for Mr. Lyttle's removal, the ICE Defendants' failure to provide a copy to Mr. Lyttle was, at best, a per se violation of 8 C.F.R. § 1003.32, and, at worst, a deliberate attempt to deny Mr. Lyttle access to, and an opportunity to contest, the fabricated evidence upon which he would be deported.

In sum, Mr. Lyttle was never afforded an adequate opportunity to contest his unlawful detention or the resulting removal. ICE Defendants were fully aware of Mr. Lyttle's significant mental disabilities prior to and throughout his detention and removal proceedings, yet made no effort to afford Mr. Lyttle any additional safeguards to ensure he understood the questions asked and the rights he was waiving. Instead, ICE Defendants interrogated Mr. Lyttle and either disregarded his answers or actively manipulated them to suit their goal of deportation. As set forth herein, these allegations are specifically made throughout the Amended Complaint.

Defendants cite to *United States v. Cristobal*, 293 F.3d 134, 141 (4th Cir. 2002 for the proposition that "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." (ICE Defs.' Br. at 28.) However, Defendants ignore a central point of *Cristobal* – while a deficient mental condition is not enough, without more, to render a waiver involuntary, a court must look at the "totality of the circumstances" to make this determination. *Christobal*, 293 F.3d at 140. The Fourth Circuit noted that "[t]o determine whether a defendant's will has been overborne or his capacity for self determination critically impaired, courts must consider the 'totality of the circumstances,' including the characteristics of the defendant, the setting of the interview, and the details of the interrogation." (*Id.*)

In addition to setting forth the extent of Defendants' knowledge of Mr. Lyttle's cognitive disabilities, the Amended Complaint specifically alleges that ICE Defendants interrogated Mr. Lyttle without a witness present (Am. Compl., ¶ 44), failed to offer Mr. Lyttle the opportunity to review the contents of the entries written by Defendants and instead simply instructed Mr. Lyttle to sign his name (*Id.*, ¶ 45), and repeatedly ignored the fact that Mr. Lyttle continued to sign his true name, "Mark Lyttle" rather than "Jose Thomas." (*Id.*, ¶¶ 45, 56.) These allegations in the

Amended Complaint show that under the "totality of the circumstances" standard (*Christobal)*, Mr. Lyttle has more than sufficiently pled that his admissions were involuntarily given or coerced in violation of his due process.

ICE Defendants deprived Mr. Lyttle of his liberty and, indeed, "all that makes life worth living," *Ho v. White*, 259 U.S. at 284, by causing Mr. Lyttle to be deported without reasonable basis or lawful authority, and despite their possession of evidence of Mr. Lyttle's citizenship. These actions constitute a violation of the Due Process Clause under the Fifth Amendment separate and distinct from the violations alleged under the Fourth Amendment. Contrary to the ICE Defendants' assertion that this claim is a "mere duplication" of Plaintiff's Fourth Amendment Claim (ICE Defs' Br. at 29), the detention of Mr. Lyttle for two days without any opportunity for a hearing establishes a separate and distinct violation of the Due Process Clause of the Fifth Amendment.

D. Plaintiff Has Stated a Violation of Clearly Established Law.

In sum, even if there were no published cases holding similar conduct unconstitutional, the absence of case law establishing the deportation of a U.S. citizen as a violation of constitutional and statutory law would be " due more to the obviousness of the illegality than the novelty of the legal issue." *Al-Kidd v. Ashcroft*, 580 F.3d 949, 970 (9th Cir. 2009) (citing *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002)). "When an officer's conduct 'is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.'" *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004).

However, Mr. Lyttle has alleged more than ample facts in the Amended Complaint to state a claim for violation of clearly established rights under the Fourth and Fifth Amendments. The case law cited is also more than sufficient. ICE Defendants' argument that a United States citizen's detention and subjection to removal proceedings is valid because it was based on an unreliable, coerced statement is ludicrous and contrary to the clearly established law of the United States Constitution.

CONCLUSION

For the foregoing reasons, Plaintiff Mark Lyttle submits that this Court should deny the ICE Defendants' Motion to Dismiss.

Respectfully submitted this 25th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2011, I electronically filed the preceding ***Memorandum of Law in Opposition to ICE Defendants' Motion to Dismiss*** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all parties of record.

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