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

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

MARK DANIEL LYTTLE,	
Plaintiff,	**FEDERAL DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION**
v.	
UNITED STATES OF AMERICA, et al.,	
Defendants.	**Fed. R. Civ. P. 72** **Local Rule 72.4**

FEDERAL DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636, Federal Rule of Civil Procedure 72, and Local Civil Rule 72.4, the federal defendants in this action (the United States, Dashanta Faucette, Dean Caputo, and Robert Kendall) respectfully submit these Objections to U.S. Magistrate Judge Webb's Memorandum and Recommendation of November 14, 2011 ("M&R"). D-E 75. In particular, the United States objects to those portions of the M&R concluding that (1) the discretionary function and due care exceptions to the Federal Tort Claims Act ("FTCA") do not bar plaintiff's three FTCA claims in this case, and (2) that plaintiff has stated viable claims for false imprisonment, negligence, and intentional infliction of emotional distress ("IIED") under North Carolina law. M&R at 10-18. At the same time, the three agents of the U.S. Immigration and Customs Enforcement ("ICE") sued in their individual capacity under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)—ICE Agents Faucette,

Caputo, and Kendall ("ICE defendants")—object to the M&R insofar as it recommends that plaintiff's Fourth Amendment claim against them may go forward. M&R at 26-29.

INTRODUCTION

At the outset, the federal defendants want to make it clear that they fully appreciate the concern caused by the deportation of an American citizen. But sometimes an individual's citizenship status is unclear—whether through the individual's own doing, through no fault of the individual, or both. And in this case, although what allegedly happened to Mr. Lyttle is unfortunate (even if he played a significant role in being deported), there was *at the time* a reasonable basis to believe he was a criminal alien. Throughout the M&R, however, and with the benefit of 20/20 hindsight, the Magistrate Judge relies quite heavily on Lyttle's *actual* status as a citizen when analyzing the claims against the federal defendants. This is, as we explain below, a legally irrelevant consideration, and is the primary (though not the only) error in the M&R.

Lyttle has never disputed that he was competent to stand trial and be sentenced—with no need for psychiatric or psychological counseling—on a state criminal misdemeanor charge that led to his incarceration in a North Carolina jail in August 2008. Nor has he disputed that a few weeks later he executed a sworn statement before a federal officer (ICE Agent Faucette) in which he admitted under oath, based on answers he gave in response to basic biographical questions, that he was born in Mexico and in the United States illegally. These (and other) incontestable facts demonstrate that, despite conflicting information indicative of Lyttle's citizenship, the FTCA's discretionary function and due care exceptions divest this Court of subject matter jurisdiction as to all three of Lyttle's claims against the United States. A finding that these exceptions do not apply here (as Magistrate Judge Webb has recommended) would be contrary to well-established and uniform case law, including that of the Fourth Circuit.

That is also true of the Magistrate Judge's proposed substantive disposition of each of Lyttle's FTCA claims. We separately have shown that Lyttle's allegations do not suffice as a matter of law to sustain claims for the torts of false imprisonment, negligence, or IIED (Counts 4, 5, and 6, respectively) under North Carolina precedent. In reaching an opposite conclusion, the Magistrate Judge has misapplied that precedent, failed to address our principal arguments, and considered allegations that have no bearing on this particular case.

Finally, the Magistrate Judge erred in recommending that Lyttle's *Bivens* claim against the ICE defendants for asserted violations of his Fourth Amendment rights (Count 3) be allowed to proceed. Although the M&R correctly concludes that the Court should not recognize a *Bivens* cause of action in the immigration context under the Fifth Amendment, the Magistrate Judge's reluctance to extend *Bivens* is equally applicable to Lyttle's Fourth Amendment claim. In suggesting otherwise, and in further proposing that the ICE defendants' qualified immunity defense be denied, the Magistrate Judge again failed to account for the fact that Lyttle was reasonably suspected of being an alien at the time.[1]

DISCUSSION

A party may file objections to a Magistrate Judge's recommended disposition of a particular matter. 28 U.S.C. § 636(b). As to dispositive motions, a district court is required to "make a de novo determination" of those portions of a Magistrate Judge's recommendations to which timely, specific, written objections have been filed. Fed. R. Civ. P. 72(b)(3).

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[1] The M&R notes that Lyttle requests injunctive relief. *See* M&R at 1. But Lyttle does so merely in passing, *see* FAC ¶ 1; in reality he seeks only damages from the federal defendants in this case, *see id*. ¶¶ 133, 139, 146, 151, 157, 163-64. In addition, the M&R cites Lyttle's "Corrected" Complaint (D-E 8). Because the currently operative complaint is Lyttle's "Amended Complaint" (D-E 44), we continue to refer to that in these Objections, as the parties did in the prior briefing, and abbreviate that complaint as "FAC" (for "First Amended Complaint").

I. The M&R Erroneously Concludes That The FTCA's Discretionary Function And Due Care Exceptions Do Not Apply

We have demonstrated that all three of Lyttle's FTCA claims should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction because the FTCA's discretionary function and due care exceptions preserve the government's sovereign immunity from tort liability under the circumstances of this case. *See* D-E 50 at 6-12; D-E 60 at 1-8. In making a contrary recommendation, the Magistrate Judge has analyzed these exceptions in a way that does not comport with Lyttle's allegations or the law applicable to those allegations.

A. The Discretionary Function Exception (Counts 5 and 6)

The FTCA's discretionary function exception generally exempts the United States from tort liability for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Determining if particular conduct falls within that exception involves a two-prong test: the conduct must be (1) "'the product of judgment or choice'" and (2) "'based on considerations of public policy.'" *Medina v. United States*, 259 F.3d 220, 226 (4th Cir. 2001) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 537 (1988)).

Although the M&R accurately summarizes these basic principles, *see* M&R at 10, it is silent on a few other foundational premises important to a discussion of the discretionary function exception in this case. Namely, the United States has directed that exception only at the allegations concerning the manner in which ICE agents interviewed Lyttle and investigated his immigration status, and the adequacy of their training and supervision in these matters. *See* D-E

50 at 7-8, 10-11; D-E 60 at 2. These allegations form the bulk of Lyttle's claims for negligence and IIED in Counts 5 and 6. *See* FAC ¶¶ 87-94, 155.[2]

Turning to the heart of those claims—*i.e.*, how the ICE defendants came to a decision about initiating deportation proceedings against Lyttle—the Magistrate Judge has stated that the "crucial fact" in this case is that the statute under which Lyttle was detained "give[s] immigration officials the authority to detain 'aliens,' and Plaintiff is not an alien." M&R at 11. The M&R goes on to say that, if Lyttle could prove his allegations of the ICE defendants coercing him into signing "a statement that ultimately proved false and by deliberately ignoring information that established his citizenship," then "these decisions were not within Defendants' 'discretion.'" *Id*. This analysis is flawed for several reasons.[3]

The M&R seems to suggest that immigration officials lack discretion to detain someone whom they suspect to be an alien but who "ultimately" turns out to be a citizen.[4] This is simply not the law. ICE is statutorily entrusted with enforcing the nation's immigration laws, which involves, among other things, ensuring that certain criminal aliens in this country are removed. *See* 6 U.S.C. §§ 251-52, 542 (note); 8 U.S.C. § 1226. By sheer necessity this requires ICE agents

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[2] The remainder of Counts 5 and 6, and all of Count 4, appear to challenge the mere fact of Lyttle's detention in ICE custody in North Carolina. That aspect of Lyttle's FTCA claims is barred by the due care exception, discussed below in Section I-B.

[3] As a preliminary matter, the M&R does not identify whether the Magistrate Judge is recommending that the United States' argument under the discretionary function exception be rejected under the first or second prong of the Supreme Court's two-part test (or both). But given the M&R's reference to "discretion," M&R at 11, and the absence of any discussion in the M&R about public policy considerations, we assume it is the first prong—*i.e.*, whether the challenged conduct is "a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. Either way, the Magistrate Judge's analysis is erroneous for the reasons we explicate below.

[4] The Magistrate Judge has invoked the post-hoc distinction between suspected and actual aliens to reject a variety of the federal defendants' arguments. *See* M&R at 11, 13, 14, 22, 29. In each instance, that distinction is unsupportable and irrelevant. *See infra* Sections I-B, II-C, III.

to detain *suspected* criminal aliens pending further investigation. *See Douglas v. United States*, No. 09-2145, 2011 WL 2471516, *11 (M.D. Fla. June 22, 2011) (noting that "ICE must weigh various policy considerations in deciding which *suspected* aliens to detain, how to detain them, and how to investigate claims of citizenship by detained aliens," and concluding "there is little doubt" that allegations of ICE agents "negligently fail[ing] to ascertain or verify [the plaintiff's] citizenship status fall squarely within the discretionary function exception") (emphasis added). Indeed, the Immigration and Nationality Act ("INA") presumes that individuals may raise claims of citizenship during their immigration proceedings. *See* 8 U.S.C. §§ 1252(b)(5); 1503.

Still more to the point, courts uniformly have held the discretionary function exception protects an immigration official's conduct in investigating a claim of citizenship and initiating deportation proceedings—even when the individual under investigation is in fact a citizen or in the country legally. *See Nguyen v. United States*, 65 F. App'x 509, 2003 WL 1922969, *1-2 (5th Cir. 2001) (per curiam); *Douglas*, 2011 WL 2471516, at *11; *Bernado v. United States*, No. 02-0974, 2004 WL 741287, *3 (N.D. Tex. Apr. 5, 2004); *Diaz v. United States*, No. 99-6374, 2002 WL 31002842, *1 (N.D. Ill. Sept. 3, 2002). Suggesting otherwise would be akin to saying that a law enforcement officer lacks discretion in how to investigate or interrogate a suspected criminal who turns out to be actually innocent. This would defy both logic and the law, and we have cited cases applying the discretionary function in precisely this situation. *See O'Ferrell v. United States*, 253 F.3d 1257, 1261-62, 1266-67 (11th Cir. 2001); *Mesa v. United States*, 123 F.3d 1435, 1438-39 (11th Cir. 1997).

The M&R accounts for none of the foregoing authority. It also cites no authority of its own to support the novel proposition that ICE agents may not detain suspected criminal aliens. And, like Lyttle's response brief, the M&R does not cite a single case in which a court has

refused to apply the discretionary function exception where the plaintiff challenged why and how immigration officials decided to initiate deportation proceedings, or why and how law enforcement officers interrogated or investigated a suspect. Indeed, we are aware of no case holding that the discretionary function exception is inapplicable in such circumstances.

Reaching that anomalous result would further require this Court to follow the M&R's strained reading of *Medina*, a Fourth Circuit opinion that bears directly on this case. In *Medina*, the Fourth Circuit held, *sua sponte*, that the decision to arrest an alien and institute deportation proceedings is a "quintessential exercise of" immigration officials' "broad discretion." *Medina*, 259 F.3d at 227. Contrary to what the M&R suggests, the holding in *Medina* does not turn on whether the plaintiff is an alien or a citizen, but on the "prosecutorial discretion" immigration officials use when arresting and detaining someone they believe should be deported. *Id*.[5]

Separately, the Magistrate Judge has suggested that the discretionary function exception should not apply because Lyttle has alleged the ICE defendants violated his constitutional rights by "coercing him to sign a statement" concerning his citizenship that "ultimately proved false," and by ignoring "information that established his citizenship." M&R at 11-12. This reasoning fails to consider several key points.

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[5] Confirming this understanding of *Medina* is *Mirmehdi v. United States*, – F.3d – , No. 09-55846, 2011 WL 5222884 (9th Cir. Nov. 3, 2011). In *Mirmehdi* the Ninth Circuit also held, *sua sponte*, that "the decision to detain an alien pending resolution of immigration proceedings" is subject to the discretionary function exception. *Id*. at *5. And its rationale for doing so was not that the plaintiffs were in fact aliens, but that the "decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability." *Id*. (internal quotations and citation omitted). The court in *Mirmehdi* quoted *Medina* to support this very proposition: "'Even though the INS ultimately decided not to pursue the deportation of Medina, we are fully satisfied that the initial decision to initiate proceedings and arrest him was the type of agency conduct Congress intended to immunize in the discretionary function exception.'" *Id*. (quoting *Medina*, 259 F.3d at 229). We brought *Mirmehdi* to the Court's attention with a Notice of Supplemental Authority (D-E 73), but it too is left out of the M&R.

First, the allegation that Lyttle was "coerced" into signing a statement concerning his nationality, *see* FAC ¶ 54, is a pure legal conclusion that is devoid of factual support and thus is not entitled to the presumption of truth. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). Second, the most that assertion amounts to is that Agent Faucette may have misjudged Lyttle's mental competency when she interviewed him. *See* FAC ¶¶ 54-55. But Lyttle has never disputed that assessing his ability to understand simple biographical questions and deciding not to refer him for an independent mental health examination were exercises in judgment and well within Faucette's discretion; moreover, his own criminal records support the assumption that he was able to answer such questions. *See* D-E 50 at 10 n.6 & Exh. G; D-E 60 at 4 n.1.[6] Third, Lyttle signed several documents attesting that he was born in Mexico and in the United States illegally. *See* FAC ¶¶ 41-45, 54-55; FAC Exh. C; D-E 50 Exhs. A, D, E; *In re Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999) (noting that recorded confessions of foreign citizenship are "inherently trustworthy and reliable to prove alienage or deportability").

In light of these undisputed facts and Lyttle's presumed competency to answer basic questions such as what his name is and where he was born, ICE at the very least had a reasonable basis to believe that Lyttle was a criminal alien. And the reasonableness of that belief *at the time* necessarily remains constant even though it "ultimately proved false." M&R at 11. As the ICE defendants thus separately have shown, Lyttle has not sufficiently alleged that those defendants violated his clearly established constitutional rights. *See Medina*, 259 F.3d at 225 n.2 (noting

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[6] Although the M&R does not refer to them, the documents attached to the federal defendants' motions to dismiss and their replies in support of those motions are either incorporated by reference into Lyttle's amended complaint or matters of public record, and are therefore properly before the Court under Rules 12(b)(1) and 12(b)(6). *See Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *Cozzarelli v. Inspire Pharm. Inc.*, 549 F.3d 618, 625 (4th Cir. 2008); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004). Lyttle has never suggested otherwise.

that in FTCA action "the United States is entitled to avail itself of any defenses its agents could raise in their individual capacities"); D-E 52 at 14-23; D-E 63 at 4-10; *infra* Section III-B.

Finally, the allegation that the ICE defendants "disregarded" evidence of Lyttle's citizenship is not enough to circumvent the discretionary function exception. That is because the exception applies "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *see*, *e.g.*, *Williams v. United States*, 242 F.3d 169, 175 (4th Cir. 2001) (finding that federally-operated hospital's refusal to treat plaintiff, "even if it amounts to an abuse" by causing plaintiff's death, fell within discretionary function exception); *O'Ferrell*, 253 F.3d at 1267 (applying exception even though agents' allegedly coercive interrogation was "indefensibly gross abuse" of their discretion).[7] This is another point the M&R does not address.

In short, the M&R contains several significant errors of omission, both factually and legally, in its discussion of the discretionary function exception.[8] The Court therefore should not adopt this part of the M&R and find instead that the discretionary function exception bars most of Counts 5 and 6 in Lyttle's amended complaint.

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[7] This assumes the ICE defendants abused their discretion when investigating Lyttle's citizenship, but there again is no factual support for such an assumption. Despite any conflicting evidence of citizenship, we have shown that the North Carolina ICE agents reasonably relied on Lyttle's repeated admissions of alienage to commence deportation proceedings against him.

[8] One more of these omissions deserves mention. There can be (and is) no debate that the discretionary function exception scotches Lyttle's FTCA claims insofar as they rest on his conclusory allegations about negligent training and supervision, and "[c]reating and/or sanctioning" policies concerning detention, interrogation, and deportation. FAC ¶¶ 88-92, 155. We have noted that the law could not be clearer on this point, and that Lyttle has tacitly conceded the point (by not disputing it). *See* D-E 50 at 11 (collecting cases); D-E 60 at 2. Yet this issue is altogether absent from the M&R, even as it recommends that "the portion of the United States' motion to dismiss which relies upon the discretionary function exception be denied" in its entirety. M&R at 12. This recommendation is erroneous for all of the reasons discussed above, but is particularly inappropriate with respect to an issue identified in the United States' motion to dismiss that neither Lyttle nor the Magistrate Judge has addressed or disputed.

B. The Due Care Exception (Counts 4-6)

Complementing the discretionary function exception is the due care exception, which "prevents the United States from being held liable for actions of its officers undertaken while reasonably executing the mandates of a statute." *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005); *see* 28 U.S.C. § 2680(a). The M&R correctly notes that, for this exception to apply, there must be a statute or regulation that "specifically proscribes a course of action for an officer to follow," and the officer must have "exercised due care in following the dictates of that statute or regulation." *Welch*, 409 F.3d at 652; *see* M&R at 12-13.

Lyttle has predicated parts of his FTCA claims—the remainder of his negligence and IIED claims in Counts 5 and 6 not already discussed above under the discretionary function exception, and all of his false imprisonment claim in Count 4—on the mere fact of his detention in North Carolina pending deportation proceedings (a total of, at most, two days). *See* FAC ¶¶ 63, 148, 150, 160. Because that detention was statutorily mandated once the ICE defendants deemed Lyttle deportable, *see* 8 U.S.C. § 1226(c)(1)(B), the due care exception forecloses this aspect of Lyttle's FTCA claims. *See Welch*, 409 F.3d at 652.

In suggesting that this exception does not apply, the Magistrate Judge again relied on the erroneous distinction that § 1226(c) "mandates the detention of criminal aliens, and Plaintiff is not an alien." M&R at 13. As we have explained at length elsewhere, ICE has the statutory duty and authority to detain *suspected* aliens, not just those who are in fact aliens. *See supra* Section I-A; D-E 60 at 6-8. And like the Fourth Circuit's discussion of the discretionary function exception in *Medina*, its discussion of the due care exception in *Welch* does not depend on whether the plaintiff was an actual or suspected criminal alien. The issue instead was simply that, once Welch "was deemed deportable," § 1226(c) mandated his detention, and the due care

exception therefore barred his FTCA false imprisonment claim as that claim was premised on the fact of his 422-day wrongful detention. *Welch*, 409 F.3d at 652. Because Lyttle also "was deemed deportable" under § 1226(c), the due care exception likewise bars his FTCA claims that are premised on the fact of his two-day detention by ICE in North Carolina.

Welch also refutes the Magistrate Judge's other ground for recommending against the application of the due care exception. The M&R states that, even "assuming that [§ 1226(c)] was applicable to Plaintiff," Lyttle's allegations of the ICE defendants "coerc[ing] him into signing a false statement and deliberately ignor[ing] information establishing his U.S. citizenship . . . demonstrate a lack of due care." M&R at 13. This is incorrect. Lyttle may well be challenging the manner in which the ICE defendants interviewed him and investigated his citizenship status. But that aspect of his FTCA claims—a complaint about the "officers' decision to detain him in the first instance," *Welch*, 409 F.3d at 652—is not relevant to deciding whether those defendants exercised due care in executing their statutory mandate to detain someone after they have deemed the individual deportable. (Such a complaint *is* relevant to, but precluded by, the discretionary function exception. *See supra* Section I-A; D-E 50 at 6-11; D-E 60 at 2-8.)[9]

Because the ICE defendants were statutorily required to detain Lyttle under § 1226(c) once they deemed him deportable, *see Welch*, 409 F.3d at 652, the due care exception clearly bars that part of his FTCA claims resting solely on his alleged two-day detention in ICE custody in North Carolina (which is all of Count 4 and that portion of Counts 5 and 6 not discussed above in Section I-A). The Court therefore should not adopt this portion of the M&R but instead should dismiss all of Lyttle's FTCA claims under Rule 12(b)(1).

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[9] What *could be* relevant to a determination of due care is if the ICE defendants executed the mandate of 8 U.S.C. § 1226(c) "improperly," *e.g.*, by detaining Lyttle "for a crime that was not deportable." *Welch*, 409 F.3d at 653. Lyttle, however, has alleged no such thing.

II. The M&R Erroneously Concludes That Lyttle Has Sufficiently Pled His FTCA Claims Under North Carolina Law

All three of Lyttle's FTCA claims should be dismissed first and foremost for lack of subject matter jurisdiction under Rule 12(b)(1). *See supra* Section I-A. In addition, though, they should be dismissed under Rule 12(b)(6), as Lyttle has failed to state legally viable claims for false imprisonment, negligence, or IIED under North Carolina law. In reaching the opposite conclusion, the Magistrate Judge has committed several additional legal and factual errors.

A. False Imprisonment (Count 4)

Two simple premises—both ignored by the Magistrate Judge—compel the dismissal of Lyttle's false imprisonment claim (which again is limited to his alleged two-day detention by ICE in North Carolina). First, the existence of legal process, such as a warrant, authorizing a plaintiff's detention is a complete defense to an action for false imprisonment in North Carolina (like most states), unless that process is "absolutely void." *Rhodes v. Collins*, 150 S.E. 492, 493-94 (N.C. 1929); *see Melton v. Rickman*, 36 S.E.2d 276, 277-78 (N.C. 1945). Second, the ICE defendants detained Lyttle pursuant to legal process, including a warrant and an immigration detainer, free of any technical defects that would have made such process void on its face. *See* FAC ¶¶ 49-52; D-E 50 at 13-14 & Exhs. C-F; D-E 57 at 11-17; D-E 60 at 8-10. These points are not, have not been, and cannot be in dispute.[10] Yet the Magistrate Judge rather inexplicably mentions none of them in his discussion of Lyttle's false imprisonment claim, *see* M&R at 14,

[10] To be sure, Lyttle has broadly questioned whether "the whole process by which [he] was erroneously determined to be a foreign born citizen was fundamentally flawed and therefore unlawful," D-E 57 at 12, whether the ICE defendants lacked probable cause to detain him, *id*. at 12-15, and whether the "waiver of [his] rights" which he executed "was invalid and void," *id*. at 17. But he has not argued—and could not argue in good faith—that the warrant used to detain him was "void" in the relevant and more narrow legal sense (*e.g.*, the warrant charged no criminal offense known to the law, he was not the person named in the warrant, or the issuing authority lacked jurisdiction to issue the warrant). *See Melton*, 36 S.E.2d at 277-78.

even though the absence of legal process is an essential element of a false imprisonment claim in North Carolina, *see Melton*, 36 S.E.2d at 277, and the only one at issue in the United States' Rule 12(b)(6) motion to dismiss that claim, *see* D-E 50 at 13-14; D-E 60 at 8-10.

The recommendation against dismissing Lyttle's false imprisonment claim instead hinges on a different but recurring error: the irrelevant distinction between actual and suspected criminal aliens. According to the M&R, the ICE defendants "had no legal authority to detain Plaintiff, because the statute which purportedly authorized his detention applie[s] only to aliens and not U.S. citizens." M&R at 14. But the M&R offers no authority of its own to support the notion that ICE agents have "no legal authority" under 8 U.S.C. § 1226(c) to detain a *suspected* criminal alien who later is determined to be a citizen (or that law enforcement officers retroactively lose their "legal authority" to detain a suspected criminal based on a facially valid warrant if the individual arrested ultimately turns out to be innocent). That notion is, with all due respect, untenable for the reasons we previously have explained. *See supra* Section I-A. In addition, North Carolina courts explicitly follow the rule that an action for false imprisonment will not lie so long as the arrest is "made under the form of legal process," even if the process is *later* shown to be erroneously issued. *Rhodes*, 150 S.E. at 494-95; *see Bryan v. Stewart*, 31 S.E. 286, 287 (N.C. 1898). This is another key point that the M&R simply does not consider.

Because it is undisputed that the North Carolina ICE agents used a warrant to detain Lyttle, and the warrant charged Lyttle with a violation that is undeniably within ICE's jurisdiction, *see* 8 U.S.C. § 1226(c), Lyttle's false imprisonment claim fails under clear North Carolina precedent. *See*, *e.g.*, *Alexander v. Lindsey*, 55 S.E.2d 470, 474 (N.C. 1949) (finding that plaintiff could not pursue claim for false imprisonment after he had been served with a warrant, as it charged "an offense within the jurisdiction of the magistrate who issued the precept").

B. Negligence (Count 5)

As with the false imprisonment claim, the Magistrate Judge has completely overlooked the argument we have advanced for dismissing Lyttle's negligence claim. It is axiomatic that the United States can be liable under the FTCA only if state law would impose upon a private person a duty of care towards the plaintiff "under like circumstances." 28 U.S.C. § 2674; *see id*. § 1346(b)(1). In other words, Lyttle must establish that North Carolina would "impose liability for breach of a duty that is sufficiently analogous to the duty" allegedly breached by the ICE defendants. *Florida Auto Auction of Orlando, Inc. v. United States*, 74 F.3d 498, 505 (4th Cir. 1996). Although this principle is essential to an FTCA negligence claim, *see id.*, and the sole basis upon which we have sought dismissal of Lyttle's negligence claim under Rule 12(b)(6), *see* D-E 50 at 15-18; D-E 60 at 10-13, it is not discussed anywhere in the M&R.

Instead, the M&R concludes that Lyttle has pled "general negligence by alleging that Defendants failed to use reasonable care in their course of conduct." M&R at 15. This frames the issue far too broadly, as we explained when Lyttle made this same argument in his opposition to the United States' motion to dismiss, *see* D-E 60 at 10-11, and does not come close to "identify[ing an] appropriate analog[y]" for a private duty analogue. *Florida Auto Auction*, 74 F.3d at 505 (reversing denial of summary judgment on FTCA claim where "[n]either the district court nor [plaintiffs] attempted to identify appropriate analogies"). The more relevant question here is whether a private person would owe a duty to a plaintiff who was in the custody of a third party to conduct an error-free investigation into the plaintiff, ensure that the plaintiff understood his legal rights, and provide assistance to him during an interrogation or before signing legal forms in deciding whether to extend his detention. *See* D-E 60 at 11 (citing *Lumsden v. United States*, 555 F. Supp. 2d 580, 588 (E.D.N.C.)). The Magistrate Judge, however, has not addressed

this question (or anything like it) in the M&R, much less cited any precedent supporting the imposition of such a duty or even a sufficiently analogous duty.[11]

While thus neglecting the central inquiry concerning Lyttle's negligence claim, the Magistrate Judge has made too much out of a peripheral matter: North Carolina's public duty doctrine. This appears to be based on a misunderstanding of our position. To be clear, the United States has not advocated "that the 'public duty doctrine' shields it from liability." M&R at 15. We actually have said that this doctrine has limited relevance here because it applies to public officers, *see Stone v. N. Carolina Dep't of Labor*, 495 S.E.2d 711, 713-17 (N.C. 1998), and "assessing the Government's liability under the FTCA in the performance of activities which private persons do not perform" (*e.g.*, enforcing the nation's immigration laws) requires a court to "look to the state-law liability of private entities, not to that of public entities." *United States v. Olson*, 546 U.S. 43, 46 (2005) (internal quotations and citation omitted); *see* D-E 50 at 16-18; D-E 60 at 12. We thus raised the public duty doctrine simply to emphasize that there is in North Carolina no common law duty that is "sufficiently analogous" to the one Lyttle has proposed in this case of using "reasonable care" when initiating deportation proceedings against a suspected criminal alien. *Florida Auto Auction*, 74 F.3d at 505; *see* D-E 50 at 17; D-E 60 at 12.

In short, the Magistrate Judge did not even attempt to find, and Lyttle himself has not established, a private duty analogue applicable to the facts of this case. The Court therefore should reject the M&R's recommendation as to Lyttle's negligence claim and instead should dismiss that claim under Rule 12(b)(6) as well.

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[11] This is even more perplexing because Lyttle has argued that the government is liable to him under a duty analogous to the "Good Samaritan" doctrine. *See* D-E 57 at 19-20. We have replied to, and refuted, that argument elsewhere. *See* D-E 60 at 11-12. But because the M&R (again) does not address these points, we will not repeat that discussion here.

C. Intentional Infliction of Emotional Distress (Count 6)

Lyttle's third and final FTCA claim, for intentional infliction of emotional distress, requires him to allege and prove, among other things, conduct that "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Foster v. Crandell*, 638 S.E.2d 526, 537 (N.C. Ct. App. 2007). In concluding that Lyttle has sufficiently pled such conduct, *see* M&R at 17, the Magistrate Judge relied on allegations that are not pertinent to this case and, simultaneously, failed to analyze the specific allegations and facts that actually are pertinent.

The M&R lists the following among the "actions" that, if proven true, would be "extreme and outrageous" in the Magistrate Judge's estimation: "improperly deport[ing]" Lyttle, "remov[ing] him from the country again when he attempted to re-enter," and "attempt[ing] to deport Plaintiff yet again" after "these mistakes were finally corrected." *Id*. Yet every one of these "actions" took place outside of North Carolina (in Georgia and Texas). FAC ¶¶ 63-69, 77-86, 95, 98-104, 112-22. While some of those "actions" thus may be relevant in determining the United States' liability in Lyttle's companion case in Georgia, *see Lyttle v. United States*, No. 11-152 (M.D. Ga.), they have no logical or legal bearing on whether the United States is liable in *this* case for the alleged conduct of the North Carolina ICE agents.

To make the latter determination, the Court's inquiry should be limited to the allegations that the North Carolina ICE agents (as the M&R puts it) "ignored evidence of Plaintiff's citizenship" and "coerced him into signing a statement that ultimately proved false." M&R at 17. But these conclusory assertions standing alone cannot defeat a motion to dismiss, and the Magistrate Judge erred in not moving beyond them in his analysis of Lyttle's IIED claim. *See id*.; *Iqbal*, 129 S. Ct. at 1949-50. Once the Court does that and thoroughly examines the

amended complaint, while "draw[ing] on its judicial experience and common sense," it should become apparent that Lyttle has not pled "sufficient factual matter to show" the North Carolina ICE agents engaged in extreme and outrageous conduct. *Iqbal*, 129 S. Ct. at 1948, 1950.

Because we have explored the inadequacy of Lyttle's allegations on this subject in depth in the prior briefing, we will not recreate that discussion here. D-E 50 at 19-21; D-E 60 at 13-14. A few points bear repeating, though. In terms of Lyttle being "coerced" into signing a statement in which he swore to being in the country illegally, he has alleged nothing to show that Agent Faucette engaged in extreme and outrageous conduct by merely presuming that he was competent to answer simple biographical questions. To the contrary, the undisputed fact that he was competent to stand trial and be sentenced, without the need for any ongoing psychiatric or psychological counseling, just a few weeks before her interview with him confirms that her presumption was at least reasonable. *See* D-E 50 Exh. G. Given the reasonableness of that presumption, and given that Lyttle's admissions of alienage were binding and sufficient evidence to prove deportability, *see In re Ponce-Hernandez*, 22 I&N Dec. at 785, it would be wholly unwarranted to cast the decision of the North Carolina ICE agents to initiate deportation proceedings against Lyttle—even assuming they were aware of conflicting evidence of his citizenship as he has alleged—as extreme and outrageous. *See supra* Section III-B. Rather, every indication is that those agents were performing their usual duties in interviewing and investigating a suspected criminal alien, just as they had done countless other times.

Because the Magistrate Judge was required to, but did not, determine whether there are enough "well-pleaded factual allegations" in Lyttle's amended complaint to state a plausible claim for IIED under North Carolina law, *Iqbal*, 129 S. Ct. at 1950, the Court should reject the M&R in this regard and dismiss Count 6 of the amended complaint.

III. The M&R Erroneously Concludes That Lyttle's *Bivens* Claims Under The Fourth Amendment (Count 3) May Proceed

We now turn our focus to the Magistrate Judge's discussion of the constitutional tort claims brought against the individual ICE defendants. To begin with, we agree with his evaluation of the Fifth Amendment claims and do not object to his recommendation to dismiss Counts 1-2 on special factors grounds. We do, however, respectfully object to his recommendation regarding the Fourth Amendment claim. As we have demonstrated in our prior briefing, all of Lyttle's *Bivens* claims, including Count 3, should be dismissed because of the unique special factors presented by the immigration context. *See* D-E 52 at 6-11; D-E 63 at 1-4. Moreover, we have shown that plaintiff has failed to state the plausible violation of any constitutional right, and that the ICE defendants would, in any event, be entitled to qualified immunity. *See* D-E 52 at 11-23; D-E 63 4-10. In making a contrary recommendation, the Magistrate Judge fails to appreciate the remedial scheme established by Congress, applies the wrong legal standard, and relies on bare legal conclusions instead of well pled factual allegations.

A. Lyttle's Fourth Amendment *Bivens* Claim Is Not Cognizable

The Supreme Court has repeatedly warned against extending a *Bivens* remedy into new contexts. *See* M&R at 23-24 (discussing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67-70 (2001)); *see also id.* at 19 ("'Because implied causes of actions are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants.'") (quoting *Iqbal*, 129 S. Ct. at 1948). Although the Magistrate Judge appropriately recommended against extending *Bivens* with respect to Lyttle's Fifth Amendment claims, *see* M&R at 24-25, he glossed over the unique circumstances of Lyttle's Fourth Amendment claim (Count 3) in just one sentence: "Plaintiff's Fourth Amendment claim is clearly permissible, as *Bivens* explicitly 'held

that a victim of a Fourth Amendment violation by federal officers may bring suit for money damages against the officers in federal court,'" *id.* at 22 (quoting *Malesko*, 534 U.S. at 66). But this straight-up comparison between Count 3 and the Fourth Amendment claim permitted in *Bivens* oversimplifies the special factors analysis in the unique context that applies to this case.[12] And it is at odds with the Magistrate Judge's correct statement that courts should "'limit *Bivens* and its two follow-on cases . . . to the *precise circumstances* that they involved.'" M&R at 24 (quoting *Malesko*, 534 U.S. at 75) (Scalia, J., concurring) (emphasis added).

Unlike *Bivens*, a case which involved an *in-home* arrest of the plaintiff, 403 U.S. at 389, Lyttle's Fourth Amendment claim arises from the fact of his detention in *removal proceedings*. Therefore, in this case, "deportation proceedings constitute the relevant 'environment of fact and law' in which to 'decide whether to recognize a *Bivens* remedy.'" *Mirmehdi*, 2011 WL 5222884, at *3 (quoting *Arar v. Ashcroft*, 585 F.3d 559, 572) (2d Cir. 2009), *cert. denied* 130 S. Ct. 3409 (2010)). To be clear, "deportation proceedings" define the special "context" of Lyttle's *Bivens* claims, which is "unique from other situations where an unlawful detention may arise." *Id.* But the M&R neither appreciates this context nor cites any Supreme Court or Fourth Circuit cases extending *Bivens* under these particular circumstances, and to our knowledge, such cases do not exist. Rather, the Supreme Court has repeatedly recognized that the political branches have plenary power over immigration, and courts generally afford substantial deference to Congress and the Executive Branch in this field. D-E 52 at 10-11 (collecting cases).

[12] For example, the Supreme Court has stated that "a *Bivens* action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in some contexts, but not in others." *FDIC v. Meyer*, 510 U.S. 471, 484 n.9 (1994); *see also Wilson v. Libby*, 498 F. Supp. 2d 74, 86 (D.D.C. 2007), *aff'd*, 535 F.3d 697 (D.C. Cir. 2008) (noting that *Bivens* actions are "context-specific" and "not recognized Amendment by Amendment in a wholesale fashion").

In recommending the dismissal of Counts 1-2, the Magistrate Judge even acknowledged that certain constitutional constraints, including due process and equal protection standards, "'do not limit the federal government's power to regulate either immigration or naturalization.'" M&R at 25-26 (quoting *Appiah v. INS*, 202 F.3d 704, 710 (4th Cir. 2010)). But the M&R stops just short of highlighting the most basic point of all: "'the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Appiah*, 202 F.3d at 710 (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)). While the Magistrate Judge was correct to respond "cautiously to [Plaintiff's] suggestion[] that *Bivens* . . . be extended into [a] new context[,]" M&R at 24 (quoting *Malesko*, 534 U.S. at 68-69), he failed to apply that appropriate caution to *all* of Lyttle's claims challenging the fact of his detention in the legally relevant immigration context at issue.

Apart from not appreciating the context of Plaintiff's Fourth Amendment claim, the Magistrate Judge overlooked the "alternative, existing process" that was available to Lyttle to protect the very same constitutional interests he seeks to vindicate today. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). That comprehensive and exclusive remedial process is found in the Immigration and Nationality Act (the "INA"). *See* D-E 52 at § I.A. (discussing statutory provisions). As we brought to the Court's attention, *see* D-E 73, the Ninth Circuit recently confirmed this limitation on remedies for wrongful detention in deportation proceedings by adopting the Second Circuit's view that "'Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration.'" *Mirmehdi*, 2011 WL 5222884, at *4 (quoting *Arar*, 585 F.3d at 572). In *Mirmehdi*, the plaintiffs alleged that they were unconstitutionally detained in removal proceedings on the basis of fabricated and manipulated evidence (just as Lyttle claims here), but the Ninth Circuit "decline[d] to extend *Bivens* to allow

the [plaintiffs] to sue federal agents for wrongful detention pending deportation given the extensive remedial procedures available" to them previously. *Id.* at *4. Because the Mirmehdis had the opportunity under the INA (and via habeas proceedings) to protect their constitutional interests, they could not pursue damages under *Bivens*. *Id.* The same is true in this case.

The M&R, however, ignores *Mirmehdi* entirely. Instead, the Magistrate Judge merely states that Lyttle "'is not attempting to use the present lawsuit to circumvent the administrative process set up to review orders of removal.'" M&R at 22 (quoting *Turnbull v. United States*, No. 1:06-cv-858, 2007 WL 2153279, at *6 (N.D. Ohio July 23, 2007)).[13] But as in *Mirmehdi*, that is precisely what Lyttle is doing by sidestepping the channels of review established by Congress. *See* 8 U.S.C. §§ 1252 (a)(2)(D), 1252(b)(9), 1252(g). In fact, had Lyttle capitalized on the administrative procedures available under the INA, and presented his constitutional challenges to the fact of his detention to the immigration judge, the Board of Immigration Appeals, and the court of appeals, he could have received the most meaningful remedy of all – his release from custody and no removal to Mexico. D-E 63 at 3. Even though the INA is limited to equitable relief, "Congress's failure to include monetary relief can hardly be said to be inadvertent, given that despite multiple changes to the structure of appellate review in the [INA], Congress never created such a remedy." *Mirmehdi*, 2011 WL 5222884, at *4; *see also* D-E 63 at 3 n.4.[14]

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[13] *Turnbull* involved the alleged "refusal to abide by [a] stay order issued in [a] habeas proceeding," and thus did "not arise from" any of the specific discretionary actions described in 8 U.S.C. § 1252(g). 2007 WL 2153279, at *5. Unlike in *Turnbull*, Lyttle's Fourth Amendment claim arises from the alleged decision to *commence* proceedings without probable cause and, as discussed below, is expressly excluded from district court review by § 1252(g).

[14] *See also Holly v. Scott*, 434 F.3d 287, 290 (4th Cir. 2006) ("[N]either the absence nor the incompleteness of such a [comprehensive] scheme represents an invitation for a court to step in to correct what it may perceive as an injustice toward an individual litigant."). Moreover, an equitable remedy that brings about the cessation of an ongoing infringement is generally considered more weighty and important than one providing a backward-looking award of civil

Ultimately, Lyttle's Fourth Amendment claim that the ICE defendants commenced removal proceedings on the basis of allegedly falsified evidence – resulting in his mandatory detention pursuant to 8 U.S.C. § 1226(c) – is *exactly* the sort of claim that Congress excluded from district court review.[15] *See* 8 U.S.C. § 1252(g) (except as otherwise provided by the INA, "no court shall have jurisdiction to hear *any* cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to *commence* [removal] proceedings….") (emphasis added). In fact, the Supreme Court has expressly held that § 1252(g) divests district courts of jurisdiction to consider claims arising from the commencement of removal proceedings. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 487 (1999) (vacating lower court decision because court lacked jurisdiction over constitutional claim that the government selectively targeted plaintiffs for deportation). The Court specifically recognized that "subjecting the prosecutor's motives and decisionmaking to outside inquiry . . . are greatly magnified in the deportation context." *Id.* at 490; *accord Mirmehdi*, 2011 WL 5222884, at *4. In short, "Congress could hardly have been more clear and unequivocal" that courts may not review claims challenging the decision to commence removal proceedings. *Mapoy v. Carroll*, 185 F.3d 224, 230 (4th Cir. 1999); *accord Malik v. Gonzalez*, 213 F. App'x 173, 174-75 (4th Cir. 2007).

In light of this framework, courts have declined to extend *Bivens* in cases virtually identical to Lyttle's. *See* D-E 63 at 2-3. The Ninth Circuit, for example, held that § 1252(g) barred a false arrest claim brought under *Bivens* because the challenged detention arose from the "decision to commence expedited removal proceedings." *Sissoko v. Rocha*, 509 F.3d 947, 950

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damages. *United States v. Stanley*, 483 U.S. 669, 683 (1987).

[15] To be clear, the ICE defendants' decision to initiate removal proceedings against Lyttle (regardless of probable cause) triggered the automatic detention that is now the subject of his Fourth Amendment *Bivens* claim. *See* D-E 52 at 14; *supra* Section 1-B.

(9th Cir. 2007). In *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1068 (N.D. Ill. 2007), the court similarly dismissed a Fourth Amendment *Bivens* claim because the plaintiff's mandatory arrest and detention in removal proceedings were "a direct outgrowth of the decision to commence proceedings."[16] As in those cases, Lyttle's "Fourth Amendment claim (the arrest/detention portion) 'arises from' the decision to commence removal proceedings," and it is therefore precluded by § 1252(g). *Id.*; *see also* D-E 63 at 2-3. Only the court of appeals, on a petition for review or habeas, could have reviewed the constitutional issues surrounding the ICE defendants' decision to place Lyttle in removal proceedings.[17] The fact that Lyttle chose to forgo that process does not entitle him to a second chance here. Put simply, Plaintiff's *Bivens* claim is a "thinly veiled attempt to evade the dictates of § 1252." *Mapoy*, 185 F.3d at 230.

Even though the Magistrate Judge focuses on the fact that Lyttle is an "American-born U.S. citizen," M&R at 22, the INA's remedial procedures were nevertheless available to him to challenge his detention. While the INA was enacted in part pursuant to Congress's authority to establish rules with respect to alienage, *see Mirmehdi*, 2011 WL 5222884, at *3, the procedures at issue are without question available to *anyone* subject to removal proceedings, regardless of

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[16] *See also Foster v. Townsley*, 243 F.3d 210, 214-15 (5th Cir 2001) (declining jurisdiction over excessive force, due process, and equal protection claims brought under *Bivens* in light of 1252(g)); *Humphries v. Various Federal USINS Employees,* 164 F.3d 936, 945 (5th Cir.1999) (dismissing First Amendment *Bivens* claim because constitutional challenges in removal proceedings are streamlined "either in a petition for review or for habeas corpus"); *Guardado v. United States*, 744 F. Supp. 2d. 482, 488-89 (E.D. Va. 2010) (dismissing *Bivens* claims under § 1252(g)); D-E 63 at 2 n.2.

[17] While the M&R notes that Lyttle is not "challenging a decision of removal" in this case, M&R at 22, that only underscores the deficiency of his claim: the constitutional issues Plaintiff raises (involving the decision to commence proceedings against him) are reviewable only through the process established by Congress – which requires petitioning a final order of removal to the court of appeals. *See* 8 U.S.C § 1252(b)(9); *see also* §§ 1252(a)(2)(D) & (a)(5).

their citizenship, *see, e.g.,* 8 U.S.C. § 1252(b)(5); 8 U.S.C. § 1503; *see also Villalba v. U.S. Attorney General*, 301 F. App'x 905, 907 (11th Cir. 2008) (discussing the process for reviewing citizenship claims raised in removal). Otherwise, the purpose of such proceedings in many cases would be pointless: "deportation proceedings 'would be vain if those accused could not be held in custody pending the inquiry into their true character.'" *Demore v. Kim*, 538 U.S. 510, 523 (2003) (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)). Because the INA contemplates that citizenship may be litigated in removal proceedings, the review process and remedies permitted by Congress apply uniformly to anyone detained for deportation – including a suspected criminal alien (as Lyttle held himself out to be). In light of the INA's process for challenging the fact of detention in removal proceedings, Count 3 is not cognizable in this case.[18]

B. The ICE Defendants Are, Alternatively, Entitled to Qualified Immunity

After improperly extending *Bivens* beyond its limited context, the Magistrate Judge next erred in finding that Lyttle has adequately pled the violation of a clearly established Fourth Amendment right. First, the Magistrate Judge applied the wrong legal standard by again focusing on the irrelevant fact that Lyttle is a U.S. citizen: "It is undisputed that the ICE Defendants were mistaken in their belief that Plaintiff was an alien, and therefore there was no lawful basis for detaining Plaintiff after October 26, 2008." M&R at 27; *see also id.* at 29. But the Fourth Amendment question is not whether Lyttle was actually a citizen (*i.e.*, innocent of the charges), but whether he was detained pursuant to "legal process that was not supported by probable cause." *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005); *see also* D-E 52 at 15.

[18] We do *not* contend that a *Bivens* remedy is *never* available in the immigration context. Claims of "excessive force" or "unconstitutional conditions of confinement," for example, are traditionally actionable under *Bivens* because neither the INA nor habeas provides any process to consider those types of claims. But Lyttle's specific Fourth Amendment claim in this case hinges on the fact of his detention, for which the INA and habeas do provide a remedial process.

And as the non-conclusory allegations – including the facts incorporated by reference – show, the ICE defendants had an objectively reasonable basis to charge Lyttle. D-E 52 at 22-23.

The Magistrate Judge, however, improperly accepts the conclusory allegations riddled throughout the complaint while at the same time ignoring the numerous, specific facts incorporated by reference. For example, he accepts the allegation that Lyttle was "unlawfully and unconstitutionally" detained, noting that to otherwise reject it as a "conclusory" statement would be "perplexing." M&R at 27 (citing DE- 52). What we respectfully submit, however, is that this allegation is precisely the type of "legal conclusion" or "[t]hreadbare recital[] of the elements" that the Supreme Court has discredited. *Iqbal*, 129 S. Ct. at 1949; *see also id.* at 1951 (rejecting the "bald" allegation that FBI Director Mueller "knew of, condoned, and willfully and maliciously agreed" to torture respondent). The M&R also credits the allegation that Lyttle was detained "based on a statement that Plaintiff 'was coerced and manipulated . . . into signing.'" M&R at 28. But such labels and conclusions are simply not afforded the assumption of truth. *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 pleading standard) (emphasis added); D-E 52 at 20.

After stripping away all of the legal conclusions, the remaining allegations and incorporated facts instead show that Lyttle freely and competently attested (on multiple occasions) to his foreign birth, Mexican citizenship, and illegal entry. But the Magistrate Judge did not address any of these facts. First, there is not a single word analyzing the specific allegations that North Carolina officials referred Lyttle to ICE after indicating on his criminal intake form that he was an "alien" from "Mexico." FAC ¶¶ 30-37. This omission is critical,

because the ICE defendants reasonably relied on such booking information, which by itself may have established probable cause. *See* D-E 52 at 16; *see also* D-E 63 at 5 (collecting cases).[19]

The M&R then ignores the non-conclusory facts demonstrating that Lyttle provided a sworn statement corroborating his alienage – which the ICE defendants had every reason to believe he gave freely and competently. Like the booking statement, this additional sworn statement, by itself, may have established probable cause to place Lyttle in removal proceedings. *See* D-E 52 at 17 (collecting authorities). Because the Magistrate Judge, however, accepts the bare legal conclusion that Lyttle was "coerced and manipulated" into signing the document, he fails to see that there are absolutely no factual allegations that any ICE defendant physically harmed, pressured, or threatened Lyttle to affirm the statement. D-E 52 at 18 (comparing to *Colorado v. Connelly*, 479 U.S. 157, 164 n.1 (1986) (describing coercive tactics)). At most, Lyttle suggests that the ICE Defendants should have discredited his confession simply because he allegedly suffers from bipolar disorder. *See, e.g.*, FAC ¶ 40. But such allegations are irrelevant, unless only a "plainly incompetent" officer could have believed that Lyttle could not understand basic biographical questions. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). And Lyttle has not pled any facts to show that this was the case. Indeed, the non-conclusory allegations and incorporated facts merely show the ICE defendants' knowledge of his bipolar diagnosis – nothing more. *See* D-E 52 at 19. However, Lyttle's bipolar diagnosis, by itself, would say nothing of his inability to comprehend the simple questions he was asked. *See id.* (collecting authorities).

[19] Even if the North Carolina employees actually falsified Lyttle's booking information, it is not alleged that the ICE defendants knew of this purported fabrication at the time he was referred to them. The ICE defendants were therefore entitled to rely on that booking information to establish Lyttle's alienage. *See, e.g., Puc-Ruiz v. Holder*, 629 F.3d 771, 781 (8th Cir. 2010).

To the contrary, the incorporated facts demonstrate that Lyttle was competent, or at the very least, reasonably presumed to be competent, by the ICE defendants. Given Lyttle's ability to stand trial and be sentenced, it was reasonable for the ICE Defendants to assume that Plaintiff could understand basic questions regarding his name, place of birth, and country of citizenship. *See* D-E 52 at 20-22 (collecting authorities). In fact, the judge who sentenced Lyttle on assault charges, just three weeks before he signed the sworn statement, chose *not* to recommend "psychiatric and/or psychological counseling." *Id.* at 21; Exh. A. Accordingly, the incorporated facts show that it was objectively reasonable not to question Lyttle's competence.[20] But the M&R is silent on the matter, glossing over all of the incorporated facts by simply relying on plaintiff's factually-unsupported conclusion that he was "coerced and manipulated."

The same is true of Lyttle's third admission of alienage – the Notice of Intent he signed consenting to removal without a hearing. Looking solely to the conclusory allegation that he was "coerced and manipulated . . . into signing" the Notice, M&R at 28; FAC ¶ 54, the M&R again fails to identify any specific factual allegations in the complaint showing that Lyttle was in any way harmed, threatened, or pressured at the time he agreed to be deported. In any event, those factual allegations do not exist. *See* D-E 52 at 20-22, 28. Thus, by ignoring crucial facts in favor of conclusory allegations, the Magistrate Judge fails to consider the three bases that reasonably supported the decision to initiate removal proceedings against Lyttle.

Moreover, even if the ICE defendants came across electronic records containing indications of Plaintiff's U.S. citizenship, *see* FAC ¶¶ 57, 60, those documents alone – which conflicted with Lyttle's repeated admissions of alienage – would not put an end to the Fourth

[20] Even if the ICE defendants (who are not alleged to be mental health providers) misjudged Lyttle's mental capacity, mere negligence would not rise to a constitutional tort. *See* D-E 52 at 25 (collecting cases); D-E 63 at 7 n. 8. The M&R is silent on this issue as well.

Amendment debate, as the Magistrate Judge suggests, *see* M&R at 27-28. Rather, probable cause turns on the "totality of the circumstances," *Maryland v. Pringle*, 540 U.S. 366, 371 (2003), and courts must therefore parse *all* of the "facts and circumstances within the officer's knowledge," *Burrell*, 395 F.3d at 514; D-E 52 at 15 n.8. The critical question, then, is whether it was objectively reasonable to commence removal proceedings against Plaintiff based on:

(1) Lyttle's booking sheet indicating that he was a Mexican alien; and,
(2) Lyttle's signed, sworn statement admitting to foreign birth, foreign citizenship, and illegal entry; and,
(3) Lyttle's signed consent to expedited removal; even though,
(4) electronic records contained references to Lyttle's U.S. citizenship.

As demonstrated, though, the Magistrate Judge did not analyze the first component at all, and he disregarded the second and third sets of facts by crediting conclusory allegations to the exclusion of all the incorporated facts, including those relating to his competency. While records contradicting Lyttle's own admissions of alienage are a single factor in the probable cause calculus, they do not provide an answer alone. Because recurring claims of foreign citizenship (let alone one confession) are highly presumptive of alienage, *see* D-E 52 at 16-17 (collecting cases), the ICE defendants had more than a reasonable basis to *charge* Lyttle, notwithstanding the conflicting records. Thus, the initiation of proceedings against Lyttle was "more likely explained" by the ICE defendants relying on Plaintiff's admissions of alienage than by their blatant disregard for the truth. *Iqbal*, 129 S. Ct. 1950; D-E 52 at 22. In sum, Lyttle has failed to state the *plausible* violation of a clearly established Fourth Amendment right.

Even assuming that the totality of the allegations and incorporated facts do not amount in actuality to probable cause, the ICE defendants are nevertheless entitled to qualified immunity because they had, at least, an arguable basis for believing probable cause existed. *See* D-E 63 at

15. Despite announcing the correct qualified immunity standard,[21] the M&R gets off track again by applying the wrong Fourth Amendment standard. *See* M&R at 29 (holding that there was "no legal basis" to detain Lyttle "[b]ecause Plaintiff is a[] United States Citizen"). The legality of Lyttle's detention turns not on the fact that he was a U.S. citizen, but on whether the ICE defendants had arguable probable cause to believe that he was not. *See, e.g.*, *Burrell*, 395 F.3d at 514. Although the Magistrate Judge ultimately acknowledges this standard, M&R at 29 (citing *Brooks v. city of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996), he then focuses on just one set of allegations in denying them immunity: records containing "evidence of his citizenship," *id.*

But qualified immunity is a *precise* inquiry. *al-Kidd*, 131 S. Ct at 2084. ("The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."). And the particular question here is this: whether it is *arguably* reasonable for a federal official to detain in removal proceedings a presumably competent individual who, after being referred to ICE as an "alien" based on booking information, claims that he is a foreign national, signs a sworn statement attesting to these facts, and signs a separate form consenting to removal – even though records may conflict with these repeated admissions. By narrowly focusing on the existence of the electronic records alone, however, the Magistrate Judge ignores the other key facts incorporated by reference that establish arguable probable cause. While at a "'general level'" there is a "'right not to be deprived of liberty or property based on the deliberate use of evidence fabricated . . . or known to be false,'" M&R at 29 (quoting *White v. Wright*, 150

[21] An action violates clearly established law only when "at the time of the challenged conduct, 'the contours of a right are sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right.'" M&R at 28 (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (emphasis added)).

F. App'x 193, 198 (4th Cir. 2005)), the Magistrate Judge cites no cases that define the right at anything near the *specific* level presented here: the right not to be placed in removal proceedings when records that may indicate citizenship conflict with a suspected alien's own repeated admissions and sworn affirmations of alienage. To our knowledge, no such cases exist.

The M&R notes that "[i]t is undisputed that the ICE Defendants were *mistaken* in their belief that Plaintiff was an alien." M&R at 27 (emphasis added). But "[e]ven law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)); D-E 52 at 16. Although multiple admissions may not have *proved* alienage in light of conflicting records, the ICE defendants were not required to prove Lyttle's removability when merely *charging* him.[22] Because the Supreme Court has recognized that "an admission of illegal alienage or other strong evidence" may justify an arrest, *INS v. Lopez-Mondoza*, 468 U.S.1032, 1045 (1984); *see also* D-E 52 at 17 (collecting authorities), the ICE defendants were not "'plainly incompetent'" or "'knowingly violat[ing] the law'" when they charged him, *al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley*, 475 U.S. at 341). Thus, the ICE defendants are entitled to qualified immunity, and Count 3 should be dismissed.

CONCLUSION

For the reasons stated above, the federal defendants respectfully request that the Court reject those portions of the M&R that recommend denying their motions to dismiss, and that the Court grant those motions in full.

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[22] *See, e.g., 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"); D-E 52 at 23 n.13.

Respectfully submitted this 1st day of December 2011,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on December 1, 2011, I electronically filed the foregoing "Federal Defendants' Objections to the Magistrate Judge's Memorandum and Recommendation" using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

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