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,	**ICE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MEMORANDUM AND RECOMMENDATION OF MAGISTRATE JUDGE**
v.	
UNITED STATES OF AMERICA, et al.,	**Fed. R. Civ. P. 72**
Defendants.	**Local Rule 72.4**

ICE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTION TO MEMORANDUM AND RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, Federal Rule of Civil Procedure 72, and Local Civil Rule 72.4, Dashanta Faucette, Dean Caputo, and Robert Kendall (collectively the "ICE defendants") respectfully submit this response to "Plaintiff's Objection to Memorandum and Recommendation of Magistrate Judge" ("Pl.'s Obj."). D-E 79. In his objection, Plaintiff, Mark Daniel Lyttle, requests that this Court reject the portion of U.S. Magistrate Judge Webb's Memorandum and Recommendation ("M&R"), D-E 75, addressing the Fifth Amendment due process and equal protection claims against the ICE defendants (Counts 1-2).[1] But as the Magistrate Judge correctly stated, such implied causes of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), are not cognizable because of the special factors presented in this case. In suggesting otherwise, Plaintiff fails to appreciate the particular

[1] On December 1, 2011, the ICE defendants and the United States filed consolidated objections on behalf of all the federal defendants in this case, objecting to those portions of the M&R that recommend denying their motions to dismiss. D-E 78. For many of the same reasons discussed below, the ICE defendants specifically contested the Magistrate Judge's recommendation to allow Lyttle's Fourth Amendment claim against them (Count 3) to proceed.

context at issue, overlooks the alternative remedial process that was available to him, and repeatedly addresses the wrong legal questions. In the end, Lyttle unwittingly verifies that his "due process" claim is nothing more than a duplicative Fourth Amendment claim cloaked in a Fifth Amendment label, warranting the dismissal of Count 1 for that reason alone.

DISCUSSION

I. Plaintiff Fails To Appreciate The Legally Relevant Context At Issue In This Case

As the M&R discusses at length, the Supreme Court's reluctance to expand *Bivens* to new contexts is beyond debate. *See* M&R at 23-24 (discussing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001)); *see also id.* at 19 (collecting cases).[2] Plaintiff even concedes this point, acknowledging that the Supreme Court has cautioned against extending *Bivens* to any "'new context or new category of defendants.'" Pl.'s Obj. at 5 (quoting *Malesko*, 534 U.S. at 68). At the heart of Lyttle's objection to the M&R, though, is his unfounded belief that the Magistrate Judge "incorrectly characterized" the constitutional claims in this case "as requiring an extension of *Bivens* liability to a new context." *Id.* Indeed, Lyttle asserts that his due process claim does not arise in any new context because such claims are "generally cognizable under *Bivens*." *See* Pl.'s Obj. at 6 (citing no authority). But by concentrating on the general constitutional provision at issue (e.g., the Fifth Amendment's due process clause) instead of the unique factual circumstances underlying that claim, Lyttle ignores the legally relevant context in this case: his placement in immigration-removal proceedings. *See Wilson v. Libby*, 498 F. Supp. 2d 74, 86 (D.D.C. 2007), *aff'd*, 535 F.3d 697 (D.C. Cir. 2008) (dismissing First and Fifth

[2] *See, e.g., Aschcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("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.") (internal quotations omitted); *accord Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 409 (4th Cir. 2004) ("In the more than thirty years since *Bivens*, the Court has been very hesitant to imply other private actions for money damages.").

Amendment *Bivens* claims on special factors grounds, noting that *Bivens* actions are "context-specific" and "not recognized Amendment by Amendment in a wholesale fashion").[3]

As the ICE defendants explained in their own objections, *see* D-E 78 at 19, "deportation proceedings constitute the relevant 'environment of fact and law' in which to 'decide whether to recognize a *Bivens* remedy.'" *Mirmehdi v. United States*, – F.3d – , No. 09-55846, 2011 WL 5222884, at *3 (9th Cir. Nov. 3, 2011) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 572) (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010)). And it is undeniable that a wrongful detention in the specific "context" of removal proceedings is "unique from other situations where an unlawful detention may arise." *Id.* Because Lyttle's constitutional claims arise in the removal context, this Court should not extend *Bivens* beyond its limited reach: "With *Mirmehdi*, wrongful immigration custody pending removal join[ed] the list of rejected *Bivens* extensions." *D'Alessandro v. Chertoff*, No. 10-cv-927A, 2011 WL 6148756, at *4-5 (W.D.N.Y. Dec. 12, 2011) (dismissing Fourth, Fifth, and Eighth Amendment *Bivens* claims challenging nearly seventeen months of allegedly wrongful detention in removal proceedings).

But Lyttle fails to identify and address this relevant context, instead focusing on the mere constitutional provision underpinning his claim. The fact that Plaintiff misses the mark is all the more surprising given his recitation of Supreme Court cases precluding *Bivens* liability because of unique factual circumstances. *See* Pl.'s Obj. at 5-6. For example, Lyttle underscored the Court's refusal to extend *Bivens* to two distinct areas – the "federal employment" and "social welfare" contexts. Pl.'s Obj. at 6. (citing *Bush v. Lucas*, 462 U.S. 367 (1983); *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (internal quotations omitted)). Indeed, the Supreme Court in *Chilicky* expressly rejected the extension of a *Bivens* remedy via a *due process* claim because of

[3] To be clear, 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) (emphasis added).

the particular circumstances presented in that case. *Chilicky*, 487 U.S. at 424-29. Although Lyttle must surely recognize (in light of the case law that *he* cites) that the special factors analysis is a context-specific inquiry, his analysis here relies on the unsupported assertion that due process claims are "generally" permissible under *Bivens*. Pl.'s Obj. at 6. Put simply, "it is not enough for [Lyttle] to point to cases recognizing *Bivens* actions under the . . . Fifth Amendment[] generally." *Wilson*, 498 F. Supp. 2d at 86. Because Lyttle's placement in removal proceedings underlies all of his constitutional claims (Counts 1-3), the Court should not extend *Bivens* liability into this new context.

II. Plaintiff Overlooks The Alternative Remedial Process Available To Remedy Wrongful Detention In Removal Proceedings

Apart from overlooking the legally relevant context at issue, Plaintiff erroneously concludes that the "lack of an alternative remedy" is an additional "justification for allowing *Bivens* liability in this case." Pl.'s Obj. at 6. This is wrong as a matter of both law and fact. Under the Supreme Court's most recent formulation of the special factors doctrine, the inquiry is not whether there exists a specific, "alternative remedy," *id.*, but whether there is an "alternative, existing *process*" for vindicating the constitutional interests at stake, *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (emphasis added); *see also Bush*, 462 U.S. at 388 ("The question is *not* what *remedy* the court should provide for a wrong that would otherwise go unredressed.") (emphasis added); *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."); D-E 52 at 6-7.[4] By focusing on specific remedies, Lyttle addresses the wrong question.

[4] *See also Libby*, 535 F.3d at 709 (explaining that it is a "significant flaw" when determining whether to create a *Bivens* remedy to "focus on the necessity of a remedy *at all*")

As we emphasized in previous briefing, D-E 52 at § I.A; D-E 78 at 20, the comprehensive and exclusive remedial *scheme* applicable here is the Immigration and Nationality Act (the "INA"). *See* 8 U.S.C. §§ 1252 (a)(2)(D), 1252(b)(9), 1252(g) (establishing appellate review of claims arising from removal proceedings). The Ninth Circuit recently confirmed that the INA includes such procedures, expressly 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 fact, the plaintiffs in *Mirmehdi* brought claims challenging their placement in removal proceedings based on falsified evidence (not unlike 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." *Id.* at *4; *see also D'Alessandro*, 2011 WL 6148756, at *4. That same remedial process was available to Lyttle.

Even if we ignore the Supreme Court's instructions and focus on the existence of specific remedies (as Plaintiff prefers), Lyttle's assertion that "[t]he INA provides no remedy for individuals found to have been unlawfully deported" is nevertheless misleading. Pl.'s Obj. at 6. Had Lyttle actually invoked the administrative procedures available under the INA, and presented his constitutional challenges concerning his placement in removal proceedings to the immigration judge, the Board of Immigration Appeals, and the court of appeals, he could have received a remedy far more significant than the one he claims is now unavailable: his release from custody *before* being deported to Mexico.[5] D-E 63 at 3. As the Supreme Court has

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(emphasis added); *W. Radio Servs. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009), *cert. denied.*, 130 S. Ct. 2402 (2010).

[5] Plaintiff again addresses the wrong question when asserting that the potential remedies, if any, under the Fourth Amendment and the Federal Tort Claims Act would be inadequate to compensate him for due process violations. *See* Pl.'s Obj. at 6-7.

recognized, 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 damages. *See United States v. Stanley*, 483 U.S. 669, 683 (1987); *Nixon v. Fitzgerald*, 457 U.S. 731, 754 n.37 (1982) (observing "there is a lesser public interest in actions for civil damages than . . . in criminal prosecutions," and stating "it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong"). Although it did not create a supplemental damages remedy, "Congress's failure to include monetary relief [in the INA] can hardly be said to be inadvertent." *Mirmehdi*, 2011 WL 5222884, at *4; D-E 63 at 3 n.4; *see also D'Alessandro*, 2011 WL 6148756, at *4 ("[T]his Court will not craft an additional remedy of money damages that is contemplated nowhere in the immigration statutes and regulations.").[6]

III. Plaintiff's Claims Undercut Congress's Plenary Power To Regulate Immigration

Plaintiff appreciates neither the particular context at issue nor the remedial process established by Congress. And he fails to cite any Supreme Court or Fourth Circuit cases extending *Bivens* liability to claims that challenge the decision to commence removal proceedings. On the contrary, 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 78 at 20 (citing D-E 52 at 10-11 (collecting cases)). For that reason, the Magistrate Judge correctly 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

[6] Even though the plaintiff in *D'Alessandro* successfully invoked habeas and was not deported, that distinction is inconsequential because the same remedial procedures were *available* to Lyttle at the time he was detained. *See* 8 U.S.C. § 1252; *see also Hernandez v. Gonzalez*, 424 F.3d 42, 42-43 (1st Cir. 2005) (explaining that individuals may challenge the fact of their detention in removal proceedings via habeas). That Lyttle neither sought habeas relief nor appealed the order of removal does not entitle him to a backwards-looking damages remedy.

(quoting *Appiah v. INS*, 202 F.3d 704, 710 (4th Cir. 2010)). In short, the Fourth Circuit has recognized that "'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)).

Although conceding that Congress's power in the field is plenary, Lyttle objects that as a "U.S. citizen who asserts *Bivens* claims against federal agents who [deliberately] violated his constitutional rights," his constitutional claims "in no way implicate[] Congress'[s] plenary power to make laws regulating immigration." Pl.'s Obj. at 9-10. But for the reasons explained above, his *Bivens* claims do exactly that – i.e., they circumvent federal law aimed to streamline claims arising from removal proceedings into a single petition for review. *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 486 (1999) ("*AADC*") (describing amendments to the INA "protecting the Executive's discretion from the courts" to be "the theme of the legislation"). Indeed, Lyttle's due process and equal protection claims, which challenge the decision to commence removal proceedings on the basis of allegedly coerced statements and his perceived race/ethnicity, are *precisely* the types of claims that Congress excluded from district court review.[7] *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); *see also AADC*, 525 U.S. at 487 (vacating lower court decision because court lacked jurisdiction under § 1252(g) to consider constitutional claim that the government *selectively targeted* the plaintiffs for deportation because of their political affiliation). Even the

[7] As the Magistrate Judge correctly recognized, Plaintiff's due process claim is actually a duplication of his Fourth Amendment claim that he was detained without probable cause. We discuss that issue separately below. *See infra* § IV.

Supreme Court has recognized that the traditional concerns associated with prosecutorial discretion are "greatly magnified in the deportation context." *AADC*, 525 U.S. at 490; *accord Mirmehdi*, 2011 WL 5222884, at *4; D-E 78 at 22. In light of the INA, "Congress could hardly have been more clear and unequivocal" that district courts may not review claims arising from 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).[8]

As we also discussed in the Federal Defendants' objections, *see* D-E 78 at 22-23, courts have declined to review *Bivens* claims in cases virtually identical to Lyttle's. See D-E 63 at 2-3. The Fifth Circuit, for example, held that it could not review plaintiff's Fifth Amendment due process and equal protection claims brought under *Bivens* because the alleged conspiracy to deport the plaintiff arose from the discretionary actions described in § 1252(g). *Foster v. Townsley*, 243 F.3d 210, 214-15 (2001). Likewise, the Ninth Circuit held that § 1252(g) barred a false arrest *Bivens* claim because the detention arose from the "decision to commence expedited removal proceedings." *Sissoko v. Rocha*, 509 F.3d 947, 950 (9th Cir. 2007). And in *Khorrami v. Rolince*, 493 F. Supp. 2d 1061 (N.D. Ill. 2007), the court dismissed a *Bivens* claim because the plaintiff's detention was "a direct outgrowth of the decision to commence proceedings." *Id.* at 1068; *see also Guardado v. United States*, 744 F. Supp. 2d. 482, 488-89 (E.D. Va. 2010) (finding that claims arising from commencing removal proceedings are precluded by 1252(g)).

[8] In addition, the special factors inquiry does not turn on whether immigration officials would "have *de facto* absolute immunity to violate the Fifth Amendment" in the absence of a *Bivens* remedy, as Lyttle erroneously suggests. D-E 79 at 7; *see also id.* at 10 (predicting that ICE would discriminate "with impunity" absent a damages remedy). The Supreme Court has rejected Lyttle's argument in no uncertain terms: "the availability of a damages action under the Constitution for particular *injuries* . . . is a question logically distinct from immunity to such an action on the part of particular *defendants*." *Stanley*, 483 U.S. at 684. To be sure, "*Bivens* itself explicitly distinguished the question of immunity from the question whether the Constitution directly provides the basis for a damages action against individual officers." *Id.* (citing *Bivens*, 403 U.S. at 397).

In this case, Lyttle's Fifth Amendment claims – alleging that he was unconstitutionally charged on the basis of coerced admissions and his perceived race/ethnicity – "bear[] more than a cursory relationship to the decision to commence proceedings. *Khorammi*, 493 F. Supp. 2d at 1068. Such allegations are "connected directly and immediately" to the decision to charge Lyttle. *Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 943 (5th Cir. 1999) (dismissing First Amendment *Bivens* claim pursuant to § 1252(g)). In short, placing him in removal proceedings "provide[s] the most direct, immediate, and recognizable cause of [Plaintiff's] injury." *Id.* at 945. This Court should dismiss Lyttle's *Bivens* claims, putting an end to his "thinly veiled attempt to evade the dictates of § 1252."[9] *Mapoy*, 185 F.3d at 230.

IV. Plaintiff Inadvertently Demonstrates That His Due Process Claim Duplicates His Fourth Amendment Claim

As a final matter, the Magistrate Judge did not err in finding that Lyttle's due process claim is just a carbon copy of his Fourth Amendment claim. *See* M&R at 25. Ironically, Lyttle's own words provide the clearest support for this view:

> "The crux of Plaintiff's claim is that, by deliberately ignoring the overwhelming evidence of his U.S. citizenship and nonetheless commencing and prosecuting removal proceedings against him, the ICE Defendants 'deported *or caused* Mr. Lyttle to be deported without reasonable basis or lawful authority.'"

[9] To the extent Plaintiff contends that the INA is inapplicable to U.S. citizens, *see, e.g.*, Pl.'s Obj. at 9 (noting that Lyttle is an "American-born U.S. citizen"), we have explained in our own objections why that distinction is meaningless. D-E 78 at 23-24. To recap, 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, but the procedures at issue are without question available to anyone subject to removal proceedings, regardless of 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); *Demore v. Kim*, 538 U.S. 510, 523 (2003) ("[D]eportation proceedings would be vain if those accused could not be held in custody pending the inquiry into their true character.") (internal quotations and citations omitted). Because aliens and citizens alike may invoke the INA's remedial procedures, the fact that Lyttle was classified as a suspected alien does not alter the special factors analysis.

Pl.'s Obj. at 7-8 (quoting FAC ¶ 129) (emphasis in original). In a nutshell, Lyttle is claiming here that the ICE defendants violated his "due process" rights by charging and placing him in removal proceedings without probable cause. But that is the same as his Fourth Amendment claim. *See* FAC ¶¶ 141-42 (alleging that the ICE defendants violated his "constitutional right to be free from unreasonable seizures" by unlawfully detaining him in removal proceedings absent probable cause); *see also* D-E 52 at 29-30. And as the ICE defendants emphasized in their motion to dismiss, D-E 52 at 14-15, the claim that Plaintiff was prosecuted without a "reasonable basis" (i.e., probable cause) is not cognizable under the Fifth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 271-75 (1994) (rejecting due process claim alleging malicious prosecution because such a claim is cognizable, if it all, only under the Fourth Amendment); *accord Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000) (explaining that a "malicious prosecution claim . . . is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort"); *see also Wallace v. Kato*, 549 U.S. 384, 390 (2007) (explaining that a constitutional malicious prosecution claim under the Fourth Amendment seeks to remedy the "*wrongful institution* of legal process").

Lyttle also asserts that the "the separate act of deportation violated his constitutional right to liberty without due process." Pl.'s Obj. at 9. But as we explained in prior briefing, the ICE defendants in this case did *not* deport Lyttle or make the decision to deport him. D-E 52 at 27. Again, Lyttle concedes elsewhere in his objection that the "crux" of his due process claim is that the ICE defendants "commenc[ed]" removal proceedings absent probable cause. Pl.'s Obj. at 7. The direct result of charging Lyttle was his mandatory detention in removal proceedings, subject to the eventual decision of removability by a trier-of-fact (in this case, an immigration judge in

Atlanta). As the M&R aptly summarized, "the ICE defendants did not make the determination that Plaintiff now asserts was not guarded by due process."[10] M&R at 25.

CONCLUSION

For the foregoing reasons, the ICE defendants respectfully request that the Court accept the portion of the M&R addressing the Fifth Amendment *Bivens* claims and dismiss Counts 1-2.

Respectfully submitted this 19th day of December 2011,

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[10] Because the ICE defendants did not make the decision to deport Lyttle, his assertion that a due process claim in this case would provide an important "deterrent effect" is likewise baseless. Pl.'s Obj. at 8.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on December 19, 2011, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

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