UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EMMANUEL ANDRO, Plaintiff, v. TOWN OF BROOKLINE, *et al.* Defendants.	)	Civil Action No.: 15-13030-NMG

MEMORANDUM IN SUPPORT OF DEFENDANTS GALLAGHER, THURLOW, CHAMBERS, MILLEY, GILBERT, SAPIA, MCNEICE, I.C.E. DOES 21-30, AND THE UNITED STATES' MOTION TO DISMISS

I. INTRODUCTION

On March 18, 2014, Plaintiff was detained by ICE agents pursuant to an immigration detainer issued based on an outstanding final order of removal from 2010. Plaintiff subsequently brought an action against a host of defendants, including the Town of Brookline and a number of its police and housing officials, as well as Norfolk County and employees of its District Attorney's office. Moreover, Plaintiff sued a number of U.S. Immigration and Customs Enforcement ("ICE") agents and officials ("ICE Defendants") under *Bivens*[1] for various purported constitutional violations arising from his detention (Counts I-III). He also sued the United States for negligence and false arrest/imprisonment under the Federal Torts Claims Acts ("FTCA") (Counts IX-X). All three *Bivens* claims should be dismissed under Rule 12(b)(6) because Plaintiff's Complaint merely lists conclusory allegations reciting the elements of his

[1] *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), provides for a cause of action against individuals claimed to have committed a constitutional violation while in the scope of their federal employment.

causes of action without providing sufficient factual support. Moreover, even if Plaintiff met the pleading requirements under Rule 8(a), each of the *Bivens* claims should be dismissed because they fail to state a claim as a matter of law. Alternatively, the ICE Defendants are entitled to a dismissal on the basis of qualified immunity because they did not violate any clearly established constitutional rights of the Plaintiff.

Additionally, because Plaintiff did not serve an administrative claim under the FTCA before filing his Complaint, this Court does not have subject matter jurisdiction over his FTCA claims and should dismiss Counts IX and X against the United States under Rule 12(b)(1).

II. STATEMENT OF FACTS

Plaintiff Emmanuel Andro is an alien who asserts he is a national of both France and Spain. *See* Complaint, Docket Entry No. 1, ¶ 48. On May 31, 2005, Plaintiff was admitted to the United States in Buffalo, New York as a J-1 immigrant exchange visitor to participate in a program sponsored by the YMCA of Greater New York. The next April, he was involuntarily suspended from the program for failing to maintain his nonimmigrant status.[2] *See* Declaration of George Sullivan ("Sullivan Decl."), *Exhibit A*, ¶ 5.

After he was issued a Notice to Appear charging him with removability pursuant to section 237(a)(1)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(C)(i), for

[2] The ICE Defendants attach the Declaration of George Sullivan, to give further context to Plaintiff's immigration status since it was raised in the Complaint. Nonetheless, the attachment of the declaration should not convert this Motion to Dismiss into one for summary judgment. *See Freeman v. Town of Hudson*, 714 F.3d 29, 36 (1st Cir. 2013) (a court may consider certain documents to evaluate a motion to dismiss, including documents sufficiently referenced in the complaint or central to plaintiff's claims, matters of public record, and facts susceptible to judicial notation). Otherwise, in its discretion, the court may convert the motion to dismiss as one seeking summary judgment. *See* Fed. R. Civ. P. 12(d).

failing to comply with the conditions of nonimmigrant status, an immigration judge ordered him removed on July 1, 2010. *Id.*, ¶ 6.

On March 14, 2014, after a domestic violence incident, Plaintiff's former partner was arrested and charged with assault and battery. *See* Complaint, Docket Entry No. 1, ¶ 50. Three days later, the Brookline police arrested Plaintiff after his former partner filed a restraining order against him. *Id.*, ¶ 52. While in custody, the Brookline Police Department ran an Immigration Alien Query on Plaintiff and then contacted ICE's Law Enforcement Support Center. *See* Sullivan Decl., *Exhibit A* ¶ 7. In light of ICE's determination that Plaintiff was subject to a final order of removal from the United States, ICE then issued an immigration detainer requesting that the Brookline Police Department hold Plaintiff for transfer to ICE custody. *See* Complaint, Docket Entry No. 1, ¶ 56. ICE took Plaintiff into custody after his arraignment and later that day transported him to Burlington, Massachusetts and then to the South Bay House of Correction. *See*. ¶ 73-76. While being transported, Plaintiff alleges that he was not secured by a seatbelt, the van was operated recklessly and dangerously causing him to slide and hit fixtures and other passengers, and he suffered physical injuries and feared for his life. *Id.*, ¶ 74.[3]

Plaintiff was released from ICE custody on April 4, and he filed a Form I-246 Application for a Stay of Deportation or Removal which was approved for a period of three months on July 28, 2014 with an expiration of October 13, 2014. *See* Sullivan Decl., *Exhibit A*, ¶ 10. On December 22, 2014, Plaintiff filed another I-246 application with a fee waiver request, which was denied by ICE because of his ineligibility on February 20, 2015. *Id*.

[3] In his recitation of the facts, Plaintiff states that he was denied access to the law library while at the South Bay House of Correction. Complaint, Docket Entry No. 1, ¶ 78. Because Plaintiff does not tie this claim to any of his causes of actions, ICE Defendants will not address it in this pleading.

On July 27, 2015, Plaintiff filed a forty-six (46) page complaint alleging numerous claims against a host of defendants. Named Defendants include the Town of Brookline and twelve of its employees, Norfolk County and four of its employees, one employee of Suffolk County, the United States, and seven ICE agents ("ICE Defendants").

Plaintiff alleges three distinct constitutional violations by the ICE Defendants under *Bivens*. In Count I, Plaintiff alleges that ICE Defendant McNeice violated the Fourth Amendment by issuing an immigration detainer against him without probable cause. Complaint, Docket Entry No. 1, ¶¶ 122-30. In Count II, Plaintiff alleges that ICE Defendants Chambers, Milley, and Sapia violated the Fifth Amendment by not allowing him to call counsel pursuant to Mass. Gen. Laws Ch. 276 § 33A, denying him the ability to attend a court hearing scheduled for March 27, 2014 while he was in custody, and refusing to permit him to file a Form I-246. *Id.*, ¶¶ 131–34. In Count III, Plaintiff alleges that ICE Defendant McNeice violated the Fifth Amendment by issuing an immigration detainer against Plaintiff "solely on the basis of his ethnicity, national origin, and/or foreign-sounding name" and that ICE Defendants Milley, Gilbert, and Sapia also discriminated against him on the basis of national origin when they prevented him from filing a Form I-246. *Id.*, ¶¶ 135-40. Plaintiff also alleges that ICE Defendants Gallagher and Thurlow are liable for all three counts as well because they "knew or should have known" that their subordinates were committing constitutional violations and they "formulated, implemented, encouraged, or willfully ignored" policies and customs that led to the violations. *Id.*, ¶¶ 97-101.

Additionally, Plaintiff asserts causes of action against the United States under the Federal Tort Claims Act (FTCA). *Id.*, ¶¶ 177-86. Specifically, he alleges in Count IX that the ICE Defendants falsely arrested and imprisoned him by issuing an immigration detainer without

justification and that they created and enforced policies that permitted individuals to be falsely arrested and imprisoned. *Id.*, ¶¶ 178-82. In Count X, Plaintiff appears to allege that the ICE Defendants breached their duties to ensure that individuals in their custody are not subject to personal injury or constitutional violations. *Id.*, ¶¶ 183-86.

III. ARGUMENT

A. Plaintiff's Complaint Should Be Dismissed For His Failure To Serve Properly Under Fed. R. Civ. P. 4.

1. Rule 4 Service

Rule 4(i) of the Federal Rules of Civil Procedure sets forth the requirements of service of process upon the United States, its agencies, and officers. The rule prescribes that service be effected upon the United States, its agencies, and officers, by delivering copies of the summons and complaint to the United States Attorney by hand delivery or by registered or certified mail, by sending copies of the summons and complaint to the Attorney General of the United States by registered or certified mail, and by sending copies to the officer or agency by registered or certified mail. Fed. R. Civ. P. 4(i)(1).

Moreover, as here, if an individual employee of the federal government is being sued in his/her personal capacity, service must be accomplished upon that individual and upon the United States Attorney□s Office, the Attorney General of the United States, and the agency. See Rule 4(i)(2). In this regard, under Fed. R. Civ. P. 4 (i)(3), to serve an employee of the United States who is being sued in their individual capacity, a party must serve the officer or employee under Rule 4(e)(2) which requires one of the following:

(a) delivering a copy of the summons and the complaint to the individual personally;

(b) leaving a copy of each at the individual□s dwelling or place of

abode; or

(c) delivering a copy of each to an agent authorized by appointment or by law to receive service.[4]

See U.S. v. Tobins, 483 F. Supp. 2d 68, 75 (D. Mass. 2007). Rule 12(b)(5) of the Federal Rules of Civil Procedure sets forth "insufficiency of service of process" as grounds for dismissal of a complaint.

This Court acquires personal jurisdiction over a defendant only if the defendant is properly served. *Omni v. Capital International v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 103 (1987) ("[T]hough personal jurisdiction and service of process are distinguishable, they are inextricably intertwined, since service of process constitutes the vehicle by which the court obtains jurisdiction"); *De La Cruz Arroyo v. Commissioner of Social Security*, 215 F.3d 1311 (1st Cir. 1998) (dismissal of case upheld when plaintiff failed to serve process seven months after complaint filed.); *Media Duplication Services, Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1232-34 (1st Cir. 1991) (jurisdiction not established where no return of service).[5]

[4] Rule 4(e)(1) also provides that one can effectuate personal service on an individual if he follows state law governing individual service.

[5] It is Plaintiff's burden to establish that proper serviced has been effectuated. *United States v. Ayer*, 857 F.2d 881, 884-85 (1st Cir. 1988).

Here, the Plaintiff did not provide effective service as prescribed in Rule 4. Indeed, the Plaintiffs failed to serve properly the Attorney General of the United States, nor has any waiver sought or been obtained to serve the United States in any other manner than provided under Rule 4. Accordingly, this Court should dismiss the instant action. *See Rivera v. Garcia*, 192 F.R.D. 57, 58 (D. P.R. 2000); *Cataldo v. U.S. Dept. of Justice*, 2000 WL 760960 *10 (D. Me. 2000) (to sue federal employee in individual capacity, Plaintiff must serve them directly not by mailing complaint to them at place of employment).

Additionally, Rule 4(m) of the Federal Rules of Civil Procedure provides that an action shall be dismissed if service is not made upon a defendant within 90 days after the filing of the complaint, □provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.□

Clearly, even with this Court's granting an extension of time, proper service has not been accomplished by Plaintiffs within 90 days of filing of the Complaint. In fact, it has been over on year since the Complaint was filed and no good cause has been shown on why service has not been made even on the Attorney General of the United States. *See*, *e.g.*, *Petrucelli v. Bohringer*, 46 F.3d 1298, 1307 (3rd Cir. 1995) (halfhearted effort to effectuate service is not good cause). Thus, the *Bivens* Defendants nor the United States have not been brought within the jurisdiction of this Court, and the Complaint against them should be dismissed for failure of proper service. *See* Fed. R. Civ. P. 4(i), 12(b)(5). Even if Plaintiff had properly served the Complaint it is subject to dismissal for the numerous reasons discussed below.

B. Plaintiff's *Bivens* Claims (Counts I-III) Should be Dismissed Under Rule 12(b)(6) or, Alternatively, Under the Doctrine of Qualified Immunity.

1. Plaintiff's *Bivens* Counts Fail to State a Valid Claim Against Any of the ICE Defendants Under Fed. R. Civ. P. 8(a) and as a Matter of Law.

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Cardigan Mountain Sch. v. N.H. Ins. Co.* 787 F.3d 82, 84 (1st Cir. 2015). Although a complaint need not lay out "detailed factual allegations," it must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Instead, the plaintiff must plead "factual allegations . . . enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true." *Twombly*, 550 U. S. at 555. When a complaint pleads only "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" with "no further factual enhancement," it is insufficient and should be dismissed. *Id.* at 555-57. In evaluating the sufficiency of a complaint, the court first "must separate the complaint's factual allegations . . . from its conclusory legal allegations (which need not be credited)." *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013) (quoting *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 224 (1st Cir. 2012)). The court must then "determine whether the remaining factual content allows a 'reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Morales-Cruz*, 676 F.3d at 220);*see also Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011).

In this vein, this Circuit has consistently ruled that "vague and conclusory" allegations are insufficient to plead a viable claim for relief. *See, e.g.*, *SEC v. Tambone*, 597 F.3d 436, 442 (1st Cir. 2010) ("If the factual allegations in the complaint are too meager, vague, or conclusory

to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal."); *McElroy v. City of Lowell*, 741 F. Supp. 2d 349, 352 (D. Mass. 2010) (dismissal of § 1983 action because the complaint made general and conclusory statements that did not imply an unlawful act); *Pease v. Burns*, 719 F. Supp. 2d 143, 149 (D. Mass. 2010) (dismissal of plaintiffs' § 1983 complaint alleging violation of constitutional rights, including Fourth Amendment, that stated "all defendants" were involved in the acts without more specificity).

These long established pleading principles are particularly stringent when Plaintiff is alleging *Bivens* claims; that is, the Complaint must allege specific actions that violated his constitutional rights committed by *each* individual defendant. *See DeMayo v. Nugent*, 475 F. Supp. 2d 110, 115 (D. Mass. 2007); *Coyne v. United States*, 233 F. Supp. 2d 135, 144 (D. Mass. 2002). While legal conclusions can provide a general framework for a complaint, they must be supported by factual allegations that, at a minimum, set forth "who did what to whom, when, where, and why . . . ." *See Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 68 (1st Cir. 2004). As can be gleaned below, Plaintiff's Complaint falls woefully short of these fundamental pleading requirements with regard to each alleged constitutional claim.

i. Plaintiff's *Bivens* Claims as They Pertain to ICE Defendants Gallagher and Thurlow Fail to State a Valid Claim Against Them As A Matter of Law.

Iqbal expressly states that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior." 556 U.S. at 676 (finding allegations in the complaint that petitioners "knew of, condoned, and willfully and maliciously agreed" to imprison the respondent "as a matter of policy" due to his race, religion, and national origin to be conclusory and thus fail to state a claim). Thus, "it is not enough to state that a defendant 'was the officer in charge during the incident' and that he

'participated in or directed the constitutional violations' alleged." *Soto-Torres v. Fraticelli*, 654 F.3d 153, 159 (1st Cir. 2011). Instead, the plaintiff must plead "that each [g]overnment-official defendant, through the official's *own* individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676 (emphasis added). Only when the complaint provides sufficient facts to show "'an affirmative link' between the behavior of a subordinate and the action or inaction of his supervisor such that the supervisor's own conduct led inexorably to the constitutional violation" can the supervisor be potentially liable under *Bivens*. *Morales v. Chadbourne*, 793 F.3d 208, 221 (1st Cir. 2015) (refusing to dismiss *Bivens* claims against ICE supervisors for unlawfully detaining a US citizen because she pled in her complaint specific statements ICE officers made to her that suggested a policy of issuing detainers against US citizens without probable cause).

Here, Plaintiff's allegations in Counts I–III as they relate to Defendants Gallagher and Thurlow essentially parrot the allegations deemed insufficient in *Iqbal*.[6] *See* 556 U.S. at 680–82. Indeed, in Count I, Plaintiff appears to allege that Defendants Gallagher and Thurlow set "policies and customs" permitting officers to issue detainers without probable cause and therefore are liable for violating his Fourth Amendment rights. Complaint, Docket Entry No. 1, ¶¶ 124-25. In Count II, he alleges that Defendants Thurlow and Gallagher violated his Fifth Amendment right to due process, but fails to state how or why he deems them liable. *Id.*, ¶ 131–34. In Count III, he alleges that the detainer was issued against him "solely on the basis of his ethnicity, national origin, and/or foreign-sounding name . . . under the supervision of Defendants Thurlow and Gallagher." *Id.*, ¶ 136. Earlier in his Complaint, Plaintiff alleges that Defendants Thurlow and Gallagher "knew or should have known" that their subordinates were committing

[6] Sean Gallagher is the former Field Office Director and Todd Thurlow is the Assistant Field Office Director for ICE's Enforcement and Removal Operations in the Manchester, New Hampshire. *See* Complaint, Docket Entry No. 1, ¶¶ 30–32.

these constitutional violations, "formulated, implemented, encouraged, or willfully ignored" official policies, and "had the power and authority to change them." *Id.*, ¶¶ 97-101.

As can be gleaned from the above, Plaintiff clearly attempts to establish Defendants Thurlow and Gallagher's liability under a theory of supervisory liability, even explicitly saying that they "are liable as supervisors." *Id.*, p. 26 (heading). Accordingly, Plaintiff's *Bivens* claims against them are barred as a matter of law, as there is no vicarious liability in this context. *Iqbal*, 556 U.S. at 676 (citing *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). Furthermore, to the extent Plaintiff is attempting to attach *Bivens* liability to these individual ICE supervisors in their official capacity, *see* Complaint, Docket Entry No. 1, ¶¶ 31, 32, dismissal is warranted as a matter of law. *See Ruiz Rivera v. Riley*, 209 F.3d 24, 28 (1st Cir. 2000) (*Bivens* action cannot be initiated against a federal officer in his official capacity).

Lastly, per *Iqbal*, *supra*, the aforementioned hollow allegations that ICE Defendants Gallagher and Thurow "knew or should have known"[7] or that they set "policies and customs" are conclusory and, thus, not entitled to an assumption of truth and subject to dismissal under Fed. R. Civ. P. 8(a). *See* Complaint, Docket Entry No. 1, ¶¶ 97-101, 124. Nor does Plaintiff allege any specific facts that would provide an inference of the "affirmative link" between Defendant Thurlow's and Defendant Gallagher's actions and the behavior of their subordinates required by *Morales*. In sum, Plaintiff has simply not pled sufficient detail to indicate that Defendants Thurlow and Gallagher took any specific action that violated his constitutional rights and, therefore, the Complaint should be dismissed for its obvious pleading deficiencies under Rule 8(a). *See Iqbal*, 556 U.S. at 682-84.

[7] Negligent acts do not incur *Bivens* liability. *See Daniels v. Williams*, 474 U.S. 327, 333 (1986); *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002) (negligent acts do not constitute constitutional liability).

ii. Plaintiff's *Bivens* Claim Alleging a Fourth Amendment Violation (Count I) Fails to State Any Facts Suggesting Defendanst McNeice, Gallagher, and Thurlow Issued an Immigration Detainer Without Probable Cause.

In Count I, Plaintiff alleges that Defendants McNeice, Gallagher, and Thurlow violated the Fourth Amendment by issuing an immigration detainer against him without probable cause. *See* Complaint, Docket Entry No. 1, ¶¶ 122-30. Plaintiff does not appear to dispute that ICE has the authority to issue immigration detainers requesting that state and local law enforcement notify them of the impending release of removable aliens so that ICE may take them into custody for removal purposes. 8 C.F.R. § 287.7; *see also Comm. for Immigrant Rights of Sonoma Cty. v. County of Sonoma*, 644 F. Supp. 2d 1177, 1198 (N.D. Cal. 2009) (holding that 8 C.F.R. § 287.7 is a valid exercise of the agency's statutory authority).

Although ICE must have probable cause to issue a detainer, *Morales,* 793 F.3d at 216, mere assertions that a detainer was issued without probable cause are insufficient to state a valid claim for relief under Rule 8(a)(2). *See Iqbal*, 556 U.S. at 678. Instead, Plaintiff must allege facts sufficient to infer that ICE did not have reason "to believe that the subject of the detainer is: (1) an alien who (2) may not have been lawfully admitted the United States or (3) otherwise is not lawfully present in the United States." *Morales v. Chadbourne*, 966 F. Supp. 2d 19, 29 (D.R.I. 2014), *aff'd*, 793 F.3d 208 (1st Cir. 2015); *see also Mendia v. Garcia*, No. 10-cv-03910-MEJ, 2016 WL 2654327, at *7 (N.D. Cal. May 10, 2016) (finding that ICE agents were not entitled to dismissal of claims that they issued a detainer without probable cause where the plaintiff listed in his complaint specific comments he made that should have informed the agents that he was a United States citizen).

Here, Plaintiff's Complaint contains only conclusory statements alleging that Defendant McNeice issued an immigration detainer against him without probable cause. For example,

Plaintiff claims that "[t]here was no probable cause for the state or federal governments to detain" him and that "Defendants McNeice and ICE Does 21-30[8] seized [him] and transported him to ICE/ERO jail in Burlington without probable cause." *See* Complaint, Docket Entry No. 1, ¶¶ 128-29. In short, Plaintiff's Complaint is woefully deficient for purpose of Rule 8(a) and should be dismissed. *See, e.g.*, *Soto Torres*, 646 F.3d at 157.

More importantly, looking beyond the obvious pleading deficiencies, at the time of the issuance of the detainer, Plaintiff *was subject to a final order of removal*, a fact not controverted by Plaintiff (or even mentioned in his Complaint). Consequently, Plaintiff was subject to the custody of ICE for purposes of executing that removal order. *See* 8 U.S.C. § 1231(a)(2) (2012). In sum, any claim that ICE did not have the authority to issue a detainer for purposes of executing a final order of removal is patently wrong as a matter of law and the claim is subject to dismissal on its merits. *See Freeman*, 714 F.3d at 40-41 (granting the defendant's motion to dismiss where a valid statute authorized his allegedly unconstitutional actions).

iii. Plaintiff's *Bivens* Claim Alleging Procedural Due Process Violations (Count II) Fails to State Facts Sufficient to Infer That He Was Unconstitutionally Denied the Ability to File a Form I-246 for a Stay of Deportation or Removal

In Count II, Plaintiff appears to allege three violations of his Fifth Amendment procedural due process rights. First, he alleges that Defendants Chambers and Milley "denied [him] access to a court hearing scheduled on March 27th 2014." *See* Complaint, Docket Entry No. 1, ¶ 134(a). Second, he alleges that Defendant Chambers and ICE Does 21-30 failed to allow him to call his attorney "in a timely fashion" and then "monitored [his] call to his attorney" by standing in the same room. *Id.*, ¶ 134(b). Third, he alleges that Defendants Sapia, Milley,

[8] Defendant cannot represent ICE Does 21-30 in their individual capacity for *Bivens* purposes because their identities are not known.

and Chambers denied him the ability to file a Form I-246 Application for a Stay of Deportation or Removal. *Id.*, ¶ 134(c).

At the outset, there is a significant question of whether *Bivens* even extends to claims brought under the Due Process Clause, *Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 33-34 (1st Cir. 2011). *See also Casey v. Department of Health and Human Services*, 807 F.3d 395, 400-401(1st Cir. 2015)(scope of *Bivens* is quite limited and over past 40 years has been extended only twice; once to cover employment discrimination under Due Process Clause of Fifth Amendment and the second covering Eighth Amendment violations by prison officials). ICE Defendants maintain that *Bivens* does not extend to Plaintiff's Fifth Amendment claim in this regard. Nonetheless, even if it does under these circumstances, Plaintiff's allegations are still insufficient. Indeed, "[t]o state a valid procedural due process claim, a plaintiff must (1) 'identify a protected liberty or property interest,' and (2) 'allege that the defendants . . . deprived [him] of that interest without constitutionally adequate process.'" *Air Sunshine, Inc.*, 663 F.3d at 34 (alteration in original) (quoting *González-Droz v. González-Colón*, 660 F.3d 1, 13 (1st Cir. 2011)).

Bearing the above in mind, with regard to his allegation that he was denied access to a court hearing, Plaintiff provides no details about the nature of this hearing beyond its date and general location (Brookline).[9] Nor does he plead any specific actions that Defendants Chambers and Milley took that denied him access to this hearing or why they were even in a position to (or

[9] According to the dockets for the criminal proceedings against both Mr. Sanderson and Plaintiff arising from the incidents of March 14-17, 2014, there did not appear to be any hearings scheduled in either of those two cases for March 27, 2014. *See* Norfolk DA Defendants' Memorandum of Law in Support of Motion to Dismiss Complaint, p. 4 n.3. In fact, the first hearing scheduled on the matter was to be held on April 8, 2014 and Plaintiff was not even in the custody of ICE as he was released on April 4, 2014. *See* Sullivan Decl., *Exhibit A*, ¶ 11.

responsible for) taking him to the hearing in the first place. As mentioned generally above, Plaintiff's Complaint thus fails to meet the *Iqbal* standard requiring the plaintiff to plead sufficient facts to support a "reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678.

In any event, criminal defendants do not have a constitutional right under the Due Process Clause to be present at all proceedings in their criminal cases. *See Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."); *see also Contreras v. Artus*, 778 F.3d 97, 113-14 (2d Cir. 2015) (finding no due process violation when the defendant was absent from an admissibility hearing on trial evidence); *United States v. Sanchez*, 917 F.2d 607, 619 (1st Cir. 1990) (same for a hearing on a motion for a new trial relying on questions of law). Thus, even if Plaintiff refers to a hearing in his criminal proceedings for violating the restraining order, it is not clear that it would be a denial of due process if he did not attend. And Plaintiff's claim is even weaker if he refers to a court hearing in a matter to which he was not a party. Since ICE can detain an alien ordered removed, *see* 8 U.S.C. § 1231(a)(2); *Zadvydas v. Davis*, 553 U.S. 678, 689 (2001) (an alien can be detained after being ordered removed for "a period reasonably necessary to bring about that alien's removal from the United States"), and can institute restrictions on an individual's freedom of movement necessary to effectuate that detention, *see Bell v. Wolfish*, 441 U.S. 520, 537 (1979), Plaintiff simply cannot assert on the basis of such a vague statement that Defendants Chambers and Milley violated his constitutional rights by denying him access to a court hearing.

With regard to Plaintiff's allegation that Defendant Chambers initially prevented him from calling his attorney and then monitored his call when he finally permitted him to, Plaintiff

again fails to provide any sufficient factual details to allow for a reasonable inference that his constitutional rights were violated. Although the Sixth Amendment right to counsel does not apply to immigration proceedings, *Muyubisnay-Cungachi v. Holder*, 734 F.3d 66, 72 (1st Cir. 2013); *Lozado v. I.N.S.*, 857 F.2d 10, 13 (1st Cir. 1988), the First Circuit has recognized that Due Process Clause encompasses the right to counsel at one's own expense in immigration proceedings. 8 U.S.C. § 1362 (2012); *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007). Courts are reluctant to find a violation of this right, however, unless the circumstances are "tantamount to denial of counsel" for the proceedings. *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005). Reasonable limits on telephone access while in immigration detention are, thus, not automatically a deprivation of the right to counsel. *Lyon v. U.S. Immigration & Customs Enf't*, No. 13-cv-05878, 2016 WL 1070650, at *12 (N.D. Cal. Mar. 18, 2016). In fact, criminal detainees are not guaranteed the right to even call an attorney until "at or after the time that judicial proceedings have been initiated against him." *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

Because Plaintiff does not provide any factual detail concerning his allegations that he was denied the ability to call his attorney, it is impossible to address the hollow allegation that he was denied his due process right to counsel. Indeed, Plaintiff merely asserts that Defendant Chambers did not allow him to call his attorney "in a timely fashion," Complaint, Docket Entry No. 1, ¶ 134(b), which could be ten minutes or ten days. Without more factual detail, Plaintiff's Complaint does not support an inference that any restrictions on telephone access was unreasonable and suffers the same pleading deficiencies under Rule 8(a) subjecting the claim to dismissal.

Oddly enough, Plaintiff's own allegations make clear that Defendant Chambers actually permitted Plaintiff the opportunity to call his attorney. *See* Complaint, Docket Entry No. 1, ¶ 134(b). If Plaintiff's claim is based on an effect of this denial of an ability to call his attorney on subsequent immigration proceedings, his Complaint is completely devoid of any such factual allegations.

Finally, Plaintiff's allegation that Defendants Chambers may have violated Mass. Gen. Laws 276 § 33A is both unsupported by sufficient facts and fails to establish that he also committed a constitutional violation. *See Snowden v. Hughes*, 321 U.S. 1, 11 (1944) ("Mere violation of a state statute does not infringe the federal Constitution."); *accord City of Boston v. Mass. Port Auth.*, 444 F.2d 167, 169 (1st Cir. 1971) (refusing to find a constitutional violation where the dispute centered on whether a state law was violated).

With regard to his allegation that he was not permitted to file a Form I-246, Plaintiff does not state a valid claim for relief because he, again, fails to provide sufficient factual detail and relies on a non-cognizable liberty or property interest to support his claim. Beyond his bare assertions that Defendants Sapia, Milley, and Chambers prevented him from filing a Form I-246 Application for a Stay of Deportation or Removal, his only factual allegations on this issue are that the application was attached to a fee waiver request, *see* Complaint, Docket Entry No. 1, ¶ 34, and that Defendant Gilbert specifically "asked [him] to 'come back with $155.00.'" *Id.*, ¶ 35. Given these allegations, it is unclear whether he is challenging a refusal to accept his I-246 or his fee waiver application. Additionally, he provides no factual basis as to why this would constitute a due process violation. Besides Defendant Gilbert's comment, he does not say when or where this event occurred or what actions any of the specific Defendants took individually. Without more detailed factual allegations, Plaintiff's blanket assertion that these three ICE

agents violated his procedural due process rights by refusing to accept his I-246 application is insufficient. *See, e.g., Casey v. Dep't. of Health & Human Servs.*, 807 F.3d 395, 403 (1st Cir. 2015) (dismissing *Bivens* claims against individual defendants for its deficiencies under Rule 8(a)).[10]

Furthermore, because there is *no* property or liberty interest involved in the discretionary decision to stay a removal or grant a fee waiver, a due process claim asserting a denial of a discretionary administrative benefit necessarily fails as a matter of law. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005)("A benefit is not a protected entitlement if government officials may grant or deny it in their discretion");*Ticoalu v. Gonzales*, 472 F.3d 8, 11 (1st Cir. 2006)("Due process rights do not accrue to discretionary forms of relief, citing *DaCosta v. Gonzales*, 449 F.3d 45, 49 (1st Cir. 2006)); *Jupiter v. Ashcroft*, 396 F.3d 487, 492 (1st Cir. 2005) (rejecting a due process challenge to an immigration judge's decision not to extend the plaintiff's voluntary departure deadline). Certainly, a stay of removal and a fee waiver are both discretionary benefits. *See* 8 C.F.R. § 241.6(a) (2002) (granting certain officials "in [their] discretion . . . [to] grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate"); 8 C.F.R. § 103.7(c)(1) (2014) ("Discretionary waiver of the fees provided in paragraph (b)(1)(i) of this section are limited as follows . . . ."). Stated differently, because such discretionary benefits are *not* a property or liberty interest protected by

[10] At any rate, Plaintiff successfully submitted two discrete I-246 stay applications, each of which were adjudicated by ICE in the exercise of administrative discretion. *See* Sullivan Decl., *Exhibit A*, ¶ 10.

the Due Process Clause, Plaintiff's allegations fail to state a claim for a procedural due process violation and should be dismissed as a matter of law.[11]

iv. Plaintiff's *Bivens* Claim Alleging Equal Protection Violations (Count III) Fails to State A Claim Suggesting He Was Targeted Because of His National Origin.

In Count III, Plaintiff alleges that ICE agents violated the Fifth Amendment guarantee of equal protection by "issuing a detainer against [him] solely on the basis of his ethnicity, national origin, and/or foreign-sounding name" and refusing to permit him to file an I-246 Application for Stay of Deportation or Removal for the same reason. *See* Complaint, Docket Entry No. 1, ¶¶ 135-40. To succeed on a *Bivens* claim of unconstitutional discrimination, "the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Iqbal*, 556 U.S. at 676 (citing *Washington v. Davis*, 426 U.S. 229, 240 (1976)). "Purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.'" *Id.* (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). Instead, the plaintiff must show that the defendant acted "'because of,' not merely 'in spite of'" the effects of his or her actions. *Id.* Thus, to suffice under Rule 8(a), an equal protection claim must include facts sufficient for the court to infer "(1) that he was selected for adverse treatment compared with others similarly

[11] Furthermore, Plaintiff *did* file an I-246 Application for Stay of Removal which was approved in July 2105, for a three month period and then filed another I-246 Stay Application with a fee waiver in December 2014, which was denied in the exercise of administrative discretion by ICE on February 20, 2015. *See* Sullivan Decl., *Exhibit A*, ¶ 11. His claim that he was denied the ability to file that application for discretionary relief is simply untrue, as is his claim of not being able to speak to his attorney. In short, he cannot show any prejudice for these purported Fifth Amendment violations, a prerequisite to stating a valid claim. *See Hossain v. Ashcroft*, 381 F.3d 29, 32 (1st Cir. 2004) ("We agree that a due process claim cannot succeed if there is no prejudice, without prejudice, any error that occurred would be harmless"); *Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999)("The applicant claiming a denial of due process must generally show prejudice"). Plaintiff, it is worth emphasizing, was *already* subject to a final order of removal at all times respecting his allegations against the individual ICE Defendants.

situated, and (2) that the selection for adverse treatment was based on his [protected trait]." *Rios-Colon v. Toledo-Davila*, 641 F.3d 1, 4-5 (1st Cir. 2011) (overturning the district court's dismissal where an employee pled that he was transferred to a less desirable job and that his supervisor used racially derogatory slurs toward him).

On this legal backdrop, it is clear that Plaintiff has failed to plead facts sufficient to infer either that he was treated adversely compared to others similarly situated or that he was targeted because of his national origin. Throughout the Complaint, Plaintiff merely pleads the elements of an equal protection violation and makes "naked assertions" against the ICE Defendants. For example, he alleges that "Defendant McNeice under supervision of Defendants Thurlow and Gallagher acted with a discriminatory purpose" and issued an immigration detainer "because he is foreign born." *See* Complaint, Docket Entry No. 1, ¶ 138. Although he alleges that he was targeted based on his national origin "as indicated by his place of birth, Spanish-sounding name, and/or other information transmitted from the Brookline Police Department," *Id.*, ¶ 58, he provides no factual assertions to support this inference. In fact, Plaintiff does not suggest that he was treated differently than any other foreign national subject to removal. At bottom, Plaintiff does not provide any factual support that the ICE officers acted with a discriminatory purpose on account of his national origin, in contrast to the plaintiff in *Rios-Colon*, who pled specific statements his employer made that suggested racial bias. Plaintiff also seemingly implies that Defendants Milley, Gilbert, and Sapia's refusal to permit him to file a Form I-246 application was on account of his national origin, *See* Complaint, Docket Entry No. 1, ¶ 139, but nowhere does he make even this conclusory statement explicit, let alone provide any factual basis for the claim.

Failing to meet the standard set forth in *Hernandez* requiring some indication of the specifics of what took place, Plaintiff does not tell us what actions each individual agent took or where or when they took them. Indeed, the only non-conclusory fact he pleads is that he is a citizen of France and Spain. *See* Complaint, Docket Entry No. 1, ¶ 11. On this fact alone, there is clearly insufficient evidence from which the Court can reasonably infer that any ICE agent discriminated against him because of his national origin and his claim on this basis must be dismissed. *See Haley*, 657 F.3d at 46.

On another note, as mentioned previously, Plaintiff omits from his Complaint any mention of the fact that he was subject to a final order of removal which statutorily permitted ICE to not only issue a detainer, but to take him into custody to effectuate his removal regardless of his race and national origin. *See generally* 8 U.S.C. §§ 1231(a)(1), (2)(directing that an alien ordered removed "shall" be detained and removed). To assert that these actions were taken as a result of his race defies logic and is nothing more than a vain attempt to state a claim.

Furthermore, whether or when to take an alien into custody for execution of a removal order is itself an exercise of administrative prosecutorial discretion under 8 U.S.C. § 1252(g). *See generally Reno v. Arab-American Anti-Discrimination Committee, et al.*, 525 U.S. 471, 483 (1999)("there was good reason for Congress to focus special attention on, and make special provision for, judicial review of the Attorney General's discrete acts of 'commencing proceedings, adjudicating, and executing removal orders…Because at each stage the *Executive discretion* to abandon the endeavor… Section 1252(g) seems clearly designed to give some measure of protection to 'no deferred action' and *similar discretionary determinations*, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed")(emphasis

added). Accordingly, there being no constitutional violation alleged, the Complaint should be dismissed as a matter of law. *See Giragosian v. Bettencourt*, 614 F.3d 25, 30 (1st Cir. 2010)(claim that Defendant committed unconstitutional search of gun shop because it was based on a tip from local police did not state a valid *Bivens* claim against the ATF agent because he was allowed by statute to conduct a warrantless search regardless of the initial intent behind the search).

2. Defendants Gallagher, Thurlow, Chambers, Milley, Gilbert, Sapia, McNeice, and ICE Does 21-30 Are Entitled To Qualified Immunity

Assuming *arguendo* that Plaintiff's *Bivens* Counts are sufficient under Rule 8(a), the ICE Defendants are entitled to protection against those claims under the doctrine of qualified immunity. Indeed, qualified immunity shields federal officials from personal damages liability whenever their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Because qualified immunity is "an immunity from suit rather than merely a defense to liability," *Pearson*, 555 U.S. at 231 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)), courts must resolve questions of qualified immunity "at the earliest possible stage in litigation." *Id.* at 232 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

An analysis of a qualified immunity defense proceeds in two steps. First, the court must determine "whether the facts alleged . . . by the plaintiff make out a violation of a constitutional right." *Stamps v. Town of Framingham*, 813 F.3d 27, 34 (1st Cir. 2016) (quoting *Mlodzinski v. Lewis*, 648 F.3d 24, 32 (1st Cir. 2011)); *accord Saucier v. Katz*, 533 U.S. 194, 201 (2001). If so,

then the court must find then that "the right was 'clearly established' at the time of the defendant's alleged violation." *Stamps*, 813 F.3d at 34 (quoting *Mlodzinski*, 648 F.3d at 32); *accord Saucier*, 533 U.S. at 201. Courts are free to analyze these two questions in either order. *Pearson*, 555 U.S. at 236 ("while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory"); *Matalon v. Hynes*, 806 F.3d 627, 633 (1st Cir. 2015).

With regard to the second prong, an official's conduct does not violate clearly established law unless the right is so "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 136 S. Ct. at 308 (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)); *Stamps*, 813 F.3d at 34. Although there does not need to be a case with the exact same facts, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. Because "the dispositive question is 'whether the violative nature of *particular* conduct is clearly established," *Mullenix*, 136 S. Ct. at 308 (emphasis in original) (quoting *al-Kidd*, 563 U.S. at 742), the Supreme Court has repeatedly emphasized that courts should define the right at issue very specifically in the context of the case and not "at a high level of generality." *al-Kidd*, 563 U.S. at 742 (suggesting that the general proposition that the Fourth Amendment prohibits unreasonable searches and seizures "is of little help in determining whether the violative nature of particular conduct is clearly established"); *accord Reichle*, 132 S. Ct at 2094 (framing the right in question as the "right to be free from a retaliatory arrest that is otherwise supported by probable cause" instead of "the general right to be free from retaliation for one's speech").

Here, Plaintiff cannot show that the named ICE officers violated any constitutional right of Plaintiff, let alone a clearly established constitutional right; thus, this Court should dismiss the

Complaint as to Defendants McNeice, Thurlow, Gallagher, Gilbert, Sapia, Milley, and Chambers on Counts I, II, and III under the doctrine of qualified immunity.

i. Defendants McNeice, Gallagher, and Thurlow Are Entitled to Qualified Immunity for Plaintiff's Fourth Amendment Claim (Count I) Because Plaintiff's Outstanding Removal Order Provided Probable Cause to Issue a Detainer.

In Count I, Plaintiff alleges that Defendants McNeice, Gallagher and Thurlow violated the Fourth Amendment by issuing an immigration detainer against him without probable cause. Given *Mullenix*'s requirement to define the alleged constitutional violation with specificity, however, these Defendants are entitled to qualified immunity unless it was clearly established as of March 17, 2014, that an ICE issuance of an immigration detainer against a deportable alien with an outstanding removal order violates the Fourth Amendment.

As previously discussed, ICE has the authority to issue immigration detainers requesting that state and local law enforcement notify them of the impending release of removable aliens so that ICE can take them into custody. 8 U.S.C. § 1357(d); 8 C.F.R. § 287.7; *see also Comm. for Immigrant Rights of Sonoma Cty. v. County of Sonoma*, 644 F. Supp. 2d 1177, 1198 (N.D. Cal. 2009) (holding that 8 C.F.R. § 287.7 is a valid exercise of the agency's statutory authority). In order to issue a detainer, ICE must have probable cause "to believe that the subject of the detainer is (1) an alien who (2) may not have been lawfully admitted the United States or (3) otherwise is not lawfully present in the United States." *Morales v. Chadbourne*, 966 F. Supp. 2d 19, 29 (D.R.I. 2014), *aff'd*, 793 F.3d 208 (1st Cir. 2015). An immigration judge's finding of removability "constitute[s] a good deal more than probable cause" to justify detention. *Turkmen v. Ashcroft*, 589 F.3d 542, 549 (2nd Cir. 2009). Likewise, ICE also has the authority to detain aliens ordered removed pending deportation. 8 U.S.C. § 1231(a)(1), (2) (2012).

Defendants McNeice, Gallagher and Thurlow undoubtedly had probable cause to believe that Plaintiff was an alien not lawfully present in the United States when the detainer was issued. When the Brookline Police Department contacted ICE's Law Enforcement Support Center and ICE ascertained that Plaintiff was subject to a final removal order issued in 2010, as in *Turkmen*, this fact is sufficient probable cause to justify taking Plaintiff into ICE custody. Simply put, Defendants McNeice, Gallagher and Thurow did not violate Plaintiff's Fourth Amendment rights and are protected under the first prong of the doctrine of qualified immunity. *See, e.g.*, *Giragosian,* 614 F.3d at 30.

Assuming *arguendo* that issuing an immigration detainer in these circumstances did violate Plaintiff's Fourth Amendment rights, the ICE Defendants would still be entitled to qualified immunity because ostensibly no court has ever held that a pending removal order is insufficient probable cause to justify a detainer. Since the existence of a removal order means that an immigration judge determined Plaintiff is deportable, it was reasonable for the ICE agent who issued the detainer to believe that this removal order provided probable cause to think that Plaintiff was "not lawfully present in the United States." *Morales,* 966 F. Supp. 2d at 29.

ii. Defendants Sapia, Milley, and Chambers Are Entitled to Qualified Immunity for Plaintiff's Fifth Amendment Claim Regarding His Form I-246 (Count II) Since the Case Officer Did Not Permit Plaintiff To File for a Fee Waiver Only Because the Application Was Incomplete.

In Count II, Plaintiff alleges that Defendants Sapia, Milley, and Chambers violated his Fifth Amendment right to procedural due process by denying him the ability to file a Form I-246 Application for a Stay of Deportation or Removal. *See* Complaint, Docket Entry No. 1, ¶ 134. Given *Mullenix*'s requirement to define the alleged constitutional violation with specificity, however, these Defendants are entitled to qualified immunity unless it was clearly established at

the unspecified time when this event occurred that refusing to permit an alien to apply for a fee waiver for an application to stay of removal based on a plainly insufficient application violated due process.

To succeed on a due process claim, the plaintiff must "(1) 'identify a protected liberty or property interest,' and (2) 'allege that the defendants . . . deprived [him] of that interest without constitutionally adequate process.'" *Air Sunshine, Inc.*, 663 F.3d at 34 (alteration in original) (quoting *González-Droz*, 660 F.3d at 13). Because there is *no* property or liberty interest involved, a due process claim complaining about the denial of a discretionary administrative benefit necessarily fails as a matter of law. *See DaCosta v. Gonzales*, 449 F.3d 45, 50 (1st Cir. 2006) (rejecting a due process challenge to INS' delay in processing her adjustment of status application); *Jupiter v. Ashcroft*, 396 F.3d 487, 492 (rejecting a due process challenge to an immigration judge's decision not to extend the plaintiff's voluntary departure deadline). Indeed, the grant of a fee waiver, stay of removal, and U-visa are all discretionary benefits. *See* 8 C.F.R. § 241.6(a) (2002) (granting certain officials the power "in [their] discretion . . . [to] grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate"); 8 C.F.R. § 103.7(c)(1) (2014) ("Discretionary waiver of the fees provided in paragraph (b)(1)(i) of this section are limited as follows . . . ."); 8 C.F.R. § 214.14(4) (2013) (granting USCIS "in its sole discretion" the power to determine "the evidentiary value of previously or concurrently submitted evidence" in deciding whether to grant an application). Since Plaintiff had no constitutional right to these discretionary benefits, the ICE Defendants named in this claim are entitled to qualified immunity as they did not violate Plaintiff's constitutional rights.

In fact, since Plaintiff does not provide any details about his allegations that Defendants Sapia, Gilbert, and Chambers unconstitutionally refused to accept his Form I-246 and Plaintiff has made numerous immigration filings over the years, *see* Sullivan Decl., *Exhibit A*, ¶ 10, it is difficult to determine exactly to what he is referring.

Assuming *arguendo* that the ICE agents did violate Plaintiff's Fifth Amendment rights, the established First Circuit case law rejecting procedural due process challenges to denials or irregularities in applications for discretionary immigration benefits militates that a reasonable officer in the agents' positions would not have understood that he was violating the Fifth Amendment in this regard. *See, e.g., Mullenix,* 136 S. Ct. at 312; *al-Kidd,* 563 U.S. at 741-42. In refusing to accept Plaintiff's fee waiver application, the agents would not have thought that they were denying Plaintiff a property interest to which he was entitled; thus, the named ICE Defendants would be entitled to qualified immunity under its second prong.[12] *See, e.g., Pearson,* 555 U.S. at 243-44.

iii. The ICE Defendants Are Entitled to Qualified Immunity for Plaintiff's Equal Protection Claim (Count III) Because His Immigration Detainer Was Issued Due to His Outstanding Removal Order.

In Count III, Plaintiff alleges Defendant McNeice issued a detainer against him "solely on the basis of his ethnicity, national origin, and/or foreign-sounding name . . . under the supervision of Defendants Thurlow and Gallagher." *See* Complaint, Docket Entry No. 1, ¶ 136. Like his other bald constitutional allegations against the ICE Defendants concerning the legality of the issuance of a detainer, Count III stands in symbiotic relation with Count I. That is,

[12] Again, despite Plaintiff's assertions otherwise, he did file successive I-246 applications to stay his removal and they were denied because he was ineligible for that relief. *See* Sullivan Decl., *Exhibit A*, ¶ 10.

Defendant committed no constitutional violation in issuing a detainer on an alien subject to a final order of removal; thus, the first prong to qualified immunity was fulfilled and the ICE Defendants are protected against any purported *Bivens* claim.

More specifically, as discussed above, to prove an equal protection violation, the plaintiff must show that the defendant acted with discriminatory purpose. *Iqbal*, 556 U.S. at 676 (citing *Washington*, 426 U.S. at 240). The defendant must act "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group. *Feeney*, 442 U.S. at 279. An official action does not constitute an equal protection violation merely due to its effect on a protected class. *See id.* at 279-80. Thus, issuing an immigration detainer will constitute an equal protection violation only when an ICE officer acts solely based on the plaintiff's race or national origin. *See Mendia*, 2016 WL 2654327, at *11 (finding ICE agents were not entitled to qualified immunity where a United States citizen sufficiently alleged that they issued a detainer against him solely due to his race and national origin); *Morales*, 966 F. Supp.2d at 35 ("Using [the plaintiff's] nation of birth as a sole permissible basis for her loss of liberty does not pass constitutional muster.").

Again, Defendant McNeice did not commit an equal protection violation because he purportedly issued an immigration detainer against Plaintiff based on his outstanding *final order of removal*, regardless of Plaintiff's national origin. Unlike in *Mendia* and *Morales* where the plaintiffs were United States citizens, Plaintiff is, in fact, a French national who had already been ordered removed from the United States to France by an IJ in 2010. *See* Sullivan Decl., *Exhibit A*, ¶ 6. Of course, enforcing removal orders will have a disparate impact on foreign-born individuals, but this disparity is obviously insufficient to constitute an equal protection violation.

Plaintiff provides no evidence nor could he legitimately suggest that his national origin, and not his outstanding removal order, was the impetus for ICE to issue the detainer against him.[13]

At bottom, in light of the fact that Plaintiff was detained within the statutory framework discussed above, Defendants did not commit any constitutional violation and are entitled to qualified immunity. *See Giragosian*, 614 F.3d at 30 (1st Cir. 2010) (granting qualified immunity to an ATF agent in connection with Plaintiff's Fourth Amendment claim of illegal search and seizure where a statute permitted warrantless inspection of a firearm dealer's gun shop).

Even if these actions did constitute equal protection violations, the ICE Defendants were reasonable in thinking at the time that those actions were permissible. ICE agents regularly issue detainers when local law enforcement have aliens subject to removal in custody, and no court has held that issuing a detainer under these circumstances is an equal protection violation merely because the subject of the detainer is a foreign national. The reason is self- evident, namely, the practice of issuing a detainer in these circumstance is authorized under 8 U.S.C. § 1357(d). Likewise, the removal and enforcement provisions of this country's statutory immigration scheme are directed *only* to aliens. 8 U.S.C. § 1227(a) ("Any alien [further described] shall, upon order of the Attorney General, be removed").

[13] Insofar as Plaintiff alleges that Defendants Milley, Gilbert, and Sapia refused to permit him to submit a Form I-246 because of his national origin, Complaint, Docket Entry No. 1, ¶¶ 139-40, it is again difficult to determine what occurred since Plaintiff has filed many immigration forms and fails to identify the instance to which he is referring. Without undue repetition, Plaintiff filed two I-246 applications despite his bald allegations otherwise. *See* Sullivan Decl., *Exhibit A*, ¶ 10.

A. Plaintiff's FTCA Claims (Counts IX-X) Must Be Dismissed Because This Court Lacks Subject Matter Jurisdiction .

1. **This Court Does Not Have Subject Matter Jurisdiction over Plaintiff's FTCA Claims Because He Has Failed to Exhaust His Administrative Remedies.**

(i) 12(b)(1) Standard

Rule 12(b)(1) permits a federal court to dismiss an action for lack of subject matter jurisdiction. Fed. R. Civ. Pro. 12(b)(1).[14] The party asserting federal subject matter jurisdiction bears the burden of proof. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996). In a 12(b)(1) motion, the defendant may either contest the sufficiency of the plaintiff's well-pleaded allegations or bring a factual challenge to the court's subject matter jurisdiction. *See, e.g.*, *Torres-Negron v. J&N Records, LLC*, 504 F.3d 151, 162 (1st Cir. 2007). When the defendant raises a factual challenge to the court's jurisdiction, "the court must determine whether the relevant facts, which would determine the court's jurisdiction, also implicate elements of the plaintiff's cause of action." *Id.* at 163. If "the relevant facts are dispositive of both the 12(b)(1) motion and portions of the merits," the court must employ a summary judgment standard, granting the motion to dismiss "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a

[14] Some circuits consider § 2675(a)'s exhaustion requirement to be a claim-processing rule, not a jurisdictional prerequisite. *See, e.g.*, *Smoke Shop, LLC v. United States*, 761 F.3d 779, 786-87 (7th Cir. 2014). The First Circuit has historically considered the exhaustion requirement to be jurisdictional but has acknowledged that this position may be less settled. *See Sanchez v. United States*, 740 F.3d 47, 54 ("[W]e may have erred in presuming that subject matter jurisdiction hinged on compliance with the FTCA's deadlines for presenting claims."). Regardless of the nature of the requirement, the proper action when the plaintiff fails to exhaust his administrative remedies is to dismiss his FTCA claims. *See McNeil v. United States*, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies. Because petitioner failed to heed that clear statutory command, the District Court properly dismissed his suit.").

matter of law." *Id.* (quoting *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987)). If the relevant facts to determine subject matter jurisdiction are distinct from the merits of the plaintiff's underlying claim, however, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). In making its determination, the court may "consider extrinsic materials and, to the extent it engages in jurisdictional fact-finding, is free to test the truthfulness of the plaintiff's allegations." *Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 37 (1st Cir. 2000).

(ii) Federal Tort Claims Act

The FTCA is the exclusive remedy "for injury . . . arising from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1) (2012). In enacting the FTCA, Congress provided a limited waiver of sovereign immunity for tort actions against the United States. *Santoni v. Potter*, 369 F.3d 594, 602 (1st Cir. 2004). The FTCA's waiver of sovereign immunity, however, is conditional. *See Rakes v. United States*, 442 F.3d 7, 18 (1st Cir. 2006). In particular, a plaintiff may bring suit under the FTCA only if he "first present[s] the claim to the appropriate federal agency and his claim [is] finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a) (2012). Given this clear language, the First Circuit has repeatedly held that "compliance with this statutory [administrative filing] requirement is a jurisdictional prerequisite to suit that cannot be waived." *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002); *accord McNeil v. United States*, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative

remedies."). "Accordingly, it is well-settled that an FTCA claim must be dismissed if a plaintiff fails to file a timely administrative claim." *Gonzales*, 284 F.3d at 288.

In evaluating the United States' 12(b)(1) motion, this Court may freely weigh the evidence under the scheme set forth in *Torres-Negron* because the facts relevant to the question of whether Plaintiff has exhausted his administrative remedies are in no way related to the merits of his underlying false arrest/imprisonment and negligence claims. Although Plaintiff generally claims he "filed administrative complaints with the Office of Civil Rights and Civil Liberties of the Department of Homeland Security," Complaint, Docket Entry No. 1, ¶ 8, ICE has never received any of these complaints. Because Plaintiff did not properly submit an administrative claim prior to filing suit, this Court does not have subject matter jurisdiction to hear his FTCA claims.[15] *See, e.g.*, *Gonzales-Bernal v. United States*, 907 F.2d 246, 248 (1st Cir. 1990).

Additionally, "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b) (2012). A FTCA claim accrues at the time of the plaintiff's injury or "when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the factual basis for the cause of action." *Gonzales*, 284 F.3d at 288. Plaintiff's FTCA claims for false arrest/imprisonment and negligence arise out of activities that occurred on March 18, 2014, and any injury he alleges to have suffered from these tortious acts also occurred at the same time. There is no indication that he discovered any facts essential to his FTCA claims after that date. Because his FTCA claims started accruing on March 18, 2014 and ICE

[15] A plaintiff bears the burden of proving that subject matter exists. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

has not received an administrative complaint in the more than two years since, Plaintiff's FTCA claims are forever barred. *See Skwira v. United States*, 344 F.3d 64, 71 (1st Cir. 2003).

IV. CONCLUSION

For the reasons set forth herein, Plaintiff's Complaint should be dismissed.

Respectfully submitted,

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Dated: August 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to pro se plaintiff, Emmanuel Andro, 1764 Dorchester Ave. #2, Boston, MA 02124, via first class mail.

/s/ Michael Sady
Michael Sady
Assistant United States Attorney

Dated: August 8, 2016