UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

RASHAD AHMAD REFAAT EL BADRAWI,

Plaintiff,

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Defendants.

Case No. 3:07-cv-01074-JCH

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT BY THE UNITED STATES OF AMERICA, DEPARTMENT OF HOMELAND SECURITY, FEDERAL BUREAU OF INVESTIGATION, MICHAEL CHERTOFF, AND ROBERT MUELLER

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INTRODUCTION

In this lawsuit, Plaintiff Rashad El Badrawi challenges his arrest and detention on immigration charges, and he also alleges that he did not receive proper medication when he was detained at a locally-operated correctional facility. At its core, this lawsuit is an attempt by El Badrawi to collaterally attack his prior immigration proceedings, which led to his voluntary departure from the country. In those prior proceedings, El Badrawi was charged with overstaying his authorized time in the country under a work visa. In response, El Badrawi did not dispute that he overstayed his authorized time in the country. Rather, he raised the same legal argument that he raises here: that his overstay was justified because he had timely filed for an extension of time to remain in the country.

El Badrawi's flawed legal argument did not prevail in the immigration proceedings, and it cannot prevail here, as El Badrawi admits that he never received an extension to remain in the country. Federal courts have unanimously held that aliens may be removed from the country immediately after they overstay their authorized time here, and to hold otherwise in this case would be to fundamentally alter this country's immigration policies. Under El Badrawi's reasoning, illegal aliens should be granted temporary amnesty if they managed to file a request for an extension before their lawful status expired.

Although El Badrawi has filed suit against both federal and state authorities, this motion concerns only the United States, the Department of Homeland Security, the Federal Bureau of Investigation, Secretary of Homeland Security Michael Chertoff, in his official capacity, and FBI Director Robert Mueller, in his official capacity (collectively, "the Federal Defendants").[1] As to

[1] El Badrawi has also sued two DHS agents in their individual capacities, and they have a filed a separate motion.

the Federal Defendants, El Badrawi seeks damages under the Federal Tort Claims Act (FTCA) and an order to expunge all federal records pertaining to his arrest. As detailed below, El Badrawi's claims against the Federal Defendants fail for three reasons. First, the Immigration and Nationality Act prohibits this Court from reopening the merits of El Badrawi's immigration proceedings. Second, El Badrawi's FTCA claims are both jurisdictionally barred and without merit. Finally, El Badrawi's expungement claims must be dismissed for lack of standing and failure to state a claim. For these reasons, this case should be dismissed or, in the alternative, summary judgment should be granted in favor of the Federal Defendants.

BACKGROUND

El Badrawi bases his claims primarily on the actions of agents working for U.S. Immigration and Customs Enforcement (ICE), the investigative arm of the Department of Homeland Security. Defendants Gregory Manack and Michael Loser are both longtime law enforcement agents for ICE. *See* Declaration of Gregory Manack ("Manack Dec."), attached as Ex. A, ¶ 2; Declaration of Michael Loser ("Loser Dec."), attached as Ex. B, ¶ 2. During the times alleged in the complaint, Manack served as the ICE Hartford Resident Agent in Charge, while Loser served as a Senior Special Agent in that office. *See* Manack Dec. ¶ 3; Loser Dec. ¶ 3. As ICE agents, Manack and Loser investigate people suspected of violating the immigrations laws of the United States, and they are authorized by law to arrest and detain any alien who they have reason to believe is in the country illegally. *See id.*; 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.5(c)(1).

Plaintiff Rashad El Badrawi, a foreign national, has periodically traveled to the United States for employment in the biotechnology industry. *See* Complaint ¶¶ 19-20. El Badrawi's employment has been authorized under the H1-B program, which allows specialized foreign workers to obtain temporary employment in the United States. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b). For an alien like El Badrawi to legally enter the country under this work program, three general steps must be completed. First, the employer must obtain approval from the Department of Labor and Department of Homeland Security ("DHS") to participate in the program. *See* 20 C.F.R. 655.700(b). Second, the alien must obtain a visa from the State Department. *See id.*; 22 C.F.R. § 41.53(a). Finally, DHS must grant the alien admission to the United States. 8 U.S.C. § 1225; 8 C.F.R § 235.1. In this case, as detailed below, El Badrawi was lawfully admitted to the country under the H1-B program, but only for a limited period of time. El Badrawi overstayed this period, which led to his arrest on the immigration charges that are the crux of this lawsuit.

A. El Badrawi's Entry Into the United States

In 2003, El Badrawi sought employment from the University of Connecticut Health Center under the H1-B program. *See* Complaint ¶¶ 23-25. As required, the University first obtained the necessary approval to participate in the program. *See* Ex. C, attachment 3. This approval, however, "does not authorize employment." *Id.* Rather, it only allows an alien to apply for a work visa from the State Department, which has sole discretion as to whether to issue the visa. *See* 22 C.F.R. § 41.53. In this case, the State Department granted El Badrawi an H1-B visa that was valid until May 1, 2004. *See* Complaint ¶ 25; Ex. B, attachment 1. This visa, however, did not authorize El Badrawi to enter the United States. Rather, a visa only allows the alien to travel to the United States and apply for admission at a port of entry. *See* 22 C.F.R. § 41.112(a); 8 C.F.R. § 214.1(a)(3).

When an alien like El Badrawi travels to a port of entry with a visa, a DHS officer determines whether to allow the alien entry into the United States, and if so, specifies how long the alien's period of admission in the country is authorized. *See* 8 U.S.C. § 1225; 8 C.F.R

§ 235.1 The period of visa validity has no relation to the period of time the immigration authorities at a port of entry may authorize the alien to stay in the United States. *See* 22 C.F.R. § 41.112(a). In this case, El Badrawi arrived at a port of entry to the country on June 1, 2003, and a DHS officer granted him admission and authorized him to remain in the United States until May 1, 2004. *See* Complaint ¶ 25; Loser Dec. ¶ 4; Ex. B, attachment 1. After El Badrawi entered the country, he began working for the University of Connecticut as a research associate. *See* Complaint ¶ 27.

While El Badrawi was working in the United States, an officer from the State Department administratively revoked El Badrawi's visa. *See* Ex. C, attachment 6. An authorized officer of the State Department may revoke visas "at any time, in his discretion" with judicial review only in removal proceedings. 8 U.S.C. § 1201(i). In this case, El Badrawi's visa was revoked because "subsequent to visa issuance, information has come to light indicating that the alien may be inadmissible to the United States and ineligible to receive a visa" under 8 U.S.C. § 1182(a)(3), which lists various categories of aliens who are ineligible for admission based on "security and related grounds." Ex. C, attachment 6. Although the certificate of revocation for El Badrawi's visa was signed on October 2, 2003, the revocation was to become effective only upon El Badrawi's departure from the United States. *See id*. This is because a visa only affects an alien's ability to *travel to* the United States; it does not establish an alien's authorization to *remain in* the United States. *See* 22 C.F.R. § 41.112(a).

El Badrawi's authority to remain in the United States was governed by the initial determination by the DHS officer, who granted him authorization to remain in the country until May 1, 2004. Loser Dec. ¶ 4; Ex. B, attachment 1. Prior to the expiration of El Badrawi's period of admission, the University of Connecticut requested permission from DHS to extend El

Badrawi's participation in the H1-B program, though neither the University nor El Badrawi ever received a decision on this request for an extension. *See* Complaint ¶¶ 31, 35; Ex. C, attachments 4-5. The extension process entails two separate determinations: first, whether to extend the work petition under the H1-B program; and second, whether to extend the alien's period of authorized admission in the United States. *See* 8 C.F.R. § 214.2(h)(15)(i).

The Act does not provide a safe harbor for aliens to remain in the country while their applications for extensions are pending, but the Act does provide that these aliens will not be subject to the otherwise standard bar on future admissibility for remaining in the country after their status has expired. *See* 8 U.S.C. § 1182(a)(9)(B); *see also* Memorandum from Michael Pearson to Regional Directors (Mar. 3, 2000), cited in Complaint ¶ 102, attached as Ex. D. In addition, when an alien timely files an application for an extension to remain in the country, an alien's work authorization is extended for an additional 240 days after his status expires. *See* 8 C.F.R. § 274a.12(b)(20). Nonetheless, an application for an extension has no effect on the alien's authorized period of admission to remain in the country, and immigration authorities may seek removal of an alien notwithstanding a pending application. *See* 8 C.F.R. § 103.2(b)(10)(ii). Accordingly, in this case El Badrawi became deportable after he remained in the country beyond his authorized period of admission: May 1, 2004. *See* 8 U.S.C. § 1227(a)(1)(B).

B. El Badrawi's Arrest and Detention

In October 2004, Gregory Manack, the Resident Agent in Charge of the ICE Hartford Office, assigned Senior Special Agent Michael Loser to determine the immigration status of El Badrawi. *See* Loser Dec. ¶ 4; Manack Dec. ¶ 4. Loser investigated the matter and determined that El Badrawi entered the United States on June 1, 2003, as an H1-B worker with an authorization to remain in the country until May 1, 2004. *See* Loser Dec. ¶ 4. Loser also discovered that El Badrawi had filed an application to extend his stay but that the request had not yet been adjudicated. *See id.* Accordingly, Loser concluded that El Badrawi unlawfully overstayed his period of admission. *See id.*

Manack subsequently issued a warrant authorizing El Badrawi's arrest. Manack Dec. ¶ 5; Ex. B, attachment 2. Manack also determined that El Badrawi should be detained on these charges, and he signed a Notice of Custody Determination, which informed El Badrawi that he could request review of his detention by an immigration judge. *See* Loser Dec. ¶ 8; Manack Dec. ¶ 6; Ex. B, attachment 4. Manack also signed a Notice to Appear, which is the formal charging document used by ICE to initiate removal proceedings. *See* Manack Dec. ¶ 5; Ex. B, attachment 3. The Notice to Appear alleged that:

1) El Badrawi is not a citizen or national of the United States;
2) El Badrawi is a native and citizen of Lebanon;
3) El Badrawi was admitted to the United States on June 1, 2003, with authorization to remain in the country until May 1, 2004; and
4) El Badrawi remained in the United States beyond May 1, 2004, without authorization from ICE.

Ex. B, attachment 3.

On October 29, 2004, Loser and other law enforcement agents arrested El Badrawi outside of his home. *See* Loser Dec. ¶ 7. ICE agents are trained to inquire whether arrestees need medication, and here Loser learned that El Badrawi took medication for Crohn's disease. *See id.* Accordingly, Loser took El Badrawi's medication from his home to the ICE facility where he was processed. *See id.* ¶ 7; Complaint ¶ 68. At the ICE facility, El Badrawi had full access to his medication. *See* Loser Dec. ¶ 7. Because El Badrawi was to be detained, Loser transferred custody of El Badrawi and his medication to ICE's Office of Detention and Removal Operations. *See id.* Neither Loser nor Manack had any further involvement with El Badrawi after he was transferred to ICE's Office of Detention and Removal Operations. *See* Loser Dec. ¶¶9-10; Manack Dec. ¶ 7.

ICE Detention Officers took El Badrawi to the Hartford Correctional Center, a local facility that has a contract with ICE to house detainees. *See* Loser Dec. ¶ 9. ICE detainees are not allowed to bring any personal belongings, including medication, to the Hartford Center. *See id.* Accordingly, pursuant to standard practice, ICE Detention Officers locked up his belongings and medication for safekeeping at the ICE facility. *See id.* When El Badrawi arrived at the Hartford Center, he completed a medical questionnaire and indicated that he had Crohn's disease and needed medication. *See* Ex. E.[2] Although El Badrawi claims in his complaint that he did not receive medication for several days after arriving at the Hartford Center, medical records show that on the day he arrived in the facility, a doctor prescribed him 400 mg of Asacol, the same medication and dosage that he had been taking before he was arrested. *See id.*; Complaint ¶ 68. El Badrawi's medical records also document that he received this medication during the duration of his stay at the Hartford Center. *See* Ex. E.

C. El Badrawi's Immigration Proceedings and Removal

On November 3, 2004, El Badrawi appeared in immigration court, represented by counsel. *See* Complaint ¶ 95; Ex. C. El Badrawi also filed formal pleadings requesting that the removal proceedings be terminated. *See* Ex. C, attachment 2. In these pleadings, El Badrawi admitted the truth of the first three allegations in the Notice to Appear (that he was a not a U.S. citizen; that he was a citizen of Lebanon; and that he was admitted to the country for a temporary period not to exceed May 1, 2004), but he denied the final allegation (that he remained in the country beyond May 1, 2004, without authorization from ICE). *See id.* In arguments before the

[2] This exhibit is being filed separately under seal.

judge, El Badrawi's counsel argued that because El Badrawi timely filed an application for an extension of his stay, his detention was inappropriate. *See* Ex. C at pp. 5-6. ICE Counsel contested this argument, noting that El Badrawi overstayed his period of lawful admission. The judge continued the case for one week, ordering that "both parties must address whether [El Badrawi] remains in valid, non-immigrant status." *See id.* pg. 11. The judge also denied El Badrawi's request for bond. *See* Ex. F.[3]

One week later, El Badrawi again appeared in immigration court with his attorney, but instead of contesting the charges against him, he offered to apply for an order for voluntary departure. *See* Ex. G at p.2; Ex. H. Voluntary departure is a benefit that may be conferred upon removable aliens who agree to leave the country at their own expense, in lieu of removal proceedings. *See* 8 U.S.C. § 1229c(a). Aliens who accept voluntary departure are not subject to the otherwise standard bar on reentry to the country that applies to aliens found removable. *See id.* § 1182(a)(9)(A)(i). In addition, ICE may attach "any conditions it deems necessary" to an order of voluntary departure to ensure that the alien leaves the country, such as continued detention pending departure. *See* 8 U.S.C. § 1229c(e); 8 C.F.R. § 240.25.

In this case, ICE agreed to allow El Badrawi the benefit of voluntary departure. *See* Ex. G at pp. 2-3. ICE attached the conditions that El Badrawi continue to be detained without bond until his departure and that he depart the country under safeguards, *i.e.*, with an ICE escort. *See id.*; Ex. H. The immigration judge then issued a written order, finding that El Badrawi was removable based on the charges in the Notice to Appear. *See* Ex. H. The judge then ordered that El Badrawi be granted voluntary departure at El Badrawi's own expense in lieu of continuing with the removal proceedings. *See id.* Finally, the judge ordered El Badrawi to voluntarily

[3] Bond proceedings are not recorded, and there is thus no transcript of the judge's denial.

depart the country on or before December 10, 2004 under ICE safeguards. *See id*. Although El Badrawi was willing to depart the country by December 10, ICE was unable to process his release and departure by this date. *See* Complaint ¶ 119. Subsequently, on December 22, 2004, ICE agents escorted El Badrawi to John F. Kennedy International Airport, and he left the country. *See* Complaint ¶ 123.

ARGUMENT

I. Plaintiff May Not Pursue Claims That Could Have And Should Have Been Brought During His Immigration Proceedings

No matter how much El Badrawi dresses up his legal arguments in constitutional clothing, stripped bare his complaints about his arrest and detention are nothing more than a collateral attack on his prior immigration proceedings.[4] Indeed, the only way this Court can determine the merits of El Badrawi's FTCA and expungement claims in this case is to reexamine the merits of his immigration case. Yet as detailed in the motion to dismiss by Defendants Manack and Loser, pp. XX-XX, the Immigration and Nationality Act explicitly prohibits district courts from reviewing the merits of immigration orders. *See* 8 U.S.C. §§ 1252 (b)(9), 1252(g), 1252(a)(2)(B)(ii), and 1226(e). Likewise, the doctrine of *Heck v. Humphrey* bars tort claims that challenge the legality of a conviction or confinement that has not been invalidated. *See* 512 U.S. 477 (1994). Therefore, for the reasons stated in Manack and Loser's motion, this Court should dismiss this action for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

II. El Badrawi's Tort Claims Are Jurisdictionally Barred And Without Merit

Assuming that the Court determines that the Immigration and Nationality Act does not jurisdictionally preclude this Court's review of El Badrawi's claims, this Court should

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[4] In addition to his claims about his arrest and detention, El Badrawi alleges that he was denied medical care. *See* Complaint ¶ 152. Yet this claim is directed only against Defendant Michael Loser in his individual capacity, not against the United States.

nonetheless find that, based on the undisputed evidence, El Badrawi's claims are meritless as a matter of law. El Badrawi makes several claims under the Federal Tort Claims Act (FTCA), which generally waives sovereign immunity for acts by any employee of the federal government within the scope of his or her employment, under circumstances in which the tort law of the state where the alleged act or omission occurred would impose liability on a private party. 28 U.S.C. §§ 1346(b)(1), 28 U.S.C. § 2674. He asserts that, by arresting him and beginning removal proceedings against him, immigration agents committed false arrest, false imprisonment, malicious prosecution, vexatious suit, abuse of process, and intentional infliction of emotional distress under tort law in the state of Connecticut. Complaint ¶ 156.

El Badrawi's claims arise out of the prosecution of an immigration case, a discretionary function for which the United States retains sovereign immunity. In addition, even if this Court could exercise jurisdiction over El Badrawi's claims, the undisputed facts prove that he has no right to recover under the laws of Connecticut. Therefore, this Court should dismiss El Badrawi's FTCA claims for lack of subject matter jurisdiction or, alternatively, grant summary judgment to the United States.

A. The FTCA Does Not Waive Sovereign Immunity Against Claims Arising Out Of A Decision To Initiate Immigration Proceedings

The FTCA waiver of sovereign immunity excludes 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," regardless of whether the employee abused this discretion. 28 U.S.C. § 2680(a). The discretionary function exception "prevent[s] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). This prevents courts from becoming involved "in making ...

decisions entrusted to other branches of the government." *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1087 (D.C. Cir. 1980). As a result, the exception "protects the principles embodied in the separation of powers doctrine." *Caban v. United States*, 671 F.2d 1230, 1233 (2d Cir. 1982). *Cf. Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 176 (2d Cir. 2006) (granting tort immunity to a government contractor who performed a discretionary function because "[t]he public interest in ensuring that immigration law administrators feel free to convey information [about a possible terrorist alien] to the proper government agencies is high").

To determine whether a particular action falls within the discretionary function exception, a court first asks whether it involves "an element of judgment or choice." *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Second, a court determines whether "considerations of public policy" governed the judgment or choice. *Id.* at 537. In this case, immigration authorities made a judgment to initiate removal proceedings against El Badrawi for alleged immigration violations. As courts have held, prosecution-like decisions involve protected policy considerations regarding whom to prosecute, how to proceed with a prosecution, and whether to abandon an already-begun prosecution. *Smith v. United States*, 375 F.2d 243, 246-48 (5th Cir. 1967).

In the immigration field, decisions regarding how to proceed against those suspected of illegally residing in the country tie inextricably into the prosecutorial function and are protected by the discretionary function exemption. *See Medina v. United States*, 259 F.3d 220, 222 (4th Cir. 2001); *Nguyen v. United States*, 65 Fed. Appx. 509, *1 (5th Cir. 2003). In *Medina*, the Fourth Circuit considered a case in which an immigration officer independently inquired into a particular person's immigration status, obtained an arrest warrant through the proper channels, and, along with other immigration officers, arrested him. 259 F.3d at 222. After the proceedings ended, Medina sued under the FTCA for assault and battery, false arrest, malicious prosecution, and infliction of emotional distress. *Id.* at 223. The court held that the conduct of the immigration officials "clearly" met the first prong of the discretionary function test because the statute governing immigration agents gave them discretion to arrest and detain a person pending a determination of his or her removability and because the agency enjoys broad prosecutorial discretion. *Id.* at 226-27 (citing 8 U.S.C. § 1226(a)). The court went on to hold that the decision to arrest Medina was "clearly clothed in policy considerations" based on the immigration agents' understanding of Medina's immigration status. *Id.* at 229. In arriving at this conclusion, the court remarked that had the agents obtained a Notice to Appear, a document instructing a person to appear before an immigration court and detailing the charges against him or her, "we are convinced that the decision to issue the [Notice to Appear] would also be excepted from the FTCA waiver of sovereign immunity as a discretionary function." *Id.* at 226 n.4. In El Badrawi's case, agents did obtain a Notice to Appear based on objective facts indicating that he had violated immigration law. *See* Ex. B, attachment 3.

In *Nguyen*, the Fifth Circuit examined claims of false imprisonment and negligent investigation brought by a man who had a legitimate claim to derivative citizenship but had been subjected to deportation proceedings and held in federal custody for fifteen months. 65 Fed. Appx. 509 at *1. The court held that the discretionary function exception barred the claims, based in part on the fact that federal statutes empower immigration agents to make arrests of suspected illegal immigrants. *Id.* at *2. The court noted that decisions about whom and how to prosecute generally fall into the exception and that "no regulation or statute prevented the INS agents from pursuing deportation proceedings against Nguyen based on the information available to them." *Id.* at *1-*2. In the court's words, the case was "essentially a claim that the INS officers failed to adequately perform a discretionary duty, which falls squarely within the discretionary function exception." *Id.*

In this case, like *Medina and Nguyen*, El Badrawi's complaint unabashedly attacks ICE's decision to prosecute removal proceedings:

- "ICE nevertheless refused to recognize [his] legal status, *proceeded to prosecute removal proceedings*, and to detain him without bond pending completion of those proceedings," Complaint ¶ 105 (emphasis added);

- "Defendants Manack and Loser acted without probable cause ... in issuing, serving, and filing the NTA and *commencing removal proceedings* against Mr. El Badrawi," *Id.* at ¶ 114 (emphasis added);

- "By... *initiating removal proceedings* against him, Defendants Manack and Loser should have known that their unlawful actions" would cause "trauma" to El Badrawi, *Id.* at ¶ 133 (emphasis added).

Because El Badrawi's claims are based on ICE's decision to initiate removal proceedings, the discretionary function exemption of the FTCA bars this suit. Like the agents in *Medina* and *Nguyen*, the ICE agents who initiated and carried out the proceedings against El Badrawi exercised judgment and choice in deciding to investigate El Badrawi's immigration status, evaluating the relevant evidence, and initiating removal proceedings. Therefore, this Court should dismiss El Badrawi's FTCA claims for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).

B. El Badrawi Cannot Establish A Violation of Connecticut Tort Law

Even if the discretionary function exception does not bar his claims, El Badrawi still cannot establish a violation of Connecticut tort law. The FTCA allows a plaintiff to recover from the United States only when the United States, if a private party, would be liable to the plaintiff under the law of the state where the alleged injury took place. 28 U.S.C. §§ 1346 (b),

2674. Thus, in order to state cognizable claims under the FTCA, El Badrawi must state tort claims under Connecticut law.[5] The undisputed facts of the case, however, cannot support a finding of false arrest, false imprisonment, malicious prosecution, vexatious suit, intentional infliction of emotional distress, or abuse of process under the laws of Connecticut. Therefore, this Court should grant summary judgment in favor of the United States. *See* Fed. R. Civ. P. 56.

1. El Badrawi Cannot Establish A False Arrest or Imprisonment

El Badrawi asserts that ICE agents falsely arrested and falsely imprisoned him but fails to point to any instance in which they restrained his liberty without legal authority. Connecticut treats claims of false arrest and false imprisonment identically. *Outlaw v. City of Meriden*, 682 A.2d 1112, 1115 (Conn. App. Ct. 1996). To recover on either theory, the plaintiff must show that the defendant restrained his or her liberty unlawfully. *See Green v. Donroe*, 440 A.2d 973, 974 (Conn. 1982); *see also Wallace v. Kato*, 127 S. Ct. 1091 (2007).

When law enforcement officers restrain an individual under the authority of a valid warrant, they act lawfully. *Outlaw*, 682 A.2d at 1115. A plaintiff "detained under regular process duly issued by a court having jurisdiction" therefore cannot succeed in a false imprisonment claim. *Clewley v. Brown, Thomson, Inc.*, 181 A. 531, 533 (Conn. 1935). As a result, one who seeks to challenge a detention pursuant to legal process must pursue claims of abuse of process or malicious prosecution rather than false arrest or false imprisonment. *Lo Sacco v. Young*, 564 A.2d 610, 617 (Conn. App. Ct. 1989) (quoting W. Prosser, Torts § 11, at 54 (5th ed. 1984)).

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[5] In accordance with the proviso to 28 U.S.C. § 2680(h), sovereign immunity has been waived for claims of false imprisonment, false arrest, malicious prosecution, and abuse of process when the alleged tort was committed by investigative or law enforcement officers.

As El Badrawi's complaint acknowledges, ICE agents obtained a warrant and a Notice to Appear before arresting him. Complaint ¶¶ 42, 45; *see also* Ex. B, attachments 2-3. His detention, therefore, cannot support a false imprisonment or false arrest claim. *See Medina*, 259 F.3d at 226 n.4 (remarking that, had INS issued a Notice to Appear in that case, "Medina would not possess a claim for false arrest"). Based on the fact that he makes no allegations that agents detained him without legal authority, this Court should dismiss El Badrawi's claims for false imprisonment and false arrest. *See Zak v. Robertson*, 249 F. Supp. 2d 203, 206 (D. Conn. 2003) (granting a defendant's summary judgment motion "[b]ecause plaintiffs have not come forward with an evidence that they suffered any deprivation of liberty prior to the issuance of legal process against them" and opining that "their claim is for malicious prosecution, not false arrest").

2. El Badrawi Cannot Establish A Malicious Prosecution or Vexatious Suit

El Badrawi has also alleged malicious prosecution and vexatious suit. "Vexatious suit" refers to wrongfully instigated civil actions,[6] and "malicious prosecution" refers to the groundless instigation of criminal lawsuits. *DeLaurentis v. City of New Haven*, 597 A.2d 807, 814 n.3 (Conn. 1991). To recover for either, a plaintiff must show that (1) the defendant initiated or caused the initiation of proceedings; (2) those proceedings terminated in the plaintiff's favor; (3) the defendant acted without probable cause; and (4) the defendant acted with malice. *McHale v. WBS Corp.*, 446 A.2d 815, 817 (Conn. 1982). El Badrawi can not satisfy the second, third, or fourth of these elements.

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[6] Connecticut statutory law also allows plaintiffs to recover civil damages for groundless or vexatious suit against "any person who commences and prosecutes any civil action or complaint against another." Conn. Gen. Stat. Ann. § 52-568.

El Badrawi cannot satisfy the "favorable termination" prong because the judge in the immigration proceedings found him to be removable on the charges for which he was arrested. *See* Ex. H. Indeed, by agreeing to voluntary departure in lieu of removal proceedings, El Badrawi effectively accepted a plea bargain. *See In re Romalez-Alcaide*, 23 I. & N. Dec. 423, 429 (BIA 2002), (explaining that voluntary departure operates "like a plea bargain" because "[t]he alien leaves with the knowledge that he does so in lieu of being placed in proceedings"); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006) (same); *Landin-Zavala v. Gonzales*, 488 F.3d 1150 (9th Cir. 2007) (same); *Garcia v. Gonzales*, 210 Fed. Appx. 521 (7th Cir. 2006) (same). A plea bargain, however, cannot satisfy the "favorable termination" prong of malicious prosecution. *See Russo v. City of Hartford*, 184 F. Supp. 2d 169, 185-86 (D. Conn. 2002); *Holman v. Cascio*, 390 F. Supp. 2d 120, 123-24 (D. Conn. 2005) (citing *See v. Gosselin*, 48 A.2d 560 (Conn. 1946)).

El Badrawi likewise cannot satisfy the "probable cause" prong of malicious prosecution, because the removal proceedings were based on objective evidence that he violated the law. El Badrawi was arrested because he "remained in the United States for a time longer than permitted," in violation of 8 U.S.C. § 1227(a)(1)(B).[7] Ex. B, attachment 3. To determine whether aliens may be removed from the country under this provision, the Second Circuit has established a simple, three-part test: ICE "'need only show [1] that the alien was admitted as a

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[7] Although El Badrawi implies in his complaint that he was arrested because his visa was revoked, the Notice to Appear makes clear that the charges against El Badrawi are limited to overstaying his period of lawful admission. *Cf. Equan v. United States Immigration & Naturalization Service*, 844 F.2d 276, 278 (5th Cir. 1988). In *Equan*, the court upheld the removal of an alien who overstayed his period of lawful admission, even though he had a valid visa: "[the alien] has confused the visa's validity date with its expiration date. His visa permitted entry into the United States at any time through 1988, but once he entered, it authorized only a one-month stay." *Id.* Likewise, in this case, the issue is not whether El Badrawi's visa was valid, but whether he exceeded his authorized time in the United States.

nonimmigrant for a temporary period, [2] that the period has elapsed, and [3] that the nonimmigrant has not departed.'" *Zerrei v. Gonzales*, 471 F.3d 342, 345 (2nd Cir. 2006), quoting *Matter of Teberen*, 15 I. & N. Dec. 689, 690 (B.I.A. 1976) (internal quotations omitted).

Here, there is no dispute that when El Badrawi was arrested on October 29, 2004: (1) El Badrawi was admitted as a nonimmigrant worker for a temporary period not to exceed May 1, 2004; (2) that period had elapsed; and (3) he had not departed the country. *See* Loser Dec. ¶ 4; Ex. C, attachment 2. Therefore, El Badrawi cannot satisfy the probable cause requirement, because the arresting officers had the requisite "knowledge of facts sufficient to justify a reasonable person in the belief that there are reasonable grounds for prosecuting an action." *Vandersluis v. Weil*, 407 A.2d 982, 985 (Conn. 1978).

Finally, neither El Badrawi's allegations nor the evidence even suggests that any federal agent acted with malice. None of the facts recited in the complaint indicate that El Badrawi's arrest or detention was "primarily for a purpose other than that of bringing an offender to justice." *McHale*, 446 A.2d at 817. El Badrawi's inability to set forth the elements of malicious prosecution or vexatious suit necessitates the dismissal of these claims.

3. El Badrawi Cannot Establish Abuse of Process

El Badrawi also cannot show that ICE agents committed abuse of process. In Connecticut, a person commits abuse of process by "us[ing] a legal process against another in an improper manner or to accomplish a purpose for which it was not designed." *Varga v. Pareles*, 81 A.2d 112, 115 (Conn. 1951). One may not recover for abuse of process against a defendant who had "an incidental motive of spite or an ulterior purpose" but nonetheless used the legal process for its intended purpose. *Mozzochi v. Beck*, 529 A.2d 171, 173 (Conn. 1987) (quoting Restatement (Second) of Torts § 682, comment b (1977)). Plaintiffs who complain of unpleasant or expensive litigation, for instance, typically lose on claims for abuse of process unless they can show that the defendant engaged in specific offensive behavior, “such as utter failure to investigate the validity of the underlying action, or unwarranted pursuit of inappropriate motions.” *Id.* at 174.

El Badrawi makes no suggestion that ICE agents acted for any purpose–primary or incidental–other than furthering the important goal of deporting those who are in the country illegally. As a result, he has failed to state a claim for abuse of process. *See Wilson v. Jefferson*, 908 A.2d 13, 25 (Conn. App. Ct. 2006) (upholding a directed verdict for a defendant where plaintiffs claimed defendant had committed abuse of process by beginning eviction proceedings but failed to present any evidence indicating plaintiff instituted proceedings for any purpose other than to evict them from an apartment).

4. El Badrawi Cannot Establish Intentional Infliction Of Emotional Distress

El Badrawi similarly fails to allege a set of facts sufficient to support a finding of intentional infliction of emotional distress. Connecticut law allows a plaintiff to recover for intentional infliction of emotional distress only when the defendant’s conduct has been so extreme as “to be regarded as atrocious, and utterly intolerable in a civilized community” and where “recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous!” *Appleton v. Bd. of Educ.*, 757 A.2d 1059, 1062 (Conn. 2000) (citations and internal quotations omitted); *Hartmann v. Gulf View Estates Homeowners Assoc.*, 869 A.2d 275, 277-78 (Conn. 2005). To ensure that offending behavior rises to this level, courts require plaintiffs to show: (1) that the defendant intended to inflict emotional distress or knew or should have known it was a likely result of the conduct; (2) the conduct was extreme and outrageous; (3) the conduct was the cause of the plaintiff’s distress; and (4) that the plaintiff’s emotional distress was severe. *DeLaurentis*, 597 A.2d at 827-28.

El Badrawi's allegations regarding his arrest fail to rise to this level.[8] *See Silberberg v. Lynberg*, 186 F. Supp. 2d 157, 175-76 (D. Conn. 2002); *Rzayeva v. Foster*, 134 F. Supp. 2d 239, 250 (D. Conn. 2001), *aff'd*, 67 Fed. Appx. 75 (2d Cir. 2003). El Badrawi's complaint accuses them merely of performing their usual duties. He presents no claim that agents engaged in extreme or outrageous behavior, singled out El Badrawi for harassment, or intended to cause him distress. He has, therefore, failed to state a claim for intentional infliction of emotional distress.

III. El Badrawi's Expungement Claims Are Jurisdictionally Barred And Without Merit

In addition to the money damages El Badrawi seeks under the FTCA, he also asks this Court for the injunctive relief of expungement. Specifically, El Badrawi asserts two claims for "unlawful maintenance of records," one under common law and one under federal statutory law. *See* Complaint ¶¶ 157-171. These claims are both premised on alleged constitutional violations, and as we have illustrated in the previous paragraphs and in Defendants Manack and Loser's motion for summary judgment, no such violations occurred in this case. Furthermore, although El Badrawi calls the maintenance of the alleged records of his arrest and detention "fundamentally unfair," Complaint ¶ 160, he does not dispute that any such records would accurately reflect the fact that he was arrested and detained on immigration charges. Accordingly, this Court has no basis to award injunctive relief to El Badrawi.

Nonetheless, were the Court to entertain El Badrawi's expungement claims, they would fail for two reasons. First, El Badrawi lacks standing to seek injunctive relief. Second, neither statutory nor common law provides a cause of action to El Badrawi to seek expungement of alleged government records. Each of these reasons is discussed below.

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[8] Although El Badrawi also alleges mistreatment while he was detained, those allegations are directed only to the warden of the Hartford Correctional Center, not the United States. *See* Complaint ¶¶ 62-94.

A. El Badrawi Lacks Standing To Seek Expungement

Because El Badrawi is a foreign national living abroad with no right to re-enter the country, his alleged injuries regarding the maintenance of alleged government records are too conjectural to establish Article III standing. To have standing to bring a lawsuit, a plaintiff must show that: (1) he has suffered an injury to a legally protected interest, (2) the injury is fairly traceable to the defendant, and (3) a favorable decision would redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In this case, El Badrawi fails to satisfy the first element of standing, as he has not suffered a "concrete and particularized" injury to a legally protected interest. *Id*. *See also City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (holding that one must show a "real and immediate threat" of future injury to establish standing); *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003).

According to El Badrawi, his injuries arise from "adverse employment consequences," "the potential for future arrest," "the inability to pursue his profession in the United States," and "the denial of banking services." Complaint ¶¶ 138, 140. Yet as a foreign national living abroad with no current connection to the United States, El Badrawi does not have any legally protected interest in these activities. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 274-275 (1990) (finding constitutional protections inapplicable to the search of Mexican property belonging to a citizen and resident of Mexico). Furthermore, El Badrawi offers no specific examples of how the alleged information in government databases has prevented him from obtaining a job or being denied banking services. Indeed, El Badrawi does not even allege that he ever intends to return to the United States. As the Supreme Court has repeatedly held, "[a]llegations of *possible* future injury do not satisfy the requirements of Article III. A threatened injury must be '*certainly impending*' to constitute injury in fact." *Whitmore v.*

Arkansas, 495 U.S. 149, 158 (1990) (citation omitted; emphasis added); *see also Lyons*, 461 U.S. at 102.

El Badrawi's allegations of possible future harm bear remarkable similarity to the claims presented by the plaintiffs in *National Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429, 439 (E.D.N.Y. 2007), *appeal docketed*, No. 07-0816-cv (2d Cir. Mar. 2, 2007). In that case, the plaintiffs alleged that federal officials had no authorization to enter civil immigration data into the national crime database and that the entry of such data increased the group's members' risk of arrest. The court, however, held that the plaintiffs had no standing to pursue injunctive relief for three reasons. *Id.* First, Congress intended the federal recordkeeping statute to aid in making arrests, so the alleged injury lacked the requisite tight connection to the statutory purpose. *Id.* Second, the threat of arrest was merely "speculative." *Id.* Third, any plaintiffs detained in the future would have adequate "due process opportunities" to challenge the basis for the arrest. *Id.*

El Badrawi, like the *La Raza* plaintiffs, presents only speculation as to the link between maintenance of records and his future risk of wrongful arrest. The fact that El Badrawi is a non-U.S. citizen living abroad makes the chances of his arrest even more remote. Therefore, El Badrawi lacks standing to pursue his expungement claims, and this Court should dismiss the claims for lack of jurisdiction.

B. No Common Law Or Statutory Right Of Action Exists For Expungement

The law is well established "that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The bar of sovereign immunity "applies alike to causes of action arising under acts of Congress, and to those arising from some violation of rights conferred upon the citizen by the Constitution." *Lynch v. United States*, 292 U.S. 571, 582 (1934) (citations omitted). Although the United States has waived sovereign immunity for certain common law claims under the Federal Tort Claims Act, that statute applies only to actions for monetary damages. *See Walker v. United States*, 116 F.R.D. 149, 152 (S.D.N.Y. 1987) (refusing to order expungement in an FTCA case because the FTCA waiver does not extend to actions for expungement). Thus, El Badrawi cannot proceed on his common law claim for unlawful maintenance of records because the United States has not waived sovereign immunity.

Likewise, although El Badrawi also bases his expungement claim under the National Crime Information Center statute, 28 U.S.C. § 534, that law contains no private right of action and thus no waiver of sovereign immunity. *See La Raza*, 468 F. Supp. 2d at 439. *See also Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001); *Olmsted v. Pruco Life Ins. Co.*, 283 F.3d 429, 432 (2d Cir. 2002) (discussing the requirements for courts to imply a private right of action into a statute). In the NCIC statute, Congress directed the Attorney General to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records" and to "exchange such records and information with, and for the official use of, authorized officials." 28 U.S.C. § 534(a)(1), (4). Under that authority, the Attorney General delegated to the FBI the responsibility to "[o]perate ... a computerized nationwide index of law enforcement information under the National Crime Information Center." 28 C.F.R. § 0.85(f). This index is a computerized information system containing information that includes, but is not limited to criminal history records. *See id.* § 20.3(n). By its very terms, the NCIC statute contains no private right of action to seek expungement.

The NCIC statute's silence on private causes of action demonstrates that Congress did not intend to allow expungement claims under that law. As the *La Raza* court noted, Congress intended for the NCIC statute to make records "accessible to law enforcement for official uses," not to protect individuals. 468 F. Supp. 2d at 439. Another indication that Congress did not intend the NCIC statute to allow private causes of action is that another law already exists for individuals to challenge the accuracy of government records—the Privacy Act. In the Privacy Act, Congress has provided specific procedures that an agency must follow when someone requests to amend his records, and the law further allows a civil remedy to individuals who believe that the agency has not complied with the law. *See* 5 U.S.C. § 552a. The existence of this comprehensive remedial scheme obviates any arguable basis to recognize a private expungement cause of action under the NCIC statute or common law.

In fact, the Privacy Act demonstrates that Congress intended to deny plaintiffs in El Badrawi's position any cause of action for expungement. The Privacy Act allows only United States citizens and lawful permanent residents to challenge the validity of records. *See* 5 U.S.C. § 522a(a)(2); *Raven v. Panama Canal Co.*, 583 F.2d 169, 170-71 (5th Cir. 1978). Likewise, the Privacy Act allows law enforcement agencies to exclude certain systems of records from the Privacy Act's amendment provision, which the FBI has done through 28 C.F.R. § 16.96. *See* 5 U.S.C. §§ 552a(d)(2), (3) and 552a(j)(2); *Bassiouni v. FBI*, 436 F.3d 712, 723-24 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 709 (2006). Thus, Congress has shown its intent that foreign nationals like El Badrawi should not be able to sue government agencies to amend law enforcement records. This lack of congressional intent proves fatal to El Badrawi's case: "Without congressional intent, 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Olmsted*, 283 F.3d at 432, *quoting Alexander*, 532 U.S. at 286-87.

Although the Second Circuit has recognized the ability of courts to exercise ancillary jurisdiction in criminal matters to expunge government records, here there is no underlying case to which ancillary jurisdiction may apply. *See United States v. Schnitzer*, 567 F.2d 536, 539 (2d

Cir. 1977). Moreover, as the Second Circuit held in *Schnitzer*, the power of courts to expunge records is "narrow" and should only be used in an "extreme circumstances." *Schnitzer*, 567 F.2d at 539 (quoting *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975). Finally, "[c]ourts have consistently held that economic hardship or negative employment consequences do not constitute the kind of 'extreme circumstances' discussed in *Schnitzer*." *United States v. Lau,* No. 94-1682, 2003 WL 22698810, at *3 (S.D.N.Y. Nov. 14, 2003). In this case, other than claims about his employment prospects, El Badrawi resorts to characterizing the maintenance of alleged records of his arrest and detention "fundamentally unfair." Complaint ¶ 160. This vague characterization cannot substitute for the concrete and particularized injury needed to support the extreme remedy of expungement, and El Badrawi's requests for equitable relief should therefore be dismissed.

CONCLUSION

For the reasons stated above, this Court should dismiss this action or, in the alternative, grant summary judgment to the Federal Defendants.

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November 19, 2007

For Defendants United States of America, Department of Homeland Security, Federal Bureau of Investigation, Michael Chertoff, and Robert Mueller.

Certificate of Service

I hereby certify that on November 19, 2007, a copy of this Memorandum of Law was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

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List of Exhibits

A. Declaration of Gregory Manack

B. Declaration of Michael Loser, with attachments:

   1. Visa
   2. Warrant
   3. Notice to Appear
   4. Notice of Custody Determination
   5. Notice of Rights

C. Transcript of Removal Proceedings, Nov. 3, 2004, with attachments:

   1. Notice to Appear
   2. Pleadings
   3. Approval of H1-B Petition
   4. Receipt of Application for Extension
   5. Letters from University of Connecticut
   6. Certificate of Visa Revocation

D. ICE Internal Memorandum from Michael Pearson

E. El Badrawi's medical records (filed separately under seal)

F. Record of Immigration Court Action

G. Transcript of Removal Proceedings, November 10, 2004

H. Order granting voluntary departure