IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Carlos Rene Morales, Rosa Vargas, Morales, Juan Mijangos Vargas, Juneidy Mijangos Vargas, D.M.V., J.A.M., Salvador Alfaro, Johana Gutierrez, Y.S.G.R., J.I.G.R., Lesly Padilla Padilla, E.D.N.P, and E.I.N.P.,	:	
Plaintiffs,	:	
	:	Civil Action No.
v.	:	
	:	1:17-CV-05052-SCJ
The United States of America,	:	
Defendant.	:	

DEFENDANT'S MOTION TO DISMISS

COMES NOW Defendant the United States of America ("United States"), by and through the United States Attorney for the Northern District of Georgia, and moves the Court to dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and the jurisdiction-stripping provisions of 8 U.S.C. § 1252(g). The grounds for this Motion are set forth more fully in the attached Memorandum of Law.

Respectfully submitted,

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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Defendant the United States of America ("United States") has moved to dismiss Plaintiffs' Complaint ("Complaint") and various allegations set forth therein, and as grounds would show the Court the following:

I. FACTUAL BACKGROUND

In late December 2015 and early January 2016, the United States Department of Homeland Security ("DHS") and U.S. Immigration and Customs Enforcement ("ICE") planned and executed Operation Border Resolve, an enforcement and removal operation that targeted family units for removal from the United States. *See*

Complaint, Doc. 1, at ¶¶ 20-23. On January 2 and 3, 2016, ICE agents conducted enforcement and removal operations in Georgia, North Carolina, and Texas. *Id.* at 30.

Plaintiff Rosa Vargas Morales ("Ms. Vargas") is a national and citizen of Guatemala. *Id.* at ¶ 1. Ms. Vargas and several of her family members allege that, beginning on the morning of January 2, 2016, as part of Operation Border Resolve they were subject to a variety of law enforcement actions by ICE agents resulting in the detention of Ms. Vargas and her children, their transportation to immigration detention centers in Georgia, Texas, and Pennsylvania, and their release to Georgia. *Id.* at ¶¶ 34-73. Plaintiffs allege various misconduct by ICE agents during these events, including the use of a "ruse" to attempt to gain consent to enter the home, entry into her home without consent, and failure to provide Ms. Vargas with water or her prescription drugs. *Id.* At the time of these events, Ms. Vargas and her children were subject to final administrative orders of removal, which were subsequently vacated. *Id.* at 71; *see also* Vargas Orders of Removal, attached hereto as Exhibit A.[1]

[1] The court may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment "if the attached document is: (1) central to the plaintiff's claim; and (2) undisputed." *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). The attached orders of removal (and accompanying

Plaintiff Johana Gutierrez ("Ms. Gutierrez") is a national and citizen of Honduras. *Id.* at ¶ 8. Ms. Gutierrez and several of her family members allege that, beginning on the morning of January 2, 2016, as part of Operation Border Resolve they were subject to a variety of law enforcement actions by ICE agents resulting in the detention of Ms. Gutierrez's niece, Ana Mejia Gutierrez and her son, their transportation to immigration detention centers in several states, and their release. *Id.* at ¶¶ 85-105. Plaintiffs alleges various misconduct by ICE agents during these events, including the use of a "ruse" to gain consent to enter the home. *Id.* At the time of these events, Ana Mejia Gutierrez and her son were subject to orders of removal, which were subsequently vacated. *Id.* at 105; *see also* Gutierrez Orders of Removal, attached hereto as Exhibit B.

Plaintiff Lesly Padilla Padilla ("Ms. Padilla") is a national and citizen of Honduras. *Id.* at ¶ 11. Ms. Padilla and her children allege that, beginning on the

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notices to appear) are specifically referenced by Plaintiffs (Complaint at ¶¶ 71, 105), cannot be disputed, and are central to Plaintiffs' claims. *See, e.g., Hodges v. Collins*, No. 5:12-CV-202 MTT, 2013 WL 557183, at *3 (M.D. Ga. Feb. 12, 2013) (permitting consideration of search warrant affidavit because "it is central to [plaintiff's] claims premised on his unlawful arrest because it establishes whether [defendant] had probable cause"); *Brown v. Benefield*, 757 F. Supp. 2d 1165, 1169 (M.D. Ala. 2010) ("the Court is free to consider the supporting affidavit and warrant, even in the context of a motion to dismiss, because the Plaintiffs refer to these documents in the complaint and these documents are central to their claims.").

morning of January 2, 2016, as part of Operation Border Resolve, they were subject to a variety of law enforcement actions by ICE agents resulting in the detention of Ms. Padilla and her children, their transportation to immigration detention centers in Georgia and, Texas, and Pennsylvania, and their release to Georgia. *Id.* at ¶¶ 113-132. Plaintiffs allege various misconduct by ICE agents during these events, including the use of a "ruse" to gain consent to enter the home. *Id.* At the time of these events, Ms. Padilla and her children were subject to orders of removal. *See* Padilla Orders of Removal, attached hereto as Exhibit C.

II. DISCUSSION

A. Applicable Standards for Dismissal of Claims.

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed.R.Civ.P. 12(h)(3); Fed.R.Civ.P. 12(b)(1). "Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction can be asserted on either facial or factual grounds." *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009). "A facial attack challenges whether the complaint itself has sufficiently alleged subject matter jurisdiction, whereas a factual attack challenges the existence of subject matter jurisdiction in fact, looking to matters outside the pleadings." *Lawrence v. U.S.*, 597 F. App'x. 599, 601-02 (11th Cir. 2015).

When deciding a facial attack to subject matter jurisdiction, a district court may consider documents attached to a motion to dismiss "if the documents are central to the plaintiff's claim and their authenticity is not disputed." *Id.* at 602. "[I]n a factual challenge to subject matter jurisdiction, a district court can 'consider extrinsic evidence such as deposition testimony and affidavits.' " *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013).

In response to a facial challenge, "Plaintiff bears the burden of alleging sufficient facts to show" that subject matter jurisdiction exists. *Neforos v. Cooper Vision, Inc.*, No. 3:15-CV-437-J-20JRK, 2016 WL 7206079, at *2 (M.D. Fla. Sept. 28, 2016). By contrast, "[i]n the face of a factual challenge to subject matter jurisdiction, the burden is on the plaintiff to prove that jurisdiction exists." *OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002). In determining whether subject matter jurisdiction exists, a court can investigate widely and has authority to look beyond the pleadings and weigh the evidence to satisfy itself as to the existence of its power to hear the case. *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (per curiam). Regardless of the type of motion asserted under Rule 12(b)(1), the plaintiff always bears the burden of showing that federal jurisdiction is proper. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-78 (1994).

In this case, the result is the same whether Defendants' motion is construed as a "facial attack," in which the Court considers only the allegations of the Complaint and the documents central to those claims, or a "factual attack," wherein the Court looks at additional evidence that Plaintiffs were subject to orders of removal that resulted in the alleged misconduct. That is because the controlling fact is undisputed: the enforcement operations at issue arose from efforts to commence and enforce removal proceedings against the Plaintiffs and their family members.[2] As such, Plaintiffs' claims should be dismissed under either standard for the reasons stated below.

With respect to a motion to dismiss under Rule 12(b)(6), a complaint may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim when a complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007). A complaint must offer more than "naked assertion[s]," "labels and conclusions, [or] a

[2] Importantly, these dispositive facts are not "inextricably intertwined" with disputed merits of Plaintiffs' claims. *See Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 734 (11th Cir. 1982). Here, Plaintiffs never allege, nor would their claims require, that they were not subject to orders of removal at the time of the alleged misconduct. Instead, they admit that they were subject to such orders, but allege that those orders were subsequently vacated. *See* Complaint at ¶¶ 71, 105. Accepting this allegation as true, even without reference to the documents attached to this motion, Plaintiffs' claims are subject to dismissal for the reasons stated below.

formulaic recitation of the elements of a cause of action." *Id*. at 555, 557. "Plausibility" requires more than a "sheer possibility that a defendant has acted unlawfully," and a complaint that alleges facts that are "merely consistent with" liability "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Chandler v. Sec'y of Fla. Dept. of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678). "Further, courts may infer from the factual allegations in the complaint obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Kivisto v. Miller, Canfield, Paddock & Stone, PLC*, 413 F. App'x 136, 138 (11th Cir. 2011).

B. <u>The District Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Claims Pursuant to the Immigration and Nationality Act.</u>

Plaintiffs' claims challenge the legality of the manner in which they (or their family members) were arrested, detained, and processed for removal from the United States. *See generally* Complaint. However, Congress has specifically divested federal district courts of jurisdiction to hear such claims. In 1996, Congress amended the Immigration and Nationality Act through the Illegal Immigration

Reform and Immigrant Responsibility Act ("IIRIRA"), a statute that "significantly restructur[ed] the scope of judicial review of immigration decisions." *Humphries v. Various Fed. USINS Employees*, 164 F.3d 936, 941 (5th Cir. 1999). The IIRIRA provisions at issue here divest the district courts of jurisdiction to review particular immigration actions or decisions as part of an intricate statutory scheme that channels all Article III judicial review into the courts of appeals. *See Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

This "jurisdiction-channeling" is evident in the provision that divests this Court of jurisdiction—8 U.S.C. § 1252(g)—which provides as follows:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, *no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action* by the Attorney General *to* commence proceedings, adjudicate cases, or *execute removal orders against any alien* under [the Immigration and Nationality Act].

8 U.S.C. § 1252(g) (emphasis added).

The Supreme Court held that § 1252(g) does not encompass all possible acts and events that tangentially relate to removal proceedings, but applies to case arising from three discrete decisions or actions: the "decision or action" to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders." *Reno v. American-Arab*

Anti-Discrimination Committee, 525 U.S. 471, 482-483 (1999) (emphasis in original). Congress promulgated § 1252(g) in order "to give some measure of protection" from litigation stemming from the specific decisions referenced in the statutory language. *Id.* at 485.

Courts have routinely applied the jurisdiction-stripping provision of § 1252(g) with regard to FTCA and *Bivens* claims in situations similar to those alleged by Plaintiffs. As the Eleventh Circuit has held:

> Section 1252(g) is unambiguous: it bars federal courts' subject-matter jurisdiction over any claim for which the "decision or action" of the Attorney General[3] (usually acting through subordinates) to commence proceedings, adjudicate cases, or execute removal orders is the basis of the claim. Securing an alien while awaiting a removal determination constitutes an action taken to commence proceedings.

Gupta v. McGahey, 709 F.3d 1062, 1065 (11th Cir. 2013); *see also Sissoko v. Rocha*, 509 F.3d 947, 949–51 (9th Cir. 2007) (noting that the district court lacked jurisdiction under § 1252(g) to review a *Bivens* claim by an alien alleging improper detention while awaiting removal); *Foster v. Townsley*, 243 F.3d 210, 213–15 (5th Cir. 2001) (holding that § 1252 stripped the district court of jurisdiction to hear

[3] In light of legislation transferring functions of the former Immigration and Naturalization Service to the United States Department of Homeland Security, 6 U.S.C. §§ 202, 251, 557, the statutory reference to "Attorney General" is construed to mean the Secretary of Homeland Security. *Elgharib v. Napolitano*, 600 F.3d 597, 606-07 (6th Cir. 2010).

Bivens claims for constitutional deprivations resulting from the plaintiff's removal, even when the actions taken were non-discretionary and in violation of regulatory requirements); *Kareva v. United States*, 9 F.Supp.3d 838, 844–45 (S.D. Ohio 2014) (finding that an alien's FTCA claims for false arrest and imprisonment, based on actions by ICE officials to secure her for removal, lack jurisdiction under § 1252 because they arise from the decision to execute a removal order); *Guardado v. United States*, 744 F.Supp.2d 482, 493 (E.D. Va. 2010) (dismissing alien's assault, battery, and false imprisonment claims under the FTCA due to lack of jurisdiction under § 1252(g), based on the facts that ICE agents handcuffed the plaintiff and placed him on an airplane during removal).

In *Gupta,* which is controlling authority here, the plaintiff alleged that "agents violated his rights under the Fourth and Fifth Amendments by wrongfully procuring a warrant for his arrest, arresting him unlawfully, illegally searching his apartment and car, illegally seizing his personal items, and wrongfully detaining him following the arrest." 709 F.3d. at 1064. Affirming the district court's dismissal of plaintiff's claims, the Eleventh Circuit held that § 1252(g) divested the district court of jurisdiction because plaintiff's claims that defendant had "illegally procured an arrest warrant, that the agents illegally arrested him, and that the agents illegally detained him each arise from an action taken to commence removal proceedings."

Id. at 1065. Similarly, the court held that the district court lacked jurisdiction over plaintiff's "claims that the agents illegally searched his apartment and illegally seized certain items of his personal property" because such claims "also arise from actions taken to commence proceedings." *Id.*

Similar conclusions have been reached by courts in this and other districts on facts similar to those alleged by Plaintiffs. In *Magallenes v. United States*, the plaintiffs, a Mexican national and his U.S. citizen wife, brought an action for a writ of mandamus, FTCA claims for kidnapping and loss of consortium, and *Bivens* claims alleging constitutional violations. *See Magallanes v. United States*, 184 F. Supp. 3d 1372, 1374 (N.D. Ga. 2015). In particular, the *Magallenes* plaintiffs alleged that "several [ICE] agents obtained entry into Plaintiffs' private residence" by "obtain[ing] Ms. Magallanes's consent through a 'ruse' in which they showed her a picture of a man and told her that they were looking for a fugitive." *Id.* at 1373.

Applying the ruling in *Gupta*, the *Magallenes* court dismissed the plaintiffs' claims, holding that "alleged injuries resulting from ICE agents searching an alien's apartment and detaining him were in an effort to secure him and therefore arose from the decision to commence removal proceedings" and the court lacked subject matter jurisdiction. *Id*. at 1378; *see also Lopez v. Prendes*, No. 3-11-CV-3184-M-BD, 2012 WL 3024209, at *1 (N.D. Tex. June 27, 2012), *report and recommendation adopted*,

No. 3-11-CV-3184-M, 2012 WL 3024750 (N.D. Tex. July 24, 2012) (dismissing claims arising from "actions of ICE agents in gaining entry into the [plaintiff's] home and reinstating [plaintiff's] prior removal order" where "agents allegedly perpetrated a ruse, misleading [plaintiff] and her husband into permitting them into their home" because those "actions… are directly and immediately connected with the initiation or prosecution of various stages in the deportation process.").

As in the cases cites above, Plaintiffs' claims all "aris[e] from the decision… to commence proceedings, adjudicate cases, or execute removal orders" and thus fall outside this Court's jurisdiction pursuant to 8 U.S.C. § 1252(g). In particular, Plaintiffs' claims arise from the decision to commence proceedings and execute removal orders against Ms. Vargas and her children, Ms. Padilla and her children, and Ana Mejia Gutierrez and her son, as acknowledged in Plaintiffs' complaint. The Court lacks jurisdiction under § 1252(g) and all claims must be dismissed.

C. Plaintiffs Fail to State a Claim For Relief.

Though all claims brought by alien Plaintiffs are plainly outside of the Court's jurisdiction, Plaintiffs' complaint also includes claims brought by Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R., who are alleged to be citizens of the United States and ages 17 months, 12 years, and 9 years, respectively, at the time of the enforcement actions. *See* Complaint, ¶¶ 6, 9-10. Those claims are inextricably intertwined with claims

brought "on behalf of any alien" pursuant to 8 U.S.C. § 1252(g). S*ee Magallanes*, 184 F. Supp. 3d 1372 at 1379 (dismissing claims brought by both alien plaintiff and U.S. citizen spouse because their "claims rest entirely upon the allegation that the Attorney General's decisions to commence removal proceedings and execute an order of removal were improper"). Insofar as the Court determines it has jurisdiction over the claims brought by Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R., the claims are still subject to dismissal under Rule 12(b)(6).

Under the FTCA, the United States is held liable, in a tort action, only in the same manner and to the same extent that a private individual would be under the law of the place where the tort occurred. 28 U.S.C. § 2674; *Daniels v. United States*, 704 F.2d 587, 591 (11th Cir. 1983). The Supreme Court has held that "§ 1346(b)'s reference to the 'law of the place' means law of the State -- the source of substantive liability under the FTCA." *FDIC v. Meyer*, 510 U.S. 471, 478 (1994). Since the relevant events in this case occurred in Georgia, the law to be applied is that of the State of Georgia. *See Tisdale v. United States*, 838 F. Supp. 592, 597 (N.D. Ga. 1993) *aff'd*, 62 F.3d 1367 (11th Cir. 1995).

a. False Imprisonment

Under Georgia law, "[f]alse imprisonment is the unlawful detention of the person of another, for any length of time, whereby such person is deprived of his

personal liberty." O.C.G.A. § 51–7–20. The tort of false imprisonment has two essential elements: a detention and the detention's unlawfulness. *Ferrell v. Mikula*, 295 Ga.App. 326, 329, 672 S.E.2d 7, 10 (2008). With respect to the second element, unlawfulness, Georgia courts have refined the false-imprisonment claim when an arrest and detention is made pursuant to legal process:

> When the detention is predicated upon *procedurally valid process*, false imprisonment is not an available remedy, ... because detention effectuated pursuant to procedurally valid process, such as an arrest warrant, is not "unlawful."

Erfani v. Bishop, 251 Ga.App. 20, 553 S.E.2d 326, 330 (2001) (quoting *Williams v. Smith*, 179 Ga.App. 712, 348 S.E.2d 50, 52–52 (1986)) (emphasis in original). Though Plaintiffs offer conclusory allegations that the enforcement actions were conducted without warrants, they admit that the entry of law enforcement agents into their homes were part of operations conducted to effectuate removal of aliens subject to removal orders. *See* Complaint at ¶¶ 20-23, 71, 105; *see also* Exhibits A, B, C. Though Plaintiffs allege that these removal orders were subsequently vacated, they do not allege the removal orders were void, defective, or obtained in bad faith.

As such, although Plaintiffs may argue they were detained, *see Lyttle v. United States*, 867 F. Supp. 2d 1256, 1298 (M.D. Ga. 2012), they were detained by valid legal process. *Redd v. City of Enterprise*, 140 F.3d 1378, 1382 (11th Cir. 1998),

instructs that a detention or an arrest must be supported by probable cause to be lawful. "[P]robable cause to arrest exists when an arrest is objectively reasonable based on the totality of the circumstances." *Durruthy v. Pastor*, 351 F.3d 1080, 1088 (11th Cir. 2003). "To seize and detain a person for being an illegal alien, an officer must have probable cause to believe that the individual is an illegal alien." *Lyttle*, 876 F. Supp. 2d at 1281.

Pursuant to 8 U.S.C. § 1357(a), ICE agents have the power, without warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States " and to arrest any alien without a warrant if he has "reason to believe" the alien is in the United States illegally. *See also* 8 C.F.R. § 287.5. In this case, it is undisputed that the ICE agents who conducted the enforcement operations at issue in the Complaint were in possession of lawful orders of removal for aliens in the subject residences and had legal authority to effectuate those arrests. *See* Complaint at ¶¶ 20-23, 71, 105; *see also* Exhibits A, B, C; *Douglas v. United States*, 796 F. Supp. 2d 1354, 1368 (M.D. Fla. 2011) (dismissing false imprisonment claim because ICE agents were operating pursuant to a Notice to Appear[4] and thus the "United States has established that [plaintiff's] arrest was made

[4]"A Notice to Appear is essentially an administrative arrest warrant that is not reviewed by a neutral magistrate." *Douglas*, 796 F. Supp. at 1360, n.5 (citing *United*

under legal authority"); *Belleri v. United States*, No. 10-81527-CIV, 2012 WL 12892399, at *9 (S.D. Fla. Jan. 17, 2012), *vacated on other grounds*, 712 F.3d 543 (11th Cir. 2013) ("ICE had the lawful authority to issue the warrant for Plaintiff's arrest and the notice to appear, so Plaintiff cannot state a claim for false imprisonment and this claim will be dismissed."); *Valencia–Mejia v. United States*, No. CV 08–2943, 2008 WL 4286979, at *5 (C.D.Cal. Sept. 15, 2008) (noting that immigration officers have a "lawful privilege" to arrest aliens, which bars a false imprisonment claim under California law); *Tovar v. United States*, No. 3:98–cv–1682, 2000 WL 425170, *7–8 (N.D. Tex. Apr. 18, 2000) (noting that INS agents had "legal authority" to detain plaintiff under INA, barring false imprisonment claim under Texas law). As such, the ICE agents had legal authority to enter the premises to effectuate arrests and detentions for purposes of enforcing federal immigration laws, thereby barring Plaintiffs' claim.

b. Trespass

Plaintiffs' claims for trespass fail to state a claim, as Plaintiffs fail to identify any property for which Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R., all minor children, had any possessory interest. In the case of personal property, typically trespass

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States v. Abdi, 463 F.3d 547, 551 (6th Cir. 2006)).

involves a wrongful taking or detention of property, or damage to the property. *See Lowery v. McTier*, 108 S.E.2d 771, 772 (1959). There are no such allegations here. To the extent the allegation alleges trespass on real property, Georgia allows that a "landowner may recover damages arising from 'any wrongful, continuing interference with a right to the exclusive use and benefit of a property right.'" *Navajo Constr., Inc. v. Brigham*, 608 S.E.2d 732, 734 (Ga. Ct. App. 2004) (emphasis added); *see also Phillips v. Publ'g Co., Inc.*, No. CV213-069, 2015 WL 5821501, at *24 (S.D. Ga. Sept. 14, 2015) ("Georgia law expressly contemplates real property rights as the type of rights protected in a trespass claim."). There is no allegation in the complaint that Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R., all minor children, have standing to assert any property interest in the real property that was the subject of the enforcement operations at issue, or possess any property interest of their own.

Moreover, "[u]nder Georgia law, a state officer does not commit trespass when he acts within the scope of his official duties." *Lavassani v. City of Canton, Ga.*, 760 F. Supp. 2d 1346, 1371 (N.D. Ga. 2010) (citing *Morton v. McCoy*, 420 S.E.2d 40 (Ga. App.1992)). Similar to *Lavassani* in which the court found that the police officers were acting within the scope of their official duties, there is no dispute that ICE agents were acting within their official capacity when they entered the subject

residences and arrested and detained Plaintiffs. Therefore, the trespass claim is subject to dismissal.

c. Negligence

Under Georgia law, a plaintiff must establish four elements in order to state a cause of action for negligence: (1) a legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty. *See Galanti v. United States*, 709 F.2d 706 (11th Cir. 1983).

Plaintiffs fail to satisfy the elements required for a negligence claim under Georgia law because Plaintiffs fail to allege a duty that the United States owed to them. "Unless Plaintiffs can identify corresponding state law duties, they have, at the least, failed to state a claim, and arguably their lapse deprives the court of even subject matter jurisdiction over the action." *Zelaya v. United States*, 781 F.3d 1315, 1325 (11th Cir. 2015). In the absence of identifying any state law duty owed by the United States, Plaintiffs instead cite to purported duties created by: 1) the U.S. Constitution; and 2) ICE practices and procedures. *See* Complaint at ¶¶ 177-180. Neither can support an FTCA claim.

The United States has not waived sovereign immunity for damage suits based upon alleged violations of the U.S. Constitution, and such a claim must be dismissed. *See Federal Deposit Ins. Co. v. Meyer*, 510 U.S. 471, 478 (1994) (holding that constitutional tort claim is not cognizable under jurisdictional grant of FTCA); *Denson v. United States*, 574 F.3d 1318, 1336 (11th Cir. 2009) (holding that suits for constitutional violations are not actionable under the FTCA).

With respect to purported violations of internal practice and procedures, such violations do not constitute the breach of a legal duty under state law to support a negligence claim under the FTCA. The Eleventh Circuit has held that:

> [T]he fact that a federal employee has failed to perform duties imposed by federal law is insufficient by itself to render the federal government liable under the FTCA. *Pate v. Oakwood Mobile Homes, Inc.*, 374 F.3d 1081, 1084 (11th Cir. 2004). Instead, a state tort cause of action is a *sine qua non* of FTCA jurisdiction, and we have dismissed FTCA suits that have pleaded breaches of federal duties without identifying a valid state tort cause of action.

Zelaya, 781 F.3d at 1323-24; *see also Dalrymple v. United States*, 460 F.3d 1318 (11th Cir. 2006) (violating an internal policy or procedure does not create a cause of action under the FTCA against the government unless the challenged conduct is independently tortious under applicable state law). Moreover, Plaintiffs' vague and conclusory allegations regarding "internal, non-discretionary DHS" policies fail to satisfy the pleading standards of *Twombly* and *Iqbal*. Because Plaintiffs fail to allege

a state law duty owed to them, their negligence claim fails as a matter of law. *See, e.g.*, *Appolon v. United States*, No. 16-2275, 2017 WL 3994925, at *16 (E.D.N.Y. Sept. 6, 2017) (negligent investigation claim against ICE dismissed because of a lack of private analogue under Georgia law).

d. Intentional Infliction of Emotional Distress

Georgia courts have recognized the tort of intentional infliction of emotional distress by stating:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Yarbray v. S. Bell Tel. & Tel. Co., 409 S.E.2d 835, 837 (Ga. 1991). In order to sustain a cause of action, the defendant's actions must have been "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Cornelius v. Auto Analyst, Inc.*, 476 S.E.2d 9, 11 (1996). A claim for intentional infliction of emotional distress requires more than an allegation that a plaintiff was offended or insulted. *Kornegay v. Mundy*, 379 S.E.2d 14, 16 (Ga. App. 1989). In fact, the burden on a plaintiff is "a stringent one." *Ingram v. JIK Realty Co.*, 404 S.E.2d 802 (Ga. App. 1991). Moreover, the claim must show that "the intentional act was directed toward the plaintiff." *Wellborn v. DeKalb County School Dist.*, 489 S.E.2d 345, 347 (Ga. App.1997).

Whether conduct is sufficiently outrageous and whether the resulting emotional distress is sufficiently severe to support a claim of intentional infliction of emotional distress are questions of law. *See Yarbray*, 409 S.E.2d at 838. In this case, the allegations brought by Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R. fail to rise to the level required for intentional infliction of emotional distress.

Plaintiffs identify no outrageous conduct directed toward Plaintiff J.A.M., who was seventeen months-old. Instead, Plaintiffs simply allege that J.A.M. was physically present at the time that ICE agents detained other members of his family pursuant to lawful removal orders. *See* Complaint at ¶¶ 33, 60, 71. In fact, Plaintiffs acknowledge that although the ICE agents came to the residence to arrest his mother, Plaintiff Juneidy Mijangos Vargas, the agents "decided not to bring… Juneidy Mijangos Vargas, with them, because she is the mother of J.A.M. who was an infant at the time." *Id.* at 67. The agents exercised their prosecutorial discretion to allow the mother of J.A.M. to remain and she was not separated from J.A.M. Plaintiffs also fail to allege that the seventeen month-old J.A.M. was cognizant of the enforcement actions or severely distressed by them, instead alleging only that when the now-three year old "is around a new person, he is frightened and nervous." *Id.* at 80. These allegations show neither conduct that is sufficiently outrageous nor resulting emotional distress that is sufficiently severe to support a claim of

intentional infliction of emotional distress. *See Miraliakbari v. Pennicooke*, 561 S.E.2d 483, 486 (Ga. App. 2002) (finding insufficient severity when supervisor refused to allow mother to contact school regarding injured child and threatened to fire her); *Odem v. Pace Acad.*, 510 S.E.2d 326, 332 (Ga. App. 1998) ("Liability for intentional infliction of emotional distress does not extend to mere insults, indignities, threat, annoyances, petty oppressions, or other trivialities.").

Similarly, with respect to Plaintiffs Y.S.G.R. and J.I.G.R, Plaintiffs allege no outrageous conduct directed toward them. Indeed, there are no specific allegations regarding conduct toward these individuals at all during the enforcement actions. *See* Complaint at ¶¶ 85-105. Instead, Plaintiffs simply allege that Y.S.G.R. and J.I.G.R were physically present at the time that ICE agents detained other members of their family pursuant to lawful removal orders. *Id.* Plaintiffs also fail to make specific factual allegations sufficient to show these Plaintiffs were severely distressed by any intentional conduct directed toward them. Instead, the allegations with respect to Y.S.G.R. are that she missed one week of school, did not want to sleep alone, and made a single remark to a classmate that she had thoughts of self-harm. *Id.* at 106. With respect to J.I.G.R., the complaint offers only the conclusory assertion that he "suffered significant emotional pain and distress." *Id.* at 107.

These allegations show neither conduct that is sufficiently outrageous nor resulting emotional distress that is sufficiently severe to support a claim of intentional infliction of emotional distress. *See Cho v. United States*, No. 13-153, 2016 WL 1611476, at *9 (M.D. Ga. Apr. 21, 2016), *aff'd*, 687 F. App'x. 833 (11th Cir. 2017) (finding that allegations of denial of medical care, assault, false arrest and imprisonment, and conditions of trips to Immigration Court did not support a claim for intentional infliction of emotional distress); *Bridges v. Winn-Dixie Atlanta, Inc.*, 335 S.E.2d 445, 448 (Ga. App. 1985) ("Emotional distress inflicted by another is not an uncommon condition; emotional distress includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that liability arises… The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.").

e. Negligent Infliction of Emotional Distress

In Georgia, to prevail on a negligent infliction of emotional distress claim, a plaintiff must satisfy the Georgia impact rule requirements, which are that "(1) he suffered a physical impact; (2) the physical impact caused him physical injury; and (3) the physical injury caused his mental suffering or emotional distress." *Kirkland v. Earth Fare, Inc.*, 658 S.E.2d 433, 436 (Ga. App. 2008). A plaintiff must allege or

proffer evidence of a physical injury to pursue this cause of action. *Id.*; *see also Bullard v. MRA Holding, LLC*, 890 F. Supp. 2d 1323, 1330 (N.D. Ga. 2012) (citing *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82 (Ga. 2000) ("In a claim concerning negligent conduct, a recovery for emotional distress is allowed only where there is some impact on the plaintiff, and that impact must be a physical injury.")); *Coon v. Med. Ctr., Inc.*, 797 S.E.2d 828, 836 (Ga. 2017) (reaffirming "that Georgia follows the physical impact rule for claims of negligent infliction of emotional distress"). Because Plaintiffs, particularly Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R, do not allege that the United States "caused plaintiff[s] any physical injury, a negligent infliction of emotional distress claim necessarily fails." *Bullard*, 890 F. Supp. 2d at 1330-31.

D. Plaintiffs May Not Recover Punitive Damages, Attorneys' Fees, or Declaratory Relief.

In their Prayer for Relief, Plaintiffs request punitive damages, attorneys' fees, and declaratory relief. *See* Complaint at 27. These are not available under the FTCA. *See* 28 U.S.C. § 2674 (no punitive damages); 28 U.S.C. § 2678 (attorney fees); *see also Douglas*, 796 F. Supp. 2d at 1363 (government not liable for punitive damages); *Mathis v. Laird*, 324 F. Supp. 885 (M.D. Fl. 1971) (dicta) (FTCA cannot be invoked by claimant seeking declaratory relief); *Moher v. United States*, 875 F.

Supp. 2d 739, 754-55 (W.D. Mich. 2012) (money damages is exclusive FTCA remedy; declaratory/injunctive relief claim dismissed).

CONCLUSION

The Court lacks subject matter jurisdiction over Plaintiffs' claims, and Plaintiffs fail to state a claim for relief. For all of the foregoing reasons, the United States requests that the Court dismiss the Complaint.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Carlos Rene Morales, Rosa Vargas, Morales, Juan Mijangos Vargas, Juneidy MijangosVargas, D.M.V., J.A.M., Salvador Alfaro, Johana Gutierrez, Y.S.G.R., J.I.G.R., Lesly Padilla Padilla, E.D.N.P, and E.I.N.P.,	:	
Plaintiffs,	:	
	:	Civil Action No.
v.	:	
	:	1:17-CV-05052-SCJ
The United States of America,	:	
Defendant.	:	

CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in LR 5.1B for documents prepared by computer.

Respectfully submitted,

s/ Gabriel Mendel
Gabriel Mendel
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
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Plaintiffs,	:	
	:	Civil Action No.
v.	:	
	:	1:17-CV-05052-SCJ
The United States of America,	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I certify that I electronically filed the within and foregoing with the Clerk of Court using the CM/ECF system.

This 16th day of February, 2018.

Respectfully submitted,

s/ Gabriel Mendel
Gabriel Mendel
Assistant U.S. Attorney