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

CARLOS RENE MORALES, et al.,	:	
	:	
Plaintiffs,	:	**CIVIL ACTION NO.**
	:	**1:17-CV-5052-SCJ**
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	
	:	

ORDER

This matter appears before the Court on Defendant's Motion to Dismiss (Doc. No. [12]).

I. BACKGROUND

Plaintiffs 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") filed a complaint against The United States of America ("Defendant") on December 11, 2017 relating to Operation Border Resolve. Doc. No. [1].[1]

[1] The Complaint states that Operation Border Resolve was an Enforcement and Removal Operation ("ERO") approved by the United States Department of Homeland Security ("DHS") in December 2015 to target the deportation of "Family Units" from El Salvador, Honduras, and Guatemala. Doc. No. [1], ¶¶ 20–21. The operation was carried out

The Plaintiffs consist of three different family units (the Vargas Family, the Gutierrez Family, and the Padilla Family). Doc. No. [1], pp. 6, 12, and 16. Most of the Plaintiffs are nationals and citizens of one of three countries, Guatemala, El Salvador, and Honduras. Id. at pp. 2–4. Three of the Plaintiffs are United States citizens, Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R. Id. at ¶¶ 6, 9 and 10.

Plaintiffs claim that Immigration and Customs Enforcement ("ICE") entered their homes under a ruse and without a warrant, exigent circumstances, and consent. Id. at pp. 12–28. Plaintiffs indicate that the agents who entered their home detained them in such a manner that they felt that they were not free to leave. Id. ¶¶ 60, 62, 95, 98. As to the Gutierrez Family, the officers searched the entire house. Id. ¶ 94. The Padilla family's apartment was also searched. Id. ¶ 124. It also appears that the Vargas family's home was searched. Id. ¶¶ 82–84.

The following Plaintiffs were transported to detention centers: (1) Ms. Rosa Vargas Morales, and her children, Juan Mijangos Vargas, Juneidy Mijangos

---

by Immigration and Customs Enforcement ("ICE") on January 2 and 3, 2016 and had a goal of deporting 400 individuals that were nationals from El Salvador, Honduras, and Guatemala. Doc. No. [1], ¶¶ 23, 27. Over 120 individuals were arrested during Operation Border Resolve and transported to an immigration detention facility in Dilley, Texas. Id. ¶ 31.

Bargas,[2] and D.M.V. — for Ms. Vargas missing an immigration court date; (2) Ms. Ana Mejia Gutierrez and her son, W.G.M.; and (3) Ms. Padilla and her twin sons, E.D.N.P. and E.I.N.P. Doc. No. [1], ¶¶ 11, 62, 96, 130. According to the Defendant, at the time of these events, Ms. Vargas and her children were subject to final administrative orders of removal, which were subsequently vacated; Ms. Ana Mejia Gutierrez and her son were subject to orders of removal, which were subsequently vacated; and Ms. Padilla and her children were subject to orders of removal. Doc. No. [12], pp. 4–6; Doc. Nos. [12-1], [12-2], and [12-3].[3]

Plaintiffs further allege that the agents engaged in misconduct and threats in the context of the raids. Doc. No. [1], pp. 5–20. Plaintiffs state that the raids

---

[2] Junedity Mijangos Vargas was not taken into custody, because she was the mother of an infant, J.A.M. Doc. No. [1], ¶ 67.

[3] In support of its motion, Defendant attached orders of removal concerning the various plaintiffs. Doc. Nos. [12-1], [12-2], and [12-3]. The Court finds it proper to consider these orders in the factual attack context of a subject matter jurisdiction review, which appears to be at hand, even though the Defendant does not specifically state the type of attack that it is bringing. See Morrison v. Amway Corp., 323 F.3d 920, 925 n.5 (11th Cir. 2003) (internal citations omitted) ("In resolving a factual attack, the district court may consider extrinsic evidence . . . ."); cf. Brooks v. Blue Cross and Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997) ("where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the court may consider the documents part of the pleadings for the purposes of Rule 12(b)(6) dismissal"). The Complaint also references vacated orders of removal concerning Ms. Vargas and her two minor children (¶ 71). There is also a reference to vacated final removal orders against Ms. Ana Mejia Guiterrez and W.G.M. (¶ 105). The Court recognizes that "Plaintiffs do not concede that any of the alleged removal orders were valid at the time of their arrest and seizure." Doc. No. [15], p. 6, n.3.

on their families "violated the Fourth Amendment rights of each plaintiff," resulting in harm, inclusive of emotional distress, pain and suffering, property loss, loss of consortium, and trauma. Doc. No. [1], ¶¶ 148–49.

Under the Federal Tort Claims Act, 28 U.S.C. § 2671, Plaintiffs assert claims of False Imprisonment, Trespass, Negligence, Intentional Infliction of Emotional Distress, and Negligent Inflict of Emotional Distress by the ICE agents involved with Operation Border Resolve. Id. ¶ 14 and at pp. 20–27. The Complaint states that all administrative remedies have been exhausted under 28 U.S.C. § 2675. Id. ¶ 19.

On February 16, 2018, Defendant filed a motion to dismiss Plaintiffs' Complaint. Doc. No. [12]. Defendant moves 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). Doc. No. [12], p. 1. The matter has been fully briefed and is now ripe for review.

II. LEGAL STANDARD

The United States seeks to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). Doc. No. [12].

"Subject matter jurisdiction defines the court's authority to hear a given type of case; it represents the extent to which a court can rule on the conduct of persons or the status of things." Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639 (2009) (internal quotations and citations omitted).

A party may challenge the court's subject-matter jurisdiction by filing a motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. A party asserting a lack of subject matter jurisdiction may employ a facial or a factual attack.

> Facial attacks challenge subject matter jurisdiction based on the allegations in the complaint, and the district court takes the allegations as true in deciding whether to grant the motion. Factual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings. In resolving a factual attack, the district court may consider extrinsic evidence such as testimony and affidavits.

Morrison v. Amway Corp., 323 F.3d 920, 925 n.5 (11th Cir. 2003) (internal citations omitted).

The Defendant does not state which type of attack it is bringing, but states that Plaintiffs' claims should be dismissed under either standard. Doc. No. [12], p. 8. Because the Court has considered matters outside of the Complaint, i.e., the final administrative orders of removal, the Court deems the Defendant to have brought a factual attack. "[W]hen the attack is factual, the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990).

Also, "[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); see also Lawrence v. United States, 597 F. App'x 599, 602 (11th Cir. 2015) (citing Sweet Pea Marine, Ltd. v. APJ Marine, Inc., 411 F.3d 1242, 1247 (11th Cir.2005)).

As to the Federal Rule of Civil Procedure 12(b)(6) ground of the pending motion to dismiss,[4] a complaint may be dismissed if the facts as pled do not state a claim for relief that is plausible on its face.[5] Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (explaining "only a complaint that states a plausible claim for relief survives a motion to dismiss") and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 561–62, 570 (2007) (retiring the prior Conley v. Gibson, 355 U.S. 41, 45–46 (1957) standard which provided that in reviewing the sufficiency of a complaint, the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In Iqbal, the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678. In Twombly, the Supreme Court emphasized that a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at

[4] "In ruling on a 12(b)(6) motion, the Court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff." Speaker v. U.S. Dep't of Health and Human Servs. Ctrs for Disease Control and Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010).

[5] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

555. Factual allegations in a complaint need not be detailed but "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 555 (internal citations and emphasis omitted).

III. ANALYSIS

A. Immigration and Nationality Act ("INA")

Defendant asserts that this Court lacks subject matter jurisdiction over Plaintiffs' claims pursuant to the Immigration and Nationality Act ("INA") and the jurisdictional channeling provision of 8 U.S.C. § 1252(g). Doc. No. [12], p. 9. Defendant states that "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," and "Congress has specifically divested federal district courts of jurisdiction to hear such claims." Id.

Section 1252(g) of Title 8 of the United States Code states in relevant part:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory) . . . , no court shall have jurisdiction to hear any cause or claim by or on behalf of

> any alien[6] arising from[7] the decision or action by the [Secretary of Homeland Security][8] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C.A. § 1252(g).

The Supreme Court has indicated that § 1252(g) "applies only to three discrete actions that the [Secretary of Homeland Security] may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute

---

[6] The INA defines an "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3); see also 8 U.S.C. § 1401 et seq. (defining a United States citizen and national at birth) and 8 U.S.C. § 1101(a)(22) (defining national).

[7] "Congress has provided no explicit definition of the phrase 'arising from,' and courts have not always agreed on its plain meaning." Humphries v. Various Fed. USINS Employees, 164 F.3d 936, 943 (5th Cir. 1999). "As a general matter, 'arising from' does seem to describe a nexus somewhat more tight than the also frequently used phrase 'related to.'" Id. Supreme Court Justice Samuel Alito has written in an opinion that the term "arising from" is "capacious," and further stated that "[the Supreme Court] did not interpret this language to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, [the Supreme Court] read the language to refer to just those three specific actions themselves [i.e., the decision or action to commence proceedings, adjudicate cases, or execute removal orders]." Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018) (Alito, J.) (citing American–Arab Anti–Discrimination Comm., 525 U.S. at 482–83).

[8] Per Defendant, 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. Doc. No. [12], p. 11, n.3 (citing Elgharib v. Napolitano, 600 F.3d 597, 606–07 (6th Cir. 2010)). The Court agrees. It has also been held that "Section 1252(g) is not limited to the Attorney General's decisions and actions, but also applies to decisions and actions taken by the Attorney General's subordinates." Magallanes v. United States, 184 F. Supp. 3d 1372, 1376 (N.D. Ga. 2015) (citing Gupta, 709 F.3d at 1065).

removal orders.'" Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999) (emphasis omitted).

In Gupta v. McGahey, 709 F.3d 1062, 1063–64 (11th Cir. 2013), the Eleventh Circuit Court of Appeals "considered whether a district court lacked jurisdiction under § 1252(g) to consider an alien's challenge under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), to the constitutionality of his arrest and detention by immigration agents, and the agents' search and seizure of his personal property, related to the initiation of removal proceedings against him." Wallace v. Sec'y, U.S. Dep't of Homeland Sec., 616 F. App'x 958, 960 (11th Cir. 2015). In Gupta, a removable alien argued that federal agents "illegally procured an arrest warrant, that the agents illegally arrested him, and that the agents illegally detained him." Alvarez v. U.S. Immigration & Customs Enf't, 818 F.3d 1194, 1203–04 (11th Cir. 2016), *cert. denied sub nom.* Alvarez v. Skinner, 137 S. Ct. 2321 (2017). The Eleventh Circuit "concluded that the district court lacked subject matter jurisdiction under § 1252(g) to consider those claims, as they pertained to actions taken to secure [plaintiff-alien] and prevent the perceived threat that he posed pending a final removal determination." Wallace, 616 F. App'x at 960. "As such, [the Eleventh Circuit] determined that [the plaintiff-alien's] challenge to the governmental actions at issue necessarily qualified as a

claim 'arising from' a 'decision . . . to commence proceedings' under § 1252(g), and affirmed the district court's dismissal for lack of jurisdiction." Wallace, 616 F. App'x at 960.

As indicated above, in the case *sub judice*, Defendant argues that "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)." Doc. No. [12], p. 14.

After review, this Court agrees with Defendant's argument as to the alien-plaintiffs, as seizing an alien subject to a removal order constitutes an action to execute a removal order and § 1252(g) bars this Court from reaching the merits of the plaintiff-alien's claims, which arise from the decision to execute the removal orders. While the plaintiffs-aliens do argue that they were detained by means of misrepresentations and disregard for policy, because the plaintiff-aliens challenge the methods that ICE used to detain them in the execution of the removal orders, these claims are foreclosed by § 1252(g) and the Eleventh Circuit's binding decision in Gupta. See Alvarez v, 818 F.3d at 1203–04. As stated by another district judge, "[a]lthough [d]efendants are alleged to have violated the statutory rules in executing [the removal orders], [p]laintiffs' claims still fall within the parameters of § 1252(g). The fact that the removal may have

been improper does not allow this Court to exercise jurisdiction where Congress clearly intended that it not." Magallanes v. United States, 184 F. Supp. 3d 1372, 1379 (N.D. Ga. 2015).

The Court recognizes Plaintiffs' public policy and slippery slope arguments, as well as their attempts to distinguish Gupta on the ground that the conduct of the agents at issue here was not discretionary and was "entirely divorced from execution of removal orders by the agents' decision to act outside their authority." Doc. No. [15]. pp. 5, 9, 11. Plaintiffs also argue that in Gupta, there was no indication that the agents were acting outside of agency policy, as the allegations in the case *sub judice* suggest and the present case was not for purposes of commencing removal proceedings, as the removal proceedings had already commenced before the seizures at issue here. Id. at p. 13.

After review, the Court is unable to uphold Plaintiffs' arguments and attempts to distinguish the binding authority[9] of the Gupta decision, as contrary to Plaintiffs' arguments, it does appear that the Gupta case involved allegations of non-discretionary acts outside of agency policy in that the plaintiff in Gupta alleged that agents wrongfully procured a warrant for his arrest, unlawfully

[9] See McGinley v. Houston, 361 F.3d 1328, 1331 (11th Cir. 2004) ("A circuit court's decision binds the district courts sitting within its jurisdiction . . . .") (citations omitted).

arrested him, illegally searched his apartment and seized his personal items, and wrongfully detained him—and the Eleventh Circuit still applied the jurisdictional bar of §1252(g). 706 F.3d at 1064. Further, while Gupta did involve commencement of removal proceedings—this case involves execution of removal orders, which is analogous and still within the exclusion of § 1252(g).

Lastly, while the Court finds that the Plaintiff-aliens' claims are barred, the Court does not find that § 1252(g) bars the claims of the United States citizen Plaintiffs, J.A.M., Y.S.G.R., and J.I.G.R.[10] As stated by one court, "[b]ecause Plaintiff is a citizen, § 1252(g) by its terms does not act as a jurisdictional bar to this case." Nwozuzu v. United States, No. 14 CIV. 8589 LGS, 2015 WL 4865772, at *4 (S.D.N.Y. Aug. 12, 2015), *aff'd*, 712 F. App'x 31 (2d Cir. 2017) (citing Kucana v. Holder, 558 U.S. 233, 251 (2010)); see also Hamdi ex rel. Hamdi v. Napolitano, 620 F.3d 615, 623 (6th Cir. 2010) ("We hold that a complaint brought by a U.S. citizen child who asserts his or her own distinct constitutional rights and separate

[10] The Court recognizes non-binding authority that could be construed as contrary authority. See Magallanes, 184 F. Supp. 3d 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"). However, because the citizen-Plaintiffs are attempting to assert their own distinct rights and separate injuries, the jurisdictional bar does not apply here. See also McGinley, 361 F.3d at 1331 ("The general rule is that a district judge's decision neither binds another district judge nor binds him, although a judge ought to give great weight to his own prior decisions.) (citations omitted).

injury does not fall fairly within the 'on behalf of any alien' jurisdictional bar in § 1252(g).") and Nguyen v. United States, No. 3:00-CV-0528-R, 2001 WL 637573, at *4 (N.D. Tex. June 5, 2001), *aff'd,* 65 F. App'x 509 (5th Cir. 2003) ("Because the Plaintiff is a U.S. citizen and was a U.S. citizen at the time his claims arose, 1252(g) does not apply to this case. Therefore, this court has jurisdiction to hear this case . . . .").

B. Rule 12(b)(6)

As to the remainder of Defendant's motion concerning Rule 12(b)(6) (failure to state a claim), Defendant has noted *inter alia* that Plaintiffs' Complaint contains a number of cursory statements. Doc. Nos. [12], [16]. The Court also notes that the Complaint contains extensive incorporation by reference of certain facts (at ¶¶ 150, 162, 174, 184, 199)[11]and there is a need for compliance with Federal Rule of Civil Procedure 17(c), as the remaining plaintiffs are all minors. In light of such, the Court exercises its discretion to order that the remaining Plaintiffs replead the Complaint for Rule 17(c) compliance and to remove cursory

[11] While not technically a shotgun pleading (because the Plaintiffs incorporate facts instead of allegations), additional clarity could be added by specifically stating which facts apply to each count. See Weiland v. Palm Beach Cty. Sheriff's Office, 792 F.3d 1313, 1321 and n.10 (11th Cir. 2015) (defining shotgun pleadings and indicating that the proper remedy is for the district court to take *sua sponte* initiative and give plaintiff an opportunity to replead).

pleading, as well as specify the facts that apply to each particular count and to each of the remaining citizen-Plaintiffs.

CONCLUSION

Defendant's Motion to Dismiss (Doc. No. [12]) is hereby **GRANTED** as to Plaintiffs Carlos Rene Morales, Rosa Vargas Morales, Juan Mijangos Vargas, Juneidy Mijangos Vargas, D.M.V., Salvador Alfaro, Johana Gutierrez, Lesly Padilla Padilla, E.D.N.P. and E.I.N.P., and **DENIED WITHOUT PREJUDICE TO REFILE** as to Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R.

The remaining Plaintiffs shall replead their Complaint (in accordance with the instructions herein) within **thirty days** of the entry of this order.

IT IS SO ORDERED, this 6th day of August, 2018.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE