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

**JUNEIDY MIJANGOS VARGAS, on behalf of a minor, J.A.M.; and JOHANA GUTIERREZ, on behalf of minors, Y.S.G.R. and J.I.G.R.,**

**Plaintiffs,**

**v.**

**THE UNITED STATES OF AMERICA,**

**Defendant.**

**CIVIL ACTION FILE NO.**

**1:17-CV-5052-SCJ**

**ORDER**

This matter appears before the Court on Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. No. [19]). Defendant's motion is based on Federal Rule of Civil Procedure 12(b)(6).[1]

[1] In its motion, Defendant also references Rule 12(b)(1) and the jurisdiction-stripping provisions of 8 U.S.C. § 1252(g) (Doc. No. [19], p. 1); however, the substance of Defendant's motion does not discuss this rule/statute. To this regard, the Court will only address Defendant's Rule 12(b)(6)/failure to state a claim arguments.

## I. BACKGROUND

In this case, Plaintiffs, who are each minors and United States citizens, seek to recover damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et al.*, based on an alleged unlawful detention by Immigration and Customs Enforcement ("ICE") agents as a part of an Enforcement and Removal Operation, entitled "Operation Border Resolve." Doc. No. [18], pp. 2–4.[2] Plaintiffs assert the following causes of action: (1) False Imprisonment; (2) Trespass; (3) Negligence; (4) Intentional Infliction of Emotional Distress; and (5) Negligent Infliction of Emotional Distress. Id. at pp. 16–33.

Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R. were respectively an infant, twelve years, and nine years old at the time of the raid. Doc. No. [18], ¶¶ 56, 65.

Plaintiff J.A.M. alleges that at the time of the raid, he was living with his mother, Juneidy Mijangos Vargas, and extended family in Stone Mountain,

[2] The Complaint states that: "Operation Border Resolve specifically targeted family units from El Salvador, Honduras, and Guatemala living in nine major U.S. metropolitan areas, including Atlanta, Georgia." Doc. No. [18], p. 4, ¶ 13. The Complaint further states that there was a numeric goal for apprehensions and deportations at 400 individuals. Id. at ¶ 14. The Complaint further states that the ICE field officers were directed to "ensure that the enforcement teams took the necessary supplies to detain children—including car seats, diapers, baby food, and baby formula." Doc. No. [18], ¶ 16.

Georgia. Doc. No. [18], ¶ 24. His extended family is: Rosa Vargas Morales (grandmother), Juan Mijangos Vargas (uncle), D.M.V. (aunt), and Carlos Rene Moran Morales (great uncle). Id. Plaintiff J.A.M. alleges that Mr. Morales was pulled over in a traffic stop near the driveway of their house when two men wearing "ICE" jackets approached. Id. ¶¶ 32–33.[3] The Complaint subsequently refers to these men as "agents." Id. ¶ 35. The agents told Mr. Morales that they knew a criminal suspect, named "Miguel Soto" was in his home and that he could be arrested for obstructing a criminal investigation. Id. Mr. Morales denied that Soto was in the home; however, the agents insisted that they needed to enter the home, threatening Mr. Morales with arrest. Id. ¶¶ 36–37. The agents told Mr. Morales that a judge "had signed a warrant and they needed to come in . . . [but] [t]hey never produced or otherwise proved to Mr. Morales that they had a

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[3] Prior to the traffic stop, earlier that morning, on January 2, 2016, at approximately 4:00 a.m., J.A.M. and his family were awakened by the doorbell ringing, banging on the front door, and flashlights shining through the windows of the home. Doc. No. [18], ¶ 25. Upon looking out the window, Mr. Morales saw nine unmarked and unfamiliar cars outside his home and approximately five officers outside, wearing "POLICE" and "ICE" jackets. Id. ¶ 26. "This knocking, doorbell ringing, and shining of flashlights into the house persisted while the family cowered in the hallway." Id. ¶ 27. Mr. Morales opened a bathroom window to speak with the officers, who asked him to open the door, but refused to provide an explanation for why they wanted to speak with him. Id. ¶ 29. "The officers eventually left." Id. ¶ 30.

warrant to enter his home." Doc. No. [18], ¶ 42. "At the entry to the home—and prior to touching the door knob—Mr. Morales explained to the agents that he would enter the home to obtain the identification cards of the people inside. He specified that the agents should wait outside, and they verbally agreed." Id. ¶ 43. "Regardless, as Mr. Morales turned the door knob to enter his home, he observed one agent put his hand on the door above his head to push the door, and he heard the other agent simultaneously kick on the door." Id. ¶ 46. "The door opened, and the agents entered the home." Id. ¶ 47. "Mr. Morales never gave the agents verbal permission to enter the home, and he never indicated otherwise that he consented to their entry. Nor did any other occupant of the house provide verbal or other consent to the agents' entry." Id. ¶ 48.

"The two ICE agents ordered all family members, including J.A.M., to gather in the living room and provide identification." Id. ¶ 49. Mr. Morales provided identification for his entire family, but the agents still did not leave. Id. ¶ 50. "J.A.M and his family were held in the room for approximately [forty] minutes, until a female agent arrived." Id. at ¶ 51. The agents were armed. Id. ¶ 51. "At one point, Mr. Morales stood up to relieve discomfort in his back, and an agent pushed him down, telling Mr. Morales to stay seated or he would

be arrested." Doc. No. [18], ¶ 52. Upon the female agent's arrival, she explained that they were there to arrest Rosa Vargas Morales, Juan Mijangos Vargas, Juneidy Mijangos Vargas, and D.M.V. for Rosa Vargas's missing an immigration court date. Id. ¶ 53. "At one point, J.A.M. offered one of his toys to an ICE agent and the agent aggressively directed him to return it to his mother. J.A.M. cried inconsolably throughout the raid." Id. ¶ 55. Since the raids, J.A.M. is frightened and nervous around law enforcement and overeating. Id. ¶ 58. When he sees police, he hides and warns his mother that the police are coming to take her. Id.

Plaintiffs Y.S.G.R. and J.I.G.R allege that they were living with their mother and guardian, Johanna Gutierrez, and her husband, Salvador Alfaro at the time of the raid. Id. ¶ 63. "Ms. Gutierrez's niece, Ana Lizeth Mejia Gutierrez, and her son, W.G.M. (age 10), were present and asleep in the home." Id. ¶ 65.

"At approximately 5:00 AM, on Saturday, January 2, 2016, Johana Gutierrez and Salvador Alfaro awoke to the sound of loud banging on the front door and ringing of the doorbell." Id. ¶ 64. "Johanna Gutierrez and Salvador Alfaro got out of bed and went downstairs to the front door. Through the front window, they could see officers with flashlights and unfamiliar, unmarked cars in front of the house." Id. ¶ 66. Ms. Gutierrez asked, "Who is it?," and "the

officers held up a photo through the window and shined their flashlights on it. It was a picture of an African American man. They indicated that the man was a criminal suspect and they had been told that the person in the photo was in the Gutierrez home." Doc. No. [18], ¶¶ 67–68. "Salvador Alfaro opened the door and, without asking for permission to enter, approximately five or six officers pushed past Mr. Alfaro and Ms. Gutierrez and immediately entered the house," with guns on their hips. Id. ¶¶ 69–70. The officers searched the entire house and woke up everyone, including Y.S.G.R. and J.I.G.R. Id. at ¶ 72. Y.S.G.R. and J.I.G.R were brought to the living room in their pajamas and detained from thirty minutes to one hour. Id. "Everyone was scared and confused. The children were crying." Id. Ms. Gutierrez tried to make a phone call and was told not to move. Id. ¶ 74. She was also threatened with arrest several times. Id. ¶ 77. "One agent stood between the family in the living room and the front door throughout the raid. No one felt free to leave." Id. ¶ 75. "The agents [eventually] arrested Ms. Ana Mejia Gutierrez and W.G.M and took them away." Id. ¶ 79.

"After the raid, Y.S.G.R. and J.I.G.R. have changed. They are more fearful. Y.S.G.R. and J.I.G.R. refuse to answer the door when someone knocks." Id. ¶ 80. "Y.S.G.R. missed school for a week. She refused to sleep alone. Y.S.G.R. indicated

to a classmate that she was thinking about harming herself. She was reported to a school counselor who referred her to a psychologist. She met with the psychologist and later her pastor to work through the mental anguish and pain as a result of the raid." Doc. No. [18], ¶ 81. "Y.S.G.R. intermittently cries without consolation, telling her mother that she no longer wants to live in the United States." Id. ¶ 82.

"After the raid, J.I.G.R. received counseling from the family's pastor. J.I.G.R. continues to suffer significant emotional pain and distress as a result of the raid." Id. ¶ 84. He no longer participates in swimming classes and sporting activities and has become insular, experiencing difficulty talking to strangers and preferring to stay home. Id.

On September 18, 2018, Defendant filed a Motion to Dismiss Plaintiff's First Amended Complaint. Doc. No. [19]. The matter has been fully briefed and is now ripe for review.

## II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Pleadings do not require any particular technical

form. Fed. R. Civ. P. (8)(d)(1). However, labels, conclusions, and formulaic recitations of the elements of the case of action "will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

"To decide whether a complaint survives a motion to dismiss, [courts] use a two-step framework." McCullough v. Finley, 907 F.3d 1324, 1333 (11th Cir. 2018). First, the court identifies "the allegations that are 'no more than conclusions,'" [as] [c]onclusory allegations are not entitled to the assumption of truth. Id. (citations omitted). "Second, after disregarding conclusory allegations, [the Court] assume[s] any remaining factual allegations are true, [identifies the elements that the plaintiffs must plead to state a claim] and determine[s] whether those factual allegations 'plausibly give rise to an entitlement to relief.'" Id.; see also Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (beginning the 12(b)(6) analysis "by taking note of the elements a plaintiff must plead to state a claim . . . .") and Speaker v. U.S. Dep't. of Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010) ("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.") and Fed. R. Civ. P. 8 (e) ("Pleadings must be construed so as to do justice.").

A complaint will be dismissed for failure to state a claim only if the facts as pled do not state a claim that is plausible on its face. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 555–56. In order to state a plausible claim, a plaintiff need only plead "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. stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. "Asking for plausible grounds . . . does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claim]." Twombly, 550 U.S. at 556.

"[W]hile notice pleading may not require that the pleader allege a specific fact to cover every element or allege with precision each element of a claim, it is still necessary that a complaint contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some

viable legal theory." Fin. Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276, 1282–83 (11th Cir. 2007) (quotations omitted).

As stated above, Plaintiffs bring this civil action under the Federal Tort Claims Act (FTCA). "The FTCA provides a limited waiver of the United States' sovereign immunity 'for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.'" Bloodworth v. United States, No. 5:13-CV-112 MTT, 2014 WL 1813374, at *7 (M.D. Ga. May 7, 2014), *aff'd*, 623 F. App'x 976 (11th Cir. 2015) (citing 28 U.S.C. § 1346(b)(1)). "The FTCA permits claims against the United States 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" Id.

"The clear mandate . . . of the FTCA requires the courts to look to the law of the state where the act or omission occurred in determining liability." Daniels v. United States, 704 F.2d 587, 591 (11th Cir. 1983); see also 28 U.S.C. § 1346(b)(1). To this regard, the Court applies the law of the State of Georgia, as stated by Defendant and Plaintiffs in their briefing. Doc. Nos. [19], p. 7, [20], p. 4 (citing 28

U.S.C. § 1346(b)(1) (requiring courts to apply the "law of the place where the act or omission occurred" to determine liability).

## III. ANALYSIS

The Court will now consider Defendant's failure to state a claim arguments as to each of Plaintiffs' five causes of action.

### A. Failure to State a Claim

#### 1. *False imprisonment*

In its Motion to Dismiss, Defendant asserts that although Plaintiffs may argue they were detained, they were detained by valid legal process (through "lawful orders of removal for aliens in the subject residences and legal authority to effectuate those arrests"), which bars Plaintiffs' claim for false imprisonment. Doc. No. [19], pp. 7–10.[4] Defendant also cites 8 U.C.S. § 1357(a) in support of its

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[4] In support of its motion, Defendant attached copies of the removal orders for Ms. Vargas and her children and Ms. Meja Gutierrez and her son. Doc. Nos. [19-1] and [19-2]. In opposition, Plaintiffs assert that the Court should not consider said orders in the absence of a legal basis. Doc. No. [20], p. 7, n.3. The Court finds that the matter of judicial deportation orders was referenced in the Complaint at Doc. No. [18], ¶ 165 ("ICE agents were limited to executing an immigration enforcement action premised on judicial deportation orders."). In light of this reference and it appearing that the deportation order documents are central to Plaintiffs' claims, and there being no challenge to authenticity, the Court will consider the Defendant's exhibits/deportation orders. See 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

arguments. Said statute grants ICE agents the power to "without warrant" to interrogate and arrest "any alien in the United States, if [the agent] has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357 (a)(1) and (2). Defendant asserts that "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." Doc. No. [19], p. 10.

In response, Plaintiffs assert that they have alleged that "the ICE agents did not have a judicially issued warrant authorizing the entry into their families' homes or Plaintiffs' detention." Doc. No. [20], p. 5 (citing Doc. No. [18], ¶¶ 60, 85, 88, 92, 94, 97). Plaintiffs also rebut Defendant's argument that the immigration removal orders were the "legal process" pursuant to which Plaintiffs' detention was authorized by stating that "those removal orders are silent as to J.A.M.,

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documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment."); see also Maxcess, Inc. v. Lucent Techs., Inc., 433 F.3d 1337, 1340 n.3 (11th Cir. 2005) ("[A] document outside the four corners of the complaint may still be considered if it is central to the plaintiff's claims and is undisputed in terms of authenticity.").

Y.S.G.R. and J.I.G.R.—who, as United States citizens, could not have been subject to removal." Doc. No. [20], p. 7. Plaintiffs state that the Government's argument under § 1357(a) as "valid legal process" are futile, because § 1357(a) authorizes warrantless arrests only where there are exigent circumstances. Id. at p. 8.

"False 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.GA. § 51-7-20. "The restraint used to create the detention must be against the plaintiff's will and be accomplished by either force or fear." Miraliakbari v. Pennicooke, 254 Ga. App. 156, 160, 561 S.E.2d 483, 488 (2002). "The restraint constituting a false imprisonment may arise out of words, acts, gestures or the like, which induce a reasonable apprehension that force will be used if plaintiff does not submit; and it is sufficient if they operate upon the will of the person threatened, and result in a reasonable fear of personal difficulty or personal injuries." Id. at p. 161 (citations omitted). "In an action to recover damages for illegal arrest or false imprisonment the only essential elements are the arrest or detention and the unlawfulness thereof." Miller v. Grand Union Co., 250 Ga. App. 751, 754, 552 S.E.2d 491, 494 (2001) (citations omitted). "An action for false imprisonment will lie where a person is unlawfully detained under a void

process, or under no process at all, and [cannot] be maintained where the process is valid, no matter how corrupt may be the motives of the person suing out the process or how unfounded the imprisonment may be." Miller, 250 Ga. App. at 754, 552 S.E.2d at 494 (citations omitted); see also Franklin v. Consol. Gov't of Columbus, Ga., 236 Ga. App. 468, 470, 512 S.E.2d 352, 355 (1999) ("[w]hen the detention is predicated upon procedurally valid process, false imprisonment is not an available remedy, regardless of the motives upon which the process was secured, because detention effectuated pursuant to procedurally valid process, such as an arrest warrant, is not 'unlawful.'") (citations and quotations omitted) and Perry v. Brooks, 175 Ga. App. 77, 77, 332 S.E.2d 375, 376 (1985) ("If a warrant or process is valid, . . . an action for false imprisonment will not lie.") (citations omitted).

Without more, Defendant's arguments do not establish valid legal process, because those arguments fail to address 8 C.F.R. § 287.8(f)(2), which provides standards for enforcement services and states in relevant part:

> (2) An immigration officer **may not enter into . . . a residence** including the curtilage of such residence . . . , for the purpose of questioning the occupants or employees concerning their right to be or remain in the United States unless the officer **has either a warrant or**

> **the consent of the owner** or other person in control of the site to be inspected.

8 C.F.R. § 287.8(f)(2) (emphasis added).[5]

The Court's own independent research has also revealed a district court case that cites to a letter from Julie Myers, in her prior capacity as the Assistant Secretary for Homeland Security for ICE in Washington, D.C., which states in relevant part:

> The procedure to obtain a warrant for removal is straightforward. An order of removal is issued by an immigration judge after a hearing. Upon receiving such an order, DRO issues a Warrant of Deportation/Removal. **These warrants are administrative in nature, as opposed to judicial, and are unlike arrest warrants. An arrest warrant allows police officers to enter a residence to arrest a person while the warrant of removal allows arrest, but it does not permit entry into a home.** Officers must "obtain consent before they are permitted to enter private residences." DHS recognizes that "warrants of removal do not grant the same authority to enter dwellings as a judicially approved search or arrest warrant."

[5] The Court recognizes that this subsection governs site inspections, but appears to be applicable for purposes of the circumstances of this case. This regulation also provides for exceptions that do not appear to be applicable here.

Argueta v. U.S. Immigration & Customs Enf't, No. CIV.A 08-1652PGS, 2010 WL 398839, at *3 (D.N.J. Jan. 27, 2010), *rev'd*, 643 F.3d 60 (3d Cir. 2011)[6] (citations omitted, emphasis added).

In essence, for the Court to uphold Defendant's valid legal process argument, the Court must conclude that the removal orders are essentially the equivalent of an arrest warrant.[7] However, the above-cited authority leaves questions for the Court as to whether such a conclusion is proper at this stage of

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[6] The Court recognizes that the district court's opinion in Argueta was reversed and that the quoted language is from a letter, which was attached to a complaint. The Court does not cite the Argueta case (or the letter) for binding principles of law or persuasive authority, but to show the results of the Court's independent research that triggered questions for the Court, post-briefing.

[7] There is some authority in Georgia law for this principle. See e.g., Williams v. Smith, 179 Ga. App. 712, 716, 348 S.E.2d 50, 54 (1986) (allowing a certificate to be "analogous to an arrest warrant and authoriz[ing] detention for an emergency examination. The process being valid, and the detention pursuant thereto being lawful . . . ."); see also Payton v. New York, 445 U.S. 573, 603 (1980) ("Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."). Georgia law also permits protective sweeps of residences and detention of occupants once law enforcement is lawfully inside a residence. See Park v. State, 308 Ga. App. 648, 653, 708 S.E.2d 614, 618 (2011) ("the trial court was authorized to find that the officers did not engage in flagrant misconduct, but rather, perceived that entry and a protective sweep of the residence was necessary to secure the occupants and to ensure officer safety."). Georgia law also permits detention of all occupants during the execution of a search warrant; however, there was no search warrant execution alleged in the Complaint of the case *sub judice*. See White v. Traino, 244 Ga. App. 208, 211, 535 S.E.2d 275, 277 (2000); see also O.C.GA. § 17-5-28.

the case. In addition, Defendant's § 1357(a) arguments and citations of authority, do not conclusively establish that the agents had authority to enter a residence, in the absence of a warrant, consent, or by the plain language of § 1357, a belief that the alien "is likely to escape before a warrant can be obtained for arrest"—which Plaintiffs essentially allege in their Complaint, were not present at the time of entry into their residences.[8] Accordingly, the Court finds that a dismissal for failure to state a claim is not appropriate at this time, as Plaintiffs have alleged facts that state a plausible claim for a false imprisonment cause of action.

**2. *Trespass***

Defendant asserts that "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." Doc. No. [19], p. 10.[9]

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[8] The Court also notes that subsection (a)(3) of § 1357 grants agents "access to private land, **but not dwellings**, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." 8 U.SC. § 1357(a)(3) (emphasis added).

[9] Defendant's argument is essentially a statutory standing argument. Cf. Leyse v. Bank of Am. Nat. Ass'n, 804 F.3d 316, 320 (3d Cir. 2015) ("Statutory standing goes to whether [the legislature] has accorded a particular plaintiff the right to sue under a statute, but it does not limit the power of the court to adjudicate the case. As a result, '[a] dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim,' and a motion to dismiss on this ground is brought pursuant to Rule 12(b)(6) . . . .").

Defendant also asserts that "ICE agents were acting within their official capacity when they entered the subject residences and arrested and detained Plaintiffs' family members subject to orders of removal." Doc. No. [19], p. 11.

In opposition, Plaintiffs assert that Georgia law does not require that Plaintiffs have an ownership interest in the homes that ICE agents unlawfully entered and that Defendant has not addressed the standing of non-owner possessors of real property in a trespass action. Doc. No. [20], pp. 9, 11. Plaintiffs state that "[t]enants with a possessory interest in the property have standing to sue for trespass." Doc. No. [20], p. 10.

Georgia's trespass statute states in relevant part: "[t]he right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie." O.C.G.A. § 51-9-1. "Thus, the cause of action for trespass to property requires an unlawful interference. Under 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, 204 Ga. App. 595, 420 S.E.2d 40 (1992)).

"To maintain an action for trespass or injury to realty, it is essential that the plaintiff show either that he was the true owner [with legal title] or was in possession at the time of the trespass." Brown Inv. Grp., LLC v. Mayor & Aldermen of City of Savannah, 303 Ga. App. 885, 886, 695 S.E.2d 331, 331 (2010), *aff'd*, 289 Ga. 67, 709 S.E.2d 214 (2011) (citations omitted); see also S. Union Mut. Ins. Co. v. Mingledorff, 211 Ga. 514, 514, 87 S.E.2d 54, 55 (1955) ("[I]t is essential for the plaintiff to allege title in himself or actual possession of the land at the time the alleged cause of action arose."). "Possession implies a present right to deal with property at pleasure, and to exclude other persons from meddling with it." Moses v. Traton Corp., 286 Ga. App. 843, 844, 650 S.E.2d 353, 355 (2007) (citations omitted).[10]

A review of the Complaint, as amended, shows that while Plaintiffs do conclusory allege that they were residents and legal tenants (with possessory interests and rights of enjoyment) of the homes that were subject to the ICE raids (Doc. No. [18], ¶¶ 113, 115), they do not set forth factual allegations that show

[10] The Moses court also rejected plaintiff's standing and "bare right" of possession arguments, where the plaintiff did not assert that he possessed the land to the exclusion of others. Moses, 286 Ga. App. at 844, 650 S.E.2d at 355.

that they, *as minor children*, had a present right to deal with the property at pleasure and to exclude others from meddling with it, in accordance with the above-stated case-law. Accordingly, Plaintiffs have not asserted a possessory interest in the homes at issue sufficient to provide a basis to demonstrate standing to sue for trespass. The Court recognizes Plaintiffs' arguments and citations of authority to the contrary; however, they are not determinative as they fail to address standing as to a plaintiff/tenant who is minor.[11] Defendant's motion to dismiss is granted as to the trespass cause of action.

**3. *Negligence***

Defendant asserts that "[b]ecause Plaintiffs fail to allege a state law duty owed to them, their negligence claim fails as a matter of law." Doc. No. [19], p. 13. Defendant states that instead of identifying a duty owed to them under state law, Plaintiffs have cited to purported duties created by the United States Constitution and ICE practices and procedures (which cannot support a FTCA claim). Id. at pp. 12, 13 (citing Zelaya v. United States, 781 F.3d 1315, 1324 (11th

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[11] The Mancha case cited by Plaintiffs is helpful, but also not determinative, as it does not appear that the district court was asked to address the plaintiffs' standing (as minors) to bring a trespass cause of action. Mancha v. Immigration & Customs Enf't, No. 106-CV-2650-TWT, 2009 WL 900800, at *4 (N.D. Ga. Mar. 31, 2009).

Cir. 2015) ("the 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. 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.") (citations omitted).

In opposition, Plaintiffs assert that their "allegations sufficiently allege that the agents breached their duty to exercise ordinary care, and the agents' breach caused Plaintiffs' harm." Doc. No. [20], p. 16. Plaintiffs also state that "[t]he Government additionally conflates every law enforcement officer's ordinary duty—whether local, state or federal—to adhere to the [Fourth] Amendment with the creation of a constitutional tort." Id.

"It is well established that to recover for injuries caused by another's negligence, a plaintiff must show four elements: a duty, a breach of that duty, causation and damages. Thus, in order to recover for any injuries resulting from the breach of a duty, there must be evidence that the injuries were proximately caused by the breach of the duty." Goldstein, Garber & Salama, LLC v. J.B., 300 Ga. 840, 841, 797 S.E.2d 87, 89 (2017) (citations and quotations omitted).

After review, the Court upholds Defendant's arguments and citations of authority, as Plaintiffs appear to be relying "on a duty owed by Georgia governmental entities, rather than a private person," however, the United States can only be liable under the FTCA as if it is a private person. Doc. No. [21], p. 6 (citing United States v. Olson, 546 U.S. 43, 45–46 (2005) ("The Act says that it waives sovereign immunity 'under circumstances where the United States, if a private person,' not 'the United States, if a state or municipal entity,' would be liable."). The Court also agrees that Plaintiffs have failed to allege non-conclusory facts showing negligent conduct on the part of the ICE agents, as opposed to violations of Georgia law and the Constitution.

**4. *Intentional infliction of emotional distress***

Defendant asserts that the allegations of the Complaint do not show conduct that is sufficiently outrageous or resulting emotional distress that is sufficiently extreme to support a claim of intentional infliction of emotional distress. Doc. No. [19], p. 17. Defendant asserts that "[t]here can be no dispute that the ICE agents entered these residences to detain other members of their family pursuant to lawful removal orders, and all of the alleged conduct that could plausibly rise to the requisite level of outrageousness was directed at other

individuals, not at Plaintiffs." Doc. No. [19], p. 15, n.3. Defendant states: "[t]hese allegations may be unpleasant or regrettable, but they do not meet the high standard of 'extreme and outrageous' conduct or "severe emotional distress" necessary to state a claim." Doc. No. [21], p. 14.

In response, Plaintiffs argue that "[t]he Government's assertion that Plaintiffs' allegations do not identify sufficiently outrageous conduct or sufficient harm, overlooks that the threshold for 'extreme and outrageous' conduct against a child is not on par with the threshold applied to adults." Doc. No. [20], p. 17. The essence of Plaintiffs' allegations of outrageous conduct is that they were forced to witness the agents, who had visible guns on their person, search, threaten, and frighten them and their family, causing them to cry throughout the detention, which lasted forty minutes for J.A.M. and thirty minutes (to one hour) for Y.S.G.R. and J.I.G.R. Doc. No. [20], p. 19; see also Doc. No. [18], pp. 29–32. Plaintiffs further assert that they have alleged sufficient harm. Id. at p. 19. Plaintiffs state that "[t]he level of that harm suffered is testimony properly left to an expert in childhood trauma or a child psychologist. This Court is not required and is not equipped to make this expert finding at this point in the case." Id. at p. 21.

In reply, Defendant states: "Plaintiffs' characterization makes clear that their presence was incidental to the conduct at issue. Put another way, Plaintiffs make no allegations to suggest the actions of the ICE agents would have been any different had Plaintiffs been absent." Doc. No. [21], p. 11.

"The elements of a cause of action for intentional infliction of emotional distress are: (1) intentional or reckless conduct; (2) that is extreme and outrageous; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) severe emotional distress." Ferrell v. Mikula, 295 Ga. App. 326, 333, 672 S.E.2d 7, 13 (2008). "[L]iability for this tort has been found only where the conduct has been so outrageous in character, and 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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" Id. (citations omitted). In addition, "[a] claim for intentional infliction of emotional distress is allowed only when the intentional act was directed toward the plaintiff." Wellborn v. DeKalb Cty. Sch. Dist., 227 Ga. App. 377, 379, 489 S.E.2d 345, 347 (1997).

"Whether a claim rises to the requisite level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress is a question of law." Yarbray v. S. Bell Tel. & Tel. Co., 261 Ga. 703, 706, 409 S.E.2d 835, 838 (1991). The allegations must show that reasonable persons might find the presence of extreme and outrageous conduct and resultingly severe emotional distress. Id.

After review, the Court finds that the allegations of Plaintiffs' Complaint, even in considering their status of minors, do not rise to the requisite level so as to state a claim for negligent infliction of emotional distress in terms of the conduct that is at issue. The Court agrees that Plaintiffs have failed to identify sufficiently outrageous conduct directed toward them, as opposed to conduct directed at their relatives. As stated in the Complaint, "Operation Border Resolve specifically targeted family units for deportation." Doc. No. [18], ¶ 11. As United States citizens, Plaintiffs were not subject to deportation and as a result, not a target of the raids of the homes in which they were living. "It is firmly established that even malicious, wilful or wanton conduct will not support a claim of intentional infliction of emotional distress if the conduct was not directed toward the plaintiff." Munoz v. Am. Lawyer Media, L.P., 236 Ga. App. 462, 465, 512

S.E.2d 347, 351 (1999). Accordingly, in the absence of sufficient allegations of conduct directed at Plaintiffs, the Court finds that Plaintiffs have failed to state a claim. The Court is unable to uphold Plaintiffs' citation of authority and arguments to the contrary.[12]

**5. *Negligent infliction of emotional distress***

Defendant asserts that because the Plaintiffs "do not allege that the United States "caused plaintiff[s] any physical injury, a negligent infliction of emotional distress claim necessarily fails." Doc. No. [19], p. 18 (citing Bullard v. MRA Holding, LLC, 890 F. Supp. 2d 1323, 1330 (N.D. Ga. 2012)).

In response, Plaintiffs assert that "allegations that the Defendant's conduct is malicious, willful, or wanton and directed at a group of people, not just the public in general, render allegations of physical impact unnecessary." Doc. No. [20], p. 21.

The Georgia Court of Appeals has stated: "[a] party claiming negligent infliction of emotional distress must . . . show a physical impact resulting in

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[12] More specifically, the arguments/allegations regarding J.A.M. offering one of his toys to an ICE agent and the agent "aggressively" directing him to return his toy to his mother (Doc. No. [18], ¶ 55), while concerning, is also not sufficient to establish a claim for intentional infliction of emotional distress. As the conduct analysis is determinative, the Court makes no ruling on the sufficiency of the harm allegations.

physical injury. On the other hand, where the defendant's conduct is malicious, wilful, or wanton, recovery can be had without the necessity of an impact." Clarke v. Freeman, 302 Ga. App. 831, 836, 692 S.E.2d 80, 84 (2010) (citations omitted).

After review, the Court agrees with Defendant's argument that in the absence of allegations of a physical impact, Plaintiffs have failed to state a claim for negligent infliction of emotional distress. The Court recognizes that Georgia law provides that there is no necessity for an impact, where the conduct is malicious, willful, or wanton; however, as correctly stated by Defendant, "such a claim, alleging a higher level of culpability than negligence, is no longer a claim for negligent infliction of emotional distress." Doc. No. [21], p. 15.[13] Support for this proposition of law is found in Georgia appellate authority. See Wellborn, 227 Ga. App. at 379, 489 S.E.2d at 347 ("as [plaintiff] has not asserted that she received a physical injury, she cannot maintain a claim for negligent infliction of emotional distress, and because she does not allege that any malicious, wilful or

[13] The Court recognizes that there is an argument that the Georgia appellate case law is in conflict. To the extent that the Georgia case law is in conflict, the older authority, cited *infra* (in the Wellborn and Hall cases), controls. See Sharpe v. Seaboard Coast Line R. Co., 528 F.2d 546, 548 (5th Cir. 1976) ("Under Georgia law, the rule of *stare decisis* applies, which means that the older case law must control.").

wanton act was directed toward her, she cannot recover for intentional infliction of emotional distress.") and Hall v. Carney, 236 Ga. App. 172, 174, 511 S.E.2d 271, 274 (1999) (discussing negligent infliction of emotional distress in a separate paragraph, then stating: "Intentional infliction of emotional distress: While recovery can be had without the necessity of an impact when the conduct is malicious, wilful or wanton, such conduct 'will not warrant a recovery for the infliction of emotional distress if the conduct was not directed toward the plaintiff.'").

**B. Available Claims under the FTCA**

Defendant asserts that punitive damages, attorneys' fees, and declaratory relief are not available under the FTCA. Doc. No. [19], pp. 18–19 (citing 28 U.S.C. § 2674 (no punitive damages); 28 U.S.C. § 2678 (attorney fees); Douglas, 796 F. Supp. 2d at 1363 (government not liable for punitive damages); 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).

In response, Plaintiffs "agree that punitive damages and declaratory relief are unavailable under the FTCA."[14] However, Plaintiff asserts that the FTCA specifically allows for attorneys' fees to be paid out of any settlement or recovery. See 28 U.S.C. § 2678. In reply, Defendant states that "[t]his is irrelevant," as its argument dealt with attorney's fees as a separate item of recovery as sought in Plaintiffs' Complaint. Doc. No. [21], p. 15 (citing Joe v. United States, 772 F.2d 1535, 1536–37 (11th Cir. 1985)) ("The FTCA does not expressly provide for attorneys' fees against the United States. The only mention of attorneys' fees within the FTCA occurs in [§] 2678, which prohibits an attorney from charging fees in excess of 25 percent of the judgment . . . . The FTCA does not contain the express waiver of sovereign immunity necessary to permit a court to award attorneys' fees against the United States directly under that act.").[15]

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[14] In their motion, Plaintiffs attempt to reserve a right to amend their complaint at a later date. The Court declines to recognize such a reservation of rights and will only permit amendment of the Complaint pursuant to applicable rule/law.

[15] Plaintiffs' Complaint, *as amended*, in the case *sub judice* also seeks attorney's fees pursuant to the Equal Justice Act (EAJA), this Court's inherent powers, and other applicable law (Doc. No. [18], p. 35); however, the Joe case cited above, indicates that in the absence of a citation to common law or statute, a plaintiff is not entitled to the requested award of attorney's fees under the EAJA. See Joe, 772 F.2d at 1536–37. Without more, Plaintiffs' inherent powers and other applicable law references also fail to state a claim.

The plain language of the FTCA states that the United States "shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674. In addition, the authority cited by Defendant shows that an attorney's fee award (as a separate item of recovery) and declaratory judgment relief are not available to Plaintiffs in this civil action. Accordingly, the Court upholds Defendant's arguments and grants its motion as to interest and punitive damages, as well as attorney's fees, to the extent that they are being sought as a separate item of recovery.

## IV. CONCLUSION

Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. No. [19]) is **GRANTED in part and DENIED in part**. More specifically, Defendant's motion is granted as to Plaintiffs' claims for trespass, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress, as well as the claims for punitive damages, attorney's fees, and declaratory relief. The motion is denied as to Plaintiffs' claim for false imprisonment. Defendant shall file its answer in accordance with the requirements of Federal Rule of Civil Procedure 12 and applicable law.

**IT IS SO ORDERED** this 28th day of August, 2019.

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