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

Carlos Rene Morales, et al.,)) Plaintiffs,)) v.)) The United States of America,)) Defendant.))	C/A No.: 1:17-cv-05052-SCJ

RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Defendant United States of America seeks to insulate itself from liability for unconstitutional and unconscionable conduct through an expansive reading of 8 U.S.C. § 1252(g). As the Supreme Court reiterated only weeks ago, the language of this statute must be read narrowly. Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018). If this Court adopts the government's proposed interpretation and refuses jurisdiction, it will give this administration free reign to disregard recognized constitutional protections in immigration enforcement actions. For the reasons below, this Court should deny the government's motion in its entirety.

I. Rule 12(b)(1): This Court has jurisdiction over Plaintiffs' claims.

The government argues that 8 U.S.C. § 1252(g) deprives this Court of jurisdiction. Gov't Mot. at 7-12 [ECF No. 12]. This interpretation ignores the Supreme Court's admonition that § 1252(g) is a "narrow[ ] provision that applies only to three discrete actions . . . [the] decision or action to commence proceedings, adjudicate cases, or execute removal orders." Reno v. Am.-Arab Anti-Discrimination Comm. (AADC), 525 U.S. 471, 482 (1999) (emphasis in original). As described below, the government agents' actions fall outside each of these three narrow actions.

The government's brief likewise glosses over the entirely separate, distinct, and unlawful acts committed by Immigration and Customs Enforcement (ICE) agents when entering Plaintiffs' homes without warrant or valid consent and thereafter unlawfully arresting certain Plaintiffs who were subject to removal orders. The Defendant also seeks to expand the application of § 1252(g)—beyond the scope any court has given it—to non-citizen Plaintiffs[1] who were not the subject of final removal orders.

[1] However, the government concedes that § 1252(g) does not preclude jurisdiction over claims of the three United States citizens: Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R.

A. Section 1252(g) does not apply here.

Steadfast principles of jurisprudence caution against denying subject matter jurisdiction over the non-citizen Plaintiffs in this case: "for ICE to prevail on jurisdictional grounds it must overcome . . . the strong presumption in favor of judicial review of administrative action." Alvarez v. U.S. Immigration & Customs Enf't, 818 F.3d 1194, 1201 (11th Cir. 2016) (quoting Immigration and Naturalization Service (INS) v. St. Cyr, 533 U.S. 289, 298 (2001) (internal quotations omitted)). See also Kucana v. Holder, 558 U.S. 233, 251 (2010) ("When a statute is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.").

Moreover, the Supreme Court has long held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." Demore v. Kim, 538 U.S. 510, 517 (2003) (quoting Webster v. Doe, 486 U.S. 592, 603 (1988) (internal quotations omitted)). The Court requires "clear and convincing evidence of congressional intent" before it will construe a statute to restrict judicial review, in part "to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Johnson v. Robison, 415 U.S. 361, 373-74 (1974);

See also St. Cyr, 533 U.S. at 320 (noting the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien").

Congress' intent as to § 1252(g) was narrow—to preserve the Attorney General's discretion to terminate removal proceedings at any stage in the process while closing the floodgates to litigants denied discretionary relief. AADC, 525 U.S. at 483-84. This mechanism for facilitating discretionary decisions to stop or start removal proceedings serves the overarching "theme" of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") which "aimed at protecting the Executive's discretion from the courts." Id. at 486. When the IIRIRA was enacted, the INS had been exercising its discretion to altogether "abandon the endeavor" of deportation proceedings notwithstanding the existence of legal basis for removal. Id. at 483 (otherwise referred to as "deferred action"). This exercise of discretion, however, "opened the door to litigation in instances where the INS chose not to exercise it." Id. at 484. § 1252(g) was "clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations." Id. at 485. Indeed, "[p]ermitting the Government to use § 1252(g) as a shield" to prevent review of unlawful agency actions "would contravene Congress' intent in enacting 8 U.S.C. § 1252(g) . . . [which was] only intended to bar courts from interfering with discretionary decisions of the Attorney

General in the context of deportation proceedings." Avalos-Palma v. United States, No. 13-5481, 2014 WL 3524758, at *8 (D.N.J. July 16, 2014).

Here, the Defendant argues that the Court lacks subject matter jurisdiction over all non-citizen Plaintiffs because the conduct of the ICE officers is sufficiently connected to the removal proceedings of *some* of the non-citizen Plaintiffs. First, the ICE officers' unlawful entry into all Plaintiffs' homes was not permitted under agency policy. Compl. ¶ 26-29, 178. Accordingly, those actions—that precipitated the subsequently unlawful searches and seizures—were entirely divorced from execution of the removal orders by the agents' decision to act outside their authority. See Compl. at ¶¶ 53-57, 82-84, 110-12, 140-42 (agents did not have a warrant, exigent circumstances, or valid consent when they entered Plaintiffs' homes). Furthermore, the entry into the homes and detention of non-citizen Plaintiffs who were not subject to removal orders—specifically, Plaintiffs Carlos Rene Morales, J.A.M., Salvador Alfaro, and Johana Gutierrez—does not even remotely "arise from" the removal proceedings at issue here. Finally, the government cannot use § 1252(g) as a shield to protect its own agents from conducting unlawful, warrantless arrests[2] of the individuals they allege were

[2] Moreover, as § 1252(g) applies to discretionary acts by the Attorney General, it does not apply to the present action—because "[a]dherence to constitutional guidelines is not discretionary; it is mandatory." Rosas v. Brock, 826 F.2d 1004,

subject to removal orders.[3] This broad application of § 1252 would mean "no judicial review of a claim by an alien that stems from an arrest on an INS detention order even where there is blatantly lawless and unconstitutional conduct by the INS agents—placing their conduct beyond judicial review and creating grave constitutional issues." Medina, 92 F. Supp. 2d at 553.

B. ICE officers' conduct that violated Plaintiffs' 4th Amendment rights does not "arise from" any discretionary decision or act covered by § 1252(g).

Contrary to the reading of § 1252(g) proffered by the Defendant, the Supreme Court "counsels in favor of reading § 1252(g) narrowly." Alvarez, 818 F.3d at 1201 (citing AADC, 525 U.S. 471 (1999)). In AADC, the Court made clear that § 1252(g) "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders." AADC, 525 U.S. at 482 (emphasis in original). The

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1008 (11th Cir. 1987). See also Mancha v. Immigration and Customs Enforcement, No. 1:06-cv-2650-TWT, 2009 WL 900800, at *4 (N.D. Ga. Mar. 31, 2009) ("That the government's conduct allegedly violated the Plaintiffs' constitutional rights means that the conduct was not discretionary."); Myers & Myers, Inc. v. U.S. Postal Serv., 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority."); Galvin v. Hay, 374 F.3d 739, 758 n.13 (9th Cir. 2004) ("[F]ederal officials do not possess discretion to violate constitutional rights.").

[3] Plaintiffs do not concede that any of the alleged removal orders were valid at the time of their arrest and seizure.

Court admonished against the "unexamined assumption that § 1252(g) covers the universe of deportation claims." Id.

The Court noted that "many other decisions or actions" are not affected by § 1252(g)'s jurisdictional bar, and courts should continue to hear claims arising from actions that are "part of the deportation process." Id. The Court named a non-exclusive list of actions related to deportation on which § 1252(g) has no effect, including: decisions to "open an investigation," "to surveil the suspected violator," "to reschedule the deportation hearing," and "to include various provisions in the final [removal] order." Id. Section 1252(g) has no effect on a claim arising from those actions, although each is necessary to the deportation process. Similarly, Plaintiffs' claims arise from searches and seizures that were part of a deportation process, but § 1252(g) should have no effect on them.

The Court recently reiterated that § 1252(g) should not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves." Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018). In Jennings, the Court was construing identical "arising from" language in a "neighboring provision." Id. (construing 8 U.S.C. § 1252(b)(9)). The Court admonished against

expansive interpretation of phrases like "arising from" because they "lead[ ] to results that no sensible person could have intended." Id. at 840.

Most relevant here, the Court described a set of tort claims that would be absurd to fit within claims "arising from" actions taken to remove aliens:

> Suppose, for example, that a detained alien wishes to assert a claim under [Bivens], based on allegedly inhumane conditions of confinement. Or suppose that a detained alien brings a state law claim for assault against a guard or fellow detainee. Or suppose that an alien is injured when a truck hits the bus transporting aliens to a detention facility, and the alien sues the driver or owner of the truck. The "questions of law and fact" in all of those cases could be said to "arise from" actions taken to remove the aliens tin the sense that the aliens' injuries would never have occurred if they had not been placed in detention. But cramming judicial review of those questions into the review of final orders of removal would be absurd.

Id. (internal citations omitted). Plaintiffs' claims fit nicely within this list.

The Eleventh Circuit has followed the Court's lead in holding that interpretation of this "arising from" language should be narrow. Alvarez, 818 F.3d at 1202 (AADC "instructs us to narrowly interpret § 1252(g)—a command that our sister circuits have applied in subsequent cases'). See, e.g., Kwai Fun Wong v. United States, 373 F.3d 952, 964 (9th Cir. 2004) ("[W]e have held that the reference to executing removal orders appearing in § 1252(g) should be interpreted narrowly[.]"); Dalis v. United States, 210 F.3d 389 (10th Cir. 2000) (in light of the AADC, § 1252(g) did not bar jurisdiction over FTCA and Bivens claims).

Here, the ICE officers' conduct "bear[s] no more than a remote relationship to the Attorney General's decision to "execute [certain Plaintiffs'] removal order[s]." Humphries v. Various Fed. USINS Employees, 164 F.3d 936, 944 (5th Cir. 1999) (finding jurisdiction to hear claim regarding mistreatment of the plaintiff while housed in immigrant detention). As in Humphries, Plaintiffs would not have been subject to constitutional and tort violations but for the decision to execute the removal orders of certain Plaintiffs. Id. Yet, there must be more than "but for" causation for § 1252(g) to apply. Plaintiffs have alleged that ICE officers entered their homes without valid consent or a warrant and thereafter conducted unlawful searches and seizures. Complaint at ¶¶ 53-57, 82-84, 110-12, 140-42. The officers were not acting within the scope of their authority or any other lawful authority when they invaded Plaintiffs' homes and arrested certain Plaintiffs without a valid arrest warrant. To the extent their unlawful acts may relate to the Attorney General's discretionary decision to execute Plaintiffs' removal orders, their decision to act against agency policy and outside federal and constitutional parameters means that their actions could not and did not arise from the Attorney General's discrete decision. See Humphries, 164 F.3d at 943 ("As a general matter, 'arising from' does seem to describe a nexus somewhat more tight than the also frequently used phrase 'related to.'").

Similarly, in El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249 (D. Conn. 2008), the court found that the decision to arrest and detain the plaintiff was "discrete from the agency's decision to initiate removal proceedings against him." Id. at 266. The El Badrawi court distinguished this action from the Attorney General's discrete decision to institute removal proceedings, noting that "an alien can successfully challenge the government's decision to detain him without actually disrupting ongoing removal proceedings." Id. (citing Parra v. Perryman, 172 F.3d 954, 957 (7th Cir. 1999)). Particularly relevant here, the Medina court similarly rejected application of the § 1252(g) jurisdictional bar to the plaintiff's FTCA false imprisonment claim because doing so would imply that "Congress silently repealed the FTCA for intentional tort claims against the government for acts of INS agents." Medina, 92 F. Supp. 2d at 549. As in Badrawi and Medina, Plaintiffs do "not seek to review or modify the INS decision in [their] immigration matter, rather [they] seek[ ] monetary damages for alleged violation of [their] constitutional rights and for civil wrongs." Medina, 92 F. Supp. 2d at 550.

The Defendant presents certain Plaintiffs' removal orders as bare evidence that the claims by all non-citizen Plaintiffs "arise from" those orders. As to those non-citizens who were not the subjects of removal orders, Defendant's assertion is plainly unsupported and those Plaintiffs' cognizable FTCA claims against the

Defendant cannot be barred on jurisdictional grounds. Furthermore, the FTCA claims by the non-citizen Plaintiffs who were the subject of removal orders are based on unauthorized, unlawful conduct by federal agents. As discussed *supra*, Congress' narrow intent was that § 1252(g) should facilitate the expediency of removal proceedings and prevent collateral attacks on the Attorney General's discretion. The ICE officers' unauthorized and unconstitutional conduct is entirely distinct from any decision to execute or not execute the removal orders, and entirely distinct from the removal proceedings themselves. See Medina, 92 F. Supp. 2d at 552; Najera v. United States, No. 16-459, 2016 WL 6877069, at *5 (E.D. Va. Nov. 22, 2016) (the plaintiff's FTCA claims were not "waging a collateral attack on his immigration proceedings, but rather seeking money damages for false imprisonment" from an entirely separate decision to detain him); Polanco v. United States, No. 10-1705, 2014 WL 795659, at *3 (E.D.N.Y. Feb. 27, 2014) ("DHS's decision to arrest [the plaintiff] was a decision that was separate and discrete from the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders."); Diaz-Bernal v. Myers, 758 F. Supp. 2d 106, 124 (D. Conn. 2010) (internal citations omitted) ("The plaintiffs here base their equal protection claims not on any [provision] about which individuals'

immigration status is subject to review, but instead on the raid officers' decision to enter their homes and detain them.").

Finally, as in Diaz-Bernal, Plaintiffs do not allege that the "the supervisory defendants . . . violated their [federal and constitutional] rights"; rather, they allege that ICE officers, and by proxy, the United States itself, violated their rights. Diaz-Bernal v. Myers, 758 F. Supp. 2d at 124 (finding jurisdiction to hear claims "arising from a plaintiff's arrest and detention because those were decisions that were separate and discrete from the agency's decision to initiate removal proceedings"). The challenge regards decisions and actions taken by ICE agents to violate the Constitution, not the Attorney General's decision or action regarding removal. Because the "arising from" language should be narrowly construed, these distinctions between the conduct alleged in the Complaint and any potential actions or decisions involved in executing the removal orders are sufficient to remove this case from the purview of § 1252(g).

The Defendant relies heavily on the Eleventh Circuit's decision in Gupta v. McGahey, 709 F.3d 1062 (11th Cir. 2013) (per curiam). Although the facts in Gupta look analogous to those at issue here, there are three important distinctions. First, there is no indication in Gupta that the agents were acting outside agency policy when they effected the plaintiff's arrest. Here, as Plaintiffs have shown, the

ICE agents did not follow agency policy to obtain valid consent or a warrant before entering Plaintiffs' homes. This unauthorized action divorces their conduct from the removal orders that they were allegedly executing and any decision by their superiors to execute those orders.

Second, Gupta is inapplicable on its own terms. Gupta held § 1252(g) strips jurisdiction to hear claims based on ICE arrests "taken to commence proceedings." *Id.* at 1065.[4] To "commence" proceedings means to begin a judicial process, as the service of a Notice to Appear commences a removal proceeding conducted under 8 U.S.C. § 1229a. 8 U.S.C. § 1229; 8 C.F.R. § 1239.1. Plaintiffs' removal proceedings had commenced long before the illegal seizures challenged here, so these agents were not commencing proceedings. It is common sense that actions *continuing* a process—such as entering Plaintiffs' homes without valid consent or a warrant and thereafter conducting unlawful searches and seizures—do not commence a new proceeding. The ICE officers' actions challenged here were, at best, "part of the deportation process" that fall outside of Gupta's holding and within the scope of review assured by AADC. AADC, 525 U.S. at 482.

[4] To the extent Gupta takes an expansive reading of what actions "commence proceedings," it improperly conflicts with binding Supreme Court precedent. It is unnecessary to wrestle with that question, however, because Gupta is inapplicable as it addresses only seizures taken to commence proceedings.

Third, as to the citizen Plaintiffs and non-citizen Plaintiffs who were not the subject of removal orders, Gupta and § 1252(g) do not apply. The ICE officers indiscriminately entered the homes and detained several individuals who were not the subject of removal orders, and by so doing they cannot use § 1252(g) as a shield to protect their unlawful conduct.

In summary, nothing indicates that the challenged actions commenced proceedings, adjudicated cases, or executed removal orders. The Department of Homeland Security (DHS) did not commence proceedings against Plaintiffs following the illegal acts challenged here. Rather, all the Plaintiffs already were in proceedings, never became subject to proceedings, or were U.S. citizens who cannot lawfully be subjected to removal proceedings.

II. Rule 12(b)(6): Plaintiffs have adequately pled their causes of action.

Plaintiffs have properly pled their causes of action. When construing the sufficiency of pleadings, courts must "accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff." Boyd v. Warden, Ala. Dep't of Corrections, 856 F.3d 853, 864 (11th Cir. 2017). A complaint need only "state a claim to relief that is plausible on its face, meaning it must contain 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Bishop v. Ross Earle &

Bonan, P.A., 817 F.3d 1268, 1270 (11th Cir. 2016) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

A. Plaintiffs pled a claim for false imprisonment.

The government argues that the Plaintiffs cannot state a claim for false imprisonment under Georgia law because ICE had probable cause to detain the Plaintiffs that were subject to final orders of removal. Gov't Mot. at 13-16. The government does not argue ICE officers had search or arrest warrants. Id. Instead, the government argues that 8 U.S.C. § 1357(a) authorizes them to conduct warrantless searches and seizures based exclusively on probable cause. Gov't Mot. at 15.

This argument fails because "the mere existence of probable cause standing alone has no real defensive bearing on the issue of liability" for false imprisonment under Georgia law. Ferrell v. Mikula, 672 S.E.2d 7, 11 (Ga. App. 2008). An arrest is not lawful merely because an officer has probable cause. Id. Georgia statutory law delineates the exigent circumstances that permit a warrantless arrest with probable cause. See Ga. Code Ann. §17-4-20(a)(2)(A)-(B). Where no such exigent circumstances exist, an arrest is not lawful under Georgia law, regardless of the presence of probable cause:

> The existence of probable cause standing alone is not a complete defense in a false imprisonment case because, even if probable cause

> to believe a crime has been committed exists, a warrantless arrest would still be illegal unless it was accomplished pursuant to one of the "exigent circumstances" applicable to law enforcement officers enumerated in OCGA § 17–4–20(a) or applicable to private persons as set forth in OCGA § 17–4–60. Thus, the defense of a warrantless arrest in a false imprisonment case must show that the arrest was made on probable cause and pursuant to the appropriate exigent circumstances.

Arbee v. Collins, 463 S.E.2d 922, 926 (Ga. App. 1995) (internal citations omitted).

Here, Plaintiffs allege ICE officers did not have a judicially issued search or arrest warrant, ICE lacked probable cause, and there were no exigent circumstances. Compl. ¶¶ 82, 110, 140, 155 (lack of judicial warrant); 155 (lack of probable cause); 83, 111, 141, 155 (lack of exigent circumstances). Plaintiffs further allege that ICE invested significant effort and time in planning Operation Border Resolve, targeted the Plaintiffs with removal orders for arrest, yet did not acquire a judicial warrant before arresting them. Compl. ¶¶ 20-32 (planning operation and targeting Plaintiffs); 82, 110, 140, 155 (lacked judicial warrant for arrest or search). Even if the removal orders alone gave ICE probable cause—a point Plaintiffs do not concede—Plaintiffs allege a lack of exigent circumstances, Compl. ¶¶ 83, 111, 141, 155, and the Defendant does not argue that exigent circumstances existed. This concession renders futile the government's reliance on 8 U.S.C. § 1357(a) as "valid legal process" because § 1357(a) only authorizes warrantless arrests in exigent circumstances. 8 U.S.C. § 1357 (a) (authorizing

warrantless arrests only if an alien unlawfully in the country "is likely to escape before a warrant can be obtained for his arrest"). Gov't Mot. at 13-16. ICE's failure to acquire knowing consent, as detailed in the Complaint, further supports Plaintiffs' claims for unlawful detention. Compl. ¶¶ 112, 142, 155; see, e.g., Lyttle v. United States, 867 F. Supp. 2d 1256, 1298 (M.D. Ga. 2012); Mancha v. ICE, No. 06-2650, 2009 WL 900800, at *4 - *5 (N.D. Ga. 2009). Accordingly, with or without probable cause, Plaintiffs have alleged their arrests were not lawful, and that is sufficient to defeat this motion.

B. Plaintiffs pled a claim for trespass.

The government next argues Plaintiffs have failed to state a claim for trespass because: (1) the ICE officers were acting within the scope of their official duties and (2) Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R do not allege a possessory interest in in any property. Gov't Mot. at 17-18. Both arguments fail.

First, Georgia law makes clear that officers do commit trespass if they interfere with a person's right to quiet enjoyment with "willfulness, malice, or corruption." Morton v. McCoy, 420 S.E.2d 40, 41 (Ga. App. 1992); Black v. Wigington, 811 F.3d 1259, 1266 (11th Cir. 2016). Thus, officers who enter a home and search it in violation of the Constitution can be liable for trespass in Georgia.

Rosas v. Brock, 826 F.2d 1004, 1008 (11th Cir.1987); Mancha v. Immigration & Customs Enf't, No. 06-2650, 2009 WL 900800, at *4 (N.D. Ga. Mar. 31, 2009).

Here, Plaintiffs allege that the ICE officers knowingly entered the Plaintiffs' homes without consent, a search warrant, or exigent circumstances in violation of the Fourth Amendment. Compl. at ¶¶ 163-69. Plaintiffs additionally allege that ICE officers engaged in unauthorized ruses to gain entry into Plaintiffs' homes and, in at least one case, physically pushed the door open without consent. Compl. ¶¶ 29, 44, 55, 90, 116, 155. Plaintiffs pled that ICE officers trespassed willfully, knowingly, and in violation of the Constitution; this is sufficient to plead trespass against the United States. See, e.g., Mancha, 2009 WL 900800, at *4 - *5.

Second, under Georgia law, tenants—like Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R—have a sufficient possessory interest to have standing to sue for trespass. Swift Loan & Fin. Co. v. Duncan, 394 S.E.2d 356, 358 (Ga. App. 1990) (noting a tenant has standing to sue for trespass). Even a tenant who is not a signer on a lease may sue for trespass. Univ. Apartments v. Uhler, 67 S.E.2d 201, 201 (Ga. App. 1951). Georgia codified a broad right for anyone with a right of enjoyment to real property to sue for trespass when someone interferes with that right: "The 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." Ga. Code Ann. §51-9-1 (emphasis added).

Here, the complaint contains allegations that Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R. lived in the apartments where ICE trespassed. Compl. ¶¶ 33 (J.A.M.), 85-87 (Y.S.G.R. and J.I.G.R.). As tenants, under Georgia law, Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R have a right of quiet enjoyment of their homes, and they have standing to sue for trespass, regardless of age. G.A. Code Ann. § 51-9-1. As such, Plaintiffs have pled trespass against the United States. See, e.g., Mancha, 2009 WL 900800, at *4 - *5.

C. Plaintiffs pled a claim for negligence.

The government next argues that Plaintiffs fail to state a claim for negligence because Plaintiffs do not identify a state law duty owed to them by the United States. Gov't Mot. at 18-20. This argument fails because the government "reads the FTCA too narrowly." Lyttle v. United States, 867 F. Supp. 2d 1256, 1301 (M.D. Ga. 2012).

As a threshold issue, Georgia recognizes a negligence claim for unlawful arrest and confinement, and implicit therewith a corresponding duty by law enforcement officers to exercise ordinary care when conducting an arrest or seizure. See Corp. Prop. Inv'rs v. Milon, 249 Ga. App. 699, 705, 549 S.E.2d 157,

163 (2001). As such, Georgia law recognizes a duty to exercise ordinary care when exercising authority to arrest and confine. Id.; Lyttle, 867 F. Supp. 2d 1301. It is important to note that, as the government seemingly recognizes, Gov't Mot. at 18, Plaintiffs need only identify a state law duty deriving from "analogous relationships." Id. (citing United States v. Olson, 546 U.S. 43, 46-47 (2005)). In other words, Plaintiffs need only plead that ICE owes a duty that state law enforcement officers in Georgia owe when conducting an arrest or effecting detention. Lyttle, 867 F. Supp. 2d 1301.

Here, Plaintiffs allege ICE had a duty to act with reasonable care during its raids. Compl. at ¶¶ 177-78 (emphasis added).[5] And Georgia recognizes that state law enforcement officers owe a duty to exercise ordinary care when exercising authority to arrest and confine. Milon, 249 Ga. App. at 705, 549 S.E.2d at 163.

[5] Specifically, plaintiffs pled:

> 177. ICE had a duty to act with reasonable care and to abide by the U.S. Constitution during enforcement actions including but not limited to entering and searching a home only when there is a judicially issued warrant, exigent circumstances, or knowing and voluntary consent to do so.
>
> 178. ICE also had a duty to act with reasonable care and to follow its own practices and procedures, including but not limited to notifying local law enforcement authorities that it intended on claiming to be "police" during the course of its raids.

Compl. ¶¶ 177, 178.

Because these allegations identify a duty on the part of ICE officers that is analogous to a duty recognized under Georgia state law, Plaintiffs have sufficiently pled a cognizable duty under state law. The government makes much of the fact that Plaintiffs also allege violations of duties created by federal sources of law. Gov't Mot. at 19-20. But additional allegations do not negate Plaintiffs' allegations that ICE officers owe a duty under state law to act with reasonable care when they conduct arrests or effect detention. Plaintiffs have, thus, pled a cause of action for negligence.

D. Plaintiffs pled a claim for intentional infliction of emotional distress.

The government argues that Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R. failed to state a claim for intentional infliction of emotional distress because their allegations do not identify sufficiently outrageous conduct or sufficient harm. Gov't Mot. at 20-23.[6] Specifically, the government argues that complaint identifies no outrageous conduct directed towards Plaintiffs J.A.M., Y.S.G.R., or J.I.G.R; the government argues that its agents' mere presence and general harm are insufficient to state a claim. Id. at 21.

[6] The government does not argue that the remaining Plaintiffs failed to state a claim for intentional infliction of emotional distress.

The government overlooks that actions taken against an adult that may not rise to the level of outrageous may, however, rise to that level for similar actions against children.

> [Outrageous] conduct must "be of such serious import as to naturally give rise to such intense feelings of humiliation, embarrassment, fright or extreme outrage as to cause severe emotional distress." Put another way, a case of intentional infliction of emotional distress is one where, generally speaking, "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!'" And while some conduct may not rise to the requisite level of outrageousness and egregiousness as a matter of law, "[o]nce the evidence shows that reasonable persons might find the presence of extreme or outrageous conduct, the jury must find the facts and make its own characterization."

Turnage v. Kasper, 307 Ga. App. 172, 182–83, 704 S.E.2d 842, 852–53 (2010) (internal citations omitted).

Here, in the light most favorable to the non-movant, Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R have alleged sufficiently outrageous conduct. In light of these Plaintiffs' ages, a toddler and young children, ICE's conduct and behavior is outrageous. J.A.M. alleges that, in the middle of the night, ICE officers knocked, rang the doorbell, and shined flashlights into his home; his entire family "cowered in the hallway" while this was going on; ICE agents ordered him and his family to gather in the living room; ICE agents kept him and his family in the room for forty minutes; and ICE agents repeatedly ordered his family around during that time,

threatening arrest. Compl. ¶¶ 34-36; 58-63. Similarly, Y.S.G.R. and J.I.G.R. were awakened in the early morning on a Saturday to loud banging on the door and ringing of the doorbell; ICE agents "discovered" them while searching the entire house; ICE agents woke everyone and forced them to sit in the living room for 30 minutes; Y.S.G.R. and J.I.G.R. witnessed the entire family as scared and confused; they cried; ICE agents searched their family and yelled at them; their mother, in fact, told ICE agents that her children were being traumatized; and their mother was trembling. Compl. ¶¶ 86-103. Further, ICE's decision not to remove the children from the room before berating and arresting the children's family members is outrageous conduct in and of itself. These allegations are sufficient to allege outrageous conduct in the context of minors.

Further, Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R alleged sufficient harm: J.A.M. is now nervous with new people, Compl. ¶ 80; Y.S.G.R. missed a week of school, threatened to hurt herself, and sought treatment for mental anguish, id. ¶ 106; and J.S.G.R. suffered emotional harm and sought treatment, id. ¶ 107. Further, all Plaintiffs allege "severe, lasting, and grave" damages. Compl. at ¶¶ 194-96. In the light most favorable to the Plaintiffs, the allegations are sufficient. Whether a toddler or child could suffer harm and the level of that harm from a traumatic event at such an early age is testimony properly left to an expert in

childhood trauma or a child psychologist. This Court is simply not equipped to make this expert finding so early in the case.

E. Plaintiffs pled a claim for negligent infliction of emotional distress.

The government argues that no Plaintiff stated a claim for negligent infliction of emotional distress because no Plaintiff alleged physical harm. Gov't Mot. at 23-24. However, 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. Clarke v. Freeman, 302 Ga. App. 831, 836, 692 S.E.2d 80, 84 (2010) ("[W]here the defendant's conduct is malicious, willful, or wanton, recovery can be had without the necessity of an impact."); Ryckeley v. Callaway, 261 Ga. 828, 828, 412 S.E.2d 826, 826 (1992) ("On the other hand, where the conduct is malicious, wilful or wanton, recovery can be had without the necessity of an impact"); In re Ford Motor Co. Speed Control Deactivation Switch Prod. Liab. Litig., No. 11-00799, 2012 WL 13006034, at *2 (E.D. Mich. Feb. 3, 2012) (applying Georgia law). Here, there are sufficient allegations that ICE acted maliciously, willfully, and wantonly in targeting family units from three countries for removal. Compl. ¶¶ 20-22. ICE went so far as to set numerical goals for arrests, allocate additional agents, and prepare its officers with car seats, diapers, baby food, and baby formula to arrest infants

and toddlers. Id. 23-25. When construed in a light most favorable to the Plaintiffs, Plaintiffs state a claim for negligent infliction of emotional distress.

III. Plaintiffs can seek attorney's fees as a remedy.

The government also argues that certain types of damages are unavailable under the FTCA. Gov't Mot. at 24-25. Plaintiffs agree that punitive damages and declaratory relief are unavailable under the FTCA. However, the FTCA specifically allows for attorneys' fees to be paid out of any settlement or recovery. See 28 U.S.C. § 2678. As this case evolves through discovery, Plaintiffs reserve the right to amend their complaint to seek punitive and declaratory relief should the facts and law allow it.

CONCLUSION

The Plaintiffs are not challenging any decision to execute a removal order. They are challenging the United States' unconstitutional and unconscionable conduct that followed its decision to execute the removal orders. This Court has jurisdiction to review these claims, and in a light most favorable to Plaintiffs, they have pled each and every claim for each and every Plaintiff. This Court should, therefore, deny this motion in its entirety.

March 16, 2018

Respectfully Submitted,

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Certificate of Service

I declare that I filed the foregoing on the court's electronic filing system, which forwarded an electronic copy to all counsel of record.

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