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

Juneidy Mijangos Vargas, on behalf of minor J.A.M.; and Johana Gutierrez, on behalf of minors Y.S.G.R. and J.I.G.R.,	:	
Plaintiffs,	:	Civil Action No.
v.	:	1:17-CV-05052-SCJ
The United States of America,	:	
Defendant.	:	

DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

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

Respectfully submitted,

BYUNG J. PAK
UNITED STATES ATTORNEY

s/ Gabriel Mendel
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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

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

I. FACTUAL BACKGROUND

In late December 2015 and early January 2016, the United States Department of Homeland Security ("DHS") and U.S. Immigration and Customs Enforcement ("ICE") planned and executed Operation Border Resolve, an enforcement and removal operation that targeted family units for removal from the United States. *See* Complaint, Doc. 1, at ¶¶ 11-13. On January 2 and 3, 2016, ICE agents conducted

enforcement and removal operations in Georgia, North Carolina, and Texas. *Id.* at 21.

Plaintiffs allege they were present during the law enforcement and removal operations. In particular, Plaintiff J.A.M. alleges that he was present when ICE agents entered the home in Stone Mountain where he resided with his mother, Juneidy Mijangos Vargas, and his extended family, including his grandmother, Rosa Vargas Morales ("Ms. Vargas"), his uncle, Juan Mijangos Vargas ("Mr. Vargas"), and aunt, D.M.V. *Id.* at ¶¶ 24, 49, 51. Plaintiffs allege various misconduct by ICE agents during these events, including the use of a "ruse" to attempt to gain consent to enter the home. *Id.* at 31-57, 94. During this operation, ICE agents detained Ms. Vargas and her children, Mr. Vargas and D.M.V. *Id.* at 57. At the time of these events, Ms. Vargas and her children were subject to final administrative orders of removal, which were subsequently vacated. *See* Vargas Orders of Removal, attached hereto as Exhibit A.[1] Though they had initially read aloud the name of Juneidy Mijangos

[1] The court may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment "if the attached document is: (1) central to the plaintiff's claim; and (2) undisputed." *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). The attached orders of removal (and accompanying notices to appear) cannot be disputed, and are central to Plaintiffs' claims. *See, e.g.*, *Hodges v. Collins*, No. 5:12-CV-202 MTT, 2013 WL 557183, at *3 (M.D. Ga. Feb. 12, 2013) (permitting consideration of search warrant affidavit because "it is central

Vargas (and she was also subject to an order of removal), the ICE agents "decided not to bring [her] with them, because she is the mother of J.A.M., who was an infant at the time." *Id.*; Complaint at ¶ 56.

Plaintiffs Y.S.G.R., and J.I.G.R allege that they live with Johana Gutierrez ("Ms. Gutierrez") and her husband, Salvador Alfaro. Complaint at ¶ 63. Plaintiffs allege that that, beginning on the morning of January 2, 2016, as part of Operation Border Resolve they were subject to a variety of law enforcement actions by ICE agents resulting in the detention of Ms. Gutierrez's niece, Ana Mejia Gutierrez and her son. *Id.* at ¶¶ 63-79, 96. Plaintiffs alleges various misconduct by ICE agents during these events, including the use of a "ruse" to gain consent to enter the home. *Id.* At the time of these events, Ana Mejia Gutierrez and her son were subject to orders of removal. *See also* Gutierrez Orders of Removal, attached hereto as Exhibit B.

II. DISCUSSION

A. Applicable Standard for Dismissal of Claims.

A complaint may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim when a complaint does not contain "enough facts to state

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to [plaintiff's] claims premised on his unlawful arrest because it establishes whether [defendant] had probable cause").

a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007). A complaint must offer more than "naked assertion[s]," "labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." *Id*. at 555, 557. "Plausibility" requires more than a "sheer possibility that a defendant has acted unlawfully," and a complaint that alleges facts that are "merely consistent with" liability "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Chandler v. Sec'y of Fla. Dept. of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678). "Further, courts may infer from the factual allegations in the complaint obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Kivisto v. Miller, Canfield, Paddock & Stone, PLC*, 413 F. App'x 136, 138 (11th Cir. 2011).

B. Plaintiffs Fail to State a Claim For Relief.

Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R., who are alleged to be citizens of the United States and ages 17 months, 12 years, and 9 years, respectively, at the time of the enforcement actions, bring a variety of tort-based claims. Under the FTCA, the United States is held liable, in a tort action, only in the same manner and to the same

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

a. False Imprisonment

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

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

Erfani v. Bishop, 251 Ga.App. 20, 553 S.E.2d 326, 330 (2001) (quoting *Williams v. Smith*, 179 Ga.App. 712, 348 S.E.2d 50, 52–52 (1986)) (emphasis in original). Though Plaintiffs offer conclusory allegations that the enforcement actions were conducted without warrants, they admit that the entry of law enforcement agents into their homes were part of law enforcement operations conducted to effectuate removal of aliens, and those aliens were subject to removal orders. *See* Complaint at ¶¶ 57 79; *see also* Exhibits A and B. Plaintiffs do not allege the removal orders were void, defective, or obtained in bad faith.

As such, although Plaintiffs may argue they were detained, *see Lyttle v. United States*, 867 F. Supp. 2d 1256, 1298 (M.D. Ga. 2012), they were detained by valid legal process. *Redd v. City of Enterprise*, 140 F.3d 1378, 1382 (11th Cir. 1998), instructs that a detention or an arrest must be supported by probable cause to be lawful. "[P]robable cause to arrest exists when an arrest is objectively reasonable based on the totality of the circumstances." *Durruthy v. Pastor*, 351 F.3d 1080, 1088 (11th Cir. 2003). "To seize and detain a person for being an illegal alien, an officer must have probable cause to believe that the individual is an illegal alien." *Lyttle*, 876 F. Supp. 2d at 1281.

Pursuant to 8 U.S.C. § 1357(a), ICE agents have the power, without warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to

remain in the United States " and to arrest any alien without a warrant if he has "reason to believe" the alien is in the United States illegally. *See also* 8 C.F.R. § 287.5. In this case, it is undisputed that the ICE agents who conducted the enforcement operations at issue in the Complaint were in possession of lawful orders of removal for aliens in the subject residences and had legal authority to effectuate those arrests. *See* Exhibits A and B; *Douglas v. United States*, 796 F. Supp. 2d 1354, 1368 (M.D. Fla. 2011) (dismissing false imprisonment claim because ICE agents were operating pursuant to a Notice to Appear[2] and thus the "United States has established that [plaintiff's] arrest was made under legal authority"); *Belleri v. United States*, No. 10-81527-CIV, 2012 WL 12892399, at *9 (S.D. Fla. Jan. 17, 2012), *vacated on other grounds*, 712 F.3d 543 (11th Cir. 2013) ("ICE had the lawful authority to issue the warrant for Plaintiff's arrest and the notice to appear, so Plaintiff cannot state a claim for false imprisonment and this claim will be dismissed."); *Valencia–Mejia v. United States*, No. CV 08–2943, 2008 WL 4286979, at *5 (C.D.Cal. Sept. 15, 2008) (noting that immigration officers have a "lawful privilege" to arrest aliens, which bars a false imprisonment claim under California law); *Tovar*

[2]"A Notice to Appear is essentially an administrative arrest warrant that is not reviewed by a neutral magistrate." *Douglas*, 796 F. Supp. at 1360, n.5 (citing *United States v. Abdi,* 463 F.3d 547, 551 (6th Cir. 2006)).

v. United States, No. 3:98–cv–1682, 2000 WL 425170, *7–8 (N.D. Tex. Apr. 18, 2000) (noting that INS agents had "legal authority" to detain plaintiff under INA, barring false imprisonment claim under Texas law). As such, the ICE agents had legal authority to enter the premises to effectuate arrests and detentions for purposes of enforcing federal immigration laws, thereby barring Plaintiffs' claim.

b. Trespass

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

assert any property interest in the real property that was the subject of the enforcement operations at issue, or possess any property interest of their own.

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

c. Negligence

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

Plaintiffs fail to satisfy the elements required for a negligence claim under Georgia law because Plaintiffs fail to allege a duty that the United States owed to them. "Unless Plaintiffs can identify corresponding state law duties, they have, at the least, failed to state a claim, and arguably their lapse deprives the court of even subject matter jurisdiction over the action." *Zelaya v. United States*, 781 F.3d 1315, 1325 (11th Cir. 2015). In the absence of identifying any state law duty owed by the United States, Plaintiffs instead cite to purported duties created by: 1) the U.S. Constitution; and 2) ICE practices and procedures. *See* Complaint at ¶¶ 121-124. Neither can support an FTCA claim.

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

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

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

Zelaya, 781 F.3d at 1323-24; *see also Dalrymple v. United States*, 460 F.3d 1318 (11th Cir. 2006) (violating an internal policy or procedure does not create a cause of action under the FTCA against the government unless the challenged conduct is independently tortious under applicable state law). Moreover, Plaintiffs' vague and conclusory allegations regarding "internal, non-discretionary DHS" policies fail to satisfy the pleading standards of *Twombly* and *Iqbal*. Because Plaintiffs fail to allege a state law duty owed to them, their negligence claim fails as a matter of law. *See, e.g.*, *Appolon v. United States*, No. 16-2275, 2017 WL 3994925, at *16 (E.D.N.Y. Sept. 6, 2017) (negligent investigation claim against ICE dismissed because of a lack of private analogue under Georgia law).

d. Intentional Infliction of Emotional Distress

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

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such

> emotional distress, and if bodily harm to the other results from it, for such bodily harm.

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

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

Plaintiffs identify no outrageous conduct directed toward Plaintiff J.A.M., who was seventeen months-old. Instead, Plaintiffs simply allege that J.A.M. was

physically present at the time that ICE agents detained other members of his family pursuant to lawful removal orders, and was told to give one of his toys to his mother after offering it to an ICE agent. *See* Complaint at ¶¶ 51, 53, 55.[3] In fact, Plaintiffs acknowledge that although the ICE agents came to the residence to arrest his mother, Plaintiff Juneidy Mijangos Vargas, the agents "decided not to bring… Juneidy Mijangos Vargas, with them, because she is the mother of J.A.M. who was an infant at the time." *Id*. at 56. The agents exercised their prosecutorial discretion to allow the mother of J.A.M. to remain and she was not separated from J.A.M. Plaintiffs also fail to allege that the seventeen month-old J.A.M. was cognizant of the enforcement actions or severely distressed by them, instead alleging only that the now-three year old "is frightened and nervous around law enforcement." *Id.* at 58. These allegations show neither conduct that is sufficiently outrageous nor resulting emotional distress that is sufficiently severe to support a claim of intentional

[3] Plaintiffs try to avoid the clear lack of outrageous conduct toward them by instead repeating their allegations of conduct directed toward *other individuals* as if such conduct was somehow directed at them *See, e.g.*, Complaint at ¶¶ 138-145. This efforts fails because intentional conduct intentional conduct "will not warrant a recovery for the infliction of emotional distress if the conduct was not directed toward the plaintiff." *Smith v. Stewart*, 660 S.E.2d 822 (Ga. App. 2008) (emphasis added). There 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.

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

Similarly, with respect to Plaintiffs Y.S.G.R. and J.I.G.R, Plaintiffs allege no outrageous conduct directed toward them. Indeed, there are no specific allegations regarding conduct toward these individuals at all during the enforcement actions, other than that they were awoken and present in their living room for 30-60 minutes. *See* Complaint at ¶ 72. Effectively, Plaintiffs simply allege that Y.S.G.R. and J.I.G.R were physically present at the time that ICE agents detained other members of their family pursuant to lawful removal orders. *Id.* Plaintiffs also fail to make specific factual allegations sufficient to show these Plaintiffs were severely distressed by any intentional conduct directed toward them, as those heightened standards are defined under Georgia law. Instead, the allegations with respect to Y.S.G.R. are that she does not like to answer the door, missed one week of school, did not want to sleep alone, and made a single remark to a classmate that she had thoughts of self-harm. *Id.* at 80-81. With respect to J.I.G.R., the complaint asserts only that he does not

like to answer the door, no longer participates in sports, and is more insular. *Id.* at 20, 84.

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

e. Negligent Infliction of Emotional Distress

In Georgia, to prevail on a negligent infliction of emotional distress claim, a plaintiff must satisfy the Georgia impact rule requirements, which are that "(1) he suffered a physical impact; (2) the physical impact caused him physical injury; and

(3) the physical injury caused his mental suffering or emotional distress." *Kirkland v. Earth Fare, Inc.*, 658 S.E.2d 433, 436 (Ga. App. 2008). A plaintiff must allege or proffer evidence of a physical injury to pursue this cause of action. *Id.*; *see also Bullard v. MRA Holding, LLC*, 890 F. Supp. 2d 1323, 1330 (N.D. Ga. 2012) (citing *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82 (Ga. 2000) ("In a claim concerning negligent conduct, a recovery for emotional distress is allowed only where there is some impact on the plaintiff, and that impact must be a physical injury.")); *Coon v. Med. Ctr., Inc.*, 797 S.E.2d 828, 836 (Ga. 2017) (reaffirming "that Georgia follows the physical impact rule for claims of negligent infliction of emotional distress"). Because Plaintiffs, particularly Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R, do not allege that the United States "caused plaintiff[s] any physical injury, a negligent infliction of emotional distress claim necessarily fails." *Bullard*, 890 F. Supp. 2d at 1330-31.

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

In their Prayer for Relief, Plaintiffs request punitive damages, attorneys' fees, and declaratory relief. *See* Complaint at 35. These are not available under the FTCA. *See* 28 U.S.C. § 2674 (no punitive damages); 28 U.S.C. § 2678 (attorney fees); *see also Douglas*, 796 F. Supp. 2d at 1363 (government not liable for punitive damages); *Mathis v. Laird*, 324 F. Supp. 885 (M.D. Fl. 1971) (dicta) (FTCA cannot

be invoked by claimant seeking declaratory relief); *Moher v. United States*, 875 F. Supp. 2d 739, 754-55 (W.D. Mich. 2012) (money damages is exclusive FTCA remedy; declaratory/injunctive relief claim dismissed).

CONCLUSION

For all of the foregoing reasons, the United States requests that the Court dismiss the Complaint.

Respectfully submitted,

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Defendant.	:	

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

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

This 18th day of September, 2018.

Respectfully submitted,

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