**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| SOUTHERN POVERTY LAW CENTER,<br>*Plaintiff*,<br>v.<br>U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,<br>*Defendants*. | Civil Action No. 18-0760 (CKK-RMM) |

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER ORDER DENYING MOTION TO SEVER AND TRANSFER VENUE**

## INTRODUCTION

Defendants once again seek to delay litigation and resolution of this case via their baseless Motion to Reconsider Order Denying Motion to Sever and Transfer Venue. Dkt. 216. Defendants waive any argument on severance, and after four years of litigation seek to transfer this case *in toto* to a district court in Georgia where no Defendants reside and which contains only one of three relevant facilities. Defendants make no mention of any harm that would flow from denial of reconsideration. Defendants do not prove any of the extraordinary circumstances required for reconsideration exist. Defendants have not met the required burden.

The Court already decided the issue of transfer, and decided it correctly. Dkt. 61, 62. There was no reason to transfer this case out of the District Court for the District of Columbia in 2019, and no significant change the facts has occurred to warrant reconsideration. Defendants' motion should be denied.

## LEGAL STANDARD

"Motions for reconsideration of prior rulings are strongly discouraged," and "may not reassert arguments previously raised and rejected by the Court or arguments which should have been previously raised but are being raised for the first time." Dkt. 215 at 2–3 (cleaned up).

A motion to reconsider brought under Federal Rule of Civil Procedure 54(b) is evaluated by the "as justice requires" standard. *Isse v. Am. Univ.*, 544 F. Supp. 2d 25, 29 (D.D.C. 2008) (Kollar-Kotelly, J.) (citation omitted). The movant bears the burden of demonstrating "that some harm, legal or at least tangible, would flow from a denial of reconsideration." *Cobell v. Norton*, 355 F. Supp. 2d 531, 540 (D.D.C. 2005). A court "generally will grant a motion for reconsideration of an interlocutory order 'only when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order.'" *Keystone Tobacco Co., Inc. v. U.S. Tobacco Co.*, 217 F.R.D. 235, 237 (D.D.C. 2003) (citation omitted). When applying this standard, a court may consider if it "'patently' misunderstood a party, made a decision beyond the adversarial issues presented to the court, made an error in failing to consider controlling decisions or data, or whether a controlling or significant change in the law or facts has occurred since the submission of the issue to the Court." *United States v. Dynamic Visions, Inc.*, 321 F.R.D. 14, 17 (D.D.C. 2017). "Developments that do not bear on the reasoning behind an order that a party asks a court to reconsider are not 'significant change[s]' . . . in the facts of a case." *McLaughlin v. Holder*, 864 F. Supp. 2d 134, 141 (D.D.C. 2012) (quoting *Ficken v. Golden*, 696 F. Supp. 2d 21, 35 (D.D.C. 2010)).

"[C]ourts should be loathe to [reconsider interlocutory orders] in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Keystone*, 217 F.R.D. at 237 (citations omitted). Finality requires that

"once the parties have battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Banks v. Booth*, 518 F. Supp. 3d 57, 63 (D.D.C.) (Kollar-Kotelly, J.) (citation omitted), *appeal dismissed*, *cause remanded*, 3 F.4th 445 (D.C. Cir. 2021).

## ARGUMENT

### A. Defendants Waive Any Argument Regarding Severance

Although Defendants reference severance in the title and first paragraph of their Motion, they never again mention it other than when discussing the history of the underlying motion. *See* Dkt. 216 at 5. They make no argument that the Court should reconsider its previous order denying severance, and thus waive the issue.[1] *Seo v. Oh*, 573 F. Supp. 3d 277, 288 (D.D.C. 2021) ("In this Court, 'perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are deemed waived[.]'" (quoting *Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013))).

Severance does not automatically accompany transfer.[2] This Court addressed severance and transfer separately in its Order denying Defendants' original motion, *see* Dkt. 62 at 2–4, and

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[1] Even if the Court determines that the issue of severance is not waived, there is no basis to disturb this Court's prior ruling that "resolution of the legal and factual issues in this case—even conditions that may differ from one facility to another—would seem to turn on those national standards and Defendants' enforcement of them." Dkt. 62 at 2.

[2] Defendants obliquely imply that they expect that severance might accompany transfer here, although even that is confused. *See* Dkt. 216 at 3 (discussing potential transfer of "this case to either the Middle District of Georgia and/or the Western District of Louisiana"), 8 (discussing impact of transferring "the cases . . . to Louisiana and Georgia"). Given the conflicting and unexplained use of "this case" in the singular and "the cases" in the plural, and the decision to use "and/or" when discussing transfer to courts in Georgia and Louisiana, the Defendants' desired outcome is as clear as mud. However, the Court need not entertain issues that "lack[] any explanation, evidentiary basis, or legal support." *Dynamic Visions*, 321 F.R.D. at 17.

made clear that its authority to sever and its authority to transfer were distinct: Fed. R. Civ. P. 21 and 28 U.S.C. § 1404(a), respectively. *Id.*

The consequence of this waiver is that Defendants seek to transfer this case *in toto* out of the District of Columbia to either the Middle District of Georgia or the Western District of Louisiana. However, as Defendants never before asked the Court to transfer the entire case to the Western District of Louisiana, they cannot seek reconsideration of that issue. Dkt. 25 at ¶ 13 ("[T]he Court will not entertain: . . . arguments which should have been previously raised, but are being raised for the first time."); *see also* Dkt. 215 at 2–3 (same). Thus, Defendants seek reconsideration of the Court's denial of their request to transfer the entire case to the Middle District of Georgia. *See* Dkt. 47 at 24 n.8. As Plaintiff Southern Poverty Law Center ("SPLC") discusses *infra*, there is absolutely no basis for granting such reconsideration.

**B. Defendants Have Not Met Their Burden to Show that Justice Requires Reconsideration of the Court's Prior Order Denying Transfer**

Defendants have neither demonstrated that they would suffer harm from a denial of reconsideration nor established any of the "extraordinary circumstances" that could justify reconsideration of the Court's well-reasoned Order denying transfer. *See Keystone*, 217 F.R.D. at 237 (citations omitted). They have failed to meet their burden and their Motion should be denied.[3]

**1. Defendants Do Not Demonstrate Any Harm**

A basic requirement for Rule 54(b) reconsideration is that the movant demonstrate that "some sort of 'injustice' will result if reconsideration is refused." *Dynamic Visions*, 321 F.R.D.

[3] Defendants make no argument that the Court committed a "clear error" in its underlying Order denying transfer or that there was a change in controlling law. *See generally* Dkt. 216. As such, Defendants have waived those arguments for reconsideration. *Seo*, 573 F. Supp. 3d at 288.

at 17 (quoting *Cobell*, 355 F. Supp. 2d at 540). The harm may be legal or tangible, but there must be "some harm." *Cobell*, 355 F. Supp. 2d at 540.

Although Defendants mention this standard, *see* Dkt. 216 at 2 (citing *Dynamic Visions*, 321 F.R.D. at 17), they never specify any harm, legal or tangible, that would flow from a denial of reconsideration. The closest they come is a discussion of inconvenience to witnesses and availability of evidence—i.e., private interests. *See* Dkt. 216 at 7–8. But *private interests* in one venue versus another are not the equivalent of *harm*.

Thus, as with severance, Defendants waive any argument regarding harm, and cannot meet their burden to demonstrate that "justice requires" reconsideration. *Dynamic Visions*, 321 F.R.D. at 17 (citation omitted). And even if the Court were to conclude that Defendants have demonstrated harm, Defendants have not established a significant change in the facts that would merit reconsideration.

**2. Defendants Do Not Establish a Change in Facts or New Evidence**

Defendants' entire argument as to why the Court should reconsider its Order denying transfer rests on supposed "factual developments over the course of the litigation." Dkt. 216 at 3. These "factual developments" are of two varieties, according to Defendants: (1) characterizations of the case by the Court and SPLC during the course of litigation, and (2) the Court's recent dismissal of one of SPLC's claims due to a jurisdictional issue. But neither is "new evidence not previously available," *Keystone*, 217 F.R.D. at 237, or a "significant change in the . . . facts," *Dynamic Visions*, 321 F.R.D. at 17, that warrants reconsideration. At its core, the Court's reasoning behind the denial of transfer was that this case "challenges policy and enforcement decisions by

Defendants that are predominantly located [in D.C.]."[4] Dkt. 62 at 4. The developments Defendants cite—even if one could call them "factual" as opposed to procedural—do not bear on that reasoning, and thus do not justify reconsideration. *McLaughlin*, 864 F. Supp. 2d at 141.

*First*, Defendants assert that this case has morphed into "a conditions of confinement claim at individual facilities" based on the Temporary Restraining Order the Court entered in June 2020, Dkt. 123, one line in the Court's recent Order granting in part and denying in part Defendants' Renewed Motion to Partially Dismiss the Second Amended Complaint ("Motion to Dismiss Order"), Dkt. 201 at 2, and Defendants' flawed and incomplete description of the discovery SPLC has pursued in this case. *See* Dkt. 216 at 5–6. This assertion is incorrect and inaccurate.

SPLC currently has five different claims in this case: two Fifth Amendment procedural due process claims, one Fifth Amendment substantive due process claim, one Administrative Procedures Act claim, and one First Amendment viewpoint discrimination claim. Defendants' description of this litigation as a mere "conditions of confinement" case is ridiculous on its face.[5]

The Court's decision to grant a TRO based on SPLC's substantive due process claim did not affect SPLC's other claims or alter the nature of the case. In response to an urgent filing, the Court issued a TRO on the basis of its clear subject matter jurisdiction over SPLC's substantive due process claim. *See* Dkt. 124 at 31–32. The Court decided not to reach the "complicated" jurisdictional questions related to SPLC's procedural due process claims when it clearly had

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[4] Defendants insinuate that the Court's "perception" of the case, "based on Plaintiff's representations," was somehow incorrect. Dkt. 216 at 2. To the extent Defendants are arguing that SPLC misrepresented its theory of the case to the Court, SPLC objects in the strongest possible terms.

[5] Defendants attempt to impose further artificial limits on SPLC's case by noting that they plan to file a FRCP 12(c) Motion for Judgment on the Pleadings to challenge SPLC's APA claim. Dkt. 216 at 3 n.1. Defendants' stated plans to file a motion in the future have no effect on the current nature of the case, and do not constitute "new evidence" or a "significant change in the . . . facts" that would warrant reconsideration. *See Keystone*, 217 F.R.D. at 237.

another source of jurisdiction to decide the motion then in front of it. *Id.* at 32 n.4. But the jurisdictional basis for the TRO is not "new evidence" and does not bear on the Court's reasoning behind the denial of transfer. It is not even a "change in the . . . *facts*." *Dynamic Visions*, 321 F.R.D. at 17 (emphasis added).

Defendants also attempt to argue that the Court's description in the Motion to Dismiss Order of SPLC's Fifth Amendment claims[6] makes this a "conditions of confinement" case. Dkt. 216 at 6. Even assuming that the language of an order could qualify as a change in the facts, Defendants are just wrong. SPLC summarizes its remaining Fifth Amendment claims differently than the Court did, given that two of them challenge Defendants' systemic denial of constitutionally-sufficient *procedural* due process—access to courts and the right to a full and fair hearing—and only one is a substantive due process challenge to illegally punitive conditions. However, the Court's labeling of two of SPLC's Fifth Amendment *procedural* due process claims as *substantive* due process claims is not probative of SPLC's theory of the case, nor does it transform "the gravamen" of the case from "Defendants' responsibility for enforcing their own standards" and meeting their constitutional obligations, Dkt. 62 at 2, to "the practices of the different contractors running the three facilities," Dkt. 216 at 7. The Motion to Dismiss Order is not new evidence, and it does not bear on the Court's reasoning denying transfer.

Finally, Defendants provide a flawed and incomplete description of discovery in this case to argue that SPLC is focused "on the conditions at the facilities themselves, as opposed to

[6] Defendants misquote the Court. Their Motion for Reconsideration states that the Court's Motion to Dismiss Order "characterized this case as a 'conditions of confinement claim in violation of Fifth Amendment substantive due process guarantees[.]'" Dkt. 216, at 6 (purportedly quoting Motion to Dismiss Order, Dkt. 201 at 2). The Court actually wrote that "Plaintiffs claim that their clients' conditions of confinement violate the Fifth Amendment's substantive due process guarantees[.]" Dkt. 201, at 2. Defendants thus attempt to attribute to the Court a position that the Court was clearly attributing to Plaintiff.

Defendants' mere oversight of them." Dkt. 216 at 6. SPLC's theory of the case, outside of its First Amendment claim, is and has been that Defendants have a non-delegable duty to ensure that the individuals they detain in their vast network of isolated immigration detention facilities can exercise both their procedural and substantive due process rights, and that Defendants are required to follow their own regulations under the APA. *See* Dkt. 70. Defendants—all but two of whom are based in D.C.—selected the facilities at issue, chose to detain specific numbers of people in them, and failed to oversee and monitor them sufficiently. *Id.* Proving these claims requires evidence of constitutional and regulatory violations at the facility level, and evidence that Defendants in D.C. created, implemented, and enforced policies that led to those violations.

To obtain the latter, SPLC has pursued discovery into Defendants' monitoring, oversight, contracting and procurement, and has sought discovery from custodians at key federal sub-agencies. *See* Dkt. 116-1 at 21–26, 41–42; *see also* Dkt. 213 at 13. Defendants have fought these discovery requests, *see* Dkt. 121 at 34–41—requests that they fail to mention in their Motion for Reconsideration. SPLC's requests for additional facility-level information stem from Defendants' refusal to produce documents or include additional relevant custodians and are not a definitive statement about the scope of the case. Defendants' cherry-picked description of discovery to date is not new evidence and does not bear on the Court's reasoning denying transfer.

*Second*, Defendants assert that the Court's dismissal of one of SPLC's claims constitutes a "factual development." Dkt. 216 at 3. However, a Court order is not "new evidence" or even a "change in the . . . facts," *Dynamic Visions*, 321 F.R.D. at 17, and the Court's jurisdictional analysis in that order does not bear on its underlying reasoning denying transfer—i.e., that this is "a case focused on national issues." Dkt. 62 at 4. SPLC's theory of the case has not changed, and the scope of the case remains the same, although there is one fewer claim. As SPLC discussed in the Joint

Meet-and-Confer Report, "SPLC's substantive due process 'punitive conditions' claim (Count V) continues to allow SPLC to challenge Defendants' restrictions on access to and communication with counsel, including in the removal defense context." Dkt. 213 at 11. In addition, SPLC's remaining Fifth Amendment claims—access to courts (Count I) and the right to a full and fair hearing (Count III)—encompass access to legal representation, privacy in communications with counsel, and other procedural safeguards. *Id.* at 12.

### C. Defendants Reassert Arguments Previously Raised and Rejected by the Court

Instead of establishing grounds for reconsideration, Defendants seek a "second bite at the apple," by rearguing the merits of transfer. *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 85 (D.D.C. 2018) (Kollar-Kotelly, J.). Should the Court reach this issue, it should again deny transfer to the Middle District of Georgia.

*First*, venue is not appropriate in the Middle District of Georgia because the named Defendants do not reside there and the federal decision-making for which SPLC seeks to hold Defendants accountable occurred in D.C., not Georgia. *See* Dkt. 50 at 24; Dkt. 58 at 13.

*Second*, the balance of private interests weighs against transfer.[7] SPLC's choice of forum was D.C., and the Court already noted "it will be more convenient for the parties to proceed in this jurisdiction than in the Middle District of Georgia because this case focuses predominantly on Defendants' policy and enforcement decisions at the national and regional levels." Dkt. 62 at 4.

[7] Defendants also reference the Court's appointment of a special monitor as evidence that private factors favor transfer. Dkt. 216 at 7. This is nonsensical. The Court's decision to appoint a special monitor stemmed from the difficulty of deciding "factual disputes arising from patterns and practices at Facilities in which 'observation of [D]efendant[]s' conduct is restricted.'" Dkt. 185 at 4 (citation omitted) (alterations in original). The crux of the issue was the difficulty of establishing the facts on the ground in a detention setting with pandemic restrictions—not whether Defendants in D.C. were ultimately responsible for policies applied in the facilities. That a special monitor was appointed to answer specific factual questions does not weigh on the correct choice of venue.

Although Defendants invoke the convenience of the witnesses, any forum will entail some inconvenience given that potential witnesses are in D.C., Louisiana, and Georgia; Defendants do not assert that any likely witnesses would not actually be available for trial.

*Third*, the balance of public interests weighs against transfer. Ironically, Defendants claim that local interests necessitate transfer, Dkt. 216 at 9, but would transfer this case *in toto* to a jurisdiction which houses only one of the three facilities in question. Why the Middle District of Georgia needs to decide Louisiana's "local controversies" is never explained. And as before, Defendants misunderstand SPLC's case. This case challenges Defendants' federal immigration detention policy and the resulting systemic violations of constitutional rights and the APA in three detention facilities—not a specific decision by one field office in a specific immigration matter, as in *Huang v. Napolitano*, 721 F. Supp. 2d 46, 48, 53 (D.D.C. 2010), or the allegedly unconstitutional application of federal policies to a specific death row prisoner, as in *Montgomery v. Barr*, 502 F. Supp. 3d 165, 177 (D.D.C. 2020), which Defendants cite. This is a case "focused on national issues of immigrants' access to counsel during detention; accordingly, the local interest in conditions at the individual detention facilities weighs less heavily than the national interests involved." Dkt. 62 at 4; *see also Aracely v. Nielsen*, 319 F. Supp. 3d 110, 131 (D.D.C. 2018) ("Plaintiffs have been clear that their challenge is not based on the specific decisions made by federal officials in Texas, but rather upon an alleged national policy promulgated by DHS, which carries with it nationwide significance.").

## CONCLUSION

As Defendants have failed to satisfy the burden for reconsideration, SPLC respectfully requests that the Court deny Defendants' Motion to Reconsider Order Denying Motion to Sever and Transfer Venue.

Respectfully submitted, this 29th day of July, 2022.

/s/ Sarah Rich
Sarah M. Rich (GA Bar No. 281985)*
Stephanie M. Alvarez-Jones (NJ Bar No. 276242018)*
Southern Poverty Law Center
150 E. Ponce de Leon Avenue, Suite 340
Decatur, GA 30030
Telephone: (404) 521-6700
sarah.rich@splcenter.org
stephanie.alvarezjones@splcenter.org

Emily B. Lubin (LA Bar No. 38823)*
Southern Poverty Law Center
201 St. Charles Ave., Suite 2000
New Orleans, LA 70170
Telephone: (225) 316-6709
emily.lubin@splcenter.org

/s/ John T. Bergin
John T. Bergin (D.C. Bar No. 448975)
Kilpatrick Townsend & Stockton LLP
607 14th Street NW, Suite 900
Washington, DC 20005
Telephone: (202) 481-9942
jbergin@kilpatricktownsend.com

/s/ William E. Dorris
William E. Dorris (Ga. Bar No. 225987)*
Susan W. Pangborn (Ga Bar. No. 735027)*
Jeffrey Fisher (Ga. Bar No. 981575)*
Kilpatrick Townsend & Stockton LLP
1100 Peachtree Street NE, Suite 2800
Atlanta, GA 30309
Telephone: (404) 815-6104
bdorris@kilpatricktownsend.com
spangborn@kilpatricktownsend.com
jfisher@kilpatricktownsend.com

*Counsel for Plaintiff*
**Admitted Pro Hac Vice*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of July, 2022, I electronically filed the forgoing Plaintiff's Response in Opposition to Defendants' Motion to Reconsider Order Denying Motion to Sever and Transfer Venue with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

/s/ William E. Dorris
William E. Dorris