UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

K.N.N., et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendant.	Civil Action No. 23-2748 (APM)

REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO TRANSER OR, IN THE ALTERNATIVE, DISMISS

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Defendants the United States of America ("United States") and the Department of Homeland Security (the "Department") (collectively, "Defendants"), by and through undersigned counsel, respectfully submit this reply in further support of their motion to transfer or, in the alternative, dismiss this case. In their motion, Defendants demonstrated that this Federal Tort Claims Act ("FTCA") case belongs in the United States District Court for the Northern District of Texas. ECF No. 16, Defs.' Mot. Plaintiffs' unpersuasive response only highlights their lack of ties to this District. ECF No. 37, Pls.' Opp'n. Therefore, the Court should transfer this case to the Northern District of Texas. Alternatively, Defendants have also established that Plaintiffs did not plead any plausible claims predicated on any act or omission occurring within this District, and accordingly the Court could also dismiss this matter for improper venue.

ARGUMENT

I. The Court Should Transfer This Action.

Despite Plaintiffs' fervent desire to remain in this District, their opposition to the Defendants' motion is rife with qualifying and hedging language about actions that Plaintiffs conclude may (or may not have) happen(ed) in the District of Columbia. Consistently throughout Plaintiffs' factual recitation, they speculate about the possibility of D.C.-based officials being involved in the actions of which they complain. *See, e.g.,* Pls.' Opp'n at 3 ("In an email thread dated October 9, 2020, the Unknown ICE Air Officer sent a draft flight itinerary to multiple ICE officials, including a D.C.-based Detention and Deportation Officer and likely others at headquarters[.]"); *id.* at 4 ("[T]he 'Acting Assistant Director' of ERO Field Operations, likely a D.C.-based officer, made decisions[.]"); *id.* at 4-5 ("[E]mail exchanges indicate[] that headquarters level officials were likely involved[.]"); *id.* at 38 (arguing that D.C.-based officials "likely coordinated [Plaintiffs'] retaliatory mistreatment and deportation to Cameroon"). Plaintiffs bear the burden of proving that venue is proper. *See Myers v. Holiday Inns, Inc.*, 915 F. Supp. 2d 136,

144 (D.D.C. 2013). Plaintiffs' response makes it clear that their Complaint has failed to meet their burden to show that venue is proper here. And their demand for venue discovery only highlights that Plaintiffs lack facts sufficient to allege a meaningful connection to this District.

A. Plaintiffs Failed to Allege Sufficient Facts Showing Ties to this District.

Plaintiffs argue that they "assert in detail" how officials in this District "actively participated in" and "directed and coordinated the wrongful conduct that Plaintiffs experienced," and assert that Defendants "ignore" their well-pled allegations of conduct in this District. Pls.' Opp'n at 7. The record tells a different story. The only allegations that Plaintiffs conclude occurred by officials in this District: these officials planned and coordinated the deportation flight, communicated with State Department officials regarding the flight, received and responded to press inquiries regarding the flight, monitored press coverage and social media communications, and designated the flight a Special High Risk Charter. Defs.' Mot. at 28, 30. That those details are sparse and conclusory is not Defendants' fault and only reflects the utter lack of adequate ties to this District.

This District is particularly cautious of plaintiffs who file suit here simply because high level government officials are located in the District. It is well-settled that "the mere involvement on the part of federal agencies, or some federal officials who are located in Washington D.C. is not determinative of the question of venue." *Patel v. Phillips*, 933 F. Supp. 2d 153, 165 (D.D.C. 2013). This Court consistently finds venue lacking where a complaint merely rests venue on a "bare assumption that policy decisions made in Washington might have affected" the matter. *Cameron v. Thornburgh*, 983 F.2d 253, 258 (D.C. Cir. 1993). "Courts in this circuit must examine challenges to [] venue carefully to guard against the danger that a plaintiff might manufacture venue in the District of Columbia. By naming high government officials as defendants, a plaintiff could bring a suit here that properly should be pursued elsewhere." *Id.* at 256. *Cameron* illustrates

the tactic Plaintiffs attempt here. This case clearly belongs in the Northern District of Texas. But Plaintiffs seek to avoid that district and speculate that actions that happened outside this District "may have been" or "likely" were directed by D.C.-based officials.

Plaintiffs assert the alleged misconduct falls into three categories: abuses in detention and deportation, retaliatory scheduling of deportation flights in response to protesting, and confidentiality violations. Pls.' Mot. at 8-9. Of course, it is beyond dispute that Plaintiffs were neither detained in nor deported from D.C. Plaintiffs did not protest in D.C. and Plaintiffs did not allegedly have their confidentiality protections violated in this District. Plaintiffs allege venue is proper here because the Department and ICE "received and responded to complaints" and other correspondence from the public, Congress, and media regarding their complaints and the flight. Assuming that is true, those allegations boil down to nothing more than pointing out that the Agencies are headquartered in D.C. The same is true for Plaintiffs' conclusion that officials in D.C. "directly oversaw" conditions in Texas, which lacks any factual allegations to back it up. Plaintiffs are essentially arguing that Agency heads are in D.C., and because they are responsible for leading all Agency employees, they must be responsible for on-the-ground actions that occur in different districts. Such bald assertions would support venue in this District in nearly every case where the defendant is headquartered here and should not support Plaintiffs' assertion that venue is proper. *Cameron*, 983 F.2d at 258.

Courts are directed to undertake a "common sense appraisal" of the "events having operative significance in the case." *Lamont v. Haig*, 590 F.2d 1124, 1134 (D.C. Cir. 1978). Plaintiffs complain about their alleged mistreatment while in detention and during the deportation process. Not a single alleged mistreatment occurred in this District. Plaintiffs have plainly failed to allege meaningful ties to this District.

B. The FTCA Venue Statute Does Not Support Venue in this District in this Matter.

Plaintiffs argue that they pled that "D.C.-based officials at DHS and ICE bore responsibility for the development, direction, and implementation of the government policies which led to Plaintiffs' mistreatment by government actors during their detention and deportation to Cameroon." Pls.' Opp'n at 9-10. Such contention makes clear Plaintiffs are attempting to manufacture venue in this District. *See Onaghise v. Dep't of Homeland Sec.*, Civ. A. No. 20-1048 (TNM), 2020 U.S. Dist. LEXIS 173309, at *5 (D.D.C. Sept. 22, 2020) ("Onaghise's only suggested connection to this District is that the decision to deny the I-140 petition was made 'at the direct supervision and control of the heads of the agencies who reside in the District' because the 'policies and guidelines followed by the local office were created and executed in the District.' [] But this smacks of the 'manufactur[ed] venue' courts in this District must guard against.") (citing *Cameron*, 983 F.2d 253).

Plaintiffs minimize the striking resemblance this matter bears to *Spotts v. United States*, 562 F. Supp. 2d 46 (D.D.C. 2008), and instead direct the Court to *Franz v. United States*, 591 F. Supp. 374 (D.D.C. 1984). Plaintiffs assert the relevant decisions in *Franz* were not "dictated" by D.C.-based officials. Pls.' Opp'n at 10-11. But the plaintiff in *Franz* asserted an FTCA claim based on his children being placed into the federal witness protection program and moved without his consent. *Id.* at 10-11. The court in *Franz* explained that, according to an affidavit from an official of the Marshals Service, the "decision to place the Franz children in the Program was made exclusively by Justice Department officials in Washington, D.C." 591 F. Supp. at 378. No such meaningful tie exists in the present matter. Similarly, Plaintiffs' reliance on *F.C.C. v. United States* is misguided. Pls.' Opp'n at 11. In that matter, the parties stipulated to transfer, and there was evidence that an individual in D.C. personally authorized an action which the plaintiff challenged.

F.C.C. v. United States, Civ. A. No. 22-5057, 2023 U.S. Dist. LEXIS 156590, at *5 (E.D.N.Y. Sept. 5, 2023). Upon review of the parties' stipulation, the *F.C.C.* court determined that the interests of justice were served by transfer. *Id.* Here, there is no indication that officials in D.C. told ICE officials to allegedly assault and batter Plaintiffs in detention and during deportation. The *F.C.C.* court's analysis boiled down to one paragraph where it found that the interests of justice were served by transfer. *Id.*

C. The Relevant Factors Support Transferring this Case to the Northern District of Texas.

Plaintiffs do not refute the United States' argument that this suit could have been brought in the Northern District of Texas. The next step is to determine whether the case is more conveniently handled in the Northern District of Texas rather than this District. After weighing the public and private interest factors it is clear this case should be transferred.

1. Private Interest Factors

a. The Parties' Chosen Forums, the Locus of the Claims, and the Convenience of the Parties

Plaintiffs argue that their Complaint has "detailed allegations" about the involvement of D.C.-based officials. Pls.' Opp'n at 14. But as explained above, Plaintiffs' conclusory allegations amount to nothing more than noting that DHS and ICE are headquartered in this District. Accordingly, Plaintiffs' choice of forum should be afforded minimal weight because D.C. is not Plaintiffs' home forum and the District has few, if any, ties to this case. *See Wolfram Alpha LLC v. Cuccinelli*, 490 F. Supp. 3d 324, 333 (D.D.C. 2020) ("deference to [plaintiff's] choice is limited because [p]laintiff is not a resident of the District of Columbia and this action lacks meaningful ties to the District of Columbia").

Next, Plaintiffs' opposition contends that Defendants' reasons for transferring this case to the Northern District of Texas "fail to give proper consideration to the facts alleged by Plaintiffs

and are therefore unavailing[.]" Pls.' Opp'n at 14. However, Plaintiffs have conceded that Defendants' choice of forum is given some weight and Plaintiffs' argument that Defendants "avoid acknowledging their significant conduct within this District," *id.*, falls flat in light of the sparse and conclusory allegations in their Amended Complaint.

The private interest factors "of predominant importance" are those demonstrating that a plaintiff's claims arose in another District. *Bourdon v. Dep't of Homeland Sec.*, 235 F. Supp. 3d 298, 305 (D.D.C. 2017); *see also, Wolfram Alpha*, 490 F. Supp. 3d at 333 ("The location of activities giving rise to the action weighs heavily in favor of transfer"). Plaintiffs acknowledge that courts must undertake a "common sense appraisal" of the "events having operative significance in the case." Pls.' Opp'n at 15. Nearly all the operative events that Plaintiffs complain of occurred in the Northern District of Texas, with a few occurring in the Louisiana, Mississippi, Alabama, and Florida. The allegations regarding this District are not meaningful enough to show anything more than the fact that DHS and ICE are headquartered in here. Common sense dictates that this case does not belong here.

b. Remaining Private Interest Factors

Although Plaintiffs repeat that the case "involved actions by multiple District of Columbia-based government agencies who also undertook challenged conduct," Pls' Opp'n at 16, the Complaint belies that assertion. As the *McAfee* court explained for "claims [that] arose primarily in the Central District [of California,]" that "District likely will be more convenient for potential witnesses and evidence." *McAfee, LLC v. U.S. Citizenship & Immigr. Servs.*, Civ. A. No. 19-2981 (DLF), 2019 WL 6051559, at *2 (D.D.C. Nov. 15, 2019). Here, all relevant evidence regarding the alleged conduct of ICE employees is in the Northern District of Texas. The majority of the pertinent ICE facilities and personnel at issue are also located there. *Wolfram Alpha*, 490 F. Supp.

3d at 333 ("When claims arise within a geographic district, that district is more likely to be convenient for potential witnesses and more likely to house evidence.").

2. Public Interest Factors

The public interest factors here are either neutral or weighs in favor of transfer. The relative congestion of the courts and the potential transferee court's familiarity with governing law are neutral or only slightly move the needle either way, and Plaintiffs' do not meaningfully argue otherwise. The public interest factor that carries the most weight, both in general and in this case, is the local interest in deciding local controversies at home. Plaintiffs again repeat their assertion that their "detailed fact-based pleadings" show "Defendants' involvement in misconduct in this District." *Id.* at 17. But no matter how many times Plaintiffs repeat themselves, clearly the core location of the controversy is in the Northern District of Texas. This matter presents a local controversy that should be in by the Northern District of Texas. Plaintiffs' reliance on *Cruz v. Dep't of Homeland Sec.,* Civ. A. No. 19-2727 (DLF), ECF No. 17 at 32-33 (D.D.C. Nov. 21, 2019), does not help them. It is hardly surprising that the Court said the case "was not limited in geographical scope" considering that the plaintiff "challenged the legality of the [Migrant Protection Protocols] themselves, not details regarding their implementation." *Id*. This controversy is local in nature and this Court should transfer the case to the Northern District of Texas.

II. The Court Should Deny Plaintiffs' Request for Venue Discovery.

In a last-ditch effort to keep their case in this District, Plaintiffs seek venue-related discovery so they can attempt to obtain facts that may show venue is proper in this District. Pls.' Opp'n at 20. This request only highlights that Plaintiffs' Complaint does not have sufficient factual allegations to carry their burden of establishing venue and show meaningful ties to this District. Plaintiffs complain Defendants have "withheld documents showing D.C.-based involvement that Plaintiffs' counsel requested under [the Freedom of Information Act ('FOIA')] nearly three years

ago." Pls.' Opp'n at 20. That there is separate litigation with separate parties occurring under a separate statute in a separate jurisdiction is beside the point. Plaintiffs bear the burden of proving that venue is proper. *Myers*, 915 F. Supp. 2d at 144. Plaintiffs' counsels' FOIA case in the Southern District of New York is pending and documents are being produced on a rolling basis. *See Project S. v. United States Immig. & Customs Enf't*, Civ. A. No. 21-8440 (S.D.N.Y.).[1] Plaintiffs could have waited to file this case until they had enough facts from those documents to establish venue. They did not, and that should not shift the burden to Defendants to help Plaintiffs establish venue where it plainly does not lie.

Plaintiffs argue that this Court "liberally" grants discovery so plaintiffs can "establish jurisdiction or venue." Pls.' Opp'n at 20. But Plaintiffs fail to cite any authority in which a court has granted venue related discovery under the circumstances present here. The cases Plaintiffs rely on involve issues primarily regarding personal jurisdiction and the application of FTCA exceptions. *Id.* at 20-21. Further, neither *Delta Sigma Theta Sorority, Inc. v. Bivins*, 215 F. Supp. 3d 12, 15-16 (D.D.C. 2013), nor *Wesberry v. United States*, 205 F. Supp. 3d 120, 135 (D.D.C. 2016), were in front of the Court on motions to transfer, and the Court in *Sledge v. United States*, 723 F. Supp. 2d 87, 94 (D.D.C. 2010), did not grant discovery based on the government's motion to transfer but to determine whether the discretionary function exception applied. Plaintiffs' reliance on *F.C.C.,* 2023 U.S. Dist. LEXIS 156590, at *5, is misplaced, as there the parties had stipulated to a transfer of venue and the court authorized venue discovery to determine whether the Eastern District of New York lacked venue under 28 U.S.C. 1402(b). The Court denied the government's motion for discretionary transfer and was focused on the FTCA's venue statute. *Id.*

[1] Notably, and ironically, Plaintiffs' counsels' FOIA lawsuit is not pending in this district even though the FOIA statute expressly confers this District with venue.

Plaintiffs also rely on *Franz v. United States*, which contains no facts at all about why venue discovery was granted. 591 F. Supp. 374. That said, *Franz* was also attempting to determine whether venue was proper under 28 U.S.C. 1402(b). *Id.* at 378-79. So to the extent the Court here finds that the interests of justice are served by transferring this action to the Northern District of Texas, *Franz* and *F.C.C.* are unhelpful.

To obtain venue discovery, Plaintiffs must make a "detailed showing of what discovery it wishes to conduct or what results it thinks such discovery would produce." *NBC-USA Hous., Inc., Twenty-Six v. Donovan*, 774 F. Supp. 2d 277, 295 (D.D.C. 2011) (citation omitted). Plaintiffs' bare-bones request for discovery explains in non-specific fashion that "[d]iscovery is likely to show D.C.-based officials' performed critical roles in the tortious conduct at issue here." Pls.' Opp'n at 21, and seeks discovery "that would include full production of unredacted copies of documents pertaining to Plaintiffs' removal flight and the circumstances of Plaintiffs' mistreatment while under the care and custody of the government." *Id.* at 23. Plaintiffs' request fails to identify the specific facts they anticipate venue discovery would produce and how such facts would sway the Court's analysis of the pending motion to transfer. Plaintiffs' failure to include such information in their filing is, by itself, an adequate basis for the Court to deny in full the request. *See Sanchez ex rel. Rivera-Sanchez v. United States*, 600 F. Supp. 2d 19, 23 (D.D.C. 2009) (denying venue discovery where plaintiff failed to offer more than "rank speculation" and failed to show that discovery would be anything other than a "fishing expedition"); *Macklin v. Mirant Mid-Atl., L.L.C.*, Civ. A. No. 04-1556 (PLF), 2005 WL 1006005, at *1 n.2 (D.D.C. Apr. 29, 2005) (denying venue discovery where the plaintiff merely asserted that discovery might identify facts to dispute the defendant's declarations and the "[p]laintiff d[id] not . . . share with the Court what, specifically, this discovery is likely to show or how it relates to the pending [venue-

related] motion"). At bottom, Plaintiffs' discovery request is simply an attempt to conduct a fishing expedition, not a legitimate attempt to establish facts necessary to assist the Court with its resolution of the motion to transfer.

The current record is sufficient for the Court to adjudicate Defendants' motion to transfer, and the Court is well within its discretion to deny the request for discovery and rule on Defendants' motion. *See Muldrow v. Garland*, Civ. A. No. 20-2958 (APM), 2021 U.S. Dist. LEXIS 253224 (D.D.C. 2021); *see also United States v. Toushin*, 714 F. Supp. 1452, 1460 (M.D. Tenn. 1989) (denying motion for venue-related discovery because the court was disposing of the venue motions and had "no reason to prolong this matter with unnecessary discovery"). *Muldrow* is particularly instructive. In that case, Judge Mehta denied a plaintiff's motion to conduct limited venue discovery and instead granted the defendant's motion to transfer. *Muldrow*, 2021 U.S. Dist. LEXIS 253224, at *8-9. The Court explained that it did "not believe discovery as to venue will alter the court's balancing of the relevant factors, particularly when it is largely undisputed that the relevant events and their effects largely occurred in Florida." *Id.* Although the plaintiff "contend[ed] that national policies and Headquarters officials played some role in the alleged adversity she suffered, [] such limited District-based influences cannot transform a case that plainly arose in Florida to one that arose in the District." *Id.* at *6. Critically, Judge Mehta explained that "the District of Columbia's connection to the dispute even under Plaintiff's view of the facts is, at least, one step removed from the central aspects of the case, all of which occurred in Florida." *Id.* at *5.

The same can be said for the present matter. Plaintiffs contend that high level officials in D.C. may have been involved in some technical aspects of the deportation flight, such as scheduling matters, and that they are responsible for the policies that govern every ICE official throughout this country. But it is not in genuine dispute that the allegedly tortious conduct that

Plaintiff's experienced—physical abuse, medical neglect, and improper use of the restraint system referred to as The WRAP that caused them severe physical and mental harm (*see* Compl. ¶¶ 35-38, 106-47)—exclusively occurred outside of this District and almost exclusively within the Northern District of Texas.

Finally, Defendants would be remiss not to point out the flood of venue-related discovery that plaintiffs could obtain if such a request is granted here. This Court is particularly cautious of plaintiffs bringing matters here simply because it is where agencies are headquartered. *Cameron*, 983 F.2d at 256. If simply alleging high-level officials might have somehow been involved in on-the-ground decisions outside the District were sufficient to obtain discovery, the courts and the Government would be flooded with discovery requests by plaintiffs attempting to establish venue. A plaintiff has the burden of establishing venue, and it should stay that way without further burdening Courts and agencies that are already stretched thin. This concern is especially pronounced when, as explained in more detail below, Plaintiffs failed to exhaust claims with respect to any allegedly tortious conduct occurring within this District.

III. If Not Transferred, Plaintiffs' Claims Should Be Dismissed for Several Reasons.

A. Venue Is Improper Because Plaintiffs Plead No Plausible Claims Predicated on D.C.-Based Actions or Omissions by Defendants.

Defendants' motion explained why venue is improper in this District and how that basis supports dismissal of this action. *See* Defs.' Mot. at 20-24. Aside from a header saying the Court should not dismiss this case based on venue, Pls.' Opp'n at 7, Plaintiffs have not meaningfully responded to Defendants' arguments regarding dismissal. To the extent Plaintiffs intended their arguments in Section I to address all of Defendants' dismissal arguments, they have wholly failed to address Defendants' pendant venue argument and the Court should thus treat that failure as a concession. *See Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 238 F. Supp. 2d 174, 178

(D.D.C. 2002) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion . . . addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.").

B. Plaintiffs Have Failed to Exhaust Administrative Remedies for Torts Allegedly Committed by D.C.-Based Actors.

Defendants explained in their motion that Plaintiffs failed to exhaust administrative remedies as to many aspects of their tort claims—and that the only exhausted claims concern alleged misconduct by actors solely located outside this District. Thus, Plaintiffs failed to satisfy the presentment requirement under the FTCA that is a "jurisdictional prerequisite to filing suit." *GAF Corp. v. United States*, 818 F.2d 901, 904 (D.C. Cir. 1987).

In opposition, Plaintiffs spill much ink arguing why they have adequately presented administratively to Defendants the broad array of torts that they assert in this action. Pls.' Opp'n at 24-28 ("A reasonably thorough investigation of the evidence required to be in ICE's possession would have uncovered details on each use of force incident, the medical treatment Plaintiffs did and did not receive at each facility, and K.N.N.'s isolation."). Conspicuously absent, however, is any argument as to where within their administrative claims ("SF-95s") Plaintiffs satisfied the "minimal" requirement to provide sufficient notice that ICE needed to investigate claims of alleged misconduct within this District. *Tookes v. United States*, 811 F. Supp. 2d 322, 332 (D.D.C. 2011). Plaintiffs provide no argument—much less any authority, binding or persuasive—as to why their SF-95s, which do not mention the District of Columbia at all and in fact expressly mention conduct occurring elsewhere, placed ICE on notice that a "reasonably prudent investigation" should encompass acts of omissions within this District. *Id.* For that reason, this Court may treat as conceded Defendants' argument that Plaintiffs have not exhausted any claims based on conduct by D.C.-based federal employees. *Hopkins*, 238 F. Supp. 2d at 178.

Even if this Court decided not to treat Defendants' argument as conceded, their argument that Plaintiffs failed to exhaust remedies as to torts allegedly committed by D.C.-based actors is correct on their merits. As detailed in Defendants' motion, Plaintiffs' administrative claims are entirely silent about any alleged misconduct occurring within this District. Defs.' Mot. at 24-26. Plaintiffs argue that this Court should construe their SF-95s as having presented to the government additional claims that occurred in unspecified areas of detention. Pls.' Opp'n at 25-26. There is no genuine dispute, however, that even this broad, generalized reading of Plaintiffs' administrative claims fails to encompass conduct within this District because Plaintiffs have not been held in custody within this District. This fails to place ICE on notice that it needed to investigate claims of allegedly tortious conduct occurring within this District—particularly when the SF-95s fail to identify any conduct occurring within this District.

Tookes—a case relied on by Plaintiffs—is instructive of why Plaintiffs have failed to present administrative claims arising from D.C.-based conduct. In *Tookes*, the government argued that the plaintiff failed to include information about a specific theory of liability—namely, a false imprisonment claim—for allegedly tortious conduct that occurred at a single location. *Tookes*, 811 F. Supp. 2d at 324-25, 332. The *Tookes* Court nonetheless determined that the plaintiff's SF-95 provided the government with sufficient notice because the administrative claim indicated that the plaintiff was "falsely arrested" and the court found that "there is no real difference as a practical matter between false arrest and false imprisonment." *Id.* at 332.

Here, however, Plaintiffs' administrative claims failed wholly to describe any allegedly tortious conduct occurring within this District—regardless of the legal theory Plaintiffs would advance in this lawsuit. *Tookes* and the other cases relied on by Plaintiffs, therefore, fail to establish that Plaintiffs' administrative claims here sufficed to put ICE on notice regarding torts allegedly

committed in this District. *See Rise v. United States*, 630 F.2d 1068, 1071 (5th Cir. 1980) (holding that the presentment requirement had been satisfied as to a negligent referral theory of liability because the administrative claim referenced the hospital to which the decedent had been transferred for the procedure that resulted in death); *Tsaknis v. United States*, 517 F. Supp. 2d 295, 299-300 (D.D.C. 2007) (finding that the presentment requirement had been met by describing the allegedly negligent treatment that had occurred at the hospital); *Johnson by Johnson v. United States*, 788 F.2d 845, 849 (2d Cir. 1986) (determining that the administrative claim had put the postal service on notice of conduct occurring in New York). And in fact, *Burchfield v. United States*, 168 F.3d 1252, 1256 (11th Cir. 1999)—a case relied on by Plaintiffs—affirms that agency investigations do not need to "go beyond the scope of the matters alleged in administrative claims. Section 2675(a) does not require an agency to undertake an independent search for injuries or theories of liability that are not closely related to the matters described in the claim." *Id.*

Finally, "[c]onfusingly," Plaintiffs claim that "Defendants point to inapplicable exhaustion standards[.]" Pls.' Opp'n at 24 n.13. Yet, Defendants did not cite those cases for the standard of proper exhaustion—they did so earlier in their motion, *compare with* Defs.' Mot. at 25-26—but rather as examples of the purposes underlying the requirement of exhaustion of administrative remedies. Plaintiffs' themselves acknowledged the purpose of exhaustion is "to give the federal government the opportunity to investigate and settle FTCA claims prior to litigation." Pls.' Opp'n at 24. There is no daylight between that articulation of the purposes of exhaustion and Defendants'. *Compare with* Defs.' Mot. at 25-26. Plaintiffs' attempt to argue otherwise is confused at best.

C. Plaintiffs Have Not Plausibly Alleged that the United States Has Waived Sovereign Immunity for Intentional Torts Committed by a D.C.-Based Actor.

In their Motion, Defendants argued that Plaintiffs failed to plausibly allege that any alleged tortious conduct in the District of Columbia that may give rise to abuse of process and intentional

infliction of emotional distress was committed by a federal law enforcement officer acting within the scope of his employment. *See* 28 U.S.C. § 2680(h). In their opposition, Plaintiffs advance two arguments: (1) Defendants failed to conduct a choice-of-law analysis and it is premature to do so without discovery, and (2) Plaintiffs plausibly allege that law enforcement officers committed abuse of process and intentional infliction of emotional distress. Pls.' Opp'n at 28-34. Neither argument has merit.

Plaintiffs are incorrect that a choice-of-law analysis is required to assess Defendants' law enforcement proviso argument. Although it is true that "[a]ny tort action in a court of the United States based on the acts of a Government employee causing harm outside the State of the district court in which the action is filed requires a determination of the source of the substantive law that will govern liability," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 705 (2004), that does not apply to the exceptions to sovereign immunity found in Section 2680—including the carve-out within Section 2680(h). *Ramirez v. United States*, 567 F.2d 854, 856 (9th Cir. 1977) ("Questions of interpretation under the exclusion provisions are controlled by federal law."). For good reason: "exceptions in 28 U.S.C. § 2680 are interpreted according to federal law in order to avoid any dependence of federal subject matter jurisdiction upon state law." *Santiago-Ramirez v. Sec'y of Def.*, 984 F.2d 16, 20 (1st Cir. 1993); *see also United States v. Neustadt*, 366 U.S. 696, 705–06 (1961) ("Whether or not this analysis accords with the law of States which have seen fit to allow recovery under analogous circumstances, it does not meet the question of whether this claim is outside the intended scope of the Federal Tort Claims Act, which depends solely upon what Congress meant by the language it used in [section] 2680(h)."). Accordingly, courts "must seek to determine the scope of liability intended by Congress in enacting the 1974 proviso to [Section] 2680(h)." *Norton v. United States*, 581 F.2d 390, 394–95 (4th Cir. 1978). *United States v. Muniz*,

374 U.S. 150, 164 (1963) ("Whether a discretionary function is involved is a matter to be decided under 28 U.S.C. § 2680(a), rather than under state rules relating to political, judicial, quasi-judicial, and ministerial functions."). This Court can thus readily dismiss any intentional torts advanced by Plaintiffs predicated on conduct allegedly committed by D.C.-based actors, without conducting a choice-of-law analysis.

Equally unavailing is Plaintiffs' argument that their abuse of process and intentional infliction of emotional distress claims fit within the law enforcement proviso carve-out to Section 2680(h). Plaintiffs are correct that for purposes of this Motion that the "government does not contest that Plaintiffs allege that law enforcement officers committed the core activities comprising Plaintiffs' abuse of process and intentional infliction of emotional distress claims," Pls.' Opp'n at 33. Indeed, that is why the government did not move to dismiss the claims Plaintiffs have plausibly alleged—for example, that law enforcement officers within the Northern District of Texas have allegedly committed assault and battery against Plaintiffs in the locations where they were detained.[2]

By contrast, however, Plaintiffs have failed to plausibly allege that any conduct from D.C.-based actors fall within carve-out to the law enforcement proviso.[3] Defs.' Mot. at 27-28. Plaintiffs'

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[2] For avoidance of doubt, Defendants reserve the opportunity to move for summary judgment at a later date should the evidence demonstrate that employees within the Northern District of Texas or elsewhere that Plaintiffs were held in custody in fact did not commit assault or battery as alleged by Plaintiffs.

[3] In a perfunctory footnote, Plaintiffs argue that courts within this District have permitted claims for intentional infliction of emotional distress to proceed notwithstanding the intentional tort exception of section 2680(h). Pls.' Opp'n at 32 n.17. While this authority exists, it misapprehends Defendants' argument. "For purposes of determining 'the essential nature of the cause of action,' it is necessary to look at the "government conduct that is alleged to have caused the injury[.]'" Defs.' Mot. at 27 (quoting *Edmonds v. United States*, 436 F. Supp. 2d 28, 35-36 (D.D.C. 2006)). As this relates to Plaintiffs' intentional infliction of emotional distress claims, the "essential nature" of that action is the same underlying conduct constituting the assault and battery claims. *See* Compl. ¶ 245 (alleging that Plaintiffs were "subject to verbal and physical abuse for

opposition argues that "D.C. officials knew about the abuse of Cameroonians in the detention centers, did not intervene to stop or rectify the behavior, and instead scheduled the Plaintiffs for deportation flights they designated as 'Special High Risk Charters,' placing a special operations team on those flights that kept the individuals being deported in painfully tightened five-point restraints and denied them medical treatment." Pls.' Opp'n at 34. That conduct does not state a plausible claim that D.C.-based federal law enforcement officers engaged in conduct constituting "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h). Nor does that plausibly allege that those D.C. officials are law enforcement officers within the meaning of section 2680(h)—at best, their unsupported argument is a legal conclusion to which this Court should afford no weight.

D. Alternatively, Plaintiffs Failed to Plausibly Allege Abuse of Process or Intentional Infliction of Emotional Distress Claims Predicated on Conduct Occurring Within this District.

Should the Court determine that the intentional torts exception does not apply to claims of abuse of process or intentional infliction of emotional distress based on conduct by D.C.-based actors, Plaintiffs nonetheless failed to plausibly allege such a claim—undercutting any reason to keep the case in this District. Defs.' Mot. at 30-32.

Plaintiffs' opposition argues only that they have stated a cause of action for abuse of process and intentional infliction of emotional distress under District of Columbia law. Pls.' Opp'n at 35-39. Critically, despite their obfuscation about the need to conduct a choice-of-law analysis at a later posture of this case, Plaintiffs do not argue that they have plausibly alleged such a claim

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the purpose of terrorizing them"). That essential conduct—which all parties agree occurred outside this District—is indisputably covered by the intentional torts exception, and as explained above, Plaintiffs have not plausibly alleged that it was committed by law enforcement officers within this District.

under Texas law or the laws of any other state. As such, Plaintiffs have conceded that this Court may analyze Plaintiffs' failure to allege a plausible claim for relief based on conduct by D.C.-based actors under District of Columbia law.

Plaintiffs fail to allege that any D.C.-based federal employee has perverted some judicial process in furtherance of ends not anticipated in the regular prosecution of the charge. Although Plaintiffs argue they "allege that the government tried to coerce their fingerprints in an attempt to force them to voluntarily accept removal from the country and used The WRAP to threaten Plaintiffs and others and stop them from raising questions about their pending claims," Pls.' Opp'n at 36 (citing Compl. ¶¶ 37, 76, 97–99, 101-05, 123)),[4] they provide no authority suggesting that those actions—committed by others outside this District—constitute a "perversion of the judicial process and achievement of some end not anticipated in the regular prosecution of the charge." *Whelan v. Abell*, 953 F.2d 663, 670 (D.C. Cir. 1992) (citing *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980)). At most, Plaintiffs have alleged that aspects of their detention have been unlawful due to conduct committed by actors occurring outside this District—but they do not argue that their removal proceedings were unlawful judicial process. Pls.' Opp'n at 36.

In fact, the case law upon which Plaintiffs rely supports the conclusion that the judicial process surrounding Plaintiffs' removal proceedings is the focus of an abuse of process claim, not the "independent" actions that occurred during their detention collateral to those proceedings. *See*

[4] Plaintiffs' characterizations of their allegations in their opposition do not match what they actually allege in their Complaint. None of the cited paragraphs in the Complaint allege that ICE officials outside this District employed the WRAP "stop them from raising questions about their pending claims." Nor do any of the allegations support their argument that officials outside this District "tried to coerce their fingerprints in an attempt to force them to voluntarily accept removal." Plaintiffs may not use their opposition to the motion to transfer or dismiss to amend their complaint without leave of court. *Schmidt v. United States*, 749 F.3d 1064, 1069 (D.C. Cir. 2015).

Spiller v. District of Columbia, 362 F. Supp. 3d 1, 7 (D.D.C. 2019) ("The rationale for that rule is self-evident: The abuse of process tort covers the improper use of the judicial machinery, and a warrantless arrest does not involve the judicial process."); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1414 (D.C. Cir. 1984) ("The essence of the tort, however, lies in the misuse of judicial proceedings."). As such, Plaintiffs have not plausibly alleged that any federal official within the District of Columbia has committed the tort of abuse of process.

Plaintiffs have likewise failed to plausibly allege that any federal officials within this District have committed the tort of intentional infliction of emotional distress under District of Columbia law. Plaintiffs' primary argument is that official outside this District "subjected them to threats and unwarranted, severe physical abuse" and "restrained Plaintiffs in The WRAP and left them confined in the device for hours in an acute angle stress position, causing excruciating pain and severe medical consequences." Pls.' Opp'n at 38. This, however, tacitly acknowledges that Defendants' argument is well-taken—as there is no genuine dispute that this allegedly "outrageous conduct" was committed by actors located outside this District. Defs.' Mot. at 29-30. Plaintiffs repeat their conclusory contention that "D.C.-based officials had knowledge of Plaintiffs' and other Cameroonians' participation in the protests and likely coordinated their retaliatory mistreatment and deportation to Cameroon," Pls.' Opp'n at 38. Yet, as before, this is a conclusory allegation to which this Court should afford no weight. Importantly, this argument confirms that any alleged involvement by D.C.-based officials fails to rise to the "[t]he 'extreme and outrageous' standard for intentional infliction of emotional distress" that is itself "more exacting than, the 'reasonableness' standard used for evaluating claims of excessive force.'" *Kotsch v. District of Columbia*, 924 A.2d 1040, 1045, n.5 (D.C. 2007). Accordingly, this Court should likewise dismiss

any intentional infliction of emotional distress claim predicated on conduct by D.C.-based officials.

E. Plaintiffs Failed to Plausibly Allege a Negligent Supervision Claim Predicated on Conduct Occurring Within this District.

Defendants established in their motion that the "alleged failure to 'properly supervise detention officers' or to 'oversee their treatment of immigrants in their custody' is an act or omission that occurred where the subordinate employees allegedly engaged in tortious behavior—that is, in the case of the use of the WRAP on Plaintiffs, the negligent supervision occurred within the Northern District of Texas." Defs.' Mot. at 30 (quoting Compl. ¶ 221(c)). In opposition, Plaintiffs assert that it is high-ranking officials—and not the day-to-day supervisors within the respective ICE detention facilities—that have negligently supervised the officers alleged to have committed assault and battery outside this District. Pls.' Opp'n at 40-41. This Court need not afford any weight to Plaintiffs' conclusory assertions. *See id.* at 40 ("D.C.-based officials' negligent supervision proximately caused the unlawful conduct and injury that Plaintiffs experienced at [sic] in detention and during the deportation process to occur."); *id.* at 41 ("Defendants' negligent supervision of its employees, the officials who harmed Plaintiffs, occurred in this District, not in the Northern District of Texas.").

To the contrary, cases upon which Plaintiffs relied for their position confirm that the allegedly negligent act of supervision should be located where the primary conduct occurred. *Katz v. District of Columbia*, 285 A.3d 1289, 1298 (D.C. 2022) (negligent supervision claim based on allegedly unlawful arrest by D.C.-based officers that occurred within the District of Columbia); *Blair v. District of Columbia*, 190 A.3d 212, 216 (D.C. 2018) (same); *James v. District of Columbia*, 869 F. Supp. 2d 119, 120 (D.D.C. 2012) (same); *District of Columbia v. Tulin*, 994 A.2d 788, 791 (D.C. 2010) (same).

Further, *Hitchcock v. United States*, 665 F.2d 354, 358 (D.C. Cir. 1981), is readily distinguishable on its facts. In that case, the issue of where the relevant "act or omission" took place related to whether the court applied the correct substantive law to the claim. *Id.* ("First, defendant argues that the district court erroneously held the Government to the standard of care applicable under District of Columbia law; it contends that Virginia law, not District of Columbia law, applies to this case."). The evidence adduced at trial, moreover, revealed that "the clinic in Virginia at which the vaccine was administered was staffed by only a nurse who was given no instructions about taking medical history, making clear to the patient that the vaccine was voluntary, or giving the patient even a rudimentary notion of the risks and benefits involved with the vaccine"—with no suggestion that there was any other employee with supervisory authority could be located there. *Id.* Finally, the vaccination occurred in Rosslyn, Virginia, far closer to this District than Texas, rendering allegations of daily supervision within this District plausible. *Id.* at 355.

By contrast, Plaintiffs claim the daily supervision of the allegedly tortious actors within the Northern District of Texas took place not where the first-line supervisors also worked but rather within the offices of high-ranking officials located within this District. Pls.' Opp'n at 40-41. Taken to its logical conclusion, this would confer universal venue for claims under the FTCA any time a plaintiff asserts that a high-ranking official located within this District is alleged to have negligently supervised line employees engaged in allegedly tortious conduct elsewhere. Such a conclusion runs afoul of both Congress' deliberate choice to have FTCA claims brought where the "act or omission complained of occurred," *see* 28 U.S.C. § 1402(b), and the D.C. Circuit's warnings that a litigant cannot name high-ranking officials residing here to manufacture venue in

this District. *Cameron*, 983 F.2d at 256-58 ("[B]y naming high government officials as defendants, a plaintiff could bring a suit here that properly should be pursued elsewhere.").

F. The Adequate Remedy Bar Under the APA Forecloses Plaintiffs' *Accardi* Doctrine Claims.

Finally, Defendants argued that Plaintiffs' *Accardi* doctrine claims should be dismissed because of the adequate remedy bar. Defs.' Mot at 34-35. In opposition, Plaintiffs argued that the adequate remedy bar is inapplicable because Defendants have not demonstrated that the relief sought by Plaintiffs' *Accardi* doctrine claims is of the "same genre" as that found in the alternative remedy. Pls.' Opp'n at 41-45.

As an initial matter, were the Court to transfer this action, it need not consider Defendants' arguments regarding whether the adequate remedy bar forecloses Plaintiffs' *Accardi* doctrine claims. That said, if the Court reaches this issue, Plaintiffs seek remedies under the FTCA for the exact same conduct alleged in their *Accardi* doctrine claims. Plaintiffs allege Defendants have violated the *Accardi* doctrine by failing to comply with their own policies and regulations governing the confidentiality of individuals in asylum-related proceedings. Compl. ¶¶ 247-53. These same allegations underly Plaintiffs' FTCA claims for abuse of process and intentional infliction of emotional distress. *See id.* ¶¶ 213-217 (incorporating all prior allegations by reference, including failure to maintain confidentiality, and alleging that they constitute an abuse of process), ¶¶ 242-46 (same, with respect to the intentional infliction of emotional distress); *see also* Pls.' Opp'n at 38 (arguing that the failure to "not abide by relevant authorized ICE practices" was extreme and outrageous).

Plaintiffs likewise allege Defendants violated the *Accardi* doctrine by failing to comply with their own policies and regulations with respect to their own use-of-force policies. Compl. ¶¶ 254-61. These alleged failures, however, also underly Plaintiffs' assault and battery claims. *Id.*

¶¶ 232-36 (incorporating all prior allegations by reference, including failure to abide by ICE policies and regulations for use of force, and alleging that the "unlawful and unjustified harmful or offensive contact" caused "substantial physical injury"); *id.* ¶¶ 140-44 (incorporating all prior allegations by reference, including failure to abide by ICE policies and regulations for use of force, and alleging officials "intentionally, knowingly, or recklessly threatened or caused harmful or offensive contact" to Plaintiffs and caused "substantial physical injury").

This suffices to trigger the bar. "The relevant question under the APA . . . [is] whether the private suit remedy provided by Congress is adequate." *Garcia v. Vilsack*, 563 F.3d 519, 525 (D.C. Cir. 2009). "[I]n determining whether an adequate remedy exists, [the D.C. Circuit] has focused on whether a statute provides an independent cause of action or an alternative review procedure." *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dep't of Health & Hum. Servs*., 396 F.3d 1265, 1270 (D.C. Cir. 2005). Here, Plaintiffs' opposition focuses on the absence of any "alternative review procedure," *see* Pls.' Opp'n at 43 ("The government does not argue that the FTCA provides an opportunity for de novo review of agency action[.]"), but is conspicuously silent on the "independent cause of action" portion of *El Rio Santa Cruz*. That is because, as discussed above, Plaintiffs' operative complaint reveals that they are already pursuing independent causes of action based on the same unlawful conduct as alleged in their *Accardi* doctrine claims. Accordingly, this Court should dismiss the claims under the adequate remedy bar.

* * *

CONCLUSION

For the foregoing reasons and those set forth in their opening brief, Defendants respectfully request that this Court grant Defendants' motion and either transfer Plaintiffs' case to the Northern District of Texas or dismiss the action.

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Washington, DC

Respectfully submitted,

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