PAUL J. FISHMAN
United States Attorney
KRUTI D. DHARIA
Assistant United States Attorney
970 Broad Street, Suite 700
Newark, New Jersey 07102
Tel. (973) 645-2891
e-mail: kruti.dharia@usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SUNY YANETH RODRIGUEZ ALVARADO & A.S.R., a minor, *Plaintiff*, v. THE UNITED STATES OF AMERICA, *Defendant*.	Hon. Madeline C. Arleo *Civil Action No.* 16-5028 (MCA) (MAH)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS AND/OR TRANSFER THE CASE TO TEXAS

PAUL J. FISHMAN
UNITED STATES ATTORNEY
Attorney for Defendant

Kruti D. Dharia
Assistant United States Attorney

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PRELIMINARY STATEMENT

Plaintiffs Suny Yaneth Rodriguez Alvarado and her child, identified as A.S.R., bring this action under the Federal Tort Claims Act ("FTCA") concerning their detention by U.S. Customs & Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE") in Texas after they were apprehended for unlawfully entering the United States through the Mexico-U.S. border. Plaintiffs allege a variety of tort claims under Texas state common law, challenging the conditions of their confinement while detained in CBP and ICE custody.

The Court should transfer Plaintiffs' Complaint to Texas for two reasons. First, venue is improper as to Ms. Rodriguez Alvarado's claims under Fed. R. Civ. P. 12(b)(3) because she is not a resident of the District of New Jersey for venue purposes. Her claims should be dismissed and/or transferred under 28 U.S.C. § 1406 as a matter of law to either the Southern or Western District of Texas, where the alleged conduct exclusively occurred. Second, the Court should transfer the entire lawsuit under 28 U.S.C. § 1404(a) because this case will be governed by Texas state law and the litigation has no factual connection with the District of New Jersey. The district courts in Texas are carefully considering similar claims regarding the conditions of these detention facilities that are located in their jurisdiction. Those courts have a strong public interest in adjudicating these controversies that occur in their local area. In the interest of justice, these cases should be decided by the courts who are familiar not only with the nuances of Texas tort law, but with the

complex situation surrounding the circumstances of these facilities and the detainees.

STATEMENT OF FACTS

Plaintiffs allege that they are refugees from Honduras who unlawfully crossed the Mexico-U.S. border with Jose Rafael Sanchez Villatoro (Ms. Alvarado's partner and A.S.R.'s father) on or about January 16, 2015. Compl. ¶ 46. Soon thereafter, Plaintiffs were apprehended by CBP and transported to a holding facility in Rio Grande City, Texas. *Id.* ¶ 47; Declaration of Manuel Padilla, Jr., dated November 14, 2016 ("Padilla Decl."), ¶ 9. Plaintiffs allege that the holding facility was cold, their clothes were wet, and they were only given cold sandwiches and juice boxes rather than hot meals. Compl. ¶¶ 46-48, 61. Plaintiffs further complain that the CBP agents pressured them to sign papers agreeing to removal, refused to refer them to an asylum officer, and separated Mr. Sanchez from them because he was to be deported. *Id.* ¶¶ 49-51, 57. According to the Complaint, A.S.R. suffers from asthma, but CBP agents never provided A.S.R. with medical treatment. *Id.* ¶ 56. Plaintiffs state that although they were provided with a blanket, they had to sleep on the floor, and CBP agents refused their request to raise the temperature, which affected A.S.R.'s asthma. *Id.* ¶¶ 60, 62-63.

Plaintiffs claim that the day after their apprehension, they were transferred to another holding facility located in McAllen, Texas, where they remained for "two days and one night." *Id.* ¶¶ 65-66; Padilla Decl. ¶ 9. Plaintiffs state that this facility was also cold and crowded, they were provided one thin blanket, and they were

harassed about signing forms agreeing to removal. Compl. ¶¶ 67, 70. According to Plaintiffs, A.S.R.'s asthma continued to worsen. *Id.* ¶ 69.

Plaintiffs state that, two days later, they were transferred to the South Texas Family Residential Center in Dilley, Texas, a facility operated by ICE in conjunction with the Corrections Corporation of America ("CCA"), a private corporation. *Id.* ¶¶ 83-84; Padilla Decl. ¶ 11; Declaration of Homer D. Salinas, dated November 17, 2016 ("Salinas Decl.") ¶¶ 3, 6. Plaintiffs allege that they were unlawfully detained in this facility until May 14, 2015, and that agents pressured them to sign removal papers throughout this period. Compl. ¶¶ 84, 86-99. Plaintiffs claim that they had trouble sleeping, that ICE officials withheld information about Mr. Sanchez's whereabouts, and that agents impeded their access to counsel. *Id.* ¶¶ 128-148.

On May 14, 2015, an immigration judge granted Ms. Rodriguez Alvarado a withholding of removal pursuant to 8 U.S.C. § 1231(b)(3)(A), which prevents the United States from removing her to Honduras. Compl. ¶ 155; Salinas Decl. ¶ 4. Plaintiffs were released from detention in Dilley, Texas, eventually relocating to New Jersey. Compl. ¶¶ 156, 158. On January 19, 2016, A.S.R. was granted asylum. *Id.* ¶ 159. However, Ms. Rodriguez Alvarado continues to remain unlawfully in the United States without lawful permanent residence ("LPR") status. *See* Salinas Decl. ¶ 4.

ARGUMENT

I. The Court Should Dismiss and/or Transfer Plaintiff Rodriguez Alvarado's Claims Because the Court Lacks Venue

If a case is filed in an improper venue, a party may seek dismissal and/or transfer to a proper venue pursuant to Rule 12(b)(3) and 28 U.S.C. §1406. *See Bockman v. First Am. Mktg. Corp.*, 459 F. App'x 157, 162 n.11 (3d Cir. 2012); *Cmty. Surgical Supply of Toms River, Inc. v. Medline DiaMed, LLC*, No. 11-CV-00221, 2011 WL 3235706, at *6 (D.N.J. July 28, 2011). The defendant has the burden of showing improper venue. *See Bockman*, 459 F. App'x at 160 (citation omitted). In considering a Rule 12(b)(3) motion, a court must generally accept a complaint's allegations as true, unless contradicted by the defendant's affidavits. *See id.* at 158 n.1. Moreover, a court may consider facts outside the complaint, provided that all reasonable inferences are made in the plaintiff's favor. *See id.* Where, as here, there are multiple claims involved, venue must be established as to each claim.[1] *See Fuentes v. Mehra*, No. 14-CV-8118, 2015 WL 3754705, at *2 (D.N.J. June 15, 2015); *C.O. Truxton, Inc. v. Blue Caribe, Inc.*, No. 14-CV-4231, 2014 WL 6883145, at *4

[1] Pursuant to 8 U.S.C. § 1159(b)(2), an alien may apply for LPR status one year after he is granted asylum. In this case, Plaintiff A.S.R. was granted asylum on January 19, 2016 (Compl. ¶ 159), and will become eligible to apply for LPR status in January 2017. Because A.S.R. does not currently have LPR status, he is not a resident under the venue statute. Accordingly, it is the Government's position that the District of New Jersey is not a proper venue for A.S.R.'s claims. Nonetheless, because A.S.R. will become eligible to apply for LPR status in January 2017, the Government is not moving to dismiss or transfer venue on this basis. Moreover, as discussed further in this brief, because Ms. Rodriguez Alvarado's case is not properly venued in this district, it is appropriate under 28 U.S.C. § 1404(a) to transfer A.S.R.'s case to Texas as well.

(D.N.J. Dec. 5, 2014); *Cmty. Surgical Supply of Toms River, Inc.*, 2011 WL 3235706, at *3.

Pursuant to 28 U.S.C. § 1402(b), venue in an FTCA action is only proper "in the judicial district (1) where the plaintiff resides or (2) wherein the act or omission complained of occurred." In this matter, venue as to Ms. Rodriguez Alvarado is improper in the District of New Jersey because Ms. Rodriguez Alvarado, who lacks LPR status, is not domiciled in this district as a matter of law, and none of the acts or omissions alleged in the Complaint occurred in this district.

Plaintiffs allege that because they live in New Jersey, *see* Compl. ¶ 6, venue is proper. However, this assertion is incorrect. The term "resides" has a specific legal meaning in the context of the federal venue statutes. Prior to 2011, courts have held that aliens, including lawfully permanent residents, could not establish residence in the United States for purposes of venue.[2] *See, e.g.*, *Galveston, H. & S.A. Ry. Co. v. Gonzales*, 151 U.S. 496, 506-07 (1894) (holding that an alien is "assumed not to reside in the United States" and "must resort to the domicile of the defendant"); *Arevalo-Franco v. INS*, 889 F.2d 589, 590 (5th Cir. 1990) (noting that "[f]ederal courts have interpreted [§ 1391, the general venue statute and § 1402(a), the statute applicable to FTCA cases] to deny venue to aliens, holding that for purposes of venue, aliens are not residents of *any* district despite where they might

[2] In 1988, Congress added the "resident alien proviso," which provided, solely for purposes of diversity but not for other venue provisions, that "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled." Pub. L. 100-702, § 203, 102 Stat. 4642 (Nov. 19, 1988).

live"); *Williams v. United States*, 704 F.2d 1222, 1225 (11th Cir. 1983) ("An alien, for purposes of establishing venue, is presumed by law not to reside in any judicial district of the United States regardless of where the alien actually lives."); *Ou v. Chertoff*, No. 07-CV-3676, 2008 WL 686869, *2 (N.D. Cal. Mar. 12, 2008) (transferring the case for improper venue because for venue purposes, an alien is assumed not to reside in the United States); *Li v. Chertoff*, No. 08-CV-3540, 2008 WL 4962992, *2-3 (N.D. Cal. Nov. 19, 2008); *Elmalky v. Upchurch*, No. 3:06-CV-2359, 2007 WL 944330, at *7 (N.D. Tex. Mar. 28, 2007); *Wilson v. Wilson-Cook Medical, Inc.*, 720 F. Supp. 533, 539 (M.D.N.C. 1989); *Prudencio v. Hanselman,* 178 F.Supp. 887, 890 (D. Minn. 1959) ("[I]t is a basic venue principle that an alien is presumed not to reside in any district.").

In 2011, Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act ("Act"), Pub. L. 112-63, 125 Stat. 758 (Dec. 7, 2011), which, as relevant here, modified these longstanding rules by allowing one specific subset of aliens—those who had obtained LPR status—to qualify for the first time as "residents" for venue purposes. Specifically, Section 202 of that Act, codified at 28 U.S.C. § 1391, provides that "[f]or all venue purposes—a natural person, *including an alien lawfully permitted for permanent residence in the United States*, shall be deemed to reside in the judicial district in which that person is domiciled." 125 Stat. at 763; 28 U.S.C. § 1391(c) (emphasis added). This provision accomplished two goals: (1) it clarified that residence is determined by domicile for purposes of venue;

and (2) it distinguished between immigrants who can lawfully establish domicile in the United States and those who cannot.

Obviously, every alien lawfully permitted for permanent residence is a natural person, so the modified clause would be unnecessary if Congress had intended this provision to apply to all aliens. *See*, *e.g.*, *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (citation omitted); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (citation omitted). Rather, Congress drafted the new clause based on the background venue law treating all aliens as non-residents for purposes of venue, with the purpose of modifying this rule to allow only a specific subset of aliens – those lawfully permitted for permanent resident – to be treated as residents for venue purposes. *See Abuelhawa v. United States*, 556 U.S. 816, 821 (2009) ("As we have said many times, we presume legislatures act with case law in mind."); *Ashcroft v. ACLU*, 535 U.S. 564, 607 n.3 (2002) (courts must "presume that Congress legislates against the backdrop of our decisions").

Moreover, the legislative history confirms that aliens lacking LPR status are not residents for the purpose of establishing venue. The House Report accompanying the bill states that the purpose of the modification of the venue statute is to "permit permanent resident aliens domiciled in the United States to

raise a venue defense." H.R. Rep. 112-10, at 33 (Feb. 11, 2011). The Report omits any intention to allow individuals lacking LPR status to establish residency for venue purposes. Rather, it makes clear that undocumented aliens are not included in the modification:

> An alien can obtain a 'lawful domicile' in the United States only if he or she has the ability under the immigration laws to form the intent to remain in this country indefinitely… such an interpretation of domicile under the venue statute as including lawful intent to remain would *foreclose the possibility that an undocumented alien would be regarded as a domiciliary of the United States for venue purposes*.
>
> *Id.* at 33 n.16 (emphasis added).

Because Ms. Rodriguez Alvarado lacks LPR status, she is not domiciled in this district for purposes of establishing venue. While Plaintiffs allege that she was granted a withholding of removal to Honduras (Compl. ¶ 155), an order granting withholding does not confer lawful status upon an alien. *See* Salinas Decl. ¶ 4. Instead, it only prevents the United States from physically removing her to Honduras. She can be removed to another country that is willing to accept her. *See* 8 C.F.R. § 1208.16(f) (2007); Salinas Decl. ¶ 4; *see also Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004) (indicating that unlike an application for asylum, a grant of an alien's application for withholding is not a basis for adjustment to lawful permanent resident status and only prohibits removal of the alien to the country of risk but not to another country) (citing *Castellano-Chacon v. INS*, 341 F.3d 533, 545 (6th Cir. 2003)); *Huang v. Ashcroft*, 390 F.3d 1118, 1121 n.2 (9th Cir. 2004) (noting that "neither withholding nor deferral of removal prevents the government from removing an alien to a third country other than the country to which removal was

withheld or deferred"); 8 C.F.R. § 1240.11(e)(providing that "[n]othing in this section is intended to limit the Attorney General's authority to remove an alien to any country permitted by section 241(b) of the Act"). Therefore, as a matter of law, Ms. Rodriguez-Alvarez cannot "reside" in the District of New Jersey so as to confer venue under 28 U.S.C. §1402(b).

In a similar case originally filed in the Eastern District of Virginia, the Government filed a motion to dismiss and/or transfer for improper venue under Rule 12(b)(3) because the alien plaintiff as a matter of law was not domiciled in the United States even though she lived in Virginia. *See Aguilar v. United States*, No. 15-CV-986 (LMB/IDD), Dkt. Nos. 26, 28 (E.D. Va.). The court granted the Government's motion and agreed that the court did not have venue. *See Aguilar*, Dkt. No. 26 at 2-3. The court transferred the case, as a "matter of law," to the Southern District of Texas where the claim arose, holding that "other than the one case out of the District of New York[3], there's no law that supports [Plaintiff's]

[3] In *Flores v. United States*, No. 14-CV-3166, 2015 WL 3622275 (E.D.N.Y. June 11, 2015), the district court denied the Government's motion to transfer venue. However, the case is distinguishable because the plaintiff there was on parole and had an asylum application pending, which, if granted, would have afforded her LPR status. Here, Ms. Rodriguez Alvarado lacks LPR status. Further, the court's decision failed to account for the background venue law, improperly treated the "lawfully permitted for permanent residence" clause in 28 U.S.C. § 1391(c)(1) as superfluous, and ignored the clear legislative history on this point. Instead, the court based its decision on a USCIS interpretative memorandum, which explained the "situations in which an alien who is actually in an unlawful immigration status is, nevertheless, protected from the accrual of unlawful presence" for purposes of the three- and ten-year bars to admissibility under 8 U.S.C. § 1182(a)(9). This memorandum is inapposite on the issue of domicile for venue purposes. Indeed, as the Eastern District of Virginia has recognized, Ms. Rodriguez Alvarado here lacks residence under the venue statute.

position in terms of [Plaintiff] having domicile for purposes of venue in this jurisdiction." *Id.* at 2.

Ms. Rodriguez Alvarado is not without recourse in this matter. Her claims can be heard in the district courts in Texas, the proper venue where the alleged acts occurred. Accordingly, this Court should transfer Ms. Rodriguez Alvarado's case to either the Western or Southern District of Texas.[4]

II. The Court Should Transfer Venue to Texas Under 28 U.S.C. § 1404(a) to Advance the Interests of Justice

Whether or not this Court determines that venue is proper as to Ms. Rodriguez Alvarado's claims, it is in the public interest that the Court transfer the litigation to Texas. Not only did the alleged tortious conduct exclusively occur in Texas, but Texas tort law governs, the detention facilities are located in Texas, the Texas district courts have a strong interest in adjudicating these controversies locally, and the judges in Texas are familiar with these issues due to the volume of individuals crossing the Mexico-U.S. border.

Pursuant to 28 U.S.C. §1404(a), a district court may transfer a civil action to another district where the action may have been brought "[f]or the convenience of parties and witnesses, in the interest of justice." Venue is proper in Texas because

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[4] Under the venue statute, Ms. Rodriguez Alvarado's claim regarding her CBP detention belongs in the Southern District of Texas, while her claim regarding her ICE detention belongs in the Western District of Texas. *See* Padilla Decl. ¶ 12; Salinas Decl. ¶ 3. However, under 28 USC § 1404(a), the Court can transfer the entire case to either the Southern or Western District of Texas rather than sever the claims. The Government will not bring another Rule 12(b)(3) motion in Texas if the Court transfers the litigation to either one of these two Texas districts.

the "the act or omission complained of occurred" there. 28 U.S.C. § 1402(b). Transferring a case under Section 1404(a) is within the sound discretion of the court. *See Goldstein v. MGM Grand Hotel & Casino*, No. 15-CV-4173, 2015 WL 9918414, at *1 (D.N.J. Nov. 5, 2015). "The purpose of Section 1404(a) is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Wm. H. McGee & Co. v. United Arab Shipping Co.*, 6 F. Supp. 2d 283, 287 (D.N.J. 1997) (citations and quotation marks omitted). The Third Circuit has articulated a list of twelve public and private interest factors for the district courts to consider when weighing whether an action should be transferred. *See Jumara v. State Farm Ins.*, 55 F.3d 873, 879-880 (3d Cir. 1995).

While each factor is analyzed below to demonstrate that this litigation should be heard in Texas, the crux of the Government's argument is that there is a strong public interest in hearing this litigation in Texas because of Texas's familiarity with similar cases. A transfer to either the Western or Southern District of Texas will promote the consistent and just application of the controlling law by the courts where these detention facilities are located.[5] To have these cases sporadically

[5] The Government takes no position whether this case should be transferred to either the Western or Southern District of Texas, but notes that transferring the case to the Southern District of Texas may be more prudent under 28 U.S.C. § 1404(a) because there are similar cases pending there. *See infra* at 18-19; *see also Platinum Ptnrs. Value Arbitrage Fund, L.P. v. TD Bank. N.A.*, No. 10-CV-6457, 2011 WL 3329087, at *6 (D.N.J. Aug. 2, 2011) ("Transfer is often meant as a time saving device, for the parties and for the Court. Thus, the transfer of a civil action to another district where similar cases are already pending 'serves not only private interests but also the interests of justice.'") (internal citations omitted).

spread across the country in districts lacking any connection to these sensitive issues may result in inconsistent case law.

A. Public Interest Factors

The public interest factors include:

> 1) the enforceability of the judgment; 2) practical considerations that could make the trial easy, expeditious, or inexpensive; 3) the relative administrative difficulty in the two fora resulting from court congestion; 4) the local interest in deciding local controversies at home; 5) the public policies of the fora; and 6) the familiarity of the trial judge with the applicable state law in diversity cases.

S. Jersey Gas Co. v. Antero Res. Appalachian Corp., No. 15-CV-1888, 2016 WL 266340, at *3 (D.N.J. Jan. 21, 2016) (quoting *Jumara*, 55 F.3d at 879-880).[6]

1) Practical considerations favor a transfer because of the location of Government witnesses

Practical considerations favor a transfer to Texas because requiring federal employees to travel, often through indirect flights, to defend a lawsuit is a significant public concern because it would create a substantial burden on the Government and detract from the agencies' important public functions. *See* Padilla Decl. ¶¶ 5, 13. While Plaintiffs are located in New Jersey, the majority of the fact witnesses that would have knowledge about Plaintiffs' situation while in detention are all Government witnesses located in Texas because this case challenges the

[6] Factor 1, the enforceability of judgment, is neutral because a judgment can be enforced in any state. Factor 3, the administrative difficulty in the two fora resulting from court congestion, is also neutral because both fora are capable of handling the complex issues at hand. *See, e.g.*, *Janosko v. United of Omaha Life Ins. Co.*, No. 16-CV-1137, 2016 WL 4009818, at *6 (D.N.J. July 25, 2016) (recognizing that all federal courts have similar burdens) (citing cases).

actions of the CBP and ICE officers who patrol the United States/Mexico border in Texas. *See, e.g., Collins v. Mary Kay, Inc.*, No. 15-CV-7129, 2016 WL 3546581, at *3 (D.N.J. June 29, 2016) (J. Arleo) (holding that practical considerations favor Texas as the forum because all the defendant's witnesses are located in Texas); *see also* Padilla Decl. ¶¶ 1,13; Salinas Decl. ¶ 5. It would create a substantial burden on the Government and taxpayers and can potentially delay pretrial discovery to litigate this case in New Jersey. *See, e.g., Collins*, 2016 WL 3546581, at *3 (reasoning that pretrial discovery may be conducted more quickly and efficiently in Texas than in New Jersey, where only the plaintiff resides.) Further, CBP and ICE officers in Texas come into contact with thousands of individuals each year, a large portion of whom are transient, and requiring these officers to travel across the country to any district a lawsuit is filed would adversely impact the substantial resource issues already facing the federal agencies. *See* Padilla Decl. ¶ 7.

Moreover, in addition to *Aguilar v. United States* as discussed above, there are other similar cases pending in Texas that were transferred from other districts. *See Amador v. United States*, No. 7:16-CV-595 (S.D. Tex.) (case transferred from Virginia on consent); *Villafuerte v. United States*, 7:16-CV-619 (S.D. Tex.) (case transferred from Maryland on consent). Thus, the transfer of a civil action to another district where similar cases are already pending "serves not only private interests but also the interests of justice." *CIBC World Mkts. v. Deutsche Bank Sec., Inc.*, 309 F. Supp. 2d 637, 651 (D.N.J. 2004); *Platinum Ptnrs. Value Arbitrage Fund, L.P. v. TD Bank, N.A.*, No. 10-CV-6457, 2011 WL 3329087, at *6 (D.N.J. Aug. 2,

2011) (finding that, where cases already pending in the Southern District of Florida "related generally" to a case pending in this District, but were not so similar that they would necessarily be consolidated upon transfer, that similarity still weighed in favor of transfer).

Finally, this case is in its early stages. Because no discovery has been exchanged and the Court has not ruled on any dispositive motions, a transfer will not unduly prejudice the case. *See, e.g.*, *Allied Old English, Inc. v. Uwajimaya, Inc.*, No. 11-CV-1239, 2012 WL 3564172, at *7 (D.N.J. Aug. 16, 2012) (granting motion to transfer in part because the case was in its early stages). Accordingly, this factor favors a transfer to Texas.

2) – 3) Texas's local interests and public policies favor a transfer

Texas has a strong interest in deciding controversies involving its border patrol and detention facilities where, as here, the events at issue occurred. Courts consistently have recognized that the local interest in having localized controversies settled at home as an important factor when evaluating a motion to transfer. *See, e.g.*, *Janosko v. United of Omaha Life Ins. Co.*, No. 16-CV-1137, 2016 WL 4009818, at *4 (D.N.J. July 25, 2016) (concluding that because the alleged act did not occur in New Jersey, but in Virginia, Virginia "has a greater interest in adjudicating this dispute"); *Gray v. Apple Inc.*, No. 13-CV-7798, 2016 WL 4149977, at *6 (D.N.J. Aug. 3, 2016) (reasoning that California has a local interest in adjudicating a case that arose there rather than New Jersey); *In re JAMS Nos. 1340007979, 1340007982*, No. 14-CV-524, 2015 WL 1954457, at *3 (D.N.J. Apr. 29, 2015) (J. Arleo) (holding

that Illinois has a stronger interest in litigating the case than New Jersey because all the underlying proceedings occurred there); *ESP Shibuya Enter., Inc. v. Fortune Fashion Indus.,* No. 08-CV-3992, 2009 WL 1392594, at *4 (D.N.J. May 15, 2009) (noting that "local dockets should not be 'clogged' with cases that have no connection to the forum"); *Cuco v. U.S. (Fed. Bureau of Prisons)*, No. 05-CV-5347, 2007 WL 2904193, at *4 (D.N.J. Oct. 2, 2007) (transferring FTCA case to the Eastern District of Kentucky because Kentucky has a stronger interest than New Jersey in resolving this action "in its home forum"); *McGee*, 6 F. Supp. 2d at 292 ("Louisiana, the location where at least some of the alleged acts occurred, would have a strong public interest in adjudicating this dispute.") (collecting cases).

This case presents a controversy that implicates CBP and ICE's operations in Texas – operations that have no ties to New Jersey. It would better serve the public for this case to be heard by the local federal courts that are most familiar with those activities in order to produce consistent and fair results. Thus, both factors strongly favor a transfer.

4) Texas judges are familiar with the controlling case law

As to the final public interest factor, Texas judges routinely apply Texas law, which is the law that would be applied here. Although this Court certainly could preside over litigation involving Texas law, federal district judges in Texas are "more likely to have a better knowledge of [Texas] tort law." *Goldstein*, 2015 WL 9918414, at *5; *see, e.g.*, *Collins*, 2016 WL 3546581, at *3 ("Although this Court is capable of effectively applying Texas law, it is logical that a Texas court would have

greater familiarity with its application."); *Janosko*, 2016 WL 4009818, at *5 (granting transfer in part because the case "is subject to Virginia law, a presiding judge in the Eastern District of Virginia would be the most familiar with the applicable law."); *In re JAMS*, 2015 WL 1954457, at *3 (granting transfer in part because a court in Illinois is more familiar with local law than in New Jersey); *Cuco*, 2007 WL 2904193, at *4 (transferring FTCA case to the Eastern District of Kentucky because the court in Kentucky will have greater familiarity with Kentucky tort law). Given the policy concerns about the conditions of confinement that these detainees are subject to in Texas, it would further the public interest if these cases are adjudicated by the courts that have developed a deep understanding of the issues.

B. Private Interest Factors

The private interest factors include:

> 1) the plaintiff's forum preference; 2) the defendant's forum preference; 3) where the claim arose; 4) the convenience of the parties as indicated by their relative physical and financial condition; 5) the convenience of the witnesses, but only to the extent they may be unavailable for trial in one of the fora; and 6) the location of books and records (similarly limited to the extent that they could not be produced in the alternative forum).

S. Jersey Gas Co., 2016 WL 266340, at *3 (quoting *Jumara*, 55 F.3d at 879).

1) Plaintiffs' forum preference should not be afforded weight

While there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, "when the central dispute in a lawsuit arose from events that

occurred almost exclusively in another forum, as is the case here, courts give substantially less weight to the plaintiff's forum choice." *See Janosko*, 2016 WL 4009818, at *3; (citing *Nat'l Prop. Inv'rs VIII v. Shell Oil Co.*, 917 F. Supp. 324, 327 (D.N.J. 1995)); *accord Gray*, 2016 WL 4149977, at *6; *S. Jersey Gas Co.*, 2016 WL 266340, at *4 (collecting cases); *McGee*, 6 F. Supp. 2d at 290 ("deference is curbed when a plaintiff's choice of forum has little connection with the operative facts of the lawsuit."); *Fortay v. Univ. of Miami*, No. 93-CV-3443, 1994 WL 62319, at *8 (D.N.J. Feb. 17, 1994) (the "plaintiff's choice of forum is accorded no special consideration when the nucleus of operative facts is outside the forum state").

Indeed, "the plaintiff's choice is not conclusive; if it were, then the courts would have no need to perform a multi-factor analysis." *In re JAMS*, 2015 WL 1954457, at *3 (J. Arleo); *see also McGee*, 6 F. Supp. 2d at 290 ("A plaintiff's choice of forum is simply a preference; it is not a right."). Thus, because New Jersey has no connection with the operative facts of the lawsuit, and Plaintiffs moved here only after the alleged tortious conduct occurred, this Court should not give weight to Plaintiffs' choice of forum. *See, e.g., Gray*, 2016 WL 4149977, at *6 (transferring the case and noting that while the "plaintiff's choice of forum is New Jersey, but that arises solely from the happenstance that he moved back here after the events in suit."); *Janosko*, 2016 WL 4009818, at *3 (transferring the case because none of the acts occurred in New Jersey and affording plaintiff's forum choice "substantially less deference than if the events had occurred within the District of New Jersey.").

2) Defendant's forum preference is where the tort occurred

Defendant's forum preference is Texas and should be afforded weight because all the operative facts, majority of witnesses, sources of proof, and substantive law are in Texas. *See, e.g., Gray*, 2016 WL 4149977, at *6 (holding that the defendant's forum choice is not arbitrary and should be considered when all the operative facts occurred there); *In re JAMS*, 2015 WL 1954457, at *4 (recognizing that the defendant prefers to litigate the matter in another forum). Accordingly, this factor favors a transfer to Texas.

3) The claim arose in Texas

The Complaint alleges that the alleged tortious conduct exclusively occurred in Texas, where Plaintiffs were apprehended and detained after unlawfully entering the United States through a section of the Mexico-U.S. border in the Southern District of Texas. Not a single aspect of the claim arose in the District of New Jersey. Accordingly, this factor weighs in favor of transferring the case to Texas. *See, e.g.*, *Janosko*, 2016 WL 4009818, at *3 (transferring case to where the claim arose); *Cuco*, 2007 WL 2904193, at *4 (transferring FTCA case to the Eastern District of Kentucky because all the operative events exclusively occurred in Kentucky).

4) The convenience of the parties as indicated by their relative physical and financial condition favors a transfer

As to the convenience of the parties, Defendant respectfully submits that this factor favors a transfer. To the extent Plaintiffs argue that it would be financially difficult for them to litigate in Texas because they live in New Jersey, "financial

inequity cannot override all the other factors in this case." *Goldstein*, 2015 WL 9918414, at *3; *see, e.g.*, *Gray*, 2016 WL 4149977, at *6 (transferring the case despite the "obvious inconvenience to plaintiff (although that arose from his decision to move back to New Jersey before filing) and the extremely disparate financial resources of the parties."); *Skyers v. MGM Grand Hotel LLC,* No. 14-CV-4631, 2015 WL 1497577, at *3 (D.N.J. Apr. 1, 2015) (transferring venue to Nevada despite "the superior financial status of defendant and its presumptive ability to absorb the costs of traveling from Nevada to litigate plaintiffs' claims in New Jersey, as opposed to the burden it would place on plaintiffs to litigate their case in Nevada"). Indeed, in *Aguilar*, a similar lawsuit alleging comparable tortious conduct, the Virginia district court transferred the case to the Southern District of Texas, notwithstanding the plaintiff's protests that "financially, [she would] not be able to prosecute [her] case in Texas," *Aguilar*, Dkt. No. 16, at p. 10. That case is currently proceeding forward in the new venue. *See generally Aguilar v. United States*, No. 1:16-CV-48 (S.D. Tex.).

Plaintiffs here may currently live in New Jersey, but Ms. Rodriguez Alvarado lacks LPR status. Moreover, Plaintiffs can seek to mitigate any inconvenience by requesting permission to participate in court conferences through telephone or video conference and seeking to have their depositions occur in New Jersey.[7]

[7] There is no local rule in either the Southern or Western District of Texas requiring a party's deposition to occur in the district where the action is pending. *See, e.g.*, *Opus Portfolio, Ltd. v. Koz*, No. 09-CV-0363, 2010 WL 723002, at *1 (W.D. Tex. Mar. 2, 2010) ("As a general rule the location of a deposition is determined by the residence or place of business of the deponent; not on the location of the court

Moreover, it is inconvenient for the Government to litigate this case in New Jersey when majority of the material fact witnesses are located in Texas. *See* Padilla Decl. ¶ 13; Salinas Decl. ¶ 5. As discussed above, nearly every key fact witness will be in Texas because the apprehension and detention occurred in Texas. Requiring these Government witnesses to travel to New Jersey, often through indirect flights, is burdensome, and it would detract from their public duties. *See* Padilla Decl. ¶¶ 5, 13. Accordingly, this factor favors a transfer of the case.

5) The convenience of the material non-party witnesses favors a transfer

Courts have reasoned that the convenience of non-party witnesses is "perhaps the most important factor" when considering motions to transfer. *ML Design Grp., LLC v. Young Mfg. Co.*, No. 12-CV-5883, 2013 WL 3049174, at *4 (D.N.J. June 17, 2013) (citation omitted); 8 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure,* § 3851 (3d ed. 2008) ("Often cited as the most important factor in passing on a motion to transfer under Section 1404(a) of Title 28 of the United States Code, and the one most frequently mentioned by the courts, ... is the convenience of witnesses, most particularly nonparty witnesses who are important to the resolution of the case.").

The Complaint alleges tortious actions by Texas employees of the Corrections Corporation of America ("CCA"), who, gleaning from the Complaint, will be material witnesses. Compl. ¶¶ 84, 89-90. CCA is a private corporation and the Government

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where the case is pending, or on the residence or for the convenience of the opposing party.").

cannot compel these Texas-based witnesses to attend trial in New Jersey.[8] A subpoena requiring attendance by non-parties at trial may only be served "within 100 miles of where the person resides, is employed, or regularly transacts business…" Fed. R. Civ. P. 45(c). Because Texas is not within 100 miles of New Jersey, the CCA witnesses may not be compelled to attend a hearing or trial in this Court. Thus, courts have found that a "forum's inability to compel the attendance of witnesses at trial is an important factor weighing in favor of transfer." *Platinum Ptnrs. Value Arbitrage Fund, L.P.*, 2011 WL 3329087, at *5; *accord Gray*, 2016 WL 4149977, at *6 (transferring the matter in a case where the fact witnesses were located in California and subject to subpoena there); *Virag, S.R.L. v. Sony Computer Entm't Am. LLC*, No.14-CV-4786, 2015 WL 1469745, at *7 (D.N.J. Mar. 30, 2015) (transferring case to California where the defendant's employees resides); *Colon v. United States*, No. 14-CV-7271, 2015 WL 1573397, at *2 (E.D. Pa. Apr. 9, 2015) (transferring the FTCA case to Puerto Rico and reasoning that the court does not have the power to compel nonparty witnesses to attend trial in Pennsylvania). Accordingly, this factor favors a transfer.

6) Location of books and records is in Texas

This factor slightly favors a transfer because the custodial facilities of which Plaintiffs complain about are located in Texas. Nevertheless, the documents regarding the claims can be reproduced and transmitted electronically to this district.

[8] http://www.cca.com/

In sum, this case should be heard in Texas where the conduct exclusively occurred. Texas's familiarity with the relevant substantive law and the situation surrounding these issues, the location of the premises that might have to be viewed, and the public interest in having this conflict resolved locally in Texas weigh strongly in favor of a transfer. Moreover, an analysis of the private interest factors favors a transfer because this district has no factual connection with the conduct alleged. Accordingly, the interest of justice warrants a transfer of the action to the either the Western or Southern District of Texas.

CONCLUSION

For the reasons set forth above, the Court should dismiss and/or transfer the Complaint to either the Western or Southern District of Texas.

Dated: Newark, New Jersey
November 18, 2016

Respectfully submitted,
PAUL J. FISHMAN
United States Attorney

By: s/ *Kruti Dharia*
KRUTI D. DHARIA
Assistant United States Attorney
Attorneys for Defendant