UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SUNY RODRIGUEZ ALVARADO, and A.S.R., a minor, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civ. No.: 2:16-cv-05028 (MCA) (SCM) Date: December 23, 2016 **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND/OR TRANSFER

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INTRODUCTION

Plaintiffs Suny Rodriguez Alvarado and her son, A.S.R, residents of West New York, New Jersey, filed this civil rights action under the Federal Tort Claims Act (FTCA) for the wrongful detention, inhumane treatment, and abuse they suffered at the hands of federal Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) officers when they came to the United States to seek asylum. Compl. ¶¶ 4, 7-8, ECF. No. 1. In response, Defendant United States of America ("Defendant" or "the government") moves to transfer the matter to an unspecified federal district court in Texas, arguing that Plaintiffs cannot, as a matter of law, bring suit in New Jersey under 28 U.S.C. § 1391(e) or § 1402(b) by virtue of their immigration status, and that litigating this matter in New Jersey would be inconvenient for the federal government. Def.'s Mem. Supp. Mot. to Dismiss and/or Transfer ("Def.'s Br."), ECF No. 17-1. Under the government's reading of the relevant venue statutes, a significant number of noncitizens who lawfully intend to remain in the United States would be precluded from seeking redress in their home fora. This Court should deny Defendant's motion because Plaintiffs are domiciled in the District of New Jersey, this suit is convenient in that District, and Defendant has failed to meet its burden to justify transfer.

As one district court recently held, the venue statutes at issue here permit noncitizens to establish venue in the judicial district where they are domiciled, even if they do not have lawful permanent resident ("LPR") status. *See Flores v. United States*, 108 F. Supp. 3d 126 (E.D.N.Y. 2015). In arguing to the contrary, Defendant cites no binding authority or even any published decisions. Traditional principles of statutory interpretation compel the same result here as in *Flores*. The plain text of the venue provisions unambiguously permits suit by noncitizens such as A.S.R. and Ms. Rodriguez Alvarado, both of whom are domiciled in New Jersey and have a

lawful intent to remain here. Moreover, the government's statutory construction is flawed because: (1) it is unsupported by the legislative history, including the background case law cited by Congress; (2) it would create absurd results affecting plaintiffs' ability to sue the government in certain actions; and (3) it would raise serious constitutional questions by drawing arbitrary distinctions among similarly situated noncitizens.

Further, the conveniences and interests in this case weigh in favor of honoring Plaintiffs' choice of forum. Transfer would be extremely inconvenient for Ms. Rodriguez Alvarado and her son due to their limited financial means, the potential psychological and emotional harm that transfer could cause, and the presence of key witnesses in New Jersey. Meanwhile, litigating this case in New Jersey would impose only a minimal burden on the Defendant, whose logistical concerns can be mitigated through depositions in Texas. Moreover, the actions of the federal government that are at issue in this case implicate national interests, not local controversies, and Texas federal courts offer no advantage in adjudicating this matter. As the government has not met its burden to justify transferring this case from the Plaintiffs' preferred forum, the Court should deny Defendant's motion to dismiss or to transfer.

STATEMENT OF FACTS

Ms. Rodriguez Alvarado and A.S.R., along with Ms. Rodriguez Alvarado's partner and A.S.R.'s father, Rafael Sanchez, fled abuse and persecution by Honduras' corrupt police force in late 2014. Compl. ¶ 44. After Plaintiffs entered the United States in January 2015, CBP agents detained them in inhumane, cold, and crowded conditions for three days. *Id.* ¶¶ 46-73. CBP agents repeatedly pressured Ms. Rodriguez Alvarado to sign documents agreeing to removal from the United States despite her unequivocal expressions of fear of returning to Honduras, *id.* ¶¶ 49, 70, and the government's unambiguous obligation not to return individuals to persecution,

see 8 U.S.C. § 1231(b)(3). Defendant's mistreatment of Plaintiffs continued after CBP and ICE officials transferred them to an ICE detention center in Dilley, Texas, where they spent the next four months. Compl. ¶ 1. During that time, ICE persisted in attempting to coerce Plaintiffs into agreeing to removal and regularly violated federal law and policy regarding the detention of families. *See, e.g.*, *id.* ¶¶ 86-99, 111-26. For instance, ICE unlawfully detained Ms. Rodriguez Alvarado by failing to provide her a custody determination in violation of 8 C.F.R. § 1236.1(c)(8), Compl. ¶ 105; attempted to place A.S.R. in a shelter for unaccompanied children and forcibly separate him from his mother despite a consent decree and federal regulations requiring ICE to prioritize release of minors to family members, Compl. ¶ 117; and encouraged other harassment by employees under its supervision, such as regular sleep disruptions, that violated the ICE Family Residential Standards, *id.* ¶¶ 129, 136.

Ms. Rodriguez Alvarado and A.S.R. eventually won their immigration cases. Ms. Rodriguez Alvarado was granted withholding of removal and A.S.R. was granted asylum. *Id.* ¶¶ 155, 159. The family now resides in West New York, New Jersey, *id.* ¶¶ 7-8, with Mr. Sanchez and Ms. Rodriguez Alvarado's two other children, aged fifteen and sixteen, who are U.S. citizens. Suny Rodriguez Alvarado Decl., Ex. A, ¶ 1 ("Rodriguez Alvarado Decl."). All three children attend school in New Jersey. *Id.* ¶ 5. A.S.R. is in elementary school and the older children attend high school. *Id.* Ms. Rodriguez Alvarado and Mr. Sanchez are both employed in New Jersey, Ms. Rodriguez Alvarado at a clothing warehouse in Secaucus, and Mr. Sanchez in the construction industry in New Jersey. *Id.* ¶¶ 10-11. The couple's combined income is low and unstable, and they very rarely, if ever, earn more than $600 a week. *Id.* ¶ 12. Plaintiffs have a close network of family in West New York, including Ms. Rodriguez Alvarado's sister, Mr. Sanchez's brother and sister, and their eight children. *Id.* ¶ 5. Ms. Rodriguez Alvarado and Mr.

Sanchez intend for their family, including A.S.R, to remain in New Jersey. *Id.* ¶¶ 6-7. On December 3, 2016, Ms. Rodriguez Alvarado and Mr. Sanchez filed A.S.R.'s application to become a lawful permanent resident. *Id.* ¶ 8.

A.S.R. and Ms. Rodriguez Alvarado experience symptoms of physical and mental illness. A.S.R. suffers from asthma and requires frequent visits to his doctor in New Jersey. *Id.* ¶ 9. Both Plaintiffs also suffer from trauma-related mental health issues following their experiences in detention, including posttraumatic stress disorder (PTSD). Dr. Jonathan Posner Decl. Ex. B, ¶¶ 16-17 ("Posner Decl."); Dr. Flavio Casoy Decl. Ex. C, ¶ 16 ("Casoy Decl."). For individuals with PTSD, reminders of traumatic experiences can have a "retriggering" effect that exacerbates symptoms. *See* Casoy Decl. ¶ 24; Posner Decl. ¶ 19. Thus, a return to Texas could worsen the symptoms that Ms. Rodriguez Alvarado and A.S.R. continue to experience if they are exposed to retriggering factors such as physical settings similar to those in which their trauma occurred or officials from the center in which they were detained. Rodriguez Alvarado Decl. ¶ 13; Casoy Decl. ¶ 24; Posner Decl. ¶ 19.

ARGUMENT

This case is properly before this Court because noncitizens can establish venue in a judicial district where they are domiciled, and both Plaintiffs are domiciled in New Jersey. The plain text of 28 U.S.C. § 1391(c) and its legislative history demonstrate that Plaintiffs can establish residency for venue purposes, because residency depends on domicile alone, rather than on alienage. Furthermore, transfer under 28 U.S.C. § 1404 is inappropriate. Plaintiffs' choice of forum is a "paramount consideration" in deciding any transfer request, *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970), and the inconvenience of transfer to Plaintiffs far

outweighs any burden the federal government might bear if the case proceeds in New Jersey. Defendant has not met its burden to justify transfer and thus its motion should be denied.

I. The Relevant Federal Venue Provisions Allow Noncitizens Like Plaintiffs to Establish Venue in the Judicial District Where They Are Domiciled

Both the plain text and legislative history of 28 U.S.C. § 1391 demonstrate that noncitizens without LPR status can establish venue in a district where they are domiciled. Furthermore, adopting the government's contrary interpretation would produce absurd results and raise serious constitutional questions. This Court should apply the plain meaning of the statute, give effect to the congressional intent as evidenced by the legislative history, and avoid the problematic and potentially unconstitutional results that would flow from the government's interpretation of the statute by permitting Plaintiffs' suit to proceed. This result would be in keeping with the Third Circuit's command that Plaintiffs' choice of forum be given significant weight in any request for transfer.

A. *The Plain Text of § 1391 Provides That Ms. Rodriguez Alvarado and Her Son May Establish Venue Where They Are Domiciled*

The plain text of 28 U.S.C. § 1391 authorizes Plaintiffs to file suit in the judicial district in which they are domiciled. Section 1391, the general venue statute, states that a plaintiff may bring suit against the United States "in any judicial district in which … the plaintiff resides …." 28 U.S.C. § 1391(e)(1). Additionally, § 1402(b) provides that "[a]ny civil action on a tort claim against the United States under [the FTCA] may be prosecuted only in the judicial district where the plaintiff resides or [where the act occurred]." 28 U.S.C. § 1402(b). The definition of "residence" in these provisions derives from § 1391(c)(1), which states that "a natural person, including an alien lawfully admitted for permanent residence . . . shall be deemed to reside in the judicial district in which that person is domiciled." 28 U.S.C. § 1391(c)(1). Plaintiffs are natural

persons domiciled in New Jersey. Thus, because "the words of the statute are unambiguous, the judicial inquiry is complete," and Plaintiffs can establish proper venue. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (internal quotation marks omitted).

The government, however, reads § 1391 to categorically exclude noncitizens who are not LPRs from establishing residency for venue purposes, even though the statute does nothing of the sort. In fact, the Supreme Court has repeatedly rejected attempts to construe "including" as categorically excluding unnamed groups or items. As the Court has stated, "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co*., 314 U.S. 95, 99-100 (1941) (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941)); *see also West v. Gibson*, 527 U.S. 212, 218 (1999) (the word "including" means that the statute is "not limited to the examples that follow that word"). The Third Circuit similarly has made clear that "the term 'including' suggests that Congress intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories." *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004); *see also In re SGL Carbon Corp.*, 200 F.3d 154, 160 (3d Cir. 1999) (the use of "including" before a list of factors "strongly suggests those factors are not exhaustive"). Therefore, the phrase "including an alien lawfully admitted for permanent residence in the United States" in § 1391(c)(1) is properly read as an illustrative example of the principle that all natural persons can establish venue in the district in which they are domiciled.[1]

Contrary to the government's contention, reading § 1391(c)(1) to establish venue here will not render the phrase at issue superfluous. Congress frequently enacts statutes with the word "include" or "including," followed by one or more illustrative examples. *See*, *e.g.*, 29 U.S.C. §

[1] Plaintiffs' immigration statuses permit them to be domiciled in New Jersey. *See infra*, Part II.

160(c) (granting power to the National Labor Relations Board to issue orders requiring "affirmative action including reinstatement of employees"); *Phelps Dodge Corp*., 313 U.S. at 188-89 (calling the phrase in § 160(c) an "illustration," and holding that it did not strictly limit the NLRB's authority).[2] The plain text of Section 1391(c)(1) thus shows that LPRs are but one example of the individuals who may establish residence for venue purposes.

B. *The Legislative History Demonstrates that Congress Did Not Intend to Categorically Ban Non-LPR Noncitizens From Establishing Venue*

Though the statutory language is clear, even if it were ambiguous, the legislative history of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("the Act") confirms that venue is proper because lawful domicile, a condition that Plaintiffs satisfy as set forth in Part II, is the essential requirement for establishing venue. *See* Pub. L. No. 112-63, 125 Stat. 758 (2011). The government argues that the legislative history reflects an intent to preclude all non-LPR noncitizens from establishing venue, but Congress's stated purpose for the Act, as well as the case law considered by Congress in drafting the Act, contradict this contention.

The 2011 amendments' primary purpose was to establish domicile as the defining feature of residence for venue purposes and ensure that LPRs, among others, could raise a venue defense. Through these amendments, Congress resolved an existing circuit split over whether

[2] Indeed, elsewhere in Title 28, Congress used the word "including" in just this manner. For example, in 28 U.S.C. § 528, Congress provided for rules "requir[ing] the disqualification of any officer or employee of the Department of Justice, *including* a United States attorney or member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a . . . conflict of interest . . . ." 28 U.S.C. § 528 (emphasis added). This text provides no reason to believe that U.S. Attorneys and their staff members are the only employees subject to these rules, and the resulting regulations do not single out any such group. *See*, *e.g*., 28 C.F.R. §§ 45.1-45.2 (explaining that "[e]mployees of the Department of Justice" are subject to a variety of ethical standards and financial disclosure regulations). The Seventh Circuit has indicated that this provision is applicable to the Attorney General. *See In re Grand Jury Subpoena of Rochon*, 873 F.2d 170, 175 (7th Cir. 1989).

"residence" should be equated with "domicile." H.R. Rep. 112-10, at 20-21 (2011). Consistent with this focus on domicile, Congress made two changes affecting noncitizens. First, Congress amended 28 U.S.C. § 1391(c)(1), adding the language on which the government now relies, in order to "permit permanent resident aliens domiciled in the United States to raise a venue defense," a goal that was "[i]n keeping with the consistent focus of determining venue by reference to the domicile of natural persons." *Id.* at 23. The Committee Report also noted that the ability to raise a venue defense would be limited to those who could "form the intent to remain in this country indefinitely" and therefore would exclude undocumented noncitizens. *Id.* at 23 n.16. As discussed below, Congress was aware that certain noncitizens without LPR status could form lawful intent to remain and therefore establish domicile when it chose to make domicile the touchstone for venue. Ms. Rodriguez Alvarado, who has withholding of removal, and A.S.R, an asylee and soon-to-be LPR, can unequivocally establish an intent to remain in this country indefinitely, *see* Part II, *infra*, and therefore are lawfully domiciled.

Second, Congress revised (c)(3) to focus on domicile, making changes that "shift[ed] the focus from 'alienage' of a defendant to whether the defendant has his or her 'residence' outside the United States." *Id.* at 22. This alteration meant that no one domiciled abroad, citizen or not, could raise a venue defense. *Id.* This provision further demonstrates that Congress's purpose in amending § 1391(c) was to make domicile the essential requirement for residency, regardless of a litigant's immigration status.

The government's attempts to read a preclusive purpose into these amendments based on background case law are unpersuasive. Defendant contends that Congress legislated against a backdrop of federal case law holding that noncitizens lacking LPR status are not residents for venue purposes. Def.'s Br. at 5-8. However, the government's authority is a 19th-century case in

which the Supreme Court presumed, but did not hold, that noncitizens could not establish venue in the United States. *See* Def.'s Br. at 5 (citing *Galveston, H. & S.A. Ry. Co. v. Gonzales*, 151 U.S. 496, 506-07 (1894)). Indeed, other cases the government cites describe *Galveston* as setting forth only a presumption. *See, e.g.*, *Williams v. United States*, 704 F.2d 1222, 1225 (11th Cir. 1983).[3] These cases do not support the government's contention that Congress's amendments permitted LPRs, and LPRs alone, to establish venue.

In fact, Congress chose to make domicile the basis of the Act's residency requirement with full knowledge of case law stating that noncitizens who were not LPRs *could* establish domicile. The Committee Report cited a case stating that LPR status is not necessary to establish lawful domicile. *See* H.R. Rep. 112-10, at 23 n.16 (citing *Castellon-Contreras v. I.N.S.*, 45 F.3d 149 (7th Cir. 1995)).[4] In that case, the court concluded that domicile turns on an individual's capacity to form a lawful intent to remain. 45 F.3d at 153-54 ("In order to have a 'lawful domicile,' . . . an alien must have the ability, under the immigration laws, to form the intent to remain in the United States indefinitely. . . . [A]liens can become lawful domiciliaries without first obtaining LPR status."); *accord White v. I.N.S.*, 75 F.3d 213, 215 (5th Cir. 1996) (same (quoting *Castellon-Contreras*, 45 F.3d at 153)); *Lok v. I.N.S.*, 548 F.2d 37, 40 (2d Cir. 1977) (holding that LPR status was not necessary to establish "lawful domicile" for 212(c) relief in deportation proceedings). Thus, the legislative record confirms that Congress was both aware that non-LPRs could establish domicile and intended that domicile, rather than lawful permanent residence status, be the touchstone for venue.

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[3] Further, as noted *infra* at Part I(C), the *Williams* court permitted a class of noncitizens that included, but was not limited to, LPRs to establish venue. The government fails to mention this holding. Def.'s Br. at 6 (citing *Williams*, 704 F.2d at 1225).

[4] Defendant omits this case when quoting the relevant section of the Report. Def.'s Br. at 8.

C. *The Government's Reading of § 1391 Would Create Absurd Results*

The Court should also reject the government's interpretation because it would produce untenable results. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute that would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Because § 1391(c) applies "[f]or all venue purposes," it applies to both 28 U.S.C. § 1402(b), one of the venue provisions at issue here, and § 1402(a), which concerns tax assessments. *See* 28 U.S.C. § 1391(c). Both provisions contain the phrase "where the plaintiff resides," *see* 28 U.S.C. § 1402(a)(1), (b), and this identical language must be read consistently. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (referring to "the basic canon of statutory construction that identical terms within an Act bear the same meaning"); *In re Cohen*, 106 F.3d 52, 57 (3d Cir. 1997) (same).

Specifically, Section 1402(a) states that certain individual claims regarding improperly assessed taxes, when brought in district court, "may be prosecuted only . . . in the judicial district where the plaintiff resides." 28 U.S.C. § 1402(a). The Internal Revenue Code further specifies that, unless certain circumstances apply, challenges to jeopardy tax assessments may be brought only in the district courts specified under § 1402(a). *See* 26 U.S.C. § 7429(b)(2), (e)(1).[5] Yet under Defendant's interpretation of § 1391(c), a lawfully present individual without LPR status cannot "reside" anywhere in the United States, as § 1402(a) requires. This interpretation would mean that lawfully present individuals without LPR status, including those with work

[5] In limited circumstances, such actions also may be brought in Tax Court. *See* 26 U.S.C. § 7429(b)(2)(B).

authorization and who pay taxes, could be barred from receiving any judicial review of an improper jeopardy tax assessment under 26 U.S.C. § 7429.

Given that many noncitizens without LPR status legally work in the United States[6] and pay federal taxes,[7] this result would be absurd, and possibly unconstitutional, and Congress could not have intended it. *See Alegria v. United States*, 945 F.2d 1523, 1527-28 (11th Cir. 1991) (holding that there is "no rational basis for treating aliens and citizens differently for venue purposes" under certain § 7429 tax assessment actions). Indeed, in *Williams*, the Eleventh Circuit held – and the government conceded upon "more mature reflection," *Williams v. United States*, 704 F.2d 1222, 1224 (11th Cir. 1983) (quoting the government's supplemental brief) – that lawfully residing individuals without LPR status bringing claims under § 7429 may establish venue for the purposes of § 1402(a) if they meet the Internal Revenue Code definition of "residing alien." *Williams,* 704 F.2d at 1224, 1227. Because § 1402(a) and § 1402(b) must be read consistently, the government's reading of § 1391(c) must be rejected.

D. *The Government's Interpretation Raises Serious Constitutional Questions*

Finally, the government's unreasonable statutory construction would also raise serious constitutional concerns, as it draws an arbitrary distinction between similarly situated noncitizens

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[6] In fiscal year 2014 alone, over one million lawfully present individuals without LPR status received, replaced, or renewed their work authorization by receiving an I-765 Employment Authorization Document from USCIS. *See* Office of Performance and Quality, Performance Analysis and External Reporting, "I-765 Receipts, Approvals and Denials for FY2008 through FY2014," U.S. Citizenship & Immigration Services 1-2 (Feb. 6, 2015), https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Statistics_and_Data/I765_Receipts_Approvals_and_Denials_for_FY2008_through_FY2014.pdf (last visited Dec. 23, 2016).

[7] For federal tax purposes, noncitizens who are not LPRs can be classified as "resident aliens" and subject to taxation on their worldwide income in the same manner as United States citizens. *See* 26 U.S.C. § 7701(b)(1)(A), (b)(3), (b)(4); 26 C.F.R. § 1.871–1(a) ("Resident alien individuals are, in general, taxable the same as citizens of the United States. . . .").

and violates Plaintiffs' right to equal protection under the Due Process Clause of the Fifth Amendment. *See Mathews v. Diaz*, 426 U.S. 67, 78 (1976) (reaffirming that the Due Process Clause applies to "all persons, aliens and citizens alike," and analyzing statutory discrimination between classes of aliens). The disparate treatment of different groups of noncitizens by the federal government triggers rational basis review. *See DeSousa v. Reno*, 190 F.3d 175, 184 (3d Cir. 1999). Under this standard, equal protection is violated where, as here, the statutory classification's relationship to its purpose is "so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

The government's proposed classification has no rational relationship to the purposes of the venue statutes. Sections 1391(e) and 1402(b) allow plaintiffs to bring lawsuits against the government where they live. *See* 28 U.S.C. §§ 1391(e), 1402(b). As discussed above, the purpose of the 2011 revisions to § 1391(c)(1) was to clarify that "for venue purposes, a natural person would be deemed to reside in the judicial district in which that person is domiciled[.]" H.R. Rep. No. 112-10, at 21 (2011). These provisions thus allow plaintiffs to sue the government where they reside and ensure that, for venue purposes, residence is equivalent to domicile.

Defendant's reading arbitrarily distinguishes LPRs from other noncitizens and, contrary to Congress's aim of ensuring that residence be equivalent to domicile for venue purposes, denies certain lawfully domiciled individuals the possibility of establishing venue through residency. When it comes to the key factor for venue purposes – domicile – both classes of noncitizens are similarly situated because each can establish a lawful intent to remain. Drawing this arbitrary line between similarly situated noncitizens thus violates equal protection principles. *See Alegria*, 954 F.2d at 1527-28 (holding that interpreting § 1402(a) to deprive a nonresident alien of venue in certain tax assessment cases would violate the Equal Protection Clause).

II. Plaintiffs Are Legally Domiciled in New Jersey, and Thus Have Established Residency for Venue Purposes

Venue is proper in this district if the Court finds that either A.S.R. or Ms. Rodriguez Alvarado resides in New Jersey. Under established Third Circuit law, 28 U.S.C. § 1391(e) imposes only a minimal residence requirement in multi-plaintiff cases. *See Exxon Corp. v. F.T.C.*, 588 F.2d 895, 898-99 (3d Cir. 1978) (holding that "[t]here is no requirement [under § 1391(e)] that all plaintiffs reside in the forum district"), implicitly overruled on other grounds by *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).[8] Since both Plaintiffs live in this state and intend to remain here indefinitely and lawfully under federal and state law, the Third Circuit's minimal residence requirement is easily satisfied here.[9]

A. *A.S.R. is Lawfully Domiciled in New Jersey and Can Therefore Establish Residence in New Jersey for Venue Purposes.*

As an asylee, A.S.R. has established residence in New Jersey for venue purposes because he is a lawful domiciliary of the state.[10] In New Jersey, "domicile is that place which the subject regards as his true and permanent home." *Citizens Bank & Trust Co. v. Glaser*, 70 N.J. 72, 81

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[8] The Defendant does not argue otherwise, but rather suggests only that venue must be established for each claim in a case. *See* Def.'s Br. at 4-5, ECF No. 17-1. Ms. Rodriguez Alvarado and A.S.R. brought all five of the claims in this case jointly. *See* Compl. ¶¶ 165-210, ECF No. 1. As a result, venue is proper as long as either A.S.R. or Ms. Rodriguez Alvarado establish residence in New Jersey. Even if complete residence were required under 28 § U.S.C. 1402(b), venue would still be proper because, as described below, both Ms. Rodriguez Alvarado and A.S.R. are residents within the meaning of the venue statute.

[9] In general, domicile is "to be decided by the state." *Elkins v. Moreno*, 435 U.S. 647, 666 (1978). Federal immigration law, however, may create barriers to establishing a "lawful intent to remain," although the Supreme Court has not precisely answered this question. *See id*. at 663-68 (Congress did not prevent certain non-immigrants from establishing domicile). Here, as described in Part I, *supra*, at 7-9, and Part II, *infra*, at 13-19, no such federal barriers exist.

[10] A.S.R. has a pending application for LPR status, which was submitted on December 3, 2016, Rodriguez Alvarado Decl. ¶ 8, and which will become reviewable in January 2017, one year after he received asylum. *See* Compl. ¶ 159 (noting the date of A.S.R.'s asylum grant). Because A.S.R. can soon become an LPR, the government does not rely on A.S.R.'s ability to establish venue. *See* Def.'s Br. at 4 n.1.

(1976). To ascertain domicile, New Jersey courts look for both "(1) physical presence, and (2) the concomitant unqualified intention to remain permanently and indefinitely." *Gosschalk v. Gosschalk*, 48 N.J. Super. 566, 573 (Super. Ct. App. Div. 1958), *aff'd*, 28 N.J. 73, 73 (1958). A.S.R. satisfies both elements of this test. First, he currently resides with his parents and two siblings in West New York, New Jersey. *See* Compl. ¶ 8; Rodriguez Alvarado Decl., Ex. A, ¶ 1. Second, he has established his lawful intent to remain in New Jersey by submitting his application for LPR status. Rodriguez Alvarado Decl. ¶ 8.[11]

Individuals with asylum can establish lawful intent to remain under federal law. First, according to official United States Citizenship and Immigration Service (USCIS) policy, asylum is one form of "lawful status," which means that individuals granted asylum are not "unlawfully present" for purposes of 8 U.S.C. § 1182(a)(9)(B).[12] *See* USCIS Adjudicator's Field Manual § 40.9(b)(1)(F)(ii), https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-17138/0-0-0-18383.html#0-0-0-1861 (last visited Dec. 23, 2016). In addition, asylees are authorized to work in the United States. *See* 8 U.S.C. § 1158(c)(1)(B). Indeed, certain male asylees must even register for the Selective Service. *See* Office of Refugee Resettlement, "Asylee Eligibility for Assistance and Services Through The Office of Refugee Resettlement,"

[11] A.S.R.'s parents also have demonstrated their intention that A.S.R. remain in New Jersey permanently by enrolling A.S.R. in school, Rodriguez Alvarado Decl. ¶ 5, pursuing his asylum case, *id.* ¶¶ 2-4, helping A.S.R. submit his application for LPR status, *id.* ¶ 8, and living with him in New Jersey since 2015, Compl. ¶ 156. Indeed, Ms. Rodriguez Alvarado intended for A.S.R. to live with his aunt in New Jersey even when Ms. Rodriguez Alvarado herself was threatened with deportation. *Id.* ¶ 113; Rodriguez Alvarado Decl. ¶ 7. *Cf. Martinez v. Bynum*, 461 U.S. 321, 332 n.14 (1983) (noting that "[i]n most cases . . . it is the intention of the parent or guardian on behalf of the child that is relevant.").

[12] Under 8 U.S.C. § 1182(a)(9)(B), noncitizens who have been unlawfully present in the United States for more than 180 days and then leave the United States face a bar to returning for three or ten years. *See* 8 U.S.C. § 1182(a)(9)(B). Because individuals who have been granted asylum are not unlawfully present, the time they spend in the United States does not count towards triggering these bars.

U.S. Dep't of Health and Human Services (2005), https://www.acf.hhs.gov/sites/default/files/orr/asyleeeligibility_english.pdf. Moreover, asylees may adjust status and become LPRs after one year of physical presence in the United States. 8 U.S.C. § 1159(b)(2).

Indeed, at least one other court has concluded that even a noncitizen applying for asylum may establish venue where the noncitizen resides. *See Flores v. United States*, 108 F. Supp. 3d 126, 129 (E.D.N.Y. 2015). The contrary oral decision upon which Defendant relies, *see* Tr. of Mot.'s Hr'g, *Aguilar v. United States*, No. 15-CV-986 (LMB/IDD) (E.D. Va. Feb. 26, 2016), while wrongly decided, as discussed below, concerned an asylum applicant rather than an individual with asylum. *See* Mem. Law. Supp. Def.'s Mot. to Dismiss, *Aguilar*, at 3 (No. 15-CV-986). A.S.R. has a much stronger claim to residence than did the plaintiff in that case. As an asylee soon eligible to become an LPR, A.S.R. is lawfully present and federal law imposes no limit on his ability to qualify as a domiciliary.

Additionally, several state courts in New Jersey have held that noncitizens can acquire domicile and residence despite their immigration status. In *Das v. Das*, the court found that a noncitizen satisfied domicile requirements, noting that her application for asylum was "compelling evidence" of her "intent to remain in this country indefinitely." 254 N.J. Super. 194, 198 n.6 (Super. Ct. Ch. Div. 1992). A.S.R.'s successful asylum application and pending application to obtain LPR status are similarly compelling evidence of his intent to remain.

Moreover, New Jersey is A.S.R.'s domicile because New Jersey law presumes a child's domicile to be that of his parents and, as set forth below, New Jersey is the domicile of A.S.R.'s mother. *See Somerville Bd. of Educ. v. Manville Bd. of Educ.*, 332 N.J. Super. 6, 12 (Super. Ct. App. Div. 2000), *aff'd*, 167 N.J. 55 (2001). However, A.S.R. can also independently establish domicile in the state. New Jersey courts have held that a child's presence and contacts with the

forum state may overcome the presumption that domicile follows from a child's parents. *See Shim v. Rutgers*, 191 N.J. 374, 379, 391 (2007) (a minor who attended high school in New Jersey, obtained a New Jersey driver's license, formed meaningful social relationships in the state, and expressed to others that she considered the state her home could be presumed a New Jersey domiciliary under an in-state tuition statute); *A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Auth.*, 427 N.J. Super. 389, 403 (Super. Ct. App. Div. 2012) (a U.S. citizen child who had lengthy and continuous residence in New Jersey met statutory residency and domicile requirements independently of her mother, who was an undocumented immigrant). Like the plaintiff in *Shim*, A.S.R. attends public school in New Jersey and has "forged several meaningful social relationships in and around the State." *Shim*, 191 N.J. at 379; Rodriguez Alvarado Decl. ¶ 5. He is surrounded by close family in his community, including two aunts, an uncle, and his eight first cousins. Rodriguez Alvarado Decl. ¶ 5. Thus, even if Ms. Rodriguez Alvarado were not domiciled in New Jersey, A.S.R. has demonstrated the contacts necessary to overcome the presumption that domicile flows from his parents' domiciliary status. *See also McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006) (noting evidence courts consider to determine domicile, including residence and location of family). For this reason, and those set forth above, A.S.R. is a resident of New Jersey for venue purposes.

B. *Ms. Rodriguez Alvarado Is Also Lawfully Domiciled in New Jersey and Therefore Can Establish Residence in New Jersey for Venue Purposes*

Plaintiff Suny Rodriguez Alvarado also lawfully resides in New Jersey. An immigration judge found that she "more likely than not" faces persecution in her country of origin if deported, Compl. ¶ 155, so the government may not remove her to Honduras. *See I.N.S. v. Cardozo Fonseca*, 480 U.S. 421, 423 (1987). By granting Ms. Rodriguez Alvarado withholding of

removal, the government satisfied its obligations under the Refugee Convention[13] not to return a noncitizen to a country where she faces persecution. *See* 8 U.S.C. § 1231(b)(3).

As someone who cannot be removed to her country of origin, can lawfully work in the United States, and lawfully enjoys other privileges in this country, Ms. Rodriguez Alvarado can establish a lawful intent to remain indefinitely in New Jersey. First, USCIS policy makes clear that individuals who have been granted withholding of removal are not unlawfully present in the United States for purposes of 8 U.S.C. § 1182(a)(9)(B). *See* USCIS Adjudicator's Field Manual § 40.9(b)(3)(K), *supra*. Second, federal laws and regulations treat individuals who have been granted withholding of removal consistently with the expectation that they will reside in the United States for lengthy periods of time, and may do so legally. For instance, individuals who have received withholding of removal are entitled to work authorization as one of several categories of "aliens authorized employment incident to status." 8 C.F.R. § 274a.12(a)(10). They are entitled to purchase subsidized health insurance using the federal marketplace created by the Affordable Care Act, because they are considered "lawfully present." *See* 45 C.F.R. § 152.2 (citing the definition of "qualified alien" in 8 U.S.C. § 1641); 42 C.F.R. § 600.5 (adopting the definition of "lawfully present" from 45 C.F.R. § 152.2 for the basic health programs established by the ACA). They can also be eligible for federal public benefits programs.[14] Indeed, when Congress restricted immigrant eligibility for various welfare programs in 1996, it nonetheless exempted individuals with withholding of removal from these restrictions. *See* Personal

[13] The United States has signed the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. This Protocol incorporates Articles 2 to 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. *See id.* art 1.

[14] These programs include social security and food stamps, 8 U.S.C. § 1612(a)(2)(A)(iii) and Medicaid, 8 U.S.C. § 1612(b)(2)(A)(i)(III).

Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 402(a)(2)(A)(iii), (b)(2)(A)(iii) 110 Stat. 2105, 2262, 2264; § 403(b)(1)(C), 110 Stat. at 2265 (maintaining benefits for those with withholding of removal along with other "refugees and asylees") (maintaining benefits for those with withholding of removal along with other "refugees and asylees").

The government argues that individuals who have received withholding of removal can be removed to countries other than those from which they fled persecution.[15] Def.'s Br. at 8. However, there are statutory limits on the countries to which noncitizens may be removed. *See* 8 U.S.C. § 1231(b)(1)-(2). It is difficult to remove someone who has received withholding of removal unless the person is a citizen, national, or resident of some other country. *See* Affidavit of Ira J. Kurzban, Ex. D, ¶ 18 ("Kurzban Aff.."). Ms. Rodriguez Alvarado does not have a claim to citizenship or legal status in any country other than Honduras – where the government cannot legally return her – and the United States. For a person in such a position to be removed after receiving withholding of removal would be unusual and extraordinary. *Id*.[16]

The government also emphasizes the oral decision of a Virginia district court judge, who decided that an asylum applicant was not a resident for venue purposes. *See* Def.'s Br. at 9-10 (citing *Aguilar v. United States*, No. 15-CV-986 (LMB/IDD), Dkt. Nos. 26, 28 (E.D. Va.)). That

[15] Likewise, the Third Circuit has described withholding of removal as a right not to be removed to a specific country, rather than an unqualified right to remain in the United States. *See Abdulai v. Ashcroft*, 239 F.3d 542, 545 (3d Cir. 2001). However, as described above, withholding of removal confers a wide range of benefits that demonstrate the government's expectation that individuals with withholding will reside in the United States indefinitely.

[16] Nor is it likely that conditions in Honduras will change so substantially as to permit Ms. Rodriguez Alvarado's safe return in the foreseeable future. Earlier this year, the U.S. State Department reported that Honduras has had "one of the highest murder rates in the world" since 2010. Bureau of Diplomatic Sec., *Honduras 2016 Crime & Safety Report*, U.S. Dep't of State (Mar. 14, 2016). *See also* Kurzban Aff. ¶ 17 (describing infrequency of removal on the basis of changed conditions).

decision is incorrect because asylum applicants, like those granted withholding of removal, are legally present in the United States and can establish a lawful intent to remain for domicile and venue purposes. *See Flores v. United States,* 108 F. Supp. 3d 126, 131 (E.D.N.Y. 2015). *Aguilar* is also clearly distinguishable from this case because Ms. Rodriguez Alvarado has already won her case for legal refuge and cannot legally be removed to her country of origin; thus her intent to remain does not depend on the outcome of any pending application.

In sum, Ms. Rodriguez Alvarado has permission from the federal authorities to live in the United States for the foreseeable future. Defendant's argument to the contrary notwithstanding, federal immigration law does not meaningfully restrict her intent to remain. Ms. Rodriguez Alvarado is domiciled in New Jersey under this state's laws and thus resides in New Jersey for venue purposes. This Court should deny the government's motion.

III. The Conveniences and Interests at Stake in this Case Make Transfer Inappropriate under 28 U.S.C. § 1404(a)

This Court should also reject the government's argument that the relative interests and conveniences of the parties support transfer. The government overstates the burdens that litigation in New Jersey would create, obscures the national immigration issues at stake in this case, and fails to account for the importance of Plaintiffs' choice of forum and the significant hardships transfer would cause. Under 28 U.S.C. § 1404, courts analyze both the private and public interests at stake to determine whether to transfer to the defendant's proposed forum. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). In making this assessment, "[t]he burden of establishing the need for transfer still rests with the movant," and "plaintiff's choice of venue should not be lightly disturbed." *Id.* (internal citation omitted). The government cannot meet its burden in this case, as neither the private nor public interest factors favor transfer. This Court should therefore deny Defendant's motion.

A. *The Private Interest Factors Favor This Forum Because Plaintiffs Have Chosen New Jersey and Texas Would Be Inconvenient for Plaintiffs and Many Witnesses*

In weighing the private interest factors, the Third Circuit considers:

> [1] plaintiff's forum preference . . . ; [2] the defendant's preference; [3] whether the claim arose elsewhere; [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 that the witnesses may actually be unavailable for trial in one of the fora; and [6] the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum).

Jumara, 55 F.3d at 879 (internal citations omitted). These factors counsel against transfer. First, the choice of forum analysis weighs strongly in favor of the Plaintiffs. Second, Plaintiffs' financial means, health, and commitments in New Jersey would make transfer extremely burdensome. Third, transfer is not required simply because operative facts happened elsewhere. Finally, the availability of witnesses weighs against transfer.[17]

i. Choice of Forum Analysis Strongly Favors Plaintiffs

As an initial matter, the Court must give significant weight to Plaintiffs' decision to file this lawsuit in the District of New Jersey. "[U]nless the balance is strongly tipped in favor of transfer, the plaintiff's choice of forum should not be disturbed." *Hardaway Constructors, Inc. v. Conesco Industries, Ltd.*, 583 F. Supp. 617, 620 (D.N.J. 1983) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). Further, this choice is "entitled to greater deference when a plaintiff chooses its home forum," as Plaintiffs have in this case. *Wm. H. McGee & Co., Inc. v. United Arab Shipping Co.*, 6 F. Supp. 2d 283, 289 (D.N.J. 1997) (internal citation and quotation marks omitted). Courts afford deference to a Plaintiff's choice of forum even where many of the

[17] Plaintiffs agree with Defendants that the availability of records is not decisive because the relevant documents stored in Texas detention facilities can be reproduced and transmitted electronically to this Court. *See* Def.'s Br. at 21. The strong possibility that relevant records are stored in facilities closer to New Jersey than Texas – such as the Department of Homeland Security's headquarters in Washington D.C. – also supports this conclusion.

operative facts took place elsewhere. *See Shutte v. Armco Steel Corp*, 431 F.2d 22, 25 (3d Cir. 1970) (giving deference to Plaintiff's forum choice even where the "accident did occur in the transferee district" because Plaintiff and her witnesses resided in the district where she filed suit).

In contrast, Defendant's preference "is entitled to considerably less weight." *EVCO Tech. & Dev. Co. v. Precision Shooting Equip., Inc.*, 379 F. Supp. 2d 728, 730 (E.D. Pa. 2005). A court should not grant a transfer motion if "transfer merely shifts the burden of litigating in a distant forum to the plaintiff," *NCR Credit Corp. v. Ye Seekers Horizon, Inc.*, 17 F. Supp. 2d 317, 322 (D.N.J. 1998), which, as explained below, is exactly what would occur were the Court to transfer this case.

ii. The Parties' Convenience Weighs in Favor of Trying the Case in New Jersey, Because of Plaintiffs' Financial Means, Health, and Commitments

Defendant seeks a transfer because indirect flights and the duties of Defendant's witnesses would make it "burdensome" to litigate the case in New Jersey, Def.'s Br. at 20, but Plaintiffs would face far greater burdens if forced to litigate this case in Texas. Plaintiffs' limited financial means, their responsibilities in New Jersey, A.S.R.'s need for medical care, and the considerable psychological and emotional harm that travel to Texas could inflict on Plaintiffs all make transfer to Texas inappropriate.

First, transfer would shift the financial burden of this case from the government to Ms. Rodriguez Alvarado and her son, whose financial means are extremely limited. Plaintiffs, as well as Mr. Sanchez (Ms. Rodriguez Alvarado's partner, A.S.R.'s father, and another key fact witness), recently arrived in the United States to seek asylum. Compl. ¶¶ 36-49. Mr. Sanchez works in construction in New Jersey, and Ms. Rodriguez Alvarado works in a clothing warehouse. Rodriguez Alvarado Decl., Ex. A, ¶¶ 10-11. Together, they make up to $500-600 a

week, and sometimes much less, to support their five-person family. *Id.* ¶ 12. They lack the financial resources to travel to and live, for the duration of the trial, in Texas, away from their jobs. Thus, this factor also weighs heavily against transfer. *See Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 338 (D.N.J. 2003); *Flores v. United States*, 142 F. Supp. 3d 279, 289 (E.D.N.Y. 2015) (denying transfer to Texas in CBP detention case in part because Plaintiff had "virtually no financial means.").

Second, transfer could cause Plaintiffs to suffer psychological harm by requiring them to return to the state where they suffered the harms at the heart of this case. While in government detention, the Plaintiffs experienced profound psychological trauma induced by CBP and ICE harassment, threats to deport Plaintiffs, and ICE's attempt to forcibly separate Ms. Rodriguez Alvarado and her son. Ms. Rodriguez Alvarado has since undergone an extensive psychiatric evaluation, and the evaluating psychiatrist concluded that being forced to litigate this case in Texas could re-trigger and worsen her trauma-related mental health symptoms, including panic attacks. Casoy Decl., Ex. C, ¶ 24. Ms. Rodriguez Alvarado herself has noted that returning to Texas, the site of experiences that are "painful to remember," would cause her to recall the trauma of her detention and would "be like returning to everything [she has] lived through before." Rodriguez Alvarado Decl. ¶ 13. Separately, a psychiatrist who diagnosed A.S.R. with separation anxiety disorder and post-traumatic stress disorder concluded that transfer to Texas could exacerbate A.S.R.'s mental health issues. Posner Decl., Ex. B, ¶ 19. Thus, psychiatric experts concur that a physical return to Texas to litigate this case may in and of itself trigger traumatic memories and painful symptoms of PTSD.

Finally, the two central figures in this case, Ms. Rodriguez Alvarado and A.S.R., are a mother and child for whom litigation in Texas would pose serious difficulties: Ms. Rodriguez

Alvarado has two children in addition to A.S.R. to care for, and A.S.R. is a nine-year old child in elementary school. Rodriguez Alvarado Decl. ¶¶ 1, 9. Requiring them to travel to Texas would be impractical. In addition, A.S.R., who has asthma, requires frequent medical attention. Id. ¶ 9. The significant burdens transfer would impose on Plaintiffs weigh strongly against transfer.

iii. Where the Claim Arose Is Not Dispositive and Does Not Require Transfer

Although the claims in this case largely arose in Texas, courts will often decline to transfer cases even where the operative facts took place elsewhere. *See, e.g.*, *Shutte*, 431 F.2d at 25 (reversing a decision to transfer where the operative facts took place in Missouri but Plaintiff and her witnesses were in Pennsylvania); *Flores*, 142 F. Supp. 3d at 291 (declining to transfer to Texas for tort claims involving CBP detention in Texas); *Yocham v. Novartis Pharmaceuticals Corp*., 565 F. Supp. 2d 554, 555 (D.N.J. 2008) (declining to transfer to Texas where plaintiff's injury occurred in Texas, but defendant's corporate offices were in New Jersey); *Carroll v. Texas Instruments, Inc.*, 910 F. Supp. 2d 1331, 1334, 1340-41 (M.D. Ala. 2012) (declining to transfer a case where the operative facts took place elsewhere, but the plaintiff was elderly man with cancer who took care of his son's family). Further, in this case, some operative facts took place in New Jersey. A.S.R.'s aunt was in New Jersey while the Plaintiffs were in detention and sought to take custody of A.S.R. while he was in detention in Texas. *See* Compl. ¶ 113. Thus, as in the cases cited above, the fact that operative facts took place outside this district is not a sufficient ground for transfer, and the Court should deny the government's motion.

iv. The Convenience of Fact and Expert Witnesses Strongly Favors the Plaintiffs' Choice of Forum

While the convenience of material, non-party witnesses may be considered, the government identifies only the Corrections Corporation of America (CCA) as such a witness,

and fails to identify individual employee witnesses or provide any concrete reason why the employees would not be available for trial. Defendant has therefore failed to meet its burden to provide: "(1) the particular witness to whom the movant is referring; (2) what that person's testimony might have to do with a trial in this case; and (3) what reason there is to think that the person will 'actually' be unavailable for trial (as opposed to the proffer of a guess or speculation on that front)." *Papst Licensing GmbH & Co. KG v. Lattice Semiconductor Corp.*, 126 F. Supp. 3d 430, 441 (D. Del. 2015); *see also* 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3851 (4th ed. 2016).

Instead of providing the required information, Defendant asserts only that this court cannot compel Texas-based CCA employees to testify in New Jersey, Def.'s Br. at 20-21. The Court should not give any weight to this bare allegation. *See Yocham*, 565 F. Supp. 2d at 554, 558 (declining to transfer to Texas where "Defendant . . . adduced no evidence that any of [these] out-of-state witnesses would be unwilling to come voluntarily to [this District]" (internal quotation marks omitted) (alterations in original)).

Unlike the government, Ms. Rodriguez Alvarado and A.S.R. have identified specific witnesses who will be inconvenienced by a transfer to Texas, and the reasons for those inconveniences. First, A.S.R.'s aunt, Lourdes Sanchez, resides in New Jersey, Rodriguez Alvarado Decl. ¶¶ 5, 7, and is likely to testify as a fact witness in this case concerning her efforts to help secure A.S.R.'s release. "Fact witnesses who possess first-hand knowledge of the events giving rise to the lawsuit . . . have traditionally weighed quite heavily in the 'balance of convenience' analysis." *Affymetrix, Inc. v. Synteni, Inc.*, 28 F. Supp. 2d 192, 203 (D. Del. 1998). Second, Dr. Flavio Casoy, a psychiatrist whose testimony is likely to be crucial to establishing the mental anguish and emotional distress Ms. Rodriguez Alvarado experienced, would likely be

unable to testify if this case were transferred to Texas. *See* Casoy Decl. ¶ 25. He therefore falls within the category of expert witnesses whose convenience may be considered in a motion to transfer. *See Robinson v. Air & Liquid Sys. Corp.*, 11-CV-4078, 2014 WL 3735338, at *2 n.4 (D.N.J. July 28, 2014) (noting that "the convenience of the witnesses (including expert witnesses) is only relevant to the extent the witness is unavailable in the relevant forums"). The convenience for third-party witnesses thus weighs against transfer.

B. *The Public Interest Factors Weigh in Favor of Proceeding Before this Court*

Just as the private interest factors weigh against dismissal or transfer of this case, so too do the public interest factors. Under Third Circuit case law, 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.

Jumara, 55 F.3d at 879-80. Here, the relevant factors weigh against transfer. Practical considerations do not favor transfer, national issues in this case far outweigh local interests and policies, and the transferee court's familiarity with controlling case law is less important where, as here, the state law to be applied is not complex.[18]

i. Practical Considerations Do Not Weigh in Favor of Transfer

Defendant asserts that transfer is appropriate because a few allegedly similar cases have been transferred to Texas and because litigation in this Court would create a "substantial burden on the Government" and affect ICE and CBP's public functions. Def.'s Br. at 12-13. However, the government glosses over the "similar" nature of each case involving detention issues, does not consider measures that could significantly ease any burden associated with litigating in New

[18] Plaintiffs agree with Defendants that factors (1) and (3) are neutral. *See* Def.'s Br. at 12 n.6.

Jersey, and does not acknowledge the burden that even litigation in Texas would pose for the government.

First, the government repeatedly contends that "Texas's familiarity with similar cases" justifies transfer to Texas, citing three "similar" cases. Def.'s Br. at 11, 13. However, Defendant misapprehends the key interest that courts seek to vindicate when transferring "similar" cases: conservation of judicial resources by avoiding duplicative fact-finding. In each case that Defendant cites in support of its argument, courts transferred the case because the fact-finding in one case would resolve issues in another relevant case. For example, in *CIBC World Markets v. Deutsche Bank Securities, Inc.*, the court noted that the "[r]esolution of [plaintiff's] claims will no doubt require findings of the same or similar facts as will be required for resolution of the claims in the … Complaints [in the other federal district]." 309 F. Supp. 2d 637, 651 (D.N.J. 2004); *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) (transferring a case because it involved the same business scheme, the "same subject," and even some of the same parties as the relevant cases in the transferee district). The cases the government identifies as similar to the current suit, *see* Def.'s Br. at 11, 13, involve unique allegations of neglect, abuse, and mistreatment that require particularized fact-finding, discovery, witnesses, and trials. Thus, transferring this case will not conserve judicial resources by allowing a district to combine consideration of similar legal issues or facts. Further, Plaintiffs here have pleaded unique facts regarding the coercion they suffered in ICE family detention, which are not at issue in any of these transferred cases.

Second, Defendant argues that litigation in New Jersey would greatly burden the government because ICE and CBP witnesses would need to take indirect flights to New Jersey, causing expense to taxpayers. Def.'s Br. at 12-13. But the government knows that even if the

case proceeds in New Jersey, the parties can conduct depositions of defense witnesses in Texas or, if necessary, via video-conferencing technology.[19]

Third, Defendant fails to address the difficulties that ICE and CBP employees would face even if the case were not transferred. The government seems to suggest transfer to the small, three-judge McAllen Division of the Southern District of Texas. *See* Padilla Dec., ECF No. 17-3 ¶ 12. But this Division is located 3 1/2 to 4 hours away from the location of Defendant's expected ICE witnesses in Dilley and San Antonio.[20] *See* Google Maps, Directions from San Antonio, Texas to McAllen, Texas (accessed Dec. 23, 2016), https://goo.gl/maps/Av8RahbWVNB2; Google Maps, Directions from Dilley, Texas to McAllen, Texas (accessed Dec. 23, 2016), https://goo.gl/maps/ESNgW5Yy4Ax. Thus, even a trial in Texas could require at least two days away (one for travel, one for testimony) for many of Defendant's testimonial witnesses, compared to three days in New Jersey. In sum, the government overstates the practical advantages of a transfer to Texas.

Finally, while Plaintiffs acknowledge the government is best situated to assess personnel capacity, Defendant's assertions should be placed in context. CBP had over 17,500 Border Patrol officers in the Southwest border region in 2015. United States Border Patrol, Border Patrol Agent Staffing by Fiscal Year (2015), https://www.cbp.gov/document/stats/us-border-patrol-fiscal-year-staffing-statistics-fy-1992-fy-2015. CBP is well equipped to allow a few officers to

[19] Video-conferencing technology is a well-established and accepted practice in this district for both depositions and testimony. *See, e.g.*, *DiNenno v. Lucky Fin Water Sports, LLC*, 837 F. Supp. 2d 419, 421 n.2 (D.N.J. 2011) (noting that one of the defendants testified at trial via videoconference).

[20] Meanwhile, at least one potential witness, ICE Counsel Paul Nishiie, *see* Compl. ¶ 116, as well as other potential supervisory witnesses, *see id.* ¶¶ 189-201, are located in Washington D.C., much closer to New Jersey than to anywhere in Texas, let alone McAllen.

testify for a day or two regarding allegations of mistreatment at their hands, especially since Plaintiffs are permitted by statute to establish venue where they reside. *See* 28 U.S.C. § 1391(e).

ii. Local Interests and Policies Are Irrelevant

In seeking dismissal or transfer, the government further argues that this cases touches upon "local" interests best addressed by a court in Texas. Def.'s Br. at 14. But contrary to Defendant's assertions, this case does not involve local interests or controversies, but rather involves issues of national importance, such as federal law and policy regarding the treatment of families in immigration detention. These topics concern immigrant communities across the country, repeatedly provoke national interest, and are precisely the type of issues that the government itself has emphasized are not suited for local decision.

First, this case does not present a localized controversy. Ms. Rodriguez Alvarado and A.S.R. were held in federal detention facilities and subject to mistreatment by federal officers in violation of federal policies, laws, and injunctions.[21] *See, e.g.*, Compl. ¶¶ 10-35, 74-82 (citing federal laws, court cases, and policies at issue in this case); *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016) (noting that family detention cases "touch on matters of national importance"). Furthermore, the treatment and prolonged detention of asylum-seeking families has garnered national attention and prompted public statements from high-level DHS officials.[22] In fact, this very case has provoked press coverage far from Texas. *See, e.g.*, Tim Darragh, *Honduran Family Sues Feds Over Immigration Detention and Treatment*, N.J.com, Aug. 19, 2016,

[21] Although these facilities were managed by private contractors, they were still ICE facilities, and Plaintiffs were in ICE custody. *See* Compl. ¶¶ 133-37 (citing the contract between ICE and the private contractor managing the detention facility).

[22] *See, e.g.*, DHS Press Release, Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations (July 10, 2014), ECF No. 1-8; Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. Times, Feb. 4, 2015 (Magazine).

http://www.nj.com/news/index.ssf/2016/08/honduran_family_sues_feds_over_immigration_detenti.html.

Second, the government's argument that this case involves local issues is belied by the fact that the government routinely presents immigration to the federal courts as an issue of national concern subject to exclusive control by the federal government. *See Arizona v. United States*, 132 S. Ct. 2492 (2012). Indeed, Defendant argued in *Arizona* that "it is the National Government that has ultimate responsibility to regulate the treatment of aliens while on American soil, because it is the Nation as a whole—*not any single State*—that must respond to the international consequences of such treatment." Br. for the Resp't at 13-14, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (emphasis added). In *Arizona*, the government rejected any role for the states in deciding immigration policy. Just as Defendant argued in that case, the present case "touches numerous national concerns: protecting the Nation's security and borders, foreign relations, humanitarian considerations, and justly administering the INA with respect to both citizens and aliens." *Id.* at 19. Viewed through the lens of the government's stated position in *Arizona*, this Court should give little weight to the government's claim that Texas has a special "interest" in this case.

Finally, the Defendant cites inapposite cases in an attempt to demonstrate that this is a local controversy. Nearly all the cited cases involve disputes between private business parties or consumers that touch upon state policies, none of which are at issue in this case.[23]

[23] *See Gray v. Apple Inc.*, No. 13-CV-7798, 2016 WL 4149977 (D.N.J. Aug. 3, 2016) (tort and discrimination suit); *Janosko v. United of Omaha Life Ins. Co.*, No. 16-CV-1137, 2016 WL 4009818 (D.N.J. July 25, 2016) (insurance dispute); *In re JAMS Nos. 1340007979, 1340007982*, No. 14-CV-524, 2015 WL 1954457 (D.N.J. Apr. 29, 2015) (arbitration award dispute); *ESP Shibuya Enter., Inc. v. Fortune Fashion Indus.*, No. 08-CV-3992, 2009 WL 1392594 (D.N.J. May 15, 2009) (trademark infringement suit).

iii. No Court's Familiarity with Controlling Case Law Favors Transfer Because Texas Tort Law Is Not Complex and This Case Also Concerns Important Federal Law Issues

Finally, given that the state law at issue in this case involves only basic tort law, this Court should reject Defendant's argument that transfer is needed due to the expertise of Texas federal judges regarding Texas state tort law. *See, e.g.*, *Yocham,* 565 F. Supp. 2d at 560 ("Disturbing Plaintiff's choice of forum in order to spare this Court the trouble of interpreting Texas law is simply not called for here."); *Flores*, 142 F. Supp. 3d at 290 ("Plaintiff's state law tort claims, which sound in common law negligence, are not complex. The court can ascertain Texas law with help from counsel.").

Furthermore, many of the key legal questions in this case will involve federal laws such as 8 U.S.C. § 1226 (the INA's detention section),[24] federal court injunctions, *e.g.*, Compl. ¶¶ 23-26, and federal policies such as CBP's Hold Rooms Policy and ICE's Family Residential Standards, *see* Compl. ¶¶ 75-80, 136, 146, 151. This Court is just as well-suited to address these federal questions as is any federal court in Texas.

CONCLUSION

For the foregoing reasons, this Court should deny Defendant's motion. The District of New Jersey is both a proper and convenient forum for Plaintiff's case.

[24] Courts in the Third Circuit, including this Court, frequently review cases involving this provision. *See, e.g.*, *Jones v. Aviles*, 15-CV-4819, 2016 WL 3965196, at *3 (D.N.J. July 21, 2016); *Kudishev v. Aviles*, No. 15-CV-2545, 2015 WL 8681042 (D.N.J. Dec. 10, 2015).

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CERTIFICATE OF SERVICE

I hereby certify that, on December 23, 2016, a copy of the foregoing Memorandum in Opposition to Defendant's Motion to Dismiss and/or Transfer and supporting exhibits were filed electronically. Notice of this filing will be sent by email to all parties by operation of the court's electronic filing system as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

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