No. __-_____

In the Supreme Court of the United States

SEAN GASKIN, *ET AL.*,

***PETITIONERS*,**

v.

STEPHEN MAY, *ET AL.*,

***RESPONDENTS*.**

ON PETITION FOR WRIT OF *CERTIORARI* TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Seeking damages for malicious prosecution and false imprisonment in Barbados, petitioners invoked ancient causes of action for which federal officers were historically not immune. In dismissing the suit under sovereign immunity, the lower courts relied on two liberalizing 20th-century statutes: the Federal Tort Claims Act of 1946 (FTCA) and the District of Columbia Court Reorganization Act of 1970 (DCCRA).

First, under 28 U.S.C. § 2679(b)(1) and *United States v. Smith*, 499 U.S. 160 (1991), the lower courts found respondents immune from suit. As *Simmons v. Himmelreich*, 578 U.S. 621, 627-28 (2016), recognized, however, the *Smith* line of cases fails to recognize that the *entire FTCA*—including § 2679(b)(1)'s exclusivity clause from the FTCA's 1988 "Westfall" amendment—does not apply when one of FTCA's exemptions apply. The FTCA neither authorizes nor bars suit here.

Second, under its 1801 enabling legislation, the District Court for the District of Columbia had common-law powers, including the power to create torts and causes of action, even against federal actors. In devolving local authority to the District's state-like court system, the DCCRA neither transferred that historic power *vis-à-vis* federal actors nor repealed it *sub silentio*, leaving the District Court able to create torts and causes of action against federal agents.

The questions presented are:

1. Whether FTCA's 1988 "Westfall" amendment created immunity that did not previously exist, thus displacing non-FTCA actions that do not rely on the FTCA or on its waiver of sovereign immunity.

2. Whether DCCRA repealed the District Court's power to create federal torts and causes of action.

PARTIES TO THE PROCEEDING

Petitioners are Sean Gaskin, John Scantlebury, and the Estate of Frederick Christopher Hawkesworth, who were plaintiffs in district court and appellants in the court of appeals.

Respondents are Stephen May, Jodi L. Avergun, Paul M. O'Brien, Christopher A. Wray, Gordon Patten, Jr., Kenneth A. Blanco, Arthur Wyatt, Alice S. Fisher, Lanny Breuer, John D. Ashcroft, Alberto Gonzales, Michael B. Mukasey, Eric H. Holder, Jr., John Does 1-20, and the United States of America, who were defendants in district court and appellees in the court of appeals.

RULE 29.6 STATEMENT

Petitioners have no parent companies, and no publicly held company owns 10 percent or more of their stock.

RELATED CASES

The following cases relate directly to this case for purposes of this Court's Rule 14.1(b)(iii):

- *Gaskin v. May*, No. 1:15-cv-0032-EGS (D.D.C.). Filed Jan. 8, 2015; dismissed May 4, 2020.
- *Gaskin v. May*, No. 1:15-cv-0033-EGS (D.D.C.). Filed Jan. 9, 2015; decided Feb. 27, 2023.
- *Gaskin v. May*, No. 23-5124 (D.C. Cir.). Filed May 30, 2023; decided Oct. 19, 2023.
- *United States v. Hawkesworth*, No. 1:04-cr-0285-EGS (D.D.C.). Filed May 19, 2004; decided June 21, 2018.
- *United States v. Scantlebury*, No. 18-3043 (D.C. Cir.). Filed July 5, 2018; decided Apr. 16, 2019.
- *United States v. Scantlebury*, No. 19-528 (U.S.). Filed Oct. 18, 2019; decided Nov. 25, 2019.

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PETITION FOR WRIT OF *CERTIORARI*

Petitioners respectfully ask this Court to review the lower court's dismissal of their tort claims for false imprisonment in Barbados caused by various federal agents and officers' malicious prosecution of them and two Guyanese co-defendants in connection with drug trafficking in 2004. The United States substituted for the federal agents and officers (collectively, the "Government") pursuant to 28 U.S.C. § 2679(d) of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA"), but the *entire FTCA* does not apply because petitioners' injuries arose abroad. 28 U.S.C. § 2680(k). Instead, petitioners seek to sue under either diversity jurisdiction, 28 U.S.C. § 1332(a), and Barbadian law or under a federal tort and cause of action within the unique power that the District Court for the District of Columbia has under its enabling legislation, Organic Act of 1801, Ch. 15, §§ 1-5, 2 Stat. 103, 104-06, to create torts and cause of action against federal actors. Significantly, suing officers of the federal government for false imprisonment is part of our English common law heritage, *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774), as is the demand that *some court* have cognizance: "if there is no other mode of trial, that alone will give the King's courts a jurisdiction." *Id.* at 1028. Petitioners' claims are not new. They are as old as the Republic.

Petitioners divide from the lower courts and respondents on the effect of two liberalizing 20th-century statutes on the ancient relief petitioners seek: (1) the Federal Torts Claims Act of 1946, ch. 753, 60 Stat. 842, and (2) the District of Columbia Court Reorganization Act of 1970, PUB. L. NO. 91-358, 84 Stat. 605 ("DCCRA"). Neither statute carries the weight that the lower courts and respondents place on

it to prevent suit in 2024:

- *In 1924*, before both the FTCA's and the DCCRA's enactment, petitioners could have brought this action under diversity jurisdiction and Barbadian law.
- Indeed, *in 1824*, petitioners could have sued in the District Court, which would have recognized the *Mostyn* false-imprisonment tort under English common law, as the common law of Maryland, adopted as the common law of the District Court.[1]

The new statutes did nothing to constrict federal jurisdiction for petitioners' claims that have existed for almost the entirety of our national existence.

OPINIONS BELOW

The District of Columbia Circuit's unreported *per curiam* order is reprinted in the Appendix ("App.") at 1a. The district court's unreported Memorandum Opinion is reprinted at App. 3a.

JURISDICTION

On October 19, 2023, the District of Columbia Circuit issued a *per curiam* order affirming the district court's dismissal. The Circuit Justice granted an application to extend the time within which to petition for a writ of certiorari to March 17, 2024. *In*

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[1] *See* Organic Act of 1801, Ch. 15, § 1, 2 Stat. at 104-05 (adopting Maryland's common law); *Baltimore Sun Co. v. Mayor & City Council of Baltimore*, 359 Md. 653, 661 (2000) ("the rules of the common law of England were adopted as the principles which were to direct the proceedings of the provincial government, whether legislative or judicial") (interior quotations and alterations omitted); *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 614 (1838) ("common law, as it was in force in Maryland when the cession was made, remained in force in this district").

re Gaskin, No. 23A633 (Jan. 11, 2024). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332(a), 1367, and the District Court's common law and equity jurisdiction from its enabling legislation. The District of Columbia Circuit had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out at App:62a-66a.

STATEMENT OF THE CASE

Even assuming for the sake of argument that the Government believed its indictment when issued in 2004, the Government's pursuit of petitioners through the dismissal of the criminal charges in January of 2014 became knowingly false and malicious at some point between 2007 and 2008. That makes the 2011 effort to revoke bail and to incarcerate petitioners pending extradition unconscionable. Even worse, the Government decided to dismiss the sealed charges at some point between Mr. Gaskin's waiving extradition on November 13, 2013, and the Government's sealed motion to dismiss on Christmas Eve, but the Government did not notify Barbados of the change until after the District Court granted the sealed motion to dismiss. Worse, the Government's sealed motion did not advise the district judge that the three men were incarcerated pending extradition, causing further unconscionable delay of their release. Such mistreatment has been a tort since the dawn of the Republic, and neither the FTCA nor the DCCRA did anything to change that.

I. FACTUAL BACKGROUND

For purposes of the Government's motion to

dismiss, the factual background consists of well-pled facts alleged in the complaint, which also "embrace those specific facts that are necessary to support the claim." *Bennett v. Spear*, 520 U.S. 154, 168 (1997). The facts are summarized below.

A. The 2004 Indictment.

On September 20, 2003, U.S. Immigration and Customs Enforcement and DEA interdicted a 184-kilogram shipment of cocaine at John F. Kennedy ("JFK") airport in New York. On or about November 11, 2003, the federal government arrested 25 people—who were eventually convicted—in connection with the 184-kilogram JFK cocaine shipment.

On or about May 19, 2004 (*i.e.*, between the JFK interdiction and the arrest of the people responsible for the JFK shipment), in No. 1:04-0285-EGS filed under seal, the United States charged petitioners and two other men—Raphel Douglas and Terrence Sugrim of Guyana—with distribution of cocaine and conspiracy to distribute cocaine in connection not only with the 184-kilogram JFK shipment but also with an alleged two-kilogram sale in Barbados that allegedly was intended for distribution to the United States.

On June 17, 2004, a federal grand jury for the District of Columbia returned a two-count indictment based on—and superseding—the criminal complaint filed on May 19, 2004: (1) Count I alleges the major cocaine action into JFK against all five defendants; and (2) Count II alleges a two-kilogram transaction in Barbados against only Douglas and Hawkesworth.

B. Revelations in 2007.

Trinidad and Tobago extradited Mr. Douglas to stand trial in No. 1:04-0285-EGS in the United States, where he was held pending the extradition of his co-

defendants. During the pre-trial proceedings in No. 1:04-0285-EGS, Mr. Douglas through counsel identified several false statements in the affidavits that the United States used to support indictment, arrest, and extradition in No. 1:04-0285-EGS. Based on these discrepancies, on February 13, 2007, the presiding judge in No. 1:04-0285-EGS directed counsel for the United States to produce Mr. May as a witness: "I want to hear from him under oath why he made those misstatements … [a]nd I suggest he bring his attorney also."

Instead of taking that route, on or about February 20, 2007, acting through the same DOJ lawyers and officials, the United States filed No. 1:07-cr-0137-RJD (E.D.N.Y.) against Messrs. Douglas, Hawkesworth, and Sugrim—but not against Messrs. Gaskin and Scantlebury—in the U.S. District Court for the Eastern District of New York.

Because No. 1:04-0285-EGS was sealed as to all defendants except Mr. Douglas, Plaintiffs did not know—when they filed this action—whether charges still are pending against them in No. 1:04-0285-EGS or in another action—sealed or otherwise—elsewhere.

C. Government Admissions in 2008.

In the Douglas proceedings in New York, the Government admitted that it had fully resolved the 184-kilogram JFK interdiction: "I did find out that they made a … mass arrest. It was an ongoing investigation, building the case. And eventually they arrested everyone that was involved in that." Hearing Tr., at 125, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (Dec. 17, 2007). Douglas pleaded guilty to one count of the telephony-related charges against him, and the Government dismissed the remaining

charges against him. As part of the process of seeking court approval, the Government acknowledged the narrow range of the issues in question:

> The case boils down to the testimony of an informant, who can be skillfully impeached by the defense. At bottom, the case involves only two kilograms of cocaine. And though there were some hazy conversations between the [informant] and Hawkesworth about other deals, in the final analysis the case is about two kilograms of cocaine.

U.S. Plea Defense, at 5 (App:81a). Significantly, Messrs. Gaskin and Scantlebury were not charged in the two-kilogram count of the indictment.

D. Revocation of Bail in 2011.

On or about May 27, 2004, a private Barbadian solicitor first appeared on behalf of the United States in the United States' extradition-related proceedings in Barbados. Those court proceedings continued through at least December 27, 2012, and other extradition-related, habeas corpus, and bail-related proceedings continued in Barbados at least through November 13, 2013. On or about June 9, 2011, Barbados remanded Plaintiffs to prison awaiting extradition.

E. Incarceration through November 2013.

Plaintiffs were held under maximum security conditions in solitary confinement, held in a single cell for 23 or more hours per day, with no contact with other prisoners. The cells had no toilet or washing facilities, and Plaintiffs had to use of a bucket—which they could empty whenever they were allowed out—as a toilet. All Plaintiffs lost weight and suffered both mentally and physically. Plaintiffs were allowed

weekly visits, but Plaintiff Gaskin had no family in Barbados and so saw hardly anyone. While Plaintiffs were incarcerated, their respective businesses suffered or failed without each Plaintiff to tend to his business's ongoing affairs.

Throughout this time, the United States sought petitioners' extradition and incarceration pending extradition, notwithstanding the Douglas proceedings in New York.

On or about November 15, 2013, upon deciding that he might be treated better in a federal detention facility managed by the United States and that he could seek the dismissal of the charges wrongly brought against him, Mr. Gaskin formally waived extradition so that he could come to the United States to face those charges. (On or about April 4, 2013, Mr. Gaskin had orally volunteered to waive extradition, but the Barbadian judge advised him to speak with his lawyers and to put the request in writing.)

F. Incarceration through January 2014.

On December 24, 2013, the United States filed a matter-of-fact motion to dismiss without disclosing key facts (*e.g.*, the defendants were incarcerated, that one had waived extradition to stand trial) after having admitted that other people did the major crime alleged at JFK, leaving *no crimes* alleged against Messrs. Gaskin and Scantlebury. Although the United States was in active extradition litigation against petitioners in Barbados where all parties had counsel, petitioners did not have counsel in the United States criminal action, which remained under seal.

The United States did not serve petitioners with the motion to dismiss through counsel or otherwise. Not having been alerted that the sealed motion was

urgent in the sense that each day's delay causes a new day of unnecessary incarceration, the district judge did not resolve the motion to dismiss for two weeks.

II. LEGAL BACKGROUND

Several legal issues underlie petitioners' claims.

A. Diversity Jurisdiction.

Federal courts have diversity jurisdiction for suits "between … citizens of different States," 28 U.S.C. § 1332(a)(1), which this Court has read to "require complete diversity between all plaintiffs and all defendants." *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005). Here, all plaintiffs reside in Barbados, and all defendants reside in various states of the United States. App:71a-73a. Like the common law tort of false imprisonment under *Mostyn*, diversity jurisdiction has been a part of federal law from the outset: "Congress first authorized the federal courts to exercise diversity jurisdiction in the Judiciary Act of 1789[.]" *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990) (citing Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78).

B. Choice of Law.

Federal courts sitting in diversity jurisdiction for cross-border cases must determine which jurisdiction's law to apply, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 709 (2004) (citing RESTATEMENT (SECOND) OF TORTS § 145). As *Sosa* explained, the states' choice-of-law tests differ, and—whatever the test—can end up picking foreign law. *Id.*; *accord Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4-5 (1975) (federal court sitting in diversity in Texas must decide between the laws of Texas and those of Cambodia based on Texas choice-of-law principles). Under

diversity jurisdiction, this Court would follow the District of Columbia's choice-of-law rules, *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941); *Semler v. Psychiatric Institute of Washington, D.C.*, 575 F.2d 922, 926 (D.C. Cir. 1978).

The District of Columbia applies the "governmental interest analysis" approach, *Moore v. Ronald Hsu Construction Co., Inc.*, 576 A.2d 734, 737 (D.C. 1990); *Stutsman v. Kaiser Foundation Health Plan*, 546 A.2d 367, 372-73 (D.C. 1988), looking to the "the factors enumerated in the Restatement, § 145 … to assist in identifying the jurisdiction with the 'most significant relationship' to the dispute." *Hercules & Co. v. Shama Rest. Corp.*, 566 A.2d 31, 40-41 (D.C. 1989). While the *federal government* may have an interest in this matter, the *District of Columbia* has no interest whatsoever in how Barbadian citizens or residents are treated in Barbados based on federal officers' tortious conduit in the United States or in Barbados. Under that view, petitioners could state a claim for damages under Barbadian law, which—as Commonwealth law—has recognized tort suits for false imprisonment for 250 years under *Mostyn*.

C. Westfall Act.

Notwithstanding the remedy and waiver of sovereign immunity that Congress provided in the FTCA, this Court held in 1988 that plaintiffs could sue federal employees in their personal capacities for state common law torts unless the employees' actions were both "within the scope of their employment" and involved an exercise of governmental discretion. *Westfall v. Ervin*, 484 U.S. 292, 295-300 (1988). Acting quickly, Congress abrogated *Westfall* in the Federal Employees Liability Reform and Tort Compensation

Act of 1988, PUB. L. NO. 100-694, 102 Stat. 4563 ("Westfall Act"). The Westfall Act amended the FTCA to make the FTCA the exclusive remedy for most wrongful acts committed by federal employees within the scope of their employment. 28 U.S.C. § 2679(b)(1).

D. Organic Act of 1801 and District of Columbia Court Reorganization Act

As explained in the complaint, App:73a, Congress gave *this* District Court common-law powers in 1801. As explained in Section II.B, *infra* Section II.B, *infra*, Congress has never taken that power away *vis-à-vis* federal actors.

Unique among federal district courts, the District Court's enabling legislation provided not only the powers of a federal district court but also common law powers: "The district court for the District of Columbia has a general equity jurisdiction authorizing it to hear the suit," although the "District of Columbia court may also exercise the same jurisdiction of United States district courts generally." *Stark v. Wickard*, 321 U.S. 288, 290 & n.1 (1944). This unique power derives from the court's enabling legislation. Act of Feb. 27, 1801, § 5; 2 Stat. at 106; *Peoples v. Dep't of Agriculture,* 427 F.2d 561, 564-65 (D.C. Cir. 1970); *Ganem v. Heckler,* 746 F.2d 844, 851 (D.C. Cir. 1984). The current statute confers the same jurisdiction as that on which the *Peoples* court relied. *Compare* D.C. CODE § 11-501 *with* D.C. CODE § 11-521 (1967). Both versions grant this Court "any other jurisdiction conferred *by law*" in addition to "jurisdiction as a

United States district court."[2]

In 1970, Congress devolved authority over local matters to a local "state-like" court system in the District of Columbia Court Reorganization Act of 1970, PUB. L. NO. 91-358, 84 Stat. 605 ("DCCRA"). The DCCRA is silent over what happened to the District Court's pre-DCCRA authority over federal actors. Significantly, if the District Court retains its pre-DCCRA common law powers *vis-à-vis* federal actors, the District Court here could do what this Court has held the other district courts cannot: namely: "flesh[] out the remedies available for a common-law tort." *Hernandez v. Mesa*, 140 S.Ct. 735, 742 (2020), such as fashioning remedies like the constitutional tort in *Bivens v. Six Unknown Fed'l Narcotics Agents*, 403 U.S. 388 (1971).

REASONS TO GRANT THE WRIT

The petition raises important issues of federal officers' immunity for tortious actions abroad and the unique common law authority given to the United States District Court for the District of Columbia in 1801. This Court should grant the writ of *certiorari* for at least four reasons.

1. The Judiciary Act of 1789 provided diversity jurisdiction, allowing foreigners whom federal actors injured abroad to seek sue in our courts. In waiving sovereign immunity for federal actors' *domestic* torts, the FTCA did nothing to displace that ancient remedy. Indeed, in *Simmons v. Himmelreich*, 578 U.S. 621, 627-28 (2016), this Court recognized that its pre-*Simmons* decisions on the scope of FTCA exclusivity

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[2] The "law" expressly conferring this Circuit's District Court with "general jurisdiction in law and equity" dates to the 1801 enabling legislation. *Kendall*, 37 U.S. (12 Pet.) at 625.

under the Westfall Act failed to consider that—when an FTCA exemption applies (*e.g.*, if injury arises abroad)—the *entire FTCA* does not apply. *See* Section I, *infra.*

2. The District Court's 1801 enabling legislation created it as not only an Article III federal district court but also as a common law court with the power to create torts and causes of action, including ones against federal actors. In devolving authority for local matters to the local court system, the DCCRA did not transfer and should not be held to have repealed *sub silentio* that historic power, as both Congress and the lower courts have recognized. Moreover, the enabling legislation adopted the common law of Maryland as the common law of the District of Columbia, and the common law of Maryland was the common law of England, which included a tort against officers of the national government for false imprisonment since before our Nation's founding. *See* Section II, *infra.*

3. For both the FTCA and the DCCRA, the canon against repeals by implication should guide this Court to reject the lower courts' constrained readings of the ancient powers that petitioners seek to invoke. *See* Sections I.B.2, II.B, *infra.*

4. This litigation is an ideal vehicle to resolve the purely legal, important, and recurring issues raised here. *See* Section III, *infra.*

Petitioners respectfully submit that these reasons all warrant granting their petition for a writ of *certiorari*.

I. THE WESTFALL ACT AND FTCA DO NOT IMMUNIZE FEDERAL AGENTS.

Congress enacted the FTCA to waive sovereign immunity for tortious and wrongful conduct by federal employees. The FTCA is fundamentally a waiver of

sovereign immunity, and the Westfall Act makes the FTCA's process exclusive where the FTCA applies. But the Westfall Act does not—and its present form cannot—deprive federal courts of jurisdiction that they have without resort to the FTCA's waiver of sovereign immunity. While Congress has the authority to pass jurisdiction-stripping laws, the Westfall Act does not strip jurisdiction from a court. Instead, the Westfall Act merely makes an FTCA remedy exclusive where an FTCA remedy exists.

A. Petitioners do not rely on the FTCA for a cause of action.

Tort suits against federal officials predated the FTCA's enactment in 1946. *See*, *e.g.*, *Belknap v. Schild*, 161 U.S. 10, 18 (1896) ("officers or agents, although acting under order of the United States, are … personally liable to be sued for their own infringement of a patent") (patent jurisdiction); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 490 (1806) ("argument … that lieutenant Maley is not liable … would have great weight, if the circumstances … had been such as to justify [the] seizure") (admiralty jurisdiction). Even without the FTCA, therefore, petitioners could have sued in diversity. As shown in this section, nothing prior to the Westfall Act even arguably changed that.

Specifically, as enacted, the FTCA posed no bar to suing federal employees in federal court under any applicable cause of action or any applicable form of federal jurisdiction:

> Originally, the FTCA afforded tort victims a remedy against the United States, but did not preclude lawsuits against individual tortfeasors. Judgment against the United

> States in an FTCA action would bar a subsequent action against the federal employee whose conduct gave rise to the claim, but plaintiffs were not obliged to proceed exclusively against the Government. They could sue as sole or joint defendants federal employees alleged to have acted tortiously in the course of performing their official duties.

Levin v. United States, 568 U.S. 503, 507 (2013) (citations omitted).

Similarly, prior to the Westfall Act' enactment in 1988, federal courts were properly attuned at least to considering diversity jurisdiction as an alternate form of federal jurisdiction. *See*, *e.g.*, *Bishop v. Tice*, 622 F.2d 349, 351 (8th Cir. 1980) (diversity action against federal employees); *Clay v. Martin*, 509 F.2d 109, 113 (2d Cir. 1975);[3] *cf. Guidry v. Durkin*, 834 F.2d 1465, 1468 (9th Cir. 1987) (considering diversity); *Myers & Myers, Inc. v. United States Postal Serv.*, 527 F.2d 1252, 1256 (2d Cir. 1975); *Diminnie v. United States*, 728 F.2d 301, 306 (6th Cir. 1984); *Reamer v. United States*, 459 F.2d 709, 710 (4th Cir. 1972). In short, prior to the enactment of the Westfall Act, petitioners could have sued federal actors in federal court under diversity jurisdiction.

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[3] In an action that was vacated for reconsideration based on this Court's decision in *Westfall*, the Fourth Circuit recognized diversity jurisdiction over federal employees, but held the federal employees immune on the merits. *Gen. Elec. Co. v. United States*, 813 F.2d 1273, 1274 (4th Cir. 1987), vacated 484 U.S. 1022 (1988).

B. The Westfall Act did not displace diversity suits under foreign law for injuries arising abroad.

Although diversity jurisdiction came before the Westfall Act, it remains theoretically possible that the Westfall Act displaced diversity jurisdiction from cases where the FTCA does not apply. (That is what the lower courts held in any event.) For two reasons, however, the Westfall Act did no such thing.

1. The FTCA's plain language defeats applying the Westfall Act to injuries arising abroad.

Congress chose not to extend the FTCA to injuries that arise abroad. 28 U.S.C. § 2680(k), When the FTCA does not apply for one of the reasons listed in § 2680(a)-(n), the *entire FTCA* does not apply:

> The provisions of *this chapter* and section 1346(b) of this title shall not apply to—
>
> …
>
> (k)Any claim arising in a foreign country.

28 U.S.C. § 2680(k) (emphasis added). "This chapter" is the FTCA (*i.e.*, Chapter 171 of Title 28), which includes the exclusivity provisions of 28 U.S.C. § 2679 that the Westfall Act added.[4]

As this Court recognized, the decisions to the contrary fail to "cite, let alone discuss, the 'shall not apply' language 'Exceptions' provision." *Simmons*, 578

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[4] Although *Minneci v. Pollard*, 565 U.S. 118, 126 (2012), cites the FTCA for the proposition that one "*ordinarily* cannot bring state-law tort actions against employees of the Federal Government," *id.* (emphasis omitted) (citing 28 U.S.C. §§ 2671, 2679(b)(1)), that proposition does not apply to situations to which the FTCA itself does not apply.

U.S. at 627-28. Arguing to the contrary appears frivolous:

> Given the clarity of the "Exceptions" section's command, a reader might be forgiven for wondering how there could be any confusion about the statute's operation.

Id. at 627. This Court can reverse the dismissal of petitioners' claims on this reason alone.

2. <u>The canon against repeals by implication defeats applying the Westfall Act to injuries arising abroad.</u>

Although the inapplicability of the Westfall Act's exclusivity is obvious from the FTCA's plain language, *see* Section I.B.1, *supra*, the same result would flow from the canon against repeals by implication:

> While a later enacted statute … can sometimes operate to amend or even repeal an earlier statutory provision …, repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007) ("*NAHB*"). Indeed, the "canon [against repeals by implication] applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975). The Government cannot meet that test.

Under the "clear and manifest" standard, "[w]hen the text of [a statute] is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors" unsettling the canon. *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior

quotations omitted). The FTCA clearly is susceptible to a reading that retains any otherwise available and pre-existing non-FTCA cause of action for injuries that the FTCA excludes. Whereas the Government seeks to use the Westfall Act as a shield, the Act is merely a doughnut hole in the FTCA's waiver of sovereign immunity.

Indeed, Congress was concerned that decisions like *Westfall* "have seriously eroded the common law tort immunity *previously available* to Federal employees." Westfall Act, § 2(a)(4), 102 Stat. at 4564 (emphasis added). In other words, Congress was not trying to create immunity that did not exist prior to the FTCA's enactment; Congress was merely trying to protect immunity that already existed. Indeed, the "FTCA was designed primarily *to remove* the sovereign immunity of the United States from suits in tort," *Sosa*, 542 U.S. at 700 (emphasis added, internal quotation omitted), which differs from taking away jurisdiction that already exists. If Congress had wanted to strip jurisdiction that predated the FTCA, Congress would need to have enacted a jurisdiction-stripping statute.

Courts construe jurisdiction-stripping statutes narrowly *Cf. Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) (requiring "clear and convincing" evidence of congressional intent). There is no such evidence. Like repeal by implication, courts cannot engage in jurisdiction stripping by implication:

> But what gives courts authority to engage in this business of jurisdiction-stripping-by implication?
>
> The answer, of course, is nothing.

Axon Enter. v. FTC, 143 S.Ct. 890, 913 (2023)

(Gorsuch, J., concurring). As indicated, the Westfall Act can be interpreted as merely rejecting non-FTCA suits when the FTCA applies. Because the Act *can* be interpreted that way, it *should* be interpreted that way.

3. *Smith* is not controlling.

In *United States v. Smith*, 499 U.S. 160 (1991), the Smiths attempted to bring a diversity suit in a federal district court in California under California and Italian law. *Smith*, 499 U.S. at 162 & n.1. The Court held that the Westfall Act precluded the Smiths' resort to diversity jurisdiction. *Id.* at 173. Although *Smith* seems on all fours with this case, it is not.

Smith dealt with whether the FTCA's exclusivity provision prevented an injured Army patient's suit against an Army doctor for alleged medical malpractice that occurred in Italy, thereby displacing a cause of action under the Gonzalez Act, 10 U.S.C. § 1089. Significantly for the Westfall Act, however, the Gonzalez Act makes the FTCA remedy "exclusive." *See* 10 U.S.C. §1089(a); *accord* 10 U.S.C. §1089(a) (1988). Thus, neither *Smith* nor the Westfall Act hold that the Smiths could not sue in diversity jurisdiction. Instead, *the Gonzalez Act* held that. Indeed, the very existence of exclusive-remedy clauses like the one in the Gonzalez Act demonstrates that the Westfall Act does not displace diversity jurisdiction in *every* case. If it did, there would be no need for exclusive-remedy clauses like the Gonzalez Act's exclusivity clause.

Simply put, the issue in *Smith* was the Gonzales Act's exclusivity clause, and that clause—like *Smith* itself—has no application here.

4. *Lamagno* is inapposite.

Like *Smith*, the underlying case in *Gutierrez De*

Martinez v. Lamagno, 515 U.S. 417, 421 (1995), seems analogous here: residents of the nation of Columbia sought to sue federal agents of the Drug Enforcement Agency for injuries arising in Barranquilla, Colombia. The *Lamagno* plaintiffs sought to sue a federal agent in diversity in a federal court in Virginia because the agent had diplomatic immunity in Colombia's courts. *Id.* at 421. Under 28 U.S.C. § 2679(d), the Attorney General had certified that the agent was acting within the scope of his employment, *id.*, which resulted in the United States' substituting for the agent. Once in the case, the United States asserted sovereign immunity because the FTCA's waiver of sovereign immunity did not apply to injury arising in Columbia. *See* 28 U.S.C. § 2680(k). Citing *Smith*, the Court reasoned that "the immunity of the United States [did not] allow petitioners to bring [the agent] back into the action." *Lamagno*, 515 U.S. at 422. While that issue may become relevant later, it is downstream from petitioners' challenge to the District Court's basis for dismissal because the petitioners in *Lamagno* did not challenge *Smith*.

What happened in the case is directly analogous to what happened here (*i.e.*, federal agents caused injury abroad), but what this Court reviewed was inapposite here. Specifically, the issue in *Lamagno* was whether the Attorney General's certification that a federal employee was acting within the scope of his employment was reviewable *Id.* at 420. That is not an issue that petitioners challenged below, although the Court's consideration of that downstream issue at least suggests that the Court would consider diversity jurisdiction, notwithstanding the Westfall Act.

Holding that scope-of-employment certifications are reviewable simply assumed—without deciding—

that *Smith* applied. Under the Gonzales Act and this Court's more recent decision in *Simmons*, *Smith* did not apply or was wrongly decided. *See* Sections I.B.1-I.B.3, *supra*. Whatever hazy support *Lamagno* might provide the Government, it is neither preclusive nor strong precedent on the Westfall Act's application to injuries that arise abroad:

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157, 170 (2004) (internal quotation omitted); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("cases cannot be read as foreclosing an argument that they never dealt with") (plurality). Put another way, *stare decisis* from a prior decision is inapposite to issues a prior court reached by the prior parties' waiver. *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 626-27 (2016). Under these various strands of authority, other parties' litigation mistakes do not bind future litigants. The bottom line is either that *Lamagno* is simply inapposite or that—to the extent that *Lamagno* impliedly held that the Westfall Act bars diversity for injuries arising abroad—*Lamagno* was wrongly decided on that implicit issue.

5. Congress did not ratify *Smith* or *Lamagno*.

As indicated in Sections I.B.3-I.B.4, supra, neither *Smith* nor *Lamagno* is controlling here. Congress did not—and could not—ratify those decisions as applied to petitioners in any post-1991 (*Smith*) or post-1995 (*Lamagno*) amendments to the FTCA. Quite to the

contrary, as this Court recently held in rejecting application of *Smith*, that decision "does not even cite, let alone discuss, the 'shall not apply' language [in the] 'Exceptions' provision." *Simmons*, 578 U.S. at 628. The Westfall Act simply does not affect the presence or absence of jurisdiction for non-FTCA suits.

II. THE DISTRICT COURT HAS POWER TO CREATE TORTS AND CAUSES OF ACTION AGAINST FEDERAL ACTORS.

As a common-law court, the District Court was—at least prior to DCCRA's enactment—free to do what this Court said in *Hernandez* that common-law courts can do: "flesh[] out the remedies available for a common-law tort." *Hernandez*, 140 S.Ct. at 742. At least prior to DCCRA's enactment, the District Court here could do what other district courts cannot: create torts and causes of action against federal actors.

As shown in Section II.A, *infra*, the District Court had that power from 1801 to 1970. The real question then is whether the DCCRA took that power away. As shown in Section II.B, *infra*, the DCCRA did not. As such, the District Court could have created a tort and cause of action against the federal actors here. Thus, petitioners seek to bring a *Bivens*-style action, but one created by the District Court's unique powers, not one created with the inadequate powers of a "regular" district court.

With respect to *Bivens*, petitioners respectfully submit that *Bivens* was wrongly decided (*i.e.*, federal district courts lack the authority that *Bivens* found). *Bivens* held what *Bell v. Hood*, 327 U.S. 678 (1946), prefigured: "'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any

available remedy to make good the wrong done.'" *Bivens*, 403 U.S. at 396 (quoting *Bell*, 327 U.S. at 684). And *Bell* made clear that the entire enterprise was based on federal-question jurisdiction: "Whether the petitioners are entitled to recover depends upon an interpretation of [the federal-question statute] and on a determination of the scope of the Fourth and Fifth Amendments' protection[.]" *Bell*, 327 U.S. at 684-85. *Bivens* simply confuses the issues here because the court here has the power to do what the *Bivens* court did not. If it helps, call this a *Gaskin* action, not a *Bivens* action.

A. Prior to the DCCRA, the District Court had the power to create torts and causes of action against federal actors.

Although this Court effectively abolished a federal common law in 1938, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[t]here is no federal general common law"); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973) ("federal courts did not possess the power to develop a concomitant body of general federal law"), the next year the District Court for the District of Columbia remained free to establish a tort under its unique common law powers:

> Defendant urges that neither Blackstone nor any local authority recognizes such a tort. But if we are in one of the "open spaces" in the law of this jurisdiction we must fill it as well as we can, with a view to the social interests which seem to be involved and with such aid as we can get from authorities elsewhere and from logic, and history, and custom, and utility, and the accepted standards of right conduct. We cannot evade this duty; for unless we establish

> a right in the plaintiff we establish a privilege or immunity in the defendant. The fact that the question is novel in this jurisdiction does not mean that the plaintiff cannot recover.

Clark v. Associated Retail Credit Men, 105 F.2d 62, 63-64 (D.C. Cir. 1939). Thus, the District Court's unique common law power survived the demise of a general federal common law in *Erie*.

B. In devolving state-like power to the District of Columbia's court system, the DCCRA reserved power *vis-à-vis* federal actors in the District Court.

The DCCRA did not repeal the District Court's historic common law power by creating the local court system. Transferring local matters to local courts does not speak to federal matters over which the District Court had cognizance. In transferring powers over local matters to the District of Columbia's local or "state" court system, the DCCRA did not extinguish the District Court's power over federal actors.

First, as indicated in Section I.B.2, *supra*, about the FTCA's exclusivity clause, the canon against repeal by implication cautions against reading the DCCRA to have eliminating that common-law power over federal actors, *NAHB,* 551 U.S. at 662 (repeals by implication require "clear and manifest" legislative intent), which "applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger,* 420 U.S. at 752. Nothing in DCCRA suggested a congressional intent to repeal that historic power over federal actors.

Second, since DCCRA's enactment in 1970, both Congress and the Court of Appeals for the District of Columbia Circuit have recognized that this historic

power continues to exist. Congress did so in amending the federal-question statute to eliminate the amount-in-controversy requirement:

> [I]n [the] situation [where a plaintiff's claim falls below the then-applicable $10,000 amount-in-controversy threshold for federal-question jurisdiction], the limitation can be circumvented *if the plaintiff brings his action in the District of Columbia* or if he can cast his action in the form of a mandamus proceeding under 28 U.S.C. section 1361, the Mandamus and Venue Act of 1962.

H.R. REP. NO. 94-1656, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6136 (emphasis added). The D.C. Circuit did so in recognizing the District Court's "common law jurisdiction" derived from the common law of Maryland "continu[ing] in force in that part of the District ceded by Maryland to the United States." *Ganem v. Heckler,* 746 F.2d 844, 851 (D.C. Cir. 1984).

Third, the DCCRA certainly did not transfer this District Court's pre-1970 common-law and equitable powers *over federal actors* to the local court system. Either the DCCRA nullified that power *sub silentio* or that power remains with the District Court. The better—and only plausible—reading is that that power remains with the District Court, as both the D.C. Circuit and Congress have indicated. *See Ganem*, 746 F.2d at 851; H.R. REP. NO. 94-1656, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6136.

C. The District Court can create malicious prosecution and false-imprisonment torts that cover respondents.

As a common-law court, the District Court was—and still is—free to do what this Court said in

Hernandez that common-law courts can do: "flesh[] out the remedies available for a common-law tort." *Hernandez*, 140 S.Ct. at 742. If that sounds like a big ask of the common law circa 1801, it is not.

The 1774 decision in *Mostyn* recognized a damages action against colonial governor for assault and false imprisonment, and Maryland adopted English common law. *Baltimore Sun*, 359 Md. at 661 (2000) ("the rules of the common law of England were adopted as the principles which were to direct the proceedings of the provincial government, whether legislative or judicial") (interior quotations and alterations omitted). *Mostyn* recognized such a damages remedy against an officer of the national government.[5]

If a colonial governor's false imprisonment in the 1700s could justify the finding of tort liability, it is at least plausible that a court heir to the same power in the 2000s might fall within the "'open spaces' in the law" that the District Court "must fill … as well as [it] can, with a view to the social interests [that] seem to be involved." *Clark*, 105 F.2d at 63-64. The only issue to decide is whether the District Court had the *power* to create a cause of action or tort.

If the District Court has the power, it may be proper for the District Court to decide whether to exercise that power in this case. Certainly, there

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[5] Because England lacked our federalist system, a colonial governor was an officer of the national government. *See*, *e.g.*, *People v. Van Rensselaer*, 9 N.Y. 291, 330-31 (1853); Ulla Secher, *The Meaning of Radical Title: The Pre-Mabo Authorities Explained*, AUSTRALIAN PROPERTY L. J., 2005 APLJ LEXIS 44, 83 n.193 (2005); Tu Yunxin, *The Question of 2047: Constitutional Fate of "One Country, Two Systems" in Hong Kong*, 21 GERMAN L. J. 1481, 1514 (2020).

would be no failure to state a claim if the District Court fashioned a new tort cause of action out of the injuries that petitioners suffered in this very case.

III. THE PETITION IS AN IDEAL VEHICLE TO RESOLVE IMPORTANT AND RECURRING ISSUES.

The issue of jurisdiction over cross-border torts is recurring and important for this Court to resolve. This petition presents purely legal issues, making it an ideal vehicle to resolve when and where foreigners can sue in our federal courts for cross-border or foreign injury caused by our federal government. There are no fact-bound issues or even any facts to resolve.

The Court last considered these issues in the *Hernandez* litigation. *See Hernandez v. Mesa*, 140 S.Ct. 735, 739 (2020); *Hernandez v. Mesa*, 582 U.S. 548, 550 (2017). If petitioners prevail where the Hernandez family failed, it will be for one of two reasons.

- First, unlike Mexico—which lacked civil laws under which the Hernandez family could have sued in diversity—Commonwealth countries like Barbados inherited civil remedies to official violence from the same 1774 English decision in *Mostyn* that informs our common law.
- Second, if the District Court for the District of Columbia retains the unique common law power that Congress gave it in 1801 and that the DCCRA did not take away, the lesson of this case could be to sue the federal government in the District of Columbia. *See Mostyn*, 98 Eng. Rep. at 1028 ("if there is no other mode of trial, that alone will give the King's courts a jurisdiction").

From *Mostyn*, the Founders in the Congress that

enacted the Organic Act to create the District Court would have understood not only the civil remedy but also the need for an American analog to the Court of the King's Bench.

Finally, with respect not only to cross-border and foreign injury but also to *Bivens* claims, the sooner this Court makes clear what the law is, the sooner Congress can stop hiding behind this Court's robes and decide what the law should be. Regarding foreign injury, diversity jurisdiction applies, as it has since the dawn of the Republic. By contrast, *Bivens* is clever judicial wordplay—and nothing more—with federal-question jurisdiction, which cannot create torts or causes of action against the sovereign or its officers. While abrogating *Bivens* may hurt a few about-to-become-lucky *Bivens* lottery winners, it will save many more legally blameless defendants. More important for future plaintiffs and defendants, the rules will be clear. On balance, setting the rules straight prospectively—first by this Court, then hopefully by Congress—will make everyone better off.

While these issues are unquestionably important, they are unlikely to result in a circuit split because only this Court can change its prior decisions:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). *Simmons* acknowledged that *Smith* is not controlling on all

instances where the Westfall Act might otherwise govern cases that the FTCA excludes under § 2680(a)-(n). This Court should now exercise its prerogative to clarify further the Westfall Act's scope.

For the foregoing reasons, this case presents an ideal vehicle to resolve the legal questions presented.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

March 18, 2024

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5124 **September Term, 2023**

1:15-cv-00033-EGS

Filed On: October 19, 2023

Sean Gaskin, et al.,

Appellants

v.

Stephen May, et al.,

Appellees

BEFORE: Henderson, Pillard, and Pan, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be dismissed as moot as to appellants' claims for declaratory and injunctive relief. Those claims are not before this court on appeal, because appellants have expressly waived any challenge to their dismissal. See Doe v. District of Columbia, 93 F.3d 861, 875 n.14, 320 U.S. App. D.C. 198 (D.C. Cir. 1996). It is

FURTHER ORDERED that the motion for summary affirmance be granted as to the remaining claims. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297, 260 U.S. App. D.C. 334 (D.C. Cir. 1987) (per curiam). The district court correctly dismissed for lack of subject

matter jurisdiction appellants' common-law tort claims for damages. See 28 U.S.C. § 2680(k); United States v. Smith, 499 U.S. 160, 165-67, 111 S. Ct. 1180, 113 L. Ed. 2d 134 (1991). And appellants have forfeited any argument concerning their constitutional claims for damages by failing to address them in response to the motion for summary affirmance. See United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497, 363 U.S. App. D.C. 180 (D.C. Cir. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SEAN P. GASKIN, *et al.*, Plaintiffs, v. STEPHEN M. MAY, *et al.*, Defendants.	**Civ. Action No. 15-33 (EGS)**

MEMORANDUM OPINION

I. Introduction

Plaintiffs Sean P. Gaskin ("Mr. Gaskin"); John W. Scantlebury ("Mr. Scantlebury"); and Frederick C. Hawkesworth ("Mr. Hawkesworth")[1] (collectively, "Plaintiffs") bring this action to recover damages and obtain declaratory and injunctive relief related to their incarceration in Barbados following an extradition request and provisional arrest warrants in *United States v. Hawkesworth*, No. 1:04-0285-EGS (D.D.C.). *See* Second Supplemented Compl. & Demand for Jury Trial ("Complaint" or "SAC"), ECF No. 47 ¶¶ 1, 81-121.[2] Plaintiffs sue the United States as well as the following individuals in their individual capacity: Stephen M. May ("Mr. May"); Gordon Patten, Jr. ("Mr. Patten"); Jodi L. Avergun

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[1] Mr. Hawkesworth died during this litigation. *See* Notice of Death of Frederick C. Hawkesworth, ECF No. 15. His wife is now representative of his estate. *See* SAC, ECF No. 47 ¶ 4.

[2] When citing electronic filings throughout this Opinion, the Court refers to the ECF page numbers, not the page numbers of the filed documents.

("Ms. Avergun"); Kenneth A. Blanco ("Mr. Blanco"); Paul M. O'Brien ("Mr. O'Brien"); Arthur Wyatt ("Mr. Wyatt"); Christopher A. Wray ("Mr. Wray"); Alice S. Fisher ("Ms. Fisher"); Lanny A. Breuer ("Mr. Breuer"); John D. Ashcroft ("Mr. Ashcroft"); Alberto Gonzales ("Mr. Gonzales"); Michael B. Mukasey ("Mr. Mukasey"); Eric H. Holder, Jr. ("Mr. Holder"); and John Does 1-20[3] (collectively, "Individual Defendants"). *Id.* ¶¶ 5-11.

Pending before the Court is Defendants' Motion to Dismiss, *see* Mot. Dismiss ("Defs.' Mot."), ECF No. 49. Upon careful consideration of the motion, opposition, and reply thereto, the applicable law, and the entire record herein, the Court hereby **GRANTS** Defendants' Motion to Dismiss, ECF No. 49.

II. Background

A. Factual

Mr. Gaskin, Mr. Scantlebury, and Mr. Hawkesworth were arrested in Barbados in May 2004 based on a criminal complaint. *See* SAC, ECF No. 47 ¶ 46. Later, on June 17, 2004, a federal grand jury for the District of Columbia returned an indictment against Plaintiffs and two other individuals on two counts of trafficking and distribution of cocaine. *Id.* ¶ 42. The United States sought Plaintiffs' extradition from Barbados. *Id.* ¶ 46. Plaintiffs challenged extradition and were released on bail in the meantime. *See id.* On June 9, 2011, authorities in Barbados remanded Plaintiffs to

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[3] The John Doe Defendants are "other federal officials or entities whose actions or inaction injured Plaintiffs under U.S. or Barbadian law, including the common law." SAC, ECF No. 47 ¶ 10.

prison while awaiting extradition. *Id.* ¶ 60. Upon motion by the United States, the Court dismissed the indictment on January 9, 2014. *Id.* ¶ 66. Plaintiffs were released from custody in Barbados that same day. *Id.*

B. Procedural

Defendants filed this Motion to Dismiss on November 9, 2020. *See* Defs.' Mot., ECF No. 49. On January 11, 2021, Plaintiffs filed a brief in opposition, *see* Mem. Law Supp. Pls.' Opp'n Def.'s Mot. Dismiss ("Pls.' Opp'n"), ECF No. 50; and Defendants replied on March 31, 2021, *see* Reply Supp. Defs.' Mot. Dismiss ("Defs.' Reply"), ECF No. 52. The motion is now ripe and ready for adjudication.

III. Legal Standard

A. Rule 12(b)(1) Motion to Dismiss

"A federal district court may only hear a claim over which [it] has subject matter jurisdiction; therefore, a Rule 12(b)(1) motion for dismissal is a threshold challenge to a court's jurisdiction." *Gregorio v. Hoover*, 238 F. Supp. 3d 37, 44 (D.D.C. 2017) (quoting *Metro. Wash. Chapter v. District of Columbia*, 57 F. Supp. 3d 1, 13 (D.D.C. 2014)). To survive a Rule 12(b)(1) motion, the plaintiff bears the burden of establishing that the court has jurisdiction by a preponderance of the evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Because Rule 12(b)(1) concerns a court's ability to hear a particular claim, "the court must scrutinize the plaintiff's allegations more closely when considering a motion to dismiss pursuant to Rule 12(b)(1) than it would under a motion to dismiss pursuant to Rule 12(b)(6)."

Schmidt v. U.S. Capitol Police Bd., 826 F. Supp. 2d 59, 65 (D.D.C. 2011) (citations omitted). In so doing, the court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff, but the court need not "accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations." *Rann v. Chao*, 154 F. Supp. 2d 61, 64 (D.D.C. 2001). The Court may also consider "undisputed facts evidenced in the record" as well as its own "resolution of disputed facts." *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197, 297 U.S. App. D.C. 406 (D.C. Cir. 1992).

Faced with motions to dismiss under Rule 12(b)(1) and Rule 12(b)(6), a court should first consider the Rule 12(b)(1) motion because "[o]nce a court determines that it lacks subject matter jurisdiction, it can proceed no further." *Ctr. for Biological Diversity v. Jackson*, 815 F. Supp. 2d 85, 90 (D.D.C. 2011) (citations and internal quotation marks omitted).

B. Rule 12(b)(6) Motion to Dismiss

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citation and internal quotation marks omitted).

Despite this liberal pleading standard, to survive

a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation and internal quotation marks omitted). "In determining whether a complaint fails to state a claim, [the Court] may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the Court] may take judicial notice." *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997). A claim is facially plausible when the facts pled in the complaint allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The standard does not amount to a "probability requirement," but it does require more than a "sheer possibility that a defendant has acted unlawfully." *Id.*

"[W]hen ruling on a defendant's motion to dismiss [pursuant to Rule 12(b)(6)], a judge must accept as true all of the factual allegations contained in the complaint." *Atherton v. D.C. Off. of the Mayor*, 567 F.3d 672, 681, 386 U.S. App. D.C. 144 (D.C. Cir. 2009) (citation and internal quotation marks omitted). In addition, the court must give the plaintiff the "benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276, 305 U.S. App. D.C. 60 (D.C. Cir. 1994).

IV. Analysis

A. The Court Will Substitute the United States in Place of the Defendants

Sued in Their Individual Capacities for the Common-Law Tort Claims

The Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679 ("Westfall Act"), "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007). Pursuant to this statute, the Attorney General may certify "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1). This certification triggers immunity for the defendant employee, *Phillips v. Spencer*, 390 F. Supp. 3d 136, 163 (D.D.C. 2019); and substitution of the United States for that employee as the party-defendant, *see Wuterich v. Murtha*, 562 F.3d 375, 380, 385 U.S. App. D.C. 222 (D.C. Cir. 2009).

Here, Plaintiffs allege several common-law tort claims against various Defendants in their individual capacity. *See* SAC, ECF No. 47 ¶¶ 81-120. Defendants have submitted with their Motion to Dismiss a Certification from Daniel F. Van Horn, Chief of the Civil Division in the Office of the U.S. Attorney for the District of Columbia,[4] stating that Mr. May, Mr. Patten, Ms. Avergun, Mr. Blanco, Mr. O'Brien, Mr. Wyatt, Mr. Wray, Ms. Fisher, Mr. Breuer, Mr. Ashcroft, Mr. Gonzales, Mr. Mukasey, and Mr. Holder were acting within the scope of their

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[4] The Attorney General may make this certification through a delegate. *See Jacobs v. Vrobel*, 724 F.3d 217, 220, 406 U.S. App. D.C. 286 (D.C. Cir. 2013).

employment at the time of the relevant events. *See* Certification from Daniel F. Van Horn, ECF No. 49-2 at 1. This certification is "*prima facie* evidence that the employee[s] w[ere] acting within the scope of [their] employment." *Council on Am. Islamic Rels. v. Ballenger*, 444 F.3d 659, 662, 370 U.S. App. D.C. 314 (D.C. Cir. 2006). Because Plaintiffs do not challenge whether the individual Defendants were acting within the scope of their employment, *see generally* Pls.' Opp'n, ECF No. 50; the Court substitutes the United States as defendant for the common-law tort claims, *see* 28 U.S.C. § 2679(d)(1).

B. The Court Does Not Have Subject Matter Jurisdiction Over Plaintiffs' Common-Law Tort Claims

Defendants move to dismiss Counts IV, V, VI, VII, and VIII of the Complaint for lack of subject matter jurisdiction. Defs.' Mot., ECF No. 49 at 16-22; Defs.' Reply, ECF No. 52 at 9-18. Specifically, they argue that the FTCA governs this case and that the FTCA's waiver of sovereign immunity does not apply to Plaintiffs' claims. *See id.* Plaintiffs concede that the FTCA's waiver of sovereign immunity does not apply to their injuries because those injuries arose abroad. Pls.' Opp'n, ECF No. 50 at 10 (citing 28 U.S.C. § 2680(k); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)). However, they maintain that the FTCA does not apply to this case and that the Court otherwise has subject matter jurisdiction over it. *See id.* at 14-20. For the reasons discussed below, the Court concludes that it does not have subject matter jurisdiction over Plaintiffs' tort claims.

"It is axiomatic that the United States may not

be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983). Plaintiffs' common-law tort claims therefore may proceed only if they "fall within a valid waiver of sovereign immunity." *Sierra Club v. Wheeler*, 956 F.3d 612, 616, 446 U.S. App. D.C. 301 (D.C. Cir. 2020). This waiver "must be 'unequivocally expressed in the statutory text' and 'strictly construed, in terms of its scope, in favor of the sovereign.'" *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575, 358 U.S. App. D.C. 79 (D.C. Cir. 2003) (quoting *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, 119 S. Ct. 687, 142 L. Ed. 2d 718 (1999)).

Here, Defendants identify the FTCA as the only possible waiver of sovereign immunity for Plaintiffs' common-law tort claims. *See* Defs.' Mot., ECF No. 49 at 17. Still, they contend that the FTCA prevents Plaintiffs from maintaining these claims because the law waives sovereign immunity only under limited circumstances, which are not present here. *See id.* at 16-22. Specifically, Defendants argue that the FTCA bars Plaintiffs' tort claims because (1) the claims are untimely, *see id.* at 17 (citing 28 U.S.C. § 2401(b)); (2) the claims are based on injuries that arose abroad, *see id.* at 18-19 (citing 28 U.S.C. § 2680(k)); (3) the claims allege that DOJ attorneys were responsible for malicious prosecution or false imprisonment, *see id.* at 20 (citing 28 U.S.C. § 2680(h)); and (4) the claims fall under the discretionary function exception to the FTCA, *see id.* at 20-22 (citing 28 U.S.C. § 2680(a)).

Plaintiffs concede that the FTCA does not waive sovereign immunity for claims, like those here, that

are based on injuries that arose abroad. Pls.' Opp'n, ECF No. 50 at 10 (citing 28 U.S.C. 2680(k); *Sosa*, 542 U.S. at 700). They do not offer an alternative statute waiving sovereign immunity for common-law tort claims against the United States. *See generally id.* This failure is fatal. *See Tri-State Hosp. Supply Corp.*, 341 F.3d at 575 ("A party bringing suit against the United States bears the burden of proving that the government has unequivocally waived its immunity.").

Moreover, the Court agrees with Defendants that there is no statutory waiver of sovereign immunity here. The FTCA is the sole waiver of sovereign immunity for tort actions against the United States. *See Gable v. United States*, 931 F. Supp. 2d 143, 147 (D.D.C. 2013); *cf. Council on Am. Islamic Rels.*, 444 F.3d at 666. This waiver is subject to several exceptions, including the foreign country exception. *See* 28 U.S.C. § 2680(k). Under the foreign country exception, sovereign immunity is not waived for "[a]ny claim arising in a foreign country." *Id.* The Supreme Court has clarified that this exception "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa*, 542 U.S. at 712. Here, it is undisputed that Plaintiffs were injured in Barbados. *See* Defs.' Mot., ECF No. 49 at 19; Pls.' Opp'n, ECF No. 50 at 10. Plaintiffs' common-law tort claims therefore all fall squarely within the foreign country exception. *See Sosa*, 542 U.S. at 712.

Plaintiffs' briefing misses the significance of this conclusion. Because the foreign country exception applies, the FTCA does not waive sovereign immunity for the tort claims in this case. *See id.* at 700. Rather than identify another basis for waiver of

sovereign immunity, Plaintiffs argue that the FTCA does not apply at all. *See* Pls.' Opp'n, ECF No. 50 at 17-20. They reason that Section 2679, which states that the FTCA is the exclusive remedy for tort actions against the United States for damages, does not apply to tort actions that fall under the exceptions to the FTCA in Section 2680, such as the foreign country exception, because Section 2680 states that the provisions of the FTCA "shall not apply." *See id.* at 17-20 (citing 28 U.S.C. §§ 2679, 2680). The Court rejects this tortured reading of the FTCA. Indeed, the authority Plaintiffs rely on—*Simmons v. Himmelreich*, 578 U.S. 621, 136 S. Ct. 1843, 195 L. Ed. 2d 106 (2016)—clearly states that "[t]he dismissal of a claim in the 'Exceptions' section signals merely that the United States cannot be held liable for a particular claim." 578 U.S. at 630. Put differently, the exceptions to the FTCA do not provide an escape hatch from the exclusive remedy provision. And even if there were such a hatch, Plaintiffs would still need to identify some other waiver of sovereign immunity. *See Sierra Club*, 956 F.3d at 616.

Plaintiffs' other arguments do not fare any better. They argue that they may "proceed[] on a *Bivens*-style tort fashioned under *this Court's common-law powers* or in a pre-FTCA diversity action based on *Barbados law*." Pls.' Opp'n, ECF No. 50 at 20 (emphasis in original). To reach this result, Plaintiffs articulate a new theory for this Court's common-law powers. *See id.* at 22-25. They do not address the issue of sovereign immunity—the critical issue at this juncture, *see generally id.* at 20-25; and provide the Court with no basis for resolution in their favor. As Defendants explain in their reply

briefing, *see* Defs.' Reply, ECF No. 52 at 12-13; even if the Court could fashion a new private right of action, the Court does not have the power to imply a waiver of sovereign immunity, *see Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996).

Plaintiffs also attempt to save their tort claims by turning to other jurisdictional matters. *See* Pls.' Opp'n, ECF No. 50 at 14-17. Specifically, they argue that the Court has subject matter jurisdiction over their tort claims because the Court has federal question jurisdiction, diversity jurisdiction, and supplemental jurisdiction. *See id.* Even assuming *arguendo* that they are correct on these points, the Court may not exercise jurisdiction over the tort claims here unless there has been a clear waiver of sovereign immunity, *see FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994).

The FTCA is the only possible waiver of sovereign immunity for Plaintiffs' tort claims against the United States. Because these claims all fall under the foreign country exception, there is no waiver of sovereign immunity here. The Court therefore **DISMISSES** Counts IV, V, VI, VII, and VIII against the United States for lack of subject matter jurisdiction.

C. Plaintiffs Have Failed to State *Bivens* Claims

Defendants next move to dismiss Counts IV, V, VI, and VII against the Defendants sued in their individual capacity for failure to state a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). *See* Defs.' Mot., ECF No. 49 at

22-29. In *Bivens*, the Supreme Court recognized an implied private right of action for damages against federal officials alleged to have violated a citizen's constitutional rights. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001). Defendants argue that (1) Mr. Gaskin and Mr. Hawkesworth cannot raise *Bivens* claims because they were non-citizens and non-residents during the relevant events; and (2) there is no basis to imply *Bivens* claims here. *See* Defs.' Mot., ECF No. 49 at 22-29.

Plaintiffs concede that *Bivens* claims are not available here. Pls.' Opp'n, ECF No. 50 at 10 (citing *Hernandez v. Mesa*, 140 S. Ct. 735, 206 L. Ed. 2d 29 (2020)). Accordingly, the Court **DISMISSES** Counts IV, V, VI, and VII against the Defendants sued in their individual capacity for failure to state a constitutional-tort claim.

D. Plaintiffs Have Failed to State a Claim for the Remaining Counts of the Complaint

Finally, Defendants move to dismiss each Count of the Complaint for failure to state a claim under Rule 12(b)(6). *See* Defs.' Mot., ECF No. 49 at 34-41. The Court addresses only Counts I, II, and III here, having already dismissed Counts IV, V, VI, VII, and VIII *supra*.

1. Malicious Prosecution and False Imprisonment

Defendants move to dismiss Count I of the Complaint, which alleges two common-law torts: malicious prosecution and false imprisonment. Defs.' Mot., ECF No. 49 at 35-37; *see* SAC, ECF No. 47 ¶¶ 81-86 (using the terms "wrongful prosecution and

imprisonment"). For the reasons that follow, the Court **DISMISSES** this Count for failure to state a claim.

"Under District of Columbia law, a plaintiff alleging malicious prosecution must prove (1) a criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the plaintiff; (3) absence of probable cause for the proceeding; and (4) malice, defined as 'a primary purpose in instituting the proceeding other than that of bringing an offender to justice.'" *Sherrod v. McHugh*, 334 F. Supp. 3d 219, 254-55 (D.D.C. 2018) (quoting *DeWitt v. District of Columbia*, 43 A.3d 291, 296 (D.C. 2012)). A showing of probable cause is a valid defense to a malicious prosecution claim. *Id.*

Under District of Columbia law, a plaintiff alleging false imprisonment must prove "(1) detention or restraint against one's will within boundaries fixed by the defendant, and (2) the unlawfulness of such restraint." *Harris v. United States VA*, 776 F.3d 907, 911-12, 414 U.S. App. D.C. 72 (D.C. Cir. 2015) (citing *Edwards v. Okie Dokie, Inc.*, 473 F. Supp. 2d 31, 44 (D.D.C. 2007)). As with malicious prosecution, probable cause is a defense to a false imprisonment claim. *Id.*

Defendants argue that both claims fail because there was probable cause for Plaintiffs' arrest, prosecution, and imprisonment. *See* Defs.' Mot., ECF No. 49 at 35-37. They point to the fact that Plaintiffs were prosecuted and incarcerated pursuant to an indictment returned by a federal grand jury for the District of Columbia. *Id.* (citing SAC, ECF No. 47 ¶ 42). Indeed, the Supreme Court "has held that an

indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause." *Gerstein v. Pugh*, 420 U.S. 103, 118 n.19, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (quoting *Ex parte United States*, 287 U.S. 241, 250, 53 S. Ct. 129, 77 L. Ed. 283 (1932)). Further, Defendants argue that Plaintiffs have raised only conclusory allegations as to the lack of probable cause. Defs.' Mot., ECF No. 49 at 36 (citing SAC, ECF No. 47 ¶¶ 65, 82-86, 88, 91, 98-99).

Plaintiffs do not defend the adequacy of their factual allegations in the Complaint. *See generally* Pls.' Opp'n, ECF No. 50. Instead, they largely repeat their motion to alter the Court's dismissal of charges from the criminal proceedings. *Compare id.* at 26-42, *with* Mot. Alter Dismissal to Dismissal with Prejudice for Lack of Probable Cause of Criminal Conduct, *United States v. Hawkesworth*, No. 1:04-0285-EGS (D.D.C.), ECF No. 106. The Court has already rejected those arguments, *see* Mem. Op., *United States v. Hawkesworth*, No. 1:04-0285-EGS (D.D.C.), ECF No. 133; and will not reconsider its earlier decision.

Plaintiffs have failed to rebut Defendants' probable cause defense; accordingly, the Court **DISMISSES** Count I of the Complaint for failure to state a claim for malicious prosecution and false imprisonment.

2. Expungement

Defendants argue that the Court should dismiss Count II of the Complaint, which alleges an injunctive claim for expungement, because expungement is an equitable remedy and not a cause of action. *See* Defs.' Mot., ECF No. 49 at 39-40.

Plaintiffs counter that they do not "lack a cause of action for expungement under the equitable doctrine of *Ex parte Young* and its modern judicial-review descendants, including the [Administrative Procedure Act, 5 U.S.C. §§ 551-706]" and that the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has recognized this cause of action. Pls.' Opp'n, ECF No. 50 at 44 (citations omitted). The Court agrees with Defendants and **DISMISSES** Count II.

There is "no standalone right to expungement of government records . . . in this Circuit." *United States v. Douglas*, 282 F. Supp. 3d 275, 278 (D.D.C. 2017) (internal quotation marks omitted) (quoting *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 787 F.3d 524, 536, 415 U.S. App. D.C. 275 (D.C. Cir. 2015)). Instead, the D.C. Circuit has held that expungement is a remedy that a court should impose "where necessary to vindicate rights secured by the Constitution or by statute." *Chastain v. Kelley*, 510 F.2d 1232, 1235, 167 U.S. App. D.C. 11 (D.C. Cir. 1975) (citing *Menard v. Saxbe*, 498 F.2d 1017, 1023, 162 U.S. App. D.C. 284 (1974)).

Here, Plaintiffs have pleaded a standalone claim for expungement. *See* SAC, ECF No. 47 ¶¶ 87-89. D.C. Circuit precedent clearly forecloses this claim. *See Abdelfattah*, 787 F.3d at 536. Plaintiffs may not now amend the claim in their opposition briefing to allege an *Ex parte Young* or Administrative Procedure Act violation. *See Budik v. Ashley*, 36 F. Supp. 3d 132, 144 (D.D.C. 2014) ("It is a well-established principle of law in this Circuit that a plaintiff may not amend her complaint by making new allegations in her opposition brief."), *aff'd sub nom. Budik v. United States*, No. 14-5102, 2014 U.S.

App. LEXIS 21460, 2014 WL 6725743 (D.C. Cir. Nov. 12, 2014). The Court therefore **DISMISSES** Count II of the Complaint for failure to state a claim.

3. Right to Travel and Associate

Defendants move to dismiss Count III of the Complaint, which alleges an injunctive claim for restrictions of the right to travel and associate freely, because Plaintiffs have not identified the source of these rights and because the Complaint is "fatally conclusory." Defs.' Mot., ECF No. 49 at 40-41. In their opposition briefing, Plaintiffs allege that they have a right to travel under the First Amendment. Pls.' Opp'n, ECF No. 50 at 44 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2416, 201 L. Ed. 2d 775 (2018)). Further, they argue that they all have third-party standing to assert their family members' right to travel and that Mr. Scantlebury has a right to visit his family in the United States. *Id.* (citation omitted). Plaintiffs also seem to suggest that they may move for leave to amend the claim. *See id.*

The Court agrees with Defendants that Plaintiffs have failed to state a claim for relief. Unlike the constitutional right to interstate travel, which "is virtually unqualified," *Haig v. Agee*, 453 U.S. 280, 307, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981); the constitutional right to international travel "is best described as the freedom to travel to foreign countries, and involves, *inter alia*, the right to own a passport," *Nattah v. Bush*, 770 F. Supp. 2d 193, 205 (D.D.C. 2011) (citations and internal quotation marks omitted). Assuming *arguendo* that Plaintiffs may assert third-party standing here, they have failed to make any factual allegations that any family member's right to travel has been affected.

See generally SAC, ECF No. 47. Nor do they plead any facts alleging that Mr. Scantlebury's right to travel to the United States has been violated. *See generally id.* Accordingly, the Court **DISMISSES** Count III for failure to state a claim. *See Iqbal*, 556 U.S. at 678.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss, ECF No. 49.

An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
February 27, 2023

United States Court of Appeals for the District of Columbia Circuit

Argued February 7, 2019
Decided April 16, 2019

No. 18-3043

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOHN WAYNE SCANTLEBURY, ALSO KNOWN AS FREDERICK DAVIS, ALSO KNOWN AS JOHN WAYNE TROTMAN,

APPELLANT.

Consolidated with 18-3044
Appeals from the United States District Court for the District of Columbia
(No. 1:04-cr-00285-3)
(No. 1:04-cr-00285-4)

Before: PILLARD and KATSAS, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: In 2004, Appellants, John Wayne Scantlebury ("Scantlebury") and Sean Gaskin ("Gaskin"), who are residents of Barbados, along with another Barbadian resident – Frederick Christopher Hawkesworth ("Hawkesworth") – and two Guyanese residents, were indicted by a grand jury in Washington, D.C., for conspiracy to traffic cocaine. Scantlebury, Gaskin, and Hawkesworth (who is now deceased) all challenged extradition to the United

States. The disputes over extradition lasted for over nine years. Finally, in December 2013, the U.S. Government moved to dismiss the charges against Scantlebury, Gaskin, and Hawkesworth without prejudice, citing "the age of the case, government resources, and other factual and legal issues which indicate the case is no longer viable." Joint Appendix ("J.A.") 41. The District Court granted the Government's motion to dismiss on January 9, 2014.

Appellants argue that prosecutors in the United States knew for years, well before they moved to dismiss the charges, that the cases had "cratered" and that there was no probable cause to support the indictments. Appellants therefore assert that the District Court should have dismissed the indictments with prejudice. On appeal, Appellants seek a remand to the District Court with instructions to dismiss the charges with prejudice. The Government in turn contends that this court has no basis upon which to entertain this appeal. We agree with the Government.

First, we are bound by the Supreme Court's decision in *Parr v. United States*, 351 U.S. 513 (1956). In *Parr*, the Court held that, without more, a criminal defendant whose indictment is dismissed without prejudice is not aggrieved and, therefore, has no standing to appeal. *Id.* at 516–17. Second, even assuming, *arguendo*, that the threat of subsequent prosecution might be sufficient in some cases to support an appeal of a dismissal without prejudice, the statute of limitations has run on the charges against Appellants, so the question is moot. Third, Appellants assert ongoing reputational injuries allegedly caused by their arrest and indictment records. But they lack standing to pursue these claims because dismissing the indictment with prejudice would not redress the alleged

reputational harms. Finally, we hold that the court lacks jurisdiction to consider Appellants' request for declaratory relief.

I. BACKGROUND

The U.S. Government began investigating Hawkesworth for cocaine trafficking in 2000. The Government suspected that Raphel Douglas ("Douglas") and Terrence Sugrim ("Sugrim") were supplying cocaine from Guyana to Hawkesworth. And Appellants were suspected of assisting Hawkesworth in an international drug trafficking operation that distributed cocaine in Barbados and transported cocaine from Barbados and Guyana to the United States.

As part of its investigation, the Government worked with an unnamed confidential informant. The informant allegedly spoke with Appellants and Hawkesworth on several occasions and made plans to help them transport cocaine to the United States.

In 2004, a federal grand jury in Washington, D.C., returned a two-count indictment against Scantlebury, Gaskin, Hawkesworth, Douglas, and Sugrim. The first count alleged that all five defendants had conspired to distribute more than five kilograms of cocaine. The second count alleged that Hawkesworth and Douglas distributed 500 grams or more of cocaine. With respect to Appellants specifically, the indictment alleged that they "obtained false identification cards and documents in order to travel to the United States to facilitate the importation of cocaine from Barbados, Guyana and elsewhere into the United States." J.A. 35. The indictment stated that Hawkesworth was the leader of the organization, which had allegedly shipped 184 kilograms of cocaine from Guyana to JFK Airport in New York City. The indictment also alleged that Scantlebury and Gaskin met with the

informant to discuss whether contacts were in place for a test shipment of cocaine and that the informant provided Scantlebury and Gaskin with fake identification cards.

Following indictment, the Government sought extradition of Scantlebury, Gaskin, and Hawkesworth from Barbados and Douglas and Sugrim from Guyana. Douglas was extradited, but Sugrim was never taken into custody. The three Barbadian defendants were arrested by Barbadian law enforcement officials, but they challenged extradition and remained in Barbados. All three were released on bail in late 2004 or early 2005. Then, for reasons that are not indicated in the record, their bail was revoked and they returned to jail in Barbados in 2011. Scantlebury, Gaskin, and Hawkesworth remained incarcerated in Barbados from 2011 until the indictments were dismissed on January 9, 2014.

In support of its requests for extradition from Barbados, the U.S. Government submitted affidavits written by a Senior Trial Attorney in the Criminal Division of the Department of Justice ("Trial Attorney"), a Drug Enforcement Administration ("DEA") special agent, and the confidential informant. The Trial Attorney's affidavit stated that the evidence against the defendants included the testimony of the confidential informant and of DEA agents, audio and video recordings of conversations, photographs, telephone records, passport records, airline records, and seized cocaine. The DEA special agent's affidavit stated that 184 kilograms of cocaine, packed in a shipment of frozen seafood, was seized at JFK Airport on September 20, 2003, and that, later that day, the confidential informant met with Sugrim and Hawkesworth, who said that they had lost a load of 180 kilograms of cocaine that had been shipped to JFK. The DEA affidavit also noted

that the confidential informant "was told that nobody was arrested." J.A. 132. In addition, the DEA affidavit noted that the confidential informant had worked with the DEA for approximately five years and had proven to be "completely reliable." *Id.* at 129.

In support of its request for extradition of Douglas, U.S. Government officials made several additional statements attesting to the reliability of the confidential informant. *Id.* at 160. Douglas was extradited from Trinidad to the United States in October 2005. It was later determined, however, that several of the Government's claims made in support of the confidential informant's reliability were not true. *See id.* at 225–31. In February 2007, the U.S. Government moved to dismiss without prejudice the District of Columbia indictment against Douglas. The motion was granted by the District Court.

The Government subsequently filed a second indictment against Douglas, Hawkesworth, and Sugrim in the Eastern District of New York on narcotics and use of telephone charges. In the New York case, the Government acknowledged that there were inaccuracies in the materials that it had submitted supporting Douglas's extradition. Douglas ultimately pled guilty to a telephone charge and was sentenced to time served. *See id.* at 276.

In November 2013, Gaskin consented to extradition to the United States, but he was never extradited. Instead, on December 24, 2013, the U.S. Government filed a motion to dismiss without prejudice the District of Columbia indictment against Scantlebury, Gaskin, Hawkesworth, and Sugrim pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure ("Rule 48(a)"). The Government explained that its motion was made "in good faith" based on "the age of the case, government resources, and other factual and legal issues which

indicate the case is no longer viable." *Id.* at 41. Approximately two weeks later, on January 9, 2014, the District Court granted the Government's motion and the defendants were released from Barbadian custody. *See id.* at 345.

In 2015, the Barbadian defendants filed civil actions against the United States and certain federal officers. *See* Complaint, Gaskin v. United States, No. 15-cv-23-EGS (D.D.C. Jan. 8, 2015); Complaint, Gaskin v. May, No. 15-cv- 33-EGS (D.D.C. Jan. 9, 2015). The criminal case arising out of the District of Columbia indictment was subsequently unsealed in September 2015. *See* J.A. 20–21. In February 2016, the Barbadian defendants moved in the criminal case for alteration of the dismissal of the indictment from a dismissal without prejudice to a dismissal with prejudice. *See id.* at 46–92. The defendants argued that they were innocent of the charges in the indictment, that the charges harmed their reputations, and that the Government had committed prosecutorial misconduct by swearing to inaccurate statements and failing to timely notify the Barbadian government when the case against the defendants fell apart. *Id.* The motion did not request expungement of the records of arrest or indictment. Instead, the defendants merely sought to "reserve the right to seek the lesser relief" of expungement if the motion requesting dismissal with prejudice was denied. *Id.* at 90. Defendant Hawkesworth passed away before the District Court ruled on the motion. *See id.* at 24.

The District Court denied the motion to alter the dismissal without prejudice to a dismissal with prejudice, concluding that dismissal with prejudice was not warranted because the defendants "failed to rebut the presumption that the government sought dismissal in good faith and because the circumstances here do not rise to the level of being

exceptional." *Id.* at 357. The District Court acknowledged that the defendants had reserved the right to seek expungement and stated that it would "address any such request [for expungement]" if "movants [sought] additional relief following the Court's decision on the pending motions." *Id.* at 366. Appellants moved for reconsideration of the District Court's denial of their motion to alter the dismissal without prejudice to a dismissal with prejudice. Their request for reconsideration was denied. Appellants never filed a motion with the District Court seeking expungement. This appeal followed.

II. DISCUSSION

Appellants assert that this court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction over "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Appellants acknowledge that their standing to appeal is dubious under *Parr*, 351 U.S. at 516, and also *Lewis v. United States*, 216 U.S. 611, 612 (1910) (per curiam) (holding that when a criminal defendant is "discharged from custody he is not legally aggrieved and therefore cannot appeal"). *See* Appellants' Br. at 27. Appellants argue, however, that they have suffered "ongoing reputational injury from the indictment . . . and thus [have] standing to seek to convert the dismissal *without* prejudice into a dismissal *with* prejudice that would exonerate them of wrongdoing and redress those ongoing injuries." *Id.* at 28–29.

The Government contends that "[t]his Court should dismiss the appeal for lack of appellate jurisdiction." Appellee's Br. at 13. In support of this position, the Government asserts, first, that "[t]he Supreme Court has squarely held that the dismissal of an indictment without prejudice is not an appealable order"; second, "[a] defendant whose

indictment is dismissed is not injured by that ruling, even if he still faces potential prosecution, suffered reputational harm from the indictment, and was deprived of liberty as a result of the charges"; and, finally, that "[a] dismissal without prejudice [] is an interlocutory order" that is subject to review only "after trial on a new indictment, conviction, and sentencing." *Id*. at 13–14.

The matters at issue in this case concern the jurisdiction of the court. *Bender v. Williamsport Area Sch. Dist*., 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction.") (internal quotation marks omitted). Therefore, we address the issues *de novo*. *See Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1285 (D.C. Cir. 2016).

On the record before us, we hold that this court has no basis upon which to entertain this appeal. Appellants lack standing to appeal because they were not aggrieved by the dismissal without prejudice; the statute of limitations has run on the charges against Appellants, so the question regarding whether they face a threat of subsequent prosecution is moot; and they have asserted no viable grounds for redress of their alleged reputational injuries. In light of these holdings, we need not decide whether the District Court's dismissal without prejudice was "final" for the purposes of § 1291.

A. Appellants Lack Standing to Appeal for Lack of Aggrievement

Federal courts may not adjudicate cases unless the parties have a personal stake in the suit, not only at the outset of the litigation but at each successive stage as well. *See Camreta v. Greene,* 563 U.S. 692, 701 (2011). One element of that inquiry is whether, at each stage of the litigation, the party

seeking relief can establish the "invasion of a legally protected interest." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). In *Parr*, the Court held that a defendant whose indictment has been dismissed without prejudice is not aggrieved so as to support standing to appeal. 351 U.S. at 516–17.

The defendant-appellant in *Parr* obtained a transfer of the indictment against him to another division within the same district on grounds of local prejudice. *Id.* at 514. The Government then dismissed that indictment and filed a new indictment in another district. *Id.* at 515. Parr appealed the dismissal without prejudice, but the Supreme Court held that Parr could not appeal unless and until he was convicted and sentenced. *Id.* at 516–18.

Taking the initial, dismissed indictment in isolation, the Court held that Parr could not appeal the dismissal for want of standing:

> If the Corpus Christi indictment is viewed in isolation from the Austin indictment, an appeal from its dismissal will not lie because petitioner has not been aggrieved. Only one injured by the judgment sought to be reviewed can appeal, and, regarding the Corpus Christi proceeding as a separate prosecution, petitioner has not been injured by its termination in his favor. So far as petitioner's standing to appeal is concerned, it makes no difference whether the dismissal still leaves him open to further prosecution, or whether, as petitioner contends, it bars his prosecution elsewhere than in Laredo because the transfer order

> operated to give him a vested right to be tried only there. The testing of the effect of the dismissal order must abide petitioner's trial, and only then, if convicted, will he have been aggrieved.

Id. at 516–17 (citations omitted).

Thus, the Court's holding in *Parr* indicates that, as a general matter, a criminal defendant is not injured, and thus lacks standing to challenge a dismissal without prejudice, unless and until he is subsequently convicted. *See also United States v. Martin*, 682 F.2d 506, 507 (5th Cir. 1982) (per curiam) ("Any testing of the dismissal order must abide the outcome of a trial on the issue of guilt. Then, if convicted, the defendants may be aggrieved.").

Appellants argue that, since the decisions in *Lewis* and *Parr*, "federal courts have expanded their appreciation of what constitutes an Article III injury . . . so a century later 'an appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement.'" Appellants' Br. at 28 (quoting *Camreta*, 563 U.S. at 702). Appellants' cited authority is inapposite to this case.

Camreta, for example, was a civil case involving qualified immunity. As the Court explained, "a state child protective services worker and a county deputy sheriff interviewed a girl at her elementary school in Oregon about allegations that her father had sexually abused her. The girl's mother subsequently sued the government officials on the child's behalf for damages under Rev. Stat. § 1979, 42 U.S.C. § 1983, claiming that the interview infringed the Fourth Amendment." 563 U.S. at 697. The Court of Appeals ruled that the public officials had violated the Constitution, but that qualified immunity protected the officials from liability.

The Supreme Court held that the public

officials in *Camreta* had standing to seek review because they retained a "necessary personal stake in the appeal," given that the ruling could still "have prospective effect on the parties." *Id.* at 702. The Court explained:

> [The] Article III standard often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution. That is not because a court has made a retrospective judgment about the lawfulness of the officials' behavior, for that judgment is unaccompanied by any personal liability. Rather, it is because the judgment may have prospective effect on the parties. The court in such a case says: "Although this official is immune from damages today, what he did violates the Constitution and he or anyone else who does that thing again will be personally liable." If the official regularly engages in that conduct as part of his job (as Camreta does), he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action.

563 U.S. at 702–03.

In *Camreta*, the defendants had the "necessary personal stake" in the outcome of the appeal because they would be compelled to alter their future conduct to comply with the judgment. Appellants have not argued that they have been affected similarly in this case, nor do they have any basis upon which to do so.

The Government also argues that Appellants

cannot appeal the dismissal without prejudice because it does not constitute a final decision for the purposes of 28 U.S.C. § 1291. In *Parr*, the Court held that the appeal was premature because the subsequent indictment was still pending at the time of appeal. *See Parr*, 351 U.S. at 518–19. In so doing, the Court broadly stated that "[f]inal judgment in a criminal case means sentence." *Id.* at 518 (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)).

In this case, however, unlike *Parr*, no subsequent indictment was handed down. And the statute of limitations on the charge against Appellants expired before oral argument. At oral argument, counsel for the Government confirmed that the Government would not seek a further indictment. Therefore, the judgment in this case is as final as it will ever be. Under these circumstances, there is reason to doubt whether *Parr*'s finality holding is applicable.

The Supreme Court in *Parr* took pains to address the first and second indictments in that case independently, treating the first, dismissed indictment as unappealable for lack of injury, while separately holding that the subsequent indictment was not yet appealable for lack of finality. And at least one of our sister circuits has made the same distinction. *See United States v. Moller-Butcher*, 723 F.2d 189, 191 (1st Cir. 1983) ("If [the defendant] is not reindicted, it will never have suffered injury as a result of the dismissal. If, on the other hand, [the defendant] is reindicted, then the dismissal is an intermediate step in the prosecution which may be reviewed only after final judgment in the case.").

It is unnecessary for us to decide whether *Parr*'s finality holding applies to this case. On the record before us, it is clear that, under *Parr*, Appellants were not aggrieved by their dismissals

without prejudice. Therefore, they have no standing to pursue this appeal.

B. Appellants' Challenges to the Dismissals of Their Indictments Without Prejudice Are Moot

We also lack jurisdiction over this appeal because the claims raised by Appellants are moot. "When 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' we have no live controversy to review." *Camreta*, 563 U.S. at 711 (alteration in original) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)).

The parties agree that the statute of limitations has run on the drug trafficking charge pursuant to which Appellants were indicted. *See* Appellants' Br. at 28 n.8 (noting that, even if the statute of limitations was tolled pending extradition, the five- year statute of limitations expired on January 13, 2019). Therefore, there is no possibility that Appellants will be indicted for the same alleged offenses that gave rise to this case. The elimination of exposure to re-indictment moots Appellants' objections to the form of the dismissal. *See Lewis*, 216 U.S. at 613; *see also Parr*, 351 U.S. at 517 & n.8 (discussing the finding of mootness in *Lewis*).

C. Due to Lack of Redressability, Appellants Lack Standing to Support Their Claims of Reputational Injuries

Appellants argue that they have standing to pursue this appeal because of alleged "ongoing reputational injury from the indictment." Appellants' Br. at 28. In support of this assertion,

Scantlebury and Gaskin submitted declarations to the court reciting reputational harms that continue to adversely affect their job opportunities, limit their abilities to secure bank loans, and make it difficult for them to visit the United States. Each Appellant claims that "[a]n order of this Court dismissing [his] indictment with prejudice – or less preferably, expunging [his] arrest record – would enable [him] to claim that the indictment was in error because [he] was not guilty of the charges and would remove an obstacle" to re-establishing his reputation or returning to the United States. J.A. 106, 109.

On the record before us, we hold that the reputational injuries alleged by Appellants do not give them standing to appeal. This is because the relief that Appellants seek – an alteration of the dismissals without prejudice to dismissals with prejudice – would not redress the injuries that Appellants have alleged.

In order to establish standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). Appellants argue that a favorable ruling from this court that "the United States charged them without probable cause would redeem their reputations" and that, with respect to Gaskin, "striking the arrest would prevent U.S. immigration officials from using the fact of the arrest against him in the discretionary processing of his planned application to apply to return to the United States." Appellants' Br. at 29. These arguments are premised on a misunderstanding of Rule 48(a), which allows the prosecution to dismiss an indictment only "with leave of court." Fed. R. Crim. P. 48(a).

"[T]he 'leave of court' authority gives no

power to a district court to deny a prosecutor's Rule 48(a) motion to dismiss charges based on a disagreement with the prosecution's exercise of charging authority." *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016). Rather, a trial court "reviews the prosecution's motion under Rule 48(a) primarily to guard against the prospect that dismissal is part of a scheme of 'prosecutorial harassment' of the defendant through repeated efforts to bring—and then dismiss—charges." *Id.* (quoting *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977)). Therefore, a finding that the District Court erred in applying Rule 48(a) would not constitute a holding in Appellants' favor that the Government charged them without probable cause. Nor would a favorable holding have any impact on the records of Appellants' arrests and indictments.

The problem for Appellants is that their alleged reputational injuries stem from their arrests and indictments, not from the District Court's application of Rule 48(a). Neither the trial court nor this court may second-guess an indictment that is "'fair upon its face,' and returned by a 'properly constituted grand jury.'" *Kaley v. United States*, 571 U.S. 320, 328 (2014) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975)); *see also id.* ("The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime."). Therefore, absent a meritorious challenge to their indictments, we lack the authority to afford Appellants the relief that they seek.

Had Appellants sought expungement of their indictment and arrest records, rather than dismissal with prejudice, the redressability analysis might have been different. But Appellants did not move for expungement before the District Court and they have not requested it before this court.

The remedy of expungement is available only if "necessary to vindicate rights secured by the Constitution or by statute." *Abdelfattah v. DHS*, 787 F.3d 524, 536 (D.C. Cir. 2015) (quoting *Chastain v. Kelley*, 510 F.2d 1232, 1235 (D.C. Cir. 1975)); *see also id.* at 538 ("[We do not] recognize a nebulous *right* to expungement of government records that are inaccurate, were illegally obtained, or are 'prejudicial without serving any proper purpose;' instead expungement is a potentially available *remedy* for legally cognizable injuries."). Appellants have made no attempt to satisfy this standard.

In sum, the remedy sought by Appellants, if granted, would not redress their alleged reputational injuries. Therefore, Appellants lack standing to pursue these claims.

D. The Court Has No Jurisdiction to Consider Appellants' Claims Under the Declaratory Judgment Act

Finally, Appellants request declaratory relief from this court under the Declaratory Judgment Act, 28 U.S.C. § 2201. However, the Declaratory Judgment Act does not extend the jurisdiction of the federal courts. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("[The Declaratory Judgment Act] enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."). Having concluded that we lack jurisdiction over this appeal on injury, mootness, and redress grounds, we further conclude that we lack jurisdiction to consider Appellants' request for declaratory relief.

III. CONCLUSION

For the reasons stated herein, these appeals are dismissed.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 04-285 (EGS)

UNITED STATES OF AMERICA,

v.

FREDERICK HAWKESWORTH,
JOHN WAYNE SCANTLEBURY,
SEAN GASKIN

DEFENDANTS.

MEMORANDUM OPINION

On January 9, 2014, this Court granted the government's motion to dismiss without prejudice the indictment against Sean Peter Gaskin, John Wayne Scantlebury and Frederick Christopher Hawkesworth[1] (collectively, "movants"), pursuant to Federal Rule of Criminal Procedure 48(a). *See* Order Dismissing Indictment Without Prejudice ("Order"), ECF No. 79. Pending before the Court is movant's Motion to Alter Dismissal to Dismissal With Prejudice for Lack of Probable Cause of Criminal Conduct. Movants argue that the Court can grant the requested relief: (1) based on its inherent power; (2) to sanction conduct; and/or (3) pursuant to Federal Rule of Criminal Procedure 48(a). Also

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[1] The Motion to Alter Dismissal was filed prior to Mr. Hawkesworth's death. Given Mr. Hawkesworth's death in September 2016, *see* Notice of Death of Frederick C. Hawkesworth, Oct. 4, 2016, ECF No. 113, he cannot be re-prosecuted for his alleged crimes. As such, Mr. Hawkesworth's request for relief is moot. *United States v. Oberlin*, 718 F.2d 894, 894 (9th Cir. 1983)(*citing Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884)("It is a well-settled rule that actions upon penal statutes do not survive the death of the wrongdoer.")

pending before the Court is movant's Motion to Bifurcate the Court's Consideration of the Pending Motion to Alter Judgment, which was filed following the death of Mr. Hawkesworth. Upon consideration of the two motions, the responses and replies thereto, the relevant law, and for the reasons discussed below, the Court **DENIES** the Motion to Alter Dismissal[2] and **DENIES** the Motion to Bifurcate.

I. Background

On June 17, 2004, Mr. Hawkesworth, Raphel Douglas, Mr. Scantlebury, Mr. Gaskin and Terrence Sugrim were indicted on drug conspiracy and

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[2] On January 29, 2018, this Court entered an order denying the pending motions without prejudice, noting that: (1) the Court of Appeals for the District of Columbia Circuit had not yet decided whether a dismissal without prejudice of a criminal case is appealable; and (2) to the extent movants sought reconsideration of the Court's dismissal without prejudice, the Court was without briefing on *United States v. Bagcho*, 227 F. Supp. 3d 28, 31 (D.D.C. 2017) and the relevant cases discussed therein. Movants moved for reconsideration of the Court's order on various grounds and convinced the Court to vacate its order. In so doing, movants argued that their reliance on the Court's authority to reconsider its dismissal order based on the Court's inherent equitable power "trumps" the authority the Court pointed to in the *Bagcho* line of cases, but that they nonetheless would meet any standard set forth in those cases. Mot. for Reconsideration of Order, ECF No. 122-2 at 8, 14-15. The government did not respond substantively to the Court's order nor the movants' motion and requested the opportunity to respond substantively if the Court vacated its Order. Because the Court has determined that it can reconsider its Order dismissing the case without prejudice *de novo* based on the fully-briefed motions, including the government's briefing on whether the Court should dismiss the complaint with prejudice over the government's objections pursuant to Federal Rule of Criminal Procedure 48(a), *see* Gov't Opp'n, ECF No. 109 at 9-17, the Court does not need additional briefing from the government, which the government could have provided in its February 7, 2018 response. *See* ECF No. 123.

distribution charges. *See* Indictment, ECF No. 4. Count I charged all four defendants with conspiracy to manufacture and distribute five kilograms or more of a substance containing a detectable amount of cocaine, intending and knowing that it would be unlawfully imported into the United States. *Id*. at 2-6. The timeframe for this conspiracy was in or about January 1999 through at least May 27, 2004. *Id*. at 2. Among other overt acts in furtherance of this conspiracy, the Indictment charged that "[o]n or about September 20, 2003, Hawkesworth, Douglas, Scantlebury, Sugrim, and other co- conspirators shipped 184 kilograms of cocaine from Guyana to JFK airport in New York." *Id*. at 5. Count II charged Mr. Hawkesworth and Mr. Douglas with distributing 500 grams or more of a substance containing a detectable amount of cocaine, intending and knowing that it would be unlawfully imported into the United States. *Id*. at 6-7.

A. Extradition Request for Mr. Hawkesworth, Mr. Scantlebury, and Mr. Sugrim

Movants were located in Barbados. The government's extradition request for the movants included, among other things: (1) Affidavit in support of request for extradition of Stephen May, a Senior Trial Attorney with the Department of Justice ("May Hawkesworth Affidavit") dated July 9, 2004; (2) Affidavit of Drug Enforcement Administration Special Agent Gordon Patten, Jr. ("Patten Hawkesworth Affidavit") dated July 9, 2004; and (3) Affidavit of the Confidential Source ("CS" or "informant") dated July 16, 2004. ECF No. 131-1 at 1, 13, 35.[3]

The May Hawkesworth Affidavit contains no specific information regarding the September 2003

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[3] When citing electronic filings throughout this opinion, the Court cites to the ECF header page number, not the original page number of the filed document.

shipment of 184 kilograms of cocaine from Guyana to JFK airport described in Count I of the Indictment. *See generally* May Hawkesworth Affidavit, ECF No. 131-1 at 1-12. With regard to Count I, the May Hawkesworth Affidavit states that the government's evidence consists of:

> the testimony of the Cooperating Source who dealt directly with each of the defendants, the testimony of DEA agents, recorded telephone conversations with HAWKES WORTH [sic], SCANTLEBURY and other co-conspirators, recorded meetings with each of the defendants, videotape recordings of meetings with each of the defendants, and corroborative evidence including photographs, telephone records, hotel records, passport records, airline records, and physical evidence including the purchase and seizure of cocaine from this drug trafficking organization.

Id. at 7. The May Hawkesworth Affidavit contains no information regarding the reliability of the informant. *See generally id*. at 1-12.

With regard to the September 2003 shipment of 184 kilograms of cocaine from Guyana to JFK airport described in Count I, the Patten Hawkesworth Affidavit states as follows:

> Approximately October 16, 2003, the CS called me and reported that Scantlebury had told him that there had been a large seizure of the organization's cocaine at JFK airport in September in New York. He was told that nobody was arrested. Based on this information, I contacted DEA Special Agent Warren Franklin, who is assigned to the New York Airport Group at JFK, and

> requested that they review their seizures for the previous month. The only significant seizure was 184 kilograms of cocaine which occurred on September 20, 2003. The cocaine had arrived on a flight from Guyana, in a shipment of frozen sea food. Later that day, the CS met with Terrence SUGRIM and HAWKES WORTH and was informed that they had lost a load of 180 kilograms of cocaine, which had been shipped to JFK airport in New York, and seized by U.S. Customs.

Patten Hawkesworth Affidavit, ECF No. 131-1 at 18-19. The Patten Hawkesworth Affidavit provides the following information about the experience and reliability of the informant: "[t]his CS has worked with the DEA for approximately 5 years and has proven to be completely reliable." *Id*. at 15.

Movants were arrested on provisional arrest warrants from the United States in 2004. Motion to Alter Dismissal to Dismissal with Prejudice ("Mot."), ECF No. 106 at 21; Gov't Opp'n, ECF No. 109 at 3. Movants challenged their extradition and Mr. Hawkesworth and Mr. Scantlebury were released on bail in 2004, with Mr. Gaskin being released on bail in 2005. Mot., ECF No. 106 at 17; Gov't Opp'n, ECF No. 109 at 3. In 2011, movants' bail was revoked. Mot., ECF No. 106 at 27, Gov't Opp'n, ECF No. 109 at 3. In or around November 2013, Mr. Gaskin waived his objections to extradition. Mot., ECF No. 106 at 18; Gov't Opp'n, ECF No. 109 at 3. On January 9, 2014, this Court granted the government's motion to dismiss, and the movants were released from custody that same day. Order, ECF No. 79; Mot., ECF No. 106 at 18; Gov't Opp'n, ECF No. 109 at 7.

B. Mr. Douglas' Extradition and Appearance Before this Court

Mr. Douglas was extradited from Barbados in October, 2005, *see* Gov't Opp'n, ECF No. 109 at 15, based on the August 3, 2005 sworn statement of Mr. May ("May Douglas Statement"). *See* May Douglas Statement, ECF No. 128-2. Mr. May stated, among other things, that "[o]n September 20, 2003, agents from the United States Immigration and Customs Enforcement (ICE) seized 184 kilograms of cocaine in unmanifested boxes at JFK [airport]. No one was arrested in connection with that case." *Id.* ¶ 6. Regarding the credibility of the informant who "dealt directly with each of the defendants" and would provide eyewitness testimony, Mr. May stated as follows:

> This CS has worked with DEA since 1999 on this and other cases. His prior cooperation with DEA, Bridgetown Country Office, Barbados, has resulted in six successful cases, several drug seizures, and the indictment and conviction of several major drug traffickers. He has testified at trial, sworn to affidavits before federal judges, appeared before federal grand juries and his success rate has been 100%. He has been found to be completely reliable by DEA and currently is "registered" as a CS with DEA.

Id. ¶¶ 25-26. Mr. Douglas' bench warrant was executed on October 17, 2005, *see* ECF No. 5, and his first appearance before this Court occurred on October 25, 2005. Minute Entry of October 25, 2005.

At a February 12, 2007 pretrial hearing before this Court, the government informed the Court that it would not pursue the portion of the indictment that alleged Mr. Douglas' connection to the 184 kilograms of cocaine that were seized at JFK airport, *see* Feb. 12, 2007 Hr'g Tr. 8:7-9, and that "this case really comes down to that two-kilogram deal" in Barbados. *Id.* 12:6-7. The government also acknowledged that "the core of the case is the

testimony of the informant" and thus the credibility of the informant is significant." *Id.* 21:13-17. Finally, the government acknowledged "that the person we believe to be the informant in this case was involved in drug trafficking from 1996 to 1998" and the government did not provide this information to Mr. Douglas' attorney. *Id*. 23:10-24:14.

When the hearing resumed the next day, the government informed the Court that it had learned from another prosecutor that the informant had been involved in criminal matters with a defendant in an unrelated case, but that if questioned, the informant would contradict that prosecutor. Feb. 13, 2007 Hr'g Tr. 3:4-23. The government also stated that in the May Douglas Statement there was one misstatement and one omission. The misstatement was about the informant's credibility since the government now knew that he would contradict the statement of a federal prosecutor. *Id*. 5:21-25. The omission was that no one else had been arrested in relation to the seizure of the 184 kilograms of cocaine at JFK airport. *Id*. 6:2-12. The Court requested that Mr. May attend a resumed hearing to explain the misstatement and omission in his affidavit, but when the Court later was informed that the government and defendant had reached a plea deal, the Court declined to question Mr. May. *Id*. 16:15-17:12, 23-25.

At a hearing on February 16, 2007, the government orally moved to dismiss, without prejudice, the charges against Mr. Douglas. Minute Entry of Feb. 16, 2007. The Court dismissed the charges as to Mr. Douglas only on February 22, 2007. Order, ECF No. 64.

C. Eastern District of New York Case

On February 20, 2007, Mr. Douglas, Mr. Hawkesworth, and Mr. Sugrim were indicted in the Eastern District of New York. Counts One through Four charged two or more of the defendants with the manufacture/distribution, conspiracy to distribute, and importation of narcotics. *See United States v.*

Douglas, Crim. Action No. 07-137, ECF No. 3, (E.D.N.Y.). In Counts Five and Six, Mr. Douglas was charged with the using a telephone to facilitate the commission of a felony. *Id*.

Mr. Douglas challenged his extradition and moved to dismiss the charges. At a December 17, 2007 hearing regarding that motion, the government acknowledged inaccuracies in the affidavit supporting the United States' request for Mr. Douglas' extradition. ECF No. 106-3 at 46-47. The transcript of that hearing is not available on the docket for that case, but it was provided by movants as an attachment to their motion. *See generally id*. The government stated that the May Douglas affidavit contained the following inaccuracies:

> (1) The statement at paragraph 6 that no one was arrested in connection with the seizure of 184 kilograms of cocaine at JFK airport because people had been arrested in connection with the case.
>
> (2) Statements at paragraph 26 regarding the experience of the confidential source; specifically: (a) he had not worked on six successful cases in cooperation with the Drug Enforcement Agency's Bridgetown Country Office in Barbados, but on a fewer number; (b) he never testified at trial; (c) he never swore to affidavits before federal judges; and (d) he had appeared before one grand jury, not multiple grand juries.

Id. at 49-51.

> (3) Statements at paragraphs 37 and 44 that telephone calls were recorded because they were not.

Id. at 51-52. The government also noted that the affidavit omitted mentioning that the informant: (1) had a prior felony conviction; (2) was a paid

informant; and (3) the information learned from another prosecutor that the informant had been involved in criminal matters with a defendant in an unrelated case, but that if questioned, the informant would contradict that prosecutor. *Id*. at 53-54; 79-82.

Following the hearing, Judge Dearie denied the motion to dismiss the case. Mr. Douglas plead guilty to Count Five and was sentenced on April 14, 2008. *United States v. Douglas,* Crim. Action No. 07-137, ECF No. 35, (E.D.N.Y.). Thereafter, on May 12, 2015, the court granted the government's motion to dismiss the indictment against Mr. Hawkesworth and Mr. Sugrim. *Id*. at ECF No. 42. The next day, movant's counsel in the case before this Court sought leave to appear *pro hac vice* in that case. *Id.* at ECF No. 42. Mr. Hawkesworth and Mr. Sugrim have not moved to alter the dismissal of that case to one with prejudice. *See generally* docket for *United States v. Douglas,* Crim. Action No. 07-137 (E.D.N.Y.).

D. Resolution of Case Against Movants

On December 24, 2013, the government moved to dismiss the indictment without prejudice against the movants here. Mot. to Dismiss, ECF No. 78. The motion was filed under seal and, according to the government, was not served on the defendants because "[t]hree of the defendants are in Barbados . . . and, to the government's knowledge, United States counsel has not been identified, retained, or appointed as counsel for service of process purposes." *Id*. at 3. The Court granted the government's motion on January 9, 2014. Order, ECF No. 79. Defendants were released from prison the same day that the Court granted the government's motion. Mot., ECF No. 106 at 28; Gov't Opp'n, ECF No. 109 at 7.

II. Analysis

A. The Court's Order Dismissing the Case without Prejudice was Likely Not Appealable

The government contends that movants seek to circumvent the appellate review process with the

motion to alter judgment because "[w]hether this case should have been dismissed with or without prejudice should have been addressed by the D.C. Circuit through a timely appeal" of the Court's Order. Gov't Opp'n, ECF No. 109 at 7. Pursuant to Federal Rule of Appellate Procedure 4(b)(1)(A), a notice of appeal is due 14 days after the entry of the order being appealed. The government states that "on the same day [that the Court dismissed the case without prejudice] Barbadian officials released the Defendants, thereby putting them on notice of the Court's dismissal." *Id*. Thus, according to the government, movants' appeal was due on due on January 23, 2014, or in the alternative, if that deadline was tolled due to the defendants not having been served with the Order, on September 24, 2015, which was 14 days after the Court unsealed the case. *Id*. at 7-8.

The government relies on precedent in the civil context to argue that dismissal without prejudice is appealable. However, precedent in the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is clear that this Circuit has not yet decided whether an order dismissing a criminal case without prejudice is appealable. *See United States v. Glover*, 377 F. App'x 20, 21 (D.C. Cir. 2010)(noting appellants' recognition that "this court has not decided whether [a dismissal of an indictment without prejudice for violation of the Speedy Trial Act] is immediately appealable"). Moreover, persuasive authority from other circuits that have considered the question have determined that dismissal of an indictment without prejudice is not a final order for purposes of appeal. *See, e.g.*, *United States v. Bert*, 814 F.3d 70, 76 n.3 (2d Cir. 2016) ("[Defendant] could not have immediately appealed the dismissal of the indictment without prejudice because that judgment was neither a 'final order' within the meaning of 28 U.S.C. § 1291, nor a collateral order."); *United States v. Kuper*, 522 F.3d 302, 303 (3d Cir. 2008)("Every court of appeals that

has considered the appealability of an order dismissing an indictment without prejudice has held such an order is not final and appealable under § 1291."); *United States v. Thompson*, 814 F.2d 1472, 1474 (10th Cir. 1987) ("[Defendant] was not injured by the dismissal of the information because the judgment was terminated in his favor, and only one who has been injured by a judgment may seek review on appeal."); *United States v. Martin*, 682 F.2d 506, 507 (5th Cir. 1982) ("The defendants appeal the district court's dismissal without prejudice of a nine count indictment charging them with mail fraud. They contend the dismissal should have been with prejudice. Because there has been no final decision within the meaning of 28 U.S.C. § 1291, we dismiss for lack of jurisdiction."); *United States v. Lanham*, 631 F.2d 356, 357 (4th Cir. 1980) ("We find that a dismissal without prejudice is not immediately reviewable and we therefore dismiss the appeals."); *see generally* 15B Wright & Miller Fed. Prac. & Proc. Juris. § 3918.3 (2d ed.) ("Grant of a government motion to dismiss without prejudice surely would seem a final order, supporting appeal by the defendant to argue that dismissal should have been with prejudice. It seems settled, however, that appeal cannot be taken.").

In view of this persuasive authority, it is not at all clear that the Court's Order would have been appealable, even if it had been served on movants at the time it was issued or timely appealed after the case was unsealed. Pursuant to this authority, because there has been no final decision in this case, the Court retains jurisdiction to consider this motion.

B. The Court Can Reconsider its Order Dismissing the Indictment Without Prejudice

The next question is whether this Court can reconsider its Order dismissing the case without prejudice. Although the Federal Rules of Criminal Procedure do not provide for motions for reconsideration, judges in this district have assumed,

without deciding, that they may consider such motions. *United States v. Bagcho*, 227 F. Supp. 3d 28, 31 (D.D.C. 2017)(citing *United States* v. *Hong Vo*, 978 F.Supp.2d 41, 47 (D.D.C. 2013); *United States v. Cabrera*, 699 F.Supp.2d 35, 40 (D.D.C. 2010); *United States v. Cooper*, 947 F.Supp.2d 108, 109 (D.D.C. 2013)). The Court will do the same.

Various standards of review have been used when considering such motions in this context:

> In some cases, judges have adopted the "as justice requires" standard of Rule 54(b) of the Federal Rules of Civil Procedure, which permits reconsideration when a court has "patently misunderstood the parties, made a decision beyond the adversarial issues presented, [or] made an error in failing to consider controlling decisions or data, or [where] a controlling or significant change in the law has occurred." *Hong Vo*, 978 F.Supp.2d at 47–48 (quotation marks and citations omitted). In other cases, judges have adopted the standard from Rule 59(e) of the Federal Rules of Civil Procedure, under which a motion for reconsideration need not be granted unless there is an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Cabrera*, 699 F.Supp.2d at 40–41 (quotation marks and citations omitted). Rule 59(e) motions must be filed within 28 days after the entry of judgment. Fed. R. Civ. P. 59(e). Finally, some judges have denied motions for reconsideration after considering the issues de novo, without deciding on a standard of review. *E.g.*,

> *Cooper*, 947 F.Supp.2d 108; *United States v. Thompson*, No. 07–153–08, 2007 WL 1954179 (D.D.C. July 5, 2007).

United States v. Bagcho, 227 F. Supp. 3d at 31.

Because this Court can consider and deny movant's "motion for reconsideration based on a *de novo* review, it is unnecessary to decide on the proper standard of review or the deadline for filing a motion for reconsideration." *Id*. A *de novo* review is appropriate because the movants, whose whereabouts were known to the government, were not served with the government's motion to dismiss. *See* Mot. to Dismiss, ECF No. 78 at 3 ("Three of the defendants are in Barbados . . . and, to the government's knowledge, United States counsel has not been identified, retained, or appointed as counsel for service of process purposes.") At the time the motion was filed, the case was under seal. As movants correctly note, Federal Rule of Criminal Procedure 49(a),(b) requires "[a] party [to] serve on every other party any written motion" "in the manner provided for a civil action." Federal Rule of Civil Procedure 5(a) requires non-*ex parte* written motions to be served on every party. The government, in its certificate of service, does not contend that the motion was an *ex parte* motion, but states that it could not serve the movants because they were not represented. Since movants were not represented, they should have been served with a paper copy of the government's motion to dismiss per Local Civil Rule 5(d)(2)("A separate certificate of service or other proof of service showing that a paper copy was served on a party is required when that party does not receive electronic notification of filings"). Since movants were not served, they did not have the opportunity to oppose the motion prior to the Court's Order. Movants are now represented and contest the dismissal without prejudice. Therefore, the Court will reconsider its dismissal order based on a *de novo* review.

C. Federal Rule of Criminal Procedure 48(a)

Movants argue that Count I[4] should be dismissed with prejudice because: (1) they did not commit the acts alleged; (2) the government did not allege a crime against them because 25 other people were arrested and convicted for the 184 kilogram interdiction; and (3) the government has admitted that the case is only about the two kilograms of cocaine charged in Count II. Mot., ECF No. 106 at 31-33. Movants argue that the government's "admission" requires dismissing Count I on various substantive grounds: (1) it does not state an offense; (3) it resulted from grand jury proceeding error; (4) it lacks specificity; and (5) it lacks the agreement a conspiracy charge requires. *Id*. at 33.

Movants further argue that the Court should grant its motion to sanction the government because of its: (1) failure to correct information provided in the extradition affidavits; (2) deceit regarding movants' involvement with the JFK cocaine interdiction; (3) deceit regarding the informant's credibility; (4) bad-faith duplicative prosecution of Mr. Hawkesworth and Sugrim in New York; (5) failure to serve movants or their Barbadian counsel with the government's motion to dismiss; (6) keeping movants in prison when the government knew that prison was not justified; and (7) keeping movants in prison for two weeks longer than they should have been because the government's motion to dismiss did not convey any sense of urgency to Court. Mot., ECF No. 106 at 45-58.

Federal Rule of Criminal Procedure Rule 48(a)

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[4] Movants also request that Count II against Mr. Hawkesworth be dismissed with prejudice. In view of Mr. Hawkesworth's death, the relief sought is moot. *See infra* n.1. To the extent movants seek a holding from this court that Mr. Hawkesworth was charged without probable cause, the Court declines to so hold. *See supra* at 23-24.

provides that at any time before trial "[t]he government may, with leave of court, dismiss an indictment." Fed.R.Crim.P. 48(a). "The discretion of whether to dismiss an indictment, and whether to dismiss it with or without prejudice, lies in the first instance with the prosecutor. Because that discretion implicates the constitutional doctrine of separation of powers, the district court's role in reviewing the prosecutor's exercise of its discretion is limited." *United States v. Florian*, 765 F. Supp. 2d 32, 34 (D.D.C. 2011)(citation omitted). "Generally speaking, there is a strong presumption in favor of dismissal without prejudice over one with prejudice." *Id.* (citation omitted). "Where [] the dismissal does not arise from a constitutional violation, dismissal is normally without prejudice." *Id*. (citing *United States v. Simmons,* 536 F.2d 827, 833 (9th Cir.), *cert. denied,* 429 U.S. 854 (1976)). "Nonetheless, in exceptional circumstances, the district court may deny the prosecutor leave to dismiss an indictment without prejudice. As the case law makes clear, this will rarely be appropriate." *Id*. (internal citation omitted).

"When the prosecutor's discretion is challenged, the prosecutor has the initial burden of explaining that a dismissal without prejudice would be in the public interest. Once the prosecutor has discharged that threshold burden, its decision is presumptively valid and the district court may not substitute its judgment for that of the prosecutor even if it might have reached a different conclusion were it presented with the issue in the first instance." *Id.* at 35. That presumption can be "rebutted when the motion to dismiss contravenes public interest because it is not made in good faith." *Id*. (internal citations and quotations omitted).

"There does not appear to be a great deal of precedent elucidating what would and what would not call for a refusal to permit a prosecution to proceed at [a] subsequent time." *United States v. Karake*, Crim. Action No. 02-256, 2007 WL 8045732

at *1 (D.D.C. Feb. 27, 2007). "What precedent there is, however, suggests that the Court should consider three factors. First, leave to dismiss with prejudice is warranted when allowing re- prosecution "would result in harassment of the defendant or would otherwise be contrary to the manifest public interest." *Id.* "Second, in addition to considering whether the government is attempting to harass defendants or gain a tactical advantage, courts have considered whether dismissal without prejudice would condone disregard for the Federal Rules of Criminal Procedure." *Id.* at *2. "Third, courts have granted leave to dismiss with prejudice when reprosecution would go 'against the concept of fundamental fairness.'" *Id.* at *3 (citation omitted). "Relevant considerations include 'the strain on the defendant, that prosecutorial discretion in choosing to indict and proceed has resulted in multiple mistrials, that retrials tend to be unsatisfactory, that witnesses are subjected to repeated inconveniences by retrials, ... the urgency of more significant court business,' whether prior trials have 'resulted in an indication of reasonable doubt in the minds of a substantial majority of the jury members,' and whether the rationale behind the government's Rule 48 motion is 'vague.'" *Id.*

On December 24, 2013, the government moved to dismiss the indictment without prejudice, stating that "[t]he request is made in good faith, and based upon, among other factors, the age of the case, government resources, and other factual and legal issues which indicate the case is no longer viable." Mot. to Dismiss, ECF No. 78 at 1. In addition to the reasons given in the government's original motion to dismiss, in its opposition briefing, the government notes one additional ground: "to avoid the potential of protracted litigation which could arise if all three defendants were not extradited together." Gov't Opp'n, ECF No. 109 at 17.

With regard to the first factor set forth in *Karake*, the government states that this case was

prosecutable at the time it was dismissed and is prosecutable today. Gov't Opp'n, ECF No. 109 at 14. The government argues that the dismissal without prejudice did not result in the harassment of the defendants, nor was it contrary to the public interest because "there was no strategic maneuvering by the Government or a tactical decision to dismiss the case without prejudice while working to cure defects in the Government's case in order to re-prosecute Defendants." *Id*. With regard to the second *Karake* factor, the government asserts that neither its "earlier motion to dismiss, nor any other litigation tactics or pleadings, [] violate[d] the Federal Rules of Criminal Procedure." *Id*. With regard to the third *Karake* factor, the government asserts that "reprosecution of this case would not go against fundamental fairness. There have been no mistrials, let alone multiple mistrials; witnesses have not been subjected to any inconvenience by trials; and the Government has provided substantial basis for its prior motion to dismiss. . . Moreover, the charges in this case . . . are very serious charges involving a statutory maximum sentence of life imprisonment, which weighs in favor of dismissal without prejudice." *Id*. at 15.

Movants attempt to rebut the presumption that the motion to dismiss was made in good faith, arguing that that the government acted in bad faith because: (1) it brought "substantially the same litigation in New York" against two of the movants here; and (2) the government's failure to correct the false statements made in support of extradition constitutes "deceit, malice, and bad faith." Reply, ECF No. 111 at 28. Movants argue that the prosecutorial misconduct that occurred in this case is itself exceptional. *Id*. at 29. Movants further argue that the Court does not need to find that a constitutional violation occurred in this case because "the government's misconduct provides the exceptional circumstances that obviate constitutional questions now, given the conduct described here and

in Movants' memorandum." *Id.*

Movants argue that the charges are not grave because: (1) "Count I simply did not happen, and the government has admitted it" *Id.* at 30. Movants also argue that the government violated Federal Rule of Criminal Procedure 16 by withholding information, identifying the informant's affidavit as information that was withheld. *Id.* at 31. Movants further argue that the government violated various rules of professional conduct by failing to correct the information in the extradition affidavit, by maintaining a charge that is not supported by probable cause, and by filing the motion to dismiss the indictment on Christmas Eve, thereby preventing the movants from being able to be home for Christmas. *Id.* at 31-33.

Finally, movants argue that dismissal with prejudice is appropriate as a matter of fundamental fairness to "end not only the government's threats . . . and misconduct . . . but also future litigation, with its resulting burdens on courts, witnesses in Barbados, and the Movants themselves." *Id.* at 34.

D. Dismissal with Prejudice is not Warranted

For the reasons explained below, the Court will deny the motion because the movants have failed to rebut the presumption that the government sought dismissal in good faith and because the circumstances here do not rise to the level of being exceptional, thereby warranting dismissal with prejudice. *See United States v. Florian*, 765 F. Supp. 2d at 34-35. Additionally, the *Karake* factors are inapplicable to the circumstances here. *See United States v. Karake*, 2007 WL 8045732 at *2-*3.

As an initial matter, movant's request that the Court dismiss the indictment with prejudice because there was a lack of probable cause of criminal conduct is squarely foreclosed by Supreme Court precedent. "The grand jury gets to say – without any review, oversight, or second-guessing—whether

probable cause exists to think that a person committed a crime." *Kaley v. United States*, 134 S.Ct. 1090, 1098 (2014).

Movants contend that dismissal with prejudice is warranted because they did not commit the acts alleged in Count I. Movants' theory is that: (1) because 25 other people were charged in relation to the JFK interdiction, the government cannot claim movants had anything to do with it; and (2) the government made an "admission against interest" when it stated before this Court that the case is only about the two kilograms of cocaine charged in Count II. Movants' theory is unavailing for two reasons. First, the fact that 25 others were charged in relation to the JFK interdiction does not in and of itself mean that movants could not have been connected to that interdiction as part of the conspiracy. Second, the government's "admission against interest" was made in the context of the case against Mr. Douglas; not the movants here. In any event, the indictment against movants has been dismissed—there are no pending charges. Had this case gone to trial, the movants would have been able to present evidence in support of their assertions of innocence. This motion is not the venue for a determination of the movants' innocence of the charges.

To the extent movants contend that the government acted in bad faith by failing to inform Barbardian officials of misstatements in the affidavits in support of extradition, movants' are wrong about the facts supporting this argument. The statements about which they complain were made in the affidavits supporting the extradition of Mr. Douglas; not the affidavits supporting the extradition of movants. Specifically, the May Hawkesworth Affidavit says nothing about the JFK seizure. *See generally* ECF No. 131-1 at 1-12. With regard to that seizure, the Patten Hawskesworth Affidavit states as follows: "Approximately October 16, 2003, the CS called me and reported that Scantlebury had told him that there had been a large

seizure of the organization's cocaine at JFK airport in September in New York. He was told that nobody was arrested." *Id*. at 18-19. It is clear from this language that Special Agent Patten is not representing to Barbadian officials that nobody was arrested, but rather that either Scantlebury was told nobody was arrested or the infomant was told by Scantlebury that no one was arrested. Because the movants are wrong about the facts upon which this argument relies, the Court need not reach movants' legal arguments, *see* Mot., ECF No. 106 at 45-50, nor their arguments that the government violated various rules of professional conduct. *See* Reply, ECF No. 111 at 32. In sum, the Court cannot find that the government acted in bad faith by not correcting information that did not need to be corrected.

Similarly, the May Hawkesworth Affidvait says nothing about the reliability of the informant. *See generally* ECF No. 131-1 at 1-12. The only statement about the informant in the Patten Hawkesworth Affidavit is: "[t]his CS has worked with the DEA for approximately 5 years and has proven to be completely reliable." *Id*. at 15. Movants argue that the informant's reliability was "falsely inflated" as part of the extradition process and that the government had an obligation to correct it. Mot., ECF No. 106 at 51. Movants point to *Florida v. Harris*, where the Supreme Court considered "how a court should determine if the 'alert' of a drug-detection dog during a traffic stop provides probable cause to search a vehicle." 568 U.S. 237, 240 (2013), which is clearly inapposite here. The Court is aware that in the Douglas matter, the government admitted that the affidavits omitted information about the informant's prior felony conviction, the fact that he was a paid informant, and his criminal activity in another case. The context for those omissions, however, was detailed information about the informant's credibility in the Douglas affidavits. Here, by contrast, there is one short statement regarding the informant's reliability.

The Court is troubled by the testimony of Mr. May and Special Agent Patten at the December 17, 2007 hearing in the New York case. ECF No. 106-3. That testimony clearly raises credibility issues with regard to the affiants as well as the credibility of the informant. That said, the fact that there are credibility issues, which could be addressed during pretrial proceedings or on cross examination, is not an "exceptional circumstance" warranting a dismissal with prejudice. *See United States v. Florian*, 765 F. Supp. 2d at 34. Movants are also wrong on the facts relating to the informant's affidavit. Movants contend that the government violated Federal Rule of Criminal Procedure 16 by failing to disclose the informant's affidavit. The informant's affidavit was filed under seal on the docket in this case on July 16, 2004. On September 10, 2015, the Court ordered the unsealing of the case with the exception of certain filings, which were to be unsealed after the government made appropriate redactions. Minute Order of Sept. 10, 2015. According to a government notice filed on September 14, 2015, the Clerk of Court was unable to locate the sealed file containing the original paper filings of the documents to be redacted. Notice, ECF No. 97. On April 27, 2018, the parties were informed via a Minute Order that the sealed file had been located, and the government was directed to make proper redactions to the relevant documents. Minute Order of Apr. 27, 2018. On May 17, 2018, the redacted affidavit was filed on the docket. ECF No. 131. Consequently, there has been no withholding of the affidavit by the government. The informant's affidavit is on the public docket in this case. Therefore, movants' reliance on the second *Karake* factor—the violation of the Federal Rules of Criminal Procedure—in support of their motion is misplaced.

Movants also complain that the government acted cruelly and unethically by filing the motion to dismiss on December 24, 2013 without alerting the Court to the urgency of the motion. This Court has

no patience for illegal incarceration. That said, since the movants could not have been released until the Court granted the government's motion, the Court cannot find that the government's failure to alert the Court to the urgency of the motion in and of itself constitutes an "exceptional circumstance" warranting a dismissal with prejudice. *See United States v. Florian*, 765 F. Supp. 2d at 34.

Regarding the remaining alleged prosecutorial misconduct, movants speculate that the government "[m]oved the prosecution of Mr. Douglas to New York to evade this Court's scrutiny and falsely designated the New York case as related to another case," that the government "appears to have handpicked the New York judge by misrepresenting the related-case status," and that the government "[f]ailed to disclose to this Court that the triggering event for the motion to dismiss was an imprisoned Movant's having waived extradition." Mot., ECF No. 106 at 44, 52. As an initial matter, this Court presided over the February 2007 hearings regarding Mr. Douglas, and did not find what it learned at that time to be a basis to dismiss the charges against Mr. Douglas with prejudice. Furthermore, movants' speculations about the government's motivations and actions neither rebut the presumption of good faith nor do those speculations satisfy the exceptional circumstances standard. *See United States v. Florian*, 765 F. Supp. 2d at 34.

Movants also contend that the filing of duplicative charges is indicative of bad faith. Mot., ECF No. 106 at 34. However, the case cited in support, *United States v. Ammidown*, merely states that the primary purpose of Rule 48(a) is "protecting a defendant from harassment, through a prosecutor's charging, dismissing without having placed a defendant in jeopardy, and commencing another prosecution at a different time or place deemed more favorable to the prosecution." 497 F.2d 615, 620 (D.C. Cir. 1973). *Ammidown* is inapposite because at issue in that case was whether a trial judge exceeded his

discretion when he rejected a plea bargain "on the ground that the public interest required that the defendant be tried on a greater charge" *id*. at 617, and not whether the filing of duplicative charges is indicative of bad faith. *United States v. Borges*, 153 F. Supp. 3d 216 (D.D.C. 2015), provides a compelling example of circumstances requiring dismissal with prejudice over the objection of the government. There, one of the special agents who had assisted in the investigation had been suspended pending a criminal investigation of whether he had engaged in misconduct by tampering with evidence in other cases. *Id.* at 218. According to the government, the agent's involvement with defendants' case "undermined the integrity of the prosecution" warranting dismissal. *Id.* at 219 (internal quotations omitted). When pressed to explain why the dismissal should be without prejudice, the government stated that defendants could hypothetically be reprosecuted if the agent affirmed that he had not tampered with any evidence in defendants' case. *Id.* at 220. Concluding that "the ongoing threat that the Government ***may*** change course at a later date [wa]s itself the very type of harassment that warrant[ed] a with prejudice dismissal," the court held that the government's conduct "objectively amount[ed] to harassment" requiring dismissal with prejudice. *Id.* at 221. Here, by contrast, movants do not claim that the government plans to commence another prosecution;[5] rather they state that converting the dismissal to one with prejudice would be helpful in the civil actions[6] they have filed. Mot., ECF No. 106

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[5] Movants only statement in this regard is that since the government still views its claims against as viable, it could re-prosecute, assuming that challenging extradition tolls the statute of limitations, Mot., ECF No. 106 at 30-31

[6] In Gaskin, et. al v. US, Civil Action No. 15-23, Mr. Gaskin and Mr. Scantlebury bring claims for: (1) wrongful prosecution; (2) wrongful imprisonment; and (3) restrictions on the right to travel and to associate freely. In Gaskin et. al v.

at 18. Therefore, movants cannot rely on the first *Karake* factor. Similarly, movants' reliance on the third *Karake* factor— fundamental fairness—is misplaced. Movants have never appeared before this Court, there have been no pretrial proceedings, and there has been no trial, much less multiple trials.

In sum, the Court finds that movants have failed to rebut the presumption that the government acted in good faith in moving to dismiss the indictment without prejudice. Furthermore, as the analysis above makes clear, the circumstances here are not exceptional, but rather are readily explainable. Finally, none of the factors set forth in *Karake* are applicable to the circumstances here.

Because the Court has assumed that it can reconsider its order pursuant to Rule 48 on a *de novo* basis, the Court need not consider whether it can reconsider its order based on its inherent power. *Shepherd v. ABC*, 62 F.3d 1469, 1475 (D.C.Cir. 1995)("When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap.")(citation omitted).

E. Personal Jurisdiction, Expungement, and Entrapment

Despite conceding D.C. Circuit precedent to the contrary, movants argue that the United States lacks personal jurisdiction over them to "preserve the issue for appeal because the circuits are split on it." Mot., ECF No. 106 at 59 (citing United States v. Ali, 718 F.3d 929, 943 (D.C. Cir. 2013). Movants also request that if the Court denies the relief sought, that the order be "without prejudice to a future motion to expunge movants' arrest records for lack of

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May et al., Mr. Gaskin, Mr. Scantlebury and Mr. Hawkesworth bring claims for: (1) denial of due process; (2) unlawful search and seizure; (3) deliberate indifference; (4) supervisory liability for deliberate indifference; (5) and (6) federal tort claims act violations.

probable cause, entrapment, and lack of personal jurisdiction." Mot., ECF No. 106 at 60. The government responds that "the law of the case doctrine should apply to any future motions addressing the same issue." Gov't Opp'n, ECF No. 109 at 30. Should movants seek additional relief following the Court's decision on the pending motions, the Court will address any such request consistent with applicable law.

F. Motion to Bifurcate

Following Mr. Hawkesworth's death, counsel moved to bifurcate consideration of Mr. Hawkesworth's claims because there are "additional claims of a monetary nature (e.g. the seizure of assets while Mr. Hawkesworth was wrongfully imprisoned) that . . . survive [his] death even if the other previously asserted claims have become moot with Mr. Hawkesworth's death." Mot. to Bifurcate, ECF No. 114-2 at 3. Counsel requests 30 days to "work through the documentary evidence with relevant third parties and prepare submission of relevant evidence." *Id*. at 4. The government responds that movant's motion "was untimely filed, and the court must therefore deny the motion with respect to all three movants" and that "any special concerns raised by defense counsel regarding [Mr.] Hawkesworth are irrelevant to the untimeliness of [the] Motion to Alter Dismissal." Gov't Opp'n, ECF No. 120 at 3.

"[M]otions for bifurcation are addressed to the 'broad discretion' of the trial judge." *Parman v. United States*, 399 F.2d 559, 561 (D.C. Cir. 1968)(citation omitted). As an initial matter, the Court will disregard both parties essentially re-briefing and raising new arguments relevant to the movant's motion to alter judgment. *See* Gov't Opp'n, ECF No. 120 at 4-8, Reply, ECF No. 121 at 8-18. The Court has reconsidered its dismissal order *de novo*, and has determined that there are no grounds to change the order to a dismissal with prejudice. Mr. Hawkesworth's alleged monetary claims existed at

the time the Motion to Alter was filed, and should have been asserted at that time. Mr. Hawkesworth's death does not change the fact that such claims were not asserted in the motion to alter. Counsel's statement that "Movants viewed these claims as more appropriately brought after the Court granted the motion to alter the judgment" is nonsensical because had the Court granted the motion to dismiss with prejudice, that would have been a final and appealable order. *See* 28 U.S.C. § 1291.

III. Conclusion

For the reasons set forth in this Memorandum Opinion, the Court **DENIES** the Motion to Alter Dismissal and **DENIES** the Motion to Bifurcate. A separate Order accompanies this Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
June 21, 2018

Organic Act of 1801, Ch. 15, §1, 2 Stat. 103, 104-05

[T]he laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States, and by them accepted as aforesaid.

Organic Act of 1801, Ch. 15, §3, 2 Stat. 103, 105-06

That there shall be a court in said district, which shall be called the circuit court of the district of Columbia; and the said court and the judges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States.

Organic Act of 1801, Ch. 15, §5, 2 Stat. 103, 106

That said court shall have cognizance of all crimes and offences committed within said district, and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district, and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants ; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States.

28 U.S.C. §2679

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)

(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish

copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)

(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial

petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) [1] of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. §2680(k)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

…

(k)Any claim arising in a foreign country.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SEAN P. GASKIN
3rd Avenue
Station Hill
St. Michaels, Barbados,

JOHN W. SCANTLEBURY,
56 Coconut Palm Avenue
Durette Garden
St. Phillip, Barbados,

and,

FREDERICK C. HAWKESWORTH,
29 Rock Dundo Heights
Cave Hill
St. Michael, Barbados,

Plaintiffs,

v.

STEPHEN M. MAY,
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530,

GORDON PATTEN, JR.,
Drug Enforcement Administration
600 Arch Street, Room 10224
Philadelphia, PA 19106,

JODI L. AVERGUN,
c/o Cadwalader, Wickersham

Civil Action Nos.
1:15-0023-EGS &
1:15-0033-EGS

COMPLAINT AND DEMAND FOR JURY TRIAL AND FOR INJUNCTIVE AND DECLARATORY RELIEF

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U.S. Department of Justice
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UNITED STATES OF AMERICA,

and,

JOHN DOES 1 - 20,

Defendants.

SECOND SUPPLEMENTED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Sean P. Gaskin, John W. Scantlebury, and Frederick C. Hawkesworth (collectively, "Plaintiffs"), by and through counsel, bring the following action for damages from violations of constitutional and common-law rights and for related declaratory and injunctive relief, based on the following allegations:

NATURE OF THE ACTION

1. This is an action to recover for Plaintiffs' unlawful incarceration in Barbados as the result of an extradition request and provisional arrest warrants in the sealed case of *United States v. Hawkesworth*, No. 1:04-0285-EGS (D.D.C.) (hereinafter, "No. 1:04-0285-EGS"), that certain agents of the U.S. Department of Justice ("DOJ") and Drug Enforcement Agency ("DEA") – and their supervisors – (collectively, "Defendants") negligently and willfully caused. Although Defendants knew or should have known that the extradition request and supporting affidavits contained false information when initially prepared in 2004, Defendants' actions and inaction became malicious in 2007-08 when Defendants acquired actual knowledge of the false information. At that time, it became clear that the United States had arrested and convicted 25 other people – unrelated to Plaintiffs – for the centerpiece of their case against Plaintiffs (a 184-kilogram cocaine interdiction in New York), leaving the case against Plaintiffs at a two-kg alleged sale to a U.S. informant in Barbados, allegedly with the intent that the cocaine illegally be imported into the United States. To avoid this Court's inquiry into the initial false information, Defendants took evasive measures. They dismissed No. 1:04-0285-EGS and filed similar charges against Plaintiff Hawkesworth and No. 1:04-0285-EGS's two

co-defendants from Guyana – but apparently not against Plaintiffs Gaskin or Scantlebury – in the Eastern District of New York, *United States v. Douglas,* No. 1:07-cr-0137-RJD (E.D.N.Y.) (hereinafter, "No. 1:07-cr-0137-RJD"), and they did not correct or update the pending extradition request in No. 1:04-0285-EGS or its supporting affidavits. In 2007-08, Plaintiffs had been released on bail from provisional arrest pending extradition, which they were contesting in Barbadian courts. In 2011, Barbados remanded them to custody in prison – with extensive stretches of solitary confinement – only releasing them in 2014 after Plaintiff Gaskin waived extradition, and the United States dismissed the action to avoid getting caught at failing to correct known false statements. This action seeks compensation from the individuals responsible for Plaintiffs' injuries and the violations of their common-law and constitutional rights.

PARTIES

2. When these actions were filed, Plaintiff Sean Gaskin was a 43-year-old resident and citizen of Barbados.

3. When these actions were filed, Plaintiff John W. Scantlebury was a 49-year-old resident of Barbados and a dual U.S.-Barbadian citizen. When living in the United States, Plaintiff Scantlebury used the surname Trotman, which is his father's surname; Scantlebury is his mother's surname, which he uses in Barbados.

4. When these actions were filed, Plaintiff Frederick C. Hawkesworth was a 52-year-old resident of Barbados. Mr. Hawkesworth died on or about September 30, 2016 and is survived by his wife as

the representative of his estate.

5. Defendant Stephen M. May is a Senior Trial Attorney in the Narcotic and Dangerous Drug Section within the U.S. Department of Justice's Criminal Division.

6. Defendant Gordon Patten, Jr. is a Special Agent in the U.S. Drug Enforcement Administration.

7. Defendants Jodi L. Avergun, Kenneth A. Blanco, Paul M. O'Brien, and Arthur Wyatt (collectively, "Section-Chief Defendants") were the Chief of the Narcotic and Dangerous Drug Section within the U.S. Department of Justice's Criminal Division for the periods relevant to this action.

8. Defendants Christopher A. Wray, Alice S. Fisher, and Lanny A. Breuer (collectively, "AAG Defendants") were the Assistant Attorney General ("AAG") for the U.S. Department of Justice's Criminal Division for the periods relevant to this action.

9. Defendants John D. Ashcroft, Alberto Gonzales, Michael B. Mukasey, and Eric H. Holder, Jr. (collectively, "Attorney-General Defendants") served as Attorney General of the United States for the periods relevant to this action.

10. The John Doe defendants are other federal officials or entities whose actions or inaction injured Plaintiffs under U.S. or Barbadian law, including the common law.

11. Defendant United States is the federal sovereign and the prosecuting party in No. 1:04-cr-0285-EGS.

JURISDICTION AND VENUE

12. This action arises out of Defendants' violations of the Fourth, Fifth, and Eighth Amendments of the U.S. Constitution and thus raises federal ques-

tions over which this Court has jurisdiction pursuant to 28 U.S.C. §1331. In addition, all plaintiffs were at the time of the case's filing residents and citizens of Barbados, and all defendants were residents and citizens of the United States, which givens this Court diversity jurisdiction under 28 U.S.C. §1332(a). Further, this action arises out of Defendant's violations of the laws of the District of Columbia, over which this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Moreover, the All Writs Act, 28 U.S.C. §1651, gives this Court equitable jurisdiction in the nature of the writ of *coram nobis* to review the criminal proceedings in No. 1:04-0285-EGS. Finally, this Court has jurisdiction pursuant to this Court's equity jurisdiction under the line of cases from *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 580-81 (1838), to *Ganem v. Heckler*, 746 F.2d 844, 851 (D.C. Cir. 1984)., over this Court's enabling legislation and its historic, common-law powers.

13. Pursuant to 28 U.S.C. §1391(e), venue is proper in the District of Columbia, the seat of the federal government, as well as the location where a substantial part of the events and omissions giving rise to Plaintiffs' claims occurred.

14. Defendants Avergun, Breuer, Fisher, and Wray maintain their principal place of business in the District of Columbia within the meaning of D.C. Code §13-422, and their actions or inaction took place in the District.

15. Defendants Breuer and Holder are residents of the District of Columbia, and their actions or inaction took place in the District.

16. Defendants Ashcroft, Avergun, Blanco, Ashcroft, and Gonzales have previously resided in the

District of Columbia, but Plaintiffs would require discovery to establish that they resided in the District at the time of their challenged actions or inaction, which took place in the District.

17. Plaintiffs require discovery to establish whether the remaining Defendants reside or maintain a principal of business in the District of Columbia, but their challenged actions and inaction took place in the District.

18. An actual and justiciable controversy exists between Plaintiffs and Defendant.

CONSTITUTIONAL BACKGROUND

19. The Fourth Amendment protects against unreasonable searches and seizures and the issuance of warrants without probable cause.

20. The Due Process Clause of the Fifth Amendment prohibits the denial of life, liberty, or property without due process of law and requires a criminal defendant to have minimum contacts with the prosecuting forum before a prosecution can proceed.

21. The Eighth Amendment prohibits inflicting "cruel and unusual punishments," which can include the terms of incarceration such as solitary confinement.

COMMON LAW

22. Perhaps because they derive from a common source, the torts of malicious prosecution and false imprisonment are similar under District of Columbia and Barbadian – which is the say British – law.

23. Malicious prosecution means (a) a proceeding terminated in the plaintiff's favor;, (b) with malice or bad faith on the defendants' part; (c) a lack of probable cause for the underlying suit; and (d) special injury occasioned by plaintiff as a result of the origi-

nal action. Where the underlying suit leads to a loss of liberty such as incarceration, the fourth criterion is met. Moreover, malice and bad faith can be inferred from the failure to correct information that one had the duty to correct. Similarly, admitting that someone else did the crime and continuing to charge another person for the same crime evidences not only malice but the absence of probable cause.

24. False imprisonment means (a) detaining someone against their will within an area fixed by the defendant, and (b) the unlawfulness of the detention, where the issue of \probable cause goes to the lawfulness of the detention.

25. In a diversity action, the substantive law of Barbados would apply because the injury and conduct occurred in Barbados to residents of Barbados, using Barbadian courts and prisons by proxy, with no center of relationship between the parties other than the Barbadian location in which the Defendants conducted their torts.

26. Although the substantive law of Barbados applies, the procedural laws of the District of Columbia apply to a federal court sitting in diversity, and the District's survivorship law, D.C. CODE § 12-101, provides that "the right of action, for all such cases, survives in favor of or against the legal representative of the deceased," which is Mr. Hawkesworth's surviving wife.

EXTRADITION TREATY

27. The extradition treaty between Barbados and the United States defines the terms and procedures for extraditions between the two countries and creates enforceable due-process rights for the citizens and residents of each country.

28. Under Article 2, Paragraph 1, offenses must be punishable by more than one year in each country to constitute an extraditable offense, except that under Article 2, Paragraph 4, offenses that occur outside the Requesting State's territory are not automatically extraditable unless the laws of the Requested State also criminalize such actions outside the Requested State.

29. Article 6, Paragraph 1, requires that all extradition requests go through diplomatic channels and be supported *inter alia* by "the procedural history of the case," *id.* art. 6, ¶2(b), and show probable cause for an arrest under the laws of the Requested State if the offense had been committed in the Requested State, *id.* art. 6, ¶3(c).

30. Article 9 provides for requests for provisional arrest, but requires that the Requesting State indicate that a formal extradition request will follow. *Id.* art. 9, ¶2(f).

31. Under Article 18 of the extradition treaty, DOJ is authorized to "consult with ["the Attorney General of Barbados"] directly in connection with the processing of individual cases," notwithstanding that the treaty requires all extradition requests to flow initially through diplomatic channels.

IRREPARABLE HARM AND INADEQUATE ALTERNATE REMEDIES

32. A plaintiff's irreparable injury and lack of an adequate legal remedy justify injunctive relief. In addition to the declaratory relief requested in Paragraph 121, because Plaintiffs' ongoing exposure to irreparable injury from unlawful federal actions and inaction entitles Plaintiffs to injunctive relief.

33. Defendants' actions and inaction have irrep-

arably injured and continue to irreparably injure Plaintiffs' reputation and, as a result, their ability to find employment and to secure financing from banks.

34. Defendants' actions and inaction have irreparably injured and continue to irreparably injure Plaintiffs' rights to travel and to associate freely with relatives in the United States.

35. Plaintiffs lack an alternative remedy to the injunctive and declaratory relief requested in Paragraph 121.

36. Because this Court has jurisdiction as a threshold matter, the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, provides this Court the power to "declare the rights and other legal relations of any interested party…, whether or not further relief is or could be sought." 28 U.S.C. §2201; *accord* FED. R. CIV. P. 57 advisory committee note ("the fact that another remedy would be equally effective affords no ground for declining declaratory relief").

37. Because the Government's and this Court's actions in the underlying criminal action are not reviewable on appeal, not only this Court but also the federal appellate courts have jurisdiction to review those actions under the All Writs Act, including relief in the nature of the writ of *coram nobis*.

38. Because the Government's actions and inaction in and related to the underlying criminal action and the extradition proceeding include final agency action for which Plaintiffs lack an adequate alternate remedy, the Administrative Procedure Act gives this Court jurisdiction and a cause of action to review that action and inactions.

FACTUAL BACKGROUND

39. On or about September 20, 2003, U.S. Immi-

gration and Customs Enforcement and DEA interdicted a 184-kilogram shipment of cocaine at John F. Kennedy ("JFK") airport in New York.

40. On or about November 11, 2003, the federal government arrested 25 people – who were eventually convicted – in connection with the 184-kilogram JFK cocaine shipment.

41. On or about May 19, 2004 (*i.e.*, between the JFK interdiction and the arrest of the people responsible for the JFK shipment), in No. 1:04-0285-EGS filed under seal, the United States charged Plaintiffs and two other men – Raphel Douglas and Terrence Sugrim of Guyana – with distribution of cocaine and conspiracy to distribute cocaine in connection not only with the 184-kilogram JFK shipment but also with an alleged two-kilogram sale in Barbados that allegedly was intended for distribution to the United States.

42. On June 17, 2004, a federal grand jury for the District of Columbia returned an indictment based on – and superseding – the criminal complaint filed on May 19, 2004.

43. In support of the indictment, arrest, and extradition of the five defendants in No. 1:04-0285-EGS, Defendant May, Defendant Patten, and a DEA confidential informant made out affidavits that alleged, *inter alia,* that the United States had made no arrests in conjunction with the 184-kilogram JFK shipment and that these five defendants were involved in the 184-kilogram JFK shipment.

44. Neither Plaintiffs nor Messrs. Douglas and Sugrim were among those arrested for the 184-kilogram JFK cocaine shipment, and neither Plaintiffs nor Messrs. Douglas and Sugrim were responsi-

ble for the 184-kilogram JFK cocaine shipment.

45. On the basis of the affidavits referenced in Paragraph 43 and arrest warrants based on those affidavits, United States sought the extradition of Plaintiffs from Barbados.

46. On or about May 27-31, 2004, Plaintiffs were arrested pending extradition and imprisoned in Barbados. All three men eventually were released on bail: Mr. Gaskin on February 7, 2005, Mr. Scantlebury on June 26, 2004, and Mr. Hawkesworth in September 2004.

47. Trinidad and Tobago extradited Mr. Douglas to stand trial in No. 1:04-0285-EGS in the United States, where he was held pending the extradition of his co-defendants.

48. Mr. Douglas's counsel moved successfully to unseal No. 1:04-0285-EGS as to Mr. Douglas only; No. 1:04-0285-EGS remained sealed as to the other four defendants until after these actions were filed.

49. During the pre-trial proceedings in No. 1:04-0285-EGS, Mr. Douglas through counsel identified several false statements in the affidavits that the United States used to support indictment, arrest, and extradition in No. 1:04-0285-EGS.

50. In light of these discrepancies, on February 13, 2007, the presiding judge in No. 1:04-0285-EGS directed counsel for the United States to produce Mr. May as a witness: "I want to hear from him under oath why he made those misstatements … [a]nd I suggest he bring his attorney also."

51. Because No. 1:04-0285-EGS was sealed as to all defendants except Mr. Douglas, Plaintiffs did not know – when they filed these actions – whether charges still are pending against them in No. 1:04-

0285-EGS or in another action – sealed or otherwise – elsewhere.

52. On or about February 20, 2007, acting through the same DOJ lawyers and officials, the United States filed No. 1:07-cr-0137-RJD against Messrs. Hawkesworth, Douglas, and Sugrim – but not against Messrs. Gaskin and Scantlebury – in the U.S. District Court for the Eastern District of New York.

53. In No. 1:07-cr-0137-RJD, the United States charged the three defendants there – namely, Messrs. Hawkesworth, Douglas, and Sugrim – with the same distribution and conspiracy to distribute cocaine as was charged in No. 1:04-0285-EGS , as well as two counts against Mr. Douglas only for using a communication facility (*i.e.,* a telephone or cellular phone) in connection with distributing narcotics.

54. The United States filed No. 1:07-cr-0137-RJD in New York on the same day that the United States formally moved to dismiss No. 1:04-0285-EGS as to Mr. Douglas only. The motion(s), if any, to dismiss No. 1:04-0285-EGS as to the other four defendants are under seal and unavailable to Plaintiffs until after these actions were filed.

55. On or about May 27, 2004, a private Barbadian solicitor first appeared on behalf of the United States in the United States' extradition-related proceedings in Barbados. Those court proceedings continued through at least December 27, 2012, and other extradition-related, habeas corpus, and bail-related proceedings continued in Barbados at least through November 13, 2013.

56. At no point in any of these Barbadian legal

proceedings did the United States, its Barbadian counsel, or DOJ disclose that No. 1:04-0285-EGS had been dismissed or that No. 1:07-cr-0137-RJD (or any other case) had been commenced.

57. On December 17, 2007, in No. 1:07-cr-0137-RJD, Defendant May appeared as a witness and was asked about the status of "the extradition of Hawkesworth and his co-defendants," and he testified that the extradition was "still going through legal process in Barbados."

58. In the Douglas proceedings in New York, the Government admitted that it had fully resolved the 184-kilogram JFK interdiction: "I did find out that they made a … mass arrest. It was an ongoing investigation, building the case. And eventually they arrested everyone that was involved in that." Hearing Tr., at 125, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (Dec. 17, 2007).

59. Similarly, in the Douglas proceedings in New York, the Government admitted "The case boils down to the testimony of an informant, who can be skillfully impeached by the defense. At bottom, the case involves only two kilograms of cocaine. And though there were some hazy conversations between the [informant] and Hawkesworth about other deals, in the final analysis the case is about two kilograms of cocaine." Gov't's Br.in Regards to Plea and Sentencing, at 5, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (Apr. 1, 2008).

60. On or about June 9, 2011, Barbados remanded Plaintiffs to prison awaiting extradition.

61. Plaintiffs were held under maximum security conditions in solitary confinement, held in a single cell for 23 or more hours per day, with no contact

with other prisoners. The cells had no toilet or washing facilities, and Plaintiffs had to use of a bucket – which they could empty whenever they were allowed out – as a toilet. All Plaintiffs lost weight and suffered both mentally and physically.

62. Plaintiffs were allowed weekly visits, but Plaintiff Gaskin had no family in Barbados and so saw hardly anyone.

63. While Plaintiffs were incarcerated, their respective businesses suffered or failed without each Plaintiff to tend to his business's ongoing affairs.

64. On or about November 15, 2013, upon deciding that he might be treated better in a federal detention facility managed by the United States and that he could possibly seek the dismissal of the charges wrongly brought against him, Mr. Gaskin formally waived extradition so that he could come to the United States to face those charges. (On or about April 4, 2013, Mr. Gaskin had orally volunteered to waive extradition, but the Barbadian judge advised him to speak with his lawyers and to put the request in writing.)

65. By filing a matter-of-fact motion to dismiss without disclosing key facts (*e.g.*, the defendants were incarcerated, that one had waived extradition to stand trial) after having admitted that wholly other people did the major crime alleged at JFK, leaving *no crimes* alleged against three defendants, including the one that waived extradition, the Government's dismissal qualifies as sufficiently favorable to Plaintiffs – as opposed to merely technical – to support a finding of no probable cause under both District of Columbia and Barbadian law.

66. On January 9, 2014, Barbadian authorities

released Plaintiffs, after the United States failed to claim Mr. Gaskin for extradition. By order dated January 9, 2014, this Court dismissed the indictment without prejudice, and on January 13, 2014, this Court quashed the arrest warrants as to all remaining defendants. (Messrs. Hawkesworth and Sugrim remained under indictment in No. 1:07-cr-0137-RJD until that case was dismissed on or about May 12, 2015.)

FALSE EVIDENCE AND THE DUTY TO CORRECT

67. Under the applicable rules of conduct, the Defendants who are attorneys owed a duty of candor to the various tribunals involved – namely, the U.S. Department of State, this Court and the U.S. District Court for the Eastern District of New York, and the Barbadian government – that required them to correct the false extradition request and supporting affidavits. Under *Giglio v. U.S.*, 405 U.S. 150, 153 (1972) (interior quotations omitted), the "deliberate deception of a court ... by the presentation of known false evidence is incompatible with rudimentary demands of justice[, … and] the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."

68. Under 18 U.S.C. §1001(a), in matters such as Defendants' submission of the extradition request to the U.S. Department of State, Defendants could not lawfully: (a) falsify, conceal, or cover up a material fact by any trick, scheme, or device; (b) make materially false, fictitious, or fraudulent statements or representations; or (c) make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statements or entries. Moreover, the foregoing requirements are subject to a "duty to correct" prior submissions if the

person subsequently becomes aware of false information inadvertently submitted to the federal agency.

69. Under the common law of deceit applicable in both Barbados and the United States, even a statement that was in fact true at the time when made – but, before being acted upon by the party to whom it was made had been rendered untrue by reason of later events – constitutes deceit by a Defendant who was aware of those later events. Moreover, the failure to correct a prior statement (either known to be made false by subsequent events or subsequently learned to have been false when made) constitutes malice and intentional fraud, if and when that party to whom the statement was made subsequently acts on the uncorrected statement.

SOVEREIGN IMMUNITY

70. Pursuant to 5 U.S.C. §702, Defendant United States has waived its sovereign immunity for actions against itself, its instrumentalities, and its officers for non-monetary injunctive and declaratory relief and for the entry of judgments and decrees against the United States in such actions.

71. The United States has waived sovereign immunity for this action and for the declaratory and injunctive relief sought in Paragraph 121.

72. The named Defendants are not sovereign in their individual capacity, and the United States' sovereign immunity does not shield their unconstitutional actions or inaction in the United States. Moreover, they hold no immunity from suit for their illegal or tortious actions and inaction in Barbados.

73. The common law enforceable by this Court against federal actors is the common law of Mary-

land prior to 1801, and the common law of Maryland at that time was the common law of England, under which executive governmental officers were individually liable for common-law torts such as false imprisonment, false arrest, and malicious prosecution. *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774). The Congress that created this Court intended these common law rights to be enforceable by this Court and no subsequent act of Congress has repealed that original grant of jurisdiction.

74. Consistent with the foregoing common law of England, the laws and common law of Barbados authorize holding executive governmental officers – i.e., both U.S. officers and Barbadian officers – liable for common-law torts such as false imprisonment, false arrest, and malicious prosecution.

INDIVIDUAL IMMUNITY

75. Defendant May is not entitled to prosecutorial immunity because he was not the prosecuting attorney in either No. 1:04-0285-EGS in the District of Columbia or No. 1:07-cr-0137-RJD in the Eastern District of New York. Extradition proceedings are civil proceedings and thus so not impart prosecutorial immunity on the participants.

76. Even if Defendant May had been a prosecuting attorney in No. 1:04-0285-EGS, he would have had to cease being a prosecuting attorney under Rule 3.7 of the applicable Rules of Professional Conduct when he became a material witness.

77. The rights on which Plaintiffs rely were firmly established at the time that – indeed, centuries before – Defendants culpably acted or failed to act in this matter.

78. By purposefully availing themselves of the

Barbadian forum to seek extradition of Plaintiffs, Defendants are bound not only by U.S. law but also by the laws and common law of Barbados.

ALTERNATE REMEDIES ARE INAQEQUATE OR UNAVAILABLE

79. The Federal Tort Claims Act, 28 U.S.C. §§2671-2680 ("FTCA"), does not provide Plaintiffs a remedy because their imprisonment occurred abroad, 28 U.S.C. §2680(k), and the policy and supervision claims fall within FTCA's "discretionary function or duty" exception, *id.* at §2680(a). Alternatively, to the extent that the FTCA applies to any of Plaintiffs' claims (*e.g.*, if an action for malicious prosecution arose in the United States, whereas an action for false imprisonment would have arisen abroad), Plaintiffs filed administrative FTCA claims on January 8, 2016, and the United States denied those claims by certified letter dated August 2, 2017. Specifically, Plaintiffs filed their administrative claims by facsimile and Express Mail on January 8, 2016; by letter dated January 19, 2016, the Torts Branch of the Civil Division of the Department of Justice acknowledged receipt of the facsimile and mail on January 8, 2016, and January 12, 2016, respectively.

80. The writ of habeas corpus that Plaintiffs sought in Barbados proved inadequate to redress Plaintiffs' injuries because the Barbadian courts did not accept the pleas of individual citizens accused – falsely in this instance – of crimes versus the claims of Defendants, who hold themselves out – again, falsely in this instance – as "representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest… is not that it shall win a case, but

that justice shall be done." Contrary to the above-quoted lofty goals that the U.S. Supreme Court set for Defendants in *Berger v. United States*, 295 U.S. 78, 88 (1935), that are etched onto the façade of the U.S. Department of Justice, Defendants here placed winning over principle and self-interest over the public interest and justice.

COUNT I
WRONGFUL PROSECUTION AND IMPRISONMENT
(DECLARATORY JUDGMENT)

81. Plaintiffs incorporate Paragraphs 1-80 and 87-121 as if fully set forth herein.

82. The evidence on which Defendant United States relied to indict and seek the arrest of Plaintiffs was false, and Defendant United States lacked probable cause to arrest Plaintiffs in 2004 and thereafter.

83. The imprisonment of Plaintiffs in 2004 pending their extradition to the United States was unlawful: Defendant United States lacked probable cause to arrest Defendants in 2011 and thereafter.

84. The imprisonment of Plaintiffs in 2011 pending their extradition to the United States was unlawful: Defendant United States lacked probable cause to detain Defendants in 2011-2014.

85. The imprisonment of Plaintiffs from November 13, 2013 (when Mr. Gaskin waived extradition) until their release on January 9, 2014, lacked probable cause to continue their incarceration without notifying the Barbadian officials who had revoked Plaintiffs' bail that the United States no longer sought their extradition.

86. For the foregoing reasons, the prosecution

and imprisonment of Plaintiffs was without probable cause and thus unlawful and tortious.

COUNT II
EXPUNGEMENT
(INJUNCTIVE RELIEF)

87. Plaintiffs incorporate Paragraphs 1-86 and 90-121 as if fully set forth herein.

88. Defendant United States' unlawful indictment, arrest warrant(s), and extradition request(s) without probable cause violate Plaintiffs' right to travel and prevent their travel not only abroad – for fear of wrongful arrest or extradition to the United States – but also to the United States to visit family, including family who are citizens of the United States.

89. For the foregoing reasons, Defendant United States' continuing publishing of the false and defamatory indictment, arrest warrant(s), and extradition requests is unlawful and tortious.

COUNT III
RESTRICTIONS OF THE RIGHT TO TRAVEL AND TO ASSOCIATE FREELY
(INJUNCTIVE RELIEF)

90. Plaintiffs incorporate Paragraphs 1-89 and 93-121 as if fully set forth herein.

91. Defendant United States' unlawful indictment, arrest warrant(s), and extradition requests without probable cause (a) violate Plaintiffs' right to travel and prevent their travel not only abroad – for fear of wrongful extradition to the United States – but also to the United States to visit family, including family who are citizens of the United States, (b) injure Plaintiffs' reputations; (c) impair Plaintiffs' ability to obtain employment; and (d) injure Plain-

tiffs' credit-worthiness for not only financing but even opening accounts with banks.

92. For the foregoing reasons, Defendant United States' ongoing impairment of Plaintiffs' rights to travel and to associate freely is unlawful and tortious.

COUNT IV
DENIAL OF PROCEDURAL DUE PROCESS AND FAILURE TO CORRECT
(DAMAGES)

93. Plaintiffs incorporate Paragraphs 1-92 and 96-121 as if fully set forth herein.

94. Defendants May and Patten and the Section-Chief Defendants had an obligation to correct the extradition request and the materials supporting the extradition request, either or both (a) when they learned that the original extradition request and supporting materials were false *ab initio*, or (b) when the original extradition request and supporting materials became false after their initial submittal due to events circa February 2007 to April 2008 (*i.e.*, the criminal case becoming at bottom one involving an alleged two-kg sale to a federal informant in Barbados).

95. As a result of the actions and inaction of the above-named Defendants, Plaintiffs suffered harm to their persons, liberty, and property, and to rights under the Fifth Amendment to the Constitution and the common law of both the District of Columbia and Barbados, as applicable.

COUNT V
MALICIOUS PROSECUTION AND FALSE IMPRISONMENT
(DAMAGES)

96. Plaintiffs incorporate Paragraphs 1-95 and 104-121 as if fully set forth herein.

97. Defendants May and Patten and the Section-Chief Defendants subjected Plaintiffs to unreasonable searches and seizures pursuant to an extradition request that was supported by false affidavits when originally prepared and filed, which became demonstrably false and known to be false by the events of February 2007 (*i.e.*, the dismissal of No. 1:04-0285-EGS, the filing of No. 1:07-cr-0137-RJD without including Messrs. Gaskin and Scantlebury, and the reduction of the case to an alleged two-kg sale to an informant in Barbados), all in violation of Plaintiffs' rights under the Fourth Amendment.

98. All federal Defendants lacked probable cause for each Plaintiff's arrest in 2004 and at all times thereafter.

99. All federal Defendants lacked probable cause for each Plaintiff's remand to custody in 2011 and at all times thereafter.

100. Defendants May, Patten, and Avergun proximately caused and contributed to the unreasonable search and seizure of Plaintiffs by executing or allowing the execution of an extradition request and supporting affidavits that they knew or should have known were false.

101. Defendants May, Patten, and Blanco proximately caused and contributed to the unreasonable search and seizure of Plaintiffs by engaging in, approving, or knowing about the "bait and switch" dismissal of No. 1:04-0285-EGS (which allegedly concerned a 184-kg importation into New York) to support extradition and subsequent filing of No. 1:07-cr-0137-RJD (which, at bottom, concerned an

alleged two-kg sale to an informant in Barbados) without correcting and updating the extradition materials, including the apparent dropping of Messrs. Gaskin and Scantlebury as targets.

102. Defendants May and Patten and all Section-Chief Defendants except Defendant Avergun (who had left office) proximately caused and contributed to the unreasonable search and seizure and the wrongful imprisonment of Plaintiffs by failing to correct and update the extradition materials, including the apparent dropping of Messrs. Gaskin and Scantlebury as targets.

103. As a result of the actions and inaction of the above-named Defendants, Plaintiffs suffered harm to their persons, liberty, and property and to rights under the Fourth Amendment to the Constitution and the common law of both the District of Columbia and Barbados, as applicable.

COUNT VI
DELIBERATE INDIFFERENCE
(DAMAGES)

104. Plaintiffs incorporate Paragraphs 1-103 and 110-121 as if fully set forth herein.

105. In his testimony on December 17, 2007, in No. 1:07-cr-0137-RJD, Defendant May was directly aware that "the extradition of Hawkesworth and his co-defendants" was "still going through legal process in Barbados," notwithstanding that he knew that his affidavit and other supporting affidavits contained false information.

106. On information and belief, formed after reasonable inquiry, which likely could be proved with a reasonable opportunity for discovery, Defendants Patten and Blanco also had direct knowledge that

the Barbadian extradition proceedings remained underway.

107. Defendant May's – and, if proved, Defendants Patten's and Blanco's – deliberate indifference to their obligations to correct or update the false extradition request and supporting materials thereby proximately caused Plaintiffs' subsequent, unnecessary, and unlawful remand to prison under the extradition request.

108. Nothing prevented Defendants' notifying the Barbadian officials pursuant to Article 18 of the Extradition Treaty directly about the changed circumstances in No. 1:04-0285-EGS.

109. As a result of the actions and inaction of the above-named Defendants, Plaintiffs suffered harm to their persons, liberty, and property and to rights under the Fourth, Fifth, and Eighth Amendment to the Constitution and the common law of both the District of Columbia and Barbados, as applicable.

COUNT VII
SUPERVISORY LIABILITY FOR DELIBERATE INDIFFERENCE
(DAMAGES)

110. Plaintiffs incorporate Paragraphs 1-109 and 117-121 as if fully set forth herein.

111. The Criminal Division AAG and the Attorney General Defendants share supervisory and regulatory control over extradition proceedings. Specifically, pursuant to 28 C.F.R. §0.55(j), "[i]nternational extradition proceedings" "are assigned to and shall be conducted, handled, or supervised by" the Criminal Division AAG. Pursuant to 28 C.F.R. §0.5(a), however, the Attorney General retains authority to "[s]upervise and direct the admin-

istration and operation of the Department of Justice."

112. The Attorney-General Defendants, the AAG Defendants, and the Section-Chief Defendants all have the supervisory authority to ensure that line attorneys representing the United States comply with all legal and ethical obligations. Each such supervisory Defendant named in this Complaint could have averted Plaintiffs' wrongful imprisonment by proper action to supervise or regulate the actions of DOJ personnel serving under them.

113. Under *Giglio v. United States*, 405 U.S. 150, 154 (1972), and numerous similar cases under U.S. and United Kingdom (*i.e.*, Barbadian) law, supervisory Defendants have an obligation to promulgate and establish procedures and regulations to address the "burden on the large prosecution offices" of procedural due-process requirements. *Id.* (recognizing supervisors' duty to promulgate and establish "procedures and regulations … to carry [a procedural] burden and to insure communication of all relevant information on each case to every lawyer who deals with it").

114. Based on this actual and constructive knowledge of the risk of an extradition request's leading to the incarceration of not only former suspects against whom charges have been dismissed outright but also continuing suspects against whom the charges have changed materially, the Attorney-General Defendants, AAG Defendants, and Section-Chief Defendants had a duty to ensure that federal agents acting under them were sufficiently trained, supervised, and regulated to prevent the failure to correct and update outstanding warrants and extradition requests in which the underlying circumstanc-

es have changed (*e.g.,* if a suspect is no longer wanted or his alleged crimes have changed materially).

115. The failure of the Attorney-General Defendants, AAG Defendants, and Section-Chief Defendants to train, supervise, and regulate their subordinates proximately caused the violation of Plaintiffs' rights to be free from unreasonable searches and seizures, deprivations of due process, and deliberate indifference under the Fourth, Fifth and Eighth Amendment.

116. As a result of the actions and inaction of the Attorney-General Defendants, AAG Defendants, and Section-Chief Defendants, Plaintiffs suffered harm to their persons, liberty, and property, and to their rights under the Fourth, Fifth, and Eighth Amendments and the common law of both the District of Columbia and Barbados, as applicable.

COUNT VIII
FEDERAL TORT CLAIMS ACT
(DAMAGES)

117. Plaintiffs incorporate Paragraphs 1-116 and 121 as if fully set forth herein.

118. To the extent that any of Plaintiffs' causes of action against any officers and agents of defendant United States arose within the United States (*i.e.*, did not arise abroad within the meaning of 28 U.S.C. §2680(k)), defendant United States has waived its sovereign immunity and consented to suit for damages for such claims, and the United States has assumed liability for such claims in FTCA.

119. To the extent that the FTCA's foreign-arising exemption applies, the entire FTCA does not apply, 28 U.S.C. §2680 ("provisions of this chapter … shall not apply"), including the FTCA's exclusivity

clause, 28 U.S.C. §2679(b)(1). Where the FTCA's exclusivity clause does not apply, Plaintiffs are free to invoke the law of either the District of Columbia or Barbados in a diversity or federal-question action.

120. As a result of the actions and inaction of officers and agents of defendant United States of America, Plaintiffs suffered harm to their persons, liberty, and property, and to their rights under the Fourth, Fifth, and Eighth Amendments, in violation of the FTCA for any of Plaintiffs' claims that arose within the United States for purposes of 28 U.S.C. §2680(k).

PRAYER FOR RELIEF

121. Wherefore, Plaintiffs Gaskin, Scantlebury, and Hawkesworth respectfully pray for relief and a judgment against Defendants:

A. Pursuant to 5 U.S.C. §706, 28 U.S.C. §§1331, 1651, 2201-2202, and FED. R. CIV. PROC. 57, a Declaratory Judgment that:
   1. There was no probable cause to arrest or imprison Plaintiffs – pending extradition – when the United States commenced No. 1:04-0285-EGS;
   2. There was no probable cause to arrest or imprison Plaintiffs – pending extradition – when Plaintiffs were remanded to custody in 2011 in connection with No. 1:04-0285-EGS;
   3. The United States lacked personal jurisdiction over the Plaintiffs for the actions that the United States took in No. 1:04-0285-EGS.

B. Pursuant to 5 U.S.C. §706, 28 U.S.C. §§1331, 2202, 1651, and this Court's equitable powers, an Order providing that:

1. Defendant United States and its officers and agents are enjoined from detaining or restricting Plaintiffs in their travels and from otherwise impairing, flagging, or monitoring Plaintiffs' travels or associations within the United States or abroad on the basis of the actions alleged in No. 1:04-0285-EGS.
2. Defendant United States and its officers and agents are enjoined from relying on the actions alleged in No. 1:04-0285-EGS for any purpose, including immigration and visas.
3. Defendant United States, through its chief law-enforcement officer, is enjoined to write and file with the Barbadian government pursuant to Article 18 of the Extradition Treaty a statement that Plaintiffs were falsely accused on criminal activity in the extradition request in connection with No. 1:04-0285-EGS, that DOJ was aware of the falsity of its prior statements, and that DOJ failed to correct those statements.

C. Ordering Defendants to pay, jointly and severally, $20,000,000 in compensatory damages to each Mr. Gaskin, Mr. Scantlebury, and Mr. Hawkesworth;

D. Ordering Defendants to pay, jointly and severally, $5,000,000 in punitive damages to each Mr. Gaskin, Mr. Scantlebury, and Mr. Hawkesworth;

E. Ordering Defendants to pay, jointly or severally, to each Plaintiff the present value of the lifetime medical damages that each Plaintiff shall prove at trial;

F. Pursuant to 28 U.S.C. §2412 and any other applicable provisions of law or equity, awarding

Plaintiffs' costs, attorneys' fees, and other disbursements for this action; and

G. Granting Plaintiffs such other and further relief as this Court deems just and proper.

JURY DEMAND

122. Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs hereby demand a trial by jury as to all issues triable by a jury.

Dated: March 13, 2020

Respectfully submitted,
/s/ Lawrence J. Joseph
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