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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JULIAN SANCHEZ MORA, et al.,

Plaintiffs,

v.

U.S. CUSTOMS AND BORDER PROTECTION, et al.,

Defendants.

Case No. 3:24-cv-02430-TLT

REPLY IN SUPPORT OF DEFENDANTS' REVISED MOTION TO TRANSFER OR DISMISS THE FIRST AMENDED COMPLAINT

Date: November 5, 2024
Time: 2:00 p.m.
The Honorable Trina L. Thompson

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I. Introduction

This case cannot be litigated in the Northern District of California because the special forum provision in the Freedom of Information Act ("FOIA") prevents the Plaintiffs who do not reside in this District from pursuing their FOIA claims here. None of the arguments in Plaintiffs' Opposition (ECF No. 47, "Opp.") leads to a different conclusion. First, this Court does not have jurisdiction over large portions of Plaintiffs' claims. Plaintiffs' contention that 5 U.S.C. § 552(a)(4)(B) is nonjurisdictional rests on a labored interpretation that is foreclosed by at least three on-point Ninth Circuit cases. And the Administrative Procedure Act ("APA") claims cannot provide jurisdiction because Plaintiffs admit that the FOIA provides an "adequate remedy" for their pattern or practice claim, and the APA claims are thus precluded by the FOIA. Further, Plaintiffs' attempt to manufacture jurisdiction under the APA in this District by bringing their FOIA claims in the wrong forum is clearly impermissible. Second, even if, contrary to Ninth Circuit law, Section 552(a)(4)(B) is found to be nonjurisdictional, venue does not lie in this District for García's and Ainab's FOIA claims, and the Opposition does not cite a single case demonstrating otherwise. Third, because jurisdiction does not lie in this District for García's and Ainab's FOIA claims, their claims should be transferred to the District of Columbia, and the remaining claims in this lawsuit should also be transferred to the District of Columbia in the interest of justice; Plaintiffs arguments to the contrary are premised on the incorrect assumption that this Court has jurisdiction over García's and Ainab's claims. Fourth, Plaintiffs cannot pursue a FOIA lawsuit against DHS because they have not submitted FOIA requests to DHS in compliance with DHS's published regulations, and the Opposition's discussion of this issue is wholly non-responsive to Defendants' argument. Finally, if the Court grants this Motion and transfers any part of this case to the District of Columbia, the Court should not stay the case to allow Plaintiffs to move to certify an interlocutory appeal under 28 U.S.C. § 1292(b) because an immediate appeal is not warranted under these facts.

II. Under The FOIA's Jurisdiction-Granting Provision, Section 552(a)(4)(B), This Court Lacks Jurisdiction Over Multiple Aspects Of This Lawsuit, And The APA Cannot Provide That Missing Jurisdiction Because Plaintiffs' APA Claims Are Precluded By The FOIA

A. Ninth Circuit Case Law Demonstrates That Section 552(a)(4)(B) Is Jurisdictional

Plaintiffs propose a tortured interpretation of Section 552(a)(4)(B) that divides the single sentence at issue into "jurisdictional language" and "venue language," but they do not cite *any* Ninth Circuit case

law to support their interpretation. Opp. at 4-8. In contrast, Defendants cite *three* Ninth Circuit cases holding that the forum elements of Section 552(a)(4)(B) are jurisdictional, and this Court must follow that Ninth Circuit guidance.

The Ninth Circuit's decision in *Rosiere v. United States* is directly on point. 693 F. App'x 556 (9th Cir. 2017). As Plaintiffs acknowledge, *Rosiere* involved a Nevada FOIA plaintiff who filed suit in the District of Hawaii seeking records located in Colorado, the District of Columbia, and New Jersey. *See* Opp. at 7. The Ninth Circuit affirmed dismissal of that FOIA lawsuit, holding that "the district court lacked jurisdiction over Rosiere's FOIA complaint." *Rosiere*, 693 F. App'x at 557. The Ninth Circuit not only found that the district court lacked jurisdiction over an out-of-district FOIA plaintiff's lawsuit but, in doing so, it unequivocally categorized the forum elements of Section 552(a)(4)(B) as jurisdictional. *See id.* (holding that "the district court 'in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, *has jurisdiction' to provide relief*") (quoting 5 U.S.C. § 552 (a)(4)(B)) (emphasis added). Plaintiffs dismissively refer to *Rosiere* as "neither binding nor persuasive" (Opp. at 7), but *Rosiere* is a recent decision of the appellate court that oversees this Court, under facts that are legally indistinguishable from the facts of this case.[1] *Babakhanlou v. Cnty. of Los Angeles*, No. 23-cv-08682, 2024 WL 3914625, at *2 n.2 (C.D. Cal. June 20, 2024) ("While not binding, unpublished opinions have persuasive value and indicate how the Ninth Circuit applies binding authority.") (citations and quotation marks omitted). As such, *Rosiere* demonstrates that the forum elements of Section 552(a)(4)(B) are jurisdictional; this is fatal to Plaintiffs' ability to pursue, in this District, (1) García's and Ainab's FOIA claims and (2) a putative nationwide class action.

Plaintiffs also argue that the Ninth Circuit did not find Section 552(a)(4)(B) to be "exclusively jurisdictional" in *Yagman v. Pompeo*, 868 F.3d 1075 (9th Cir. 2017). Opp. at 6-7. But Plaintiffs' argument is contrary to the plain language of the *Yagman* decision, where the Ninth Circuit expressly characterized the forum elements of Section 552(a)(4)(B) as "*providing for jurisdiction in* 'the district court of the

[1] Substituting the facts of this case for *Rosiere* highlights just how similar these cases are: García and Ainab are FOIA plaintiffs from Texas and Massachusetts who filed suit in the Northern District of California regarding records located in the District of Columbia and the surrounding areas. Accordingly, just like the district court in *Rosiere*, this Court "lack[s] jurisdiction over [García and Ainab]'s FOIA complaint." *Rosiere*, 693 F. App'x at 557.

United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia.'" *Yagman*, 868 F.3d at 1083 (emphasis added). As such, the *Yagman* court explicitly and unmistakably described the forum elements of Section 552(a)(4)(B) as jurisdictional. *Id.* Moreover, in addition to ignoring the plain text of the *Yagman* decision, Plaintiffs' argument also disregards *Yagman*'s analytical framework. Opp. at 6-7. The *Yagman* decision analyzed whether a different section of the FOIA, 5 U.S.C. § 552(a)(3)(A)(i), was jurisdictional, and in making that determination, *Yagman* repeatedly noted that Section 552(a)(4)(B) is the FOIA's "jurisdiction-granting provision," thereby reinforcing the *Yagman* court's holding that the forum elements of Section 552(a)(4)(B) are jurisdictional. *Yagman*, 868 F.3d at 1082.

Plaintiffs also claim that the Ninth Circuit did not find Section 552(a)(4)(B) to be "exclusively jurisdictional" in *Hajro v. USCIS*, 811 F.3d 1086 (9th Cir. 2016), but Plaintiffs' argument once again ignores the analytical framework of that case. Opp. at 7. *Hajro* held that a "waiver of sovereign immunity means the United States is amenable to suit in a court properly possessing jurisdiction; it does not guarantee a forum." *Hajro*, 811 F.3d at 1100. As such, "in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction." *Id.* (quoting *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007)). In that context, *Hajro*'s finding that Section 552(a)(4)(B) is the "FOIA's waiver of immunity and jurisdictional grant" is fundamentally inconsistent with Plaintiffs' argument. *See id.* at 1101. Indeed, pursuant to the *Hajro* court's analysis, the forum elements of Section 552(a)(4)(B) must be jurisdictional; otherwise, there would be no district court forum "properly possessing jurisdiction" over FOIA claims. *Id.* at 1100 (a waiver of sovereign immunity "does not guarantee a forum"). That is precisely the purpose of the forum elements of Section 552(a)(4)(B): they provide the statutory authority needed to establish jurisdiction in the forums delineated by the statute (*i.e.*, "in the district [(1)] in which the complainant resides, or has his principal place of business, or [(2)] in which the agency records are situated, or [(3)] in the District of Columbia").

The unmistakable implication of the holdings in *Rosiere*, *Yagman*, and *Hajro* is that the forum elements of Section 552(a)(4)(B) are jurisdictional. Plaintiffs, however, ask this Court to flout the Ninth Circuit's guidance without citing a single Ninth Circuit case in support of their position. Simply stated, this Court cannot do as Plaintiffs ask, and it instead must follow the Ninth Circuit's rulings on the precise

jurisdictional issue before the Court. *See Rosiere*, 693 F. App'x at 557; *Yagman*, 868 F.3d at 1082-83; *Hajro*, 811 F.3d at 1100-01.

But even assuming the Court could discard Ninth Circuit law finding the forum elements of Section 552(a)(4)(B) to be jurisdictional, Plaintiffs' proposed interpretation of Section 552(a)(4)(B) is inconsistent with the Ninth Circuit's standard for determining whether a statute is jurisdictional. In the Ninth Circuit, a "requirement or rule is nonjurisdictional if it (1) is not clearly labeled jurisdictional, (2) is not located in a jurisdiction-granting provision, and (3) no other reasons necessitate that the provision be construed as jurisdictional." *Yagman*, 868 F.3d at 1082 (citation and quotation marks omitted). The Opposition fails even to mention *Yagman*'s multi-factor test. Moreover, each of these factors points in one direction: the forum elements of Section 552(a)(4)(B) are jurisdictional. As to the first factor, the forum elements of Section 552(a)(4)(B) are clearly labeled as jurisdictional because the sentence at issue grants a particular set of district courts "jurisdiction" to hear FOIA lawsuits. 5 U.S.C. § 552(a)(4)(B). As to the second factor, the Ninth Circuit has already found that the forum elements of Section 552(a)(4)(B) are "located in a jurisdiction-granting provision," and that factor thus also weighs in favor of finding the forum elements of Section 552(a)(4)(B) to be jurisdictional. *Yagman*, 868 F.3d at 1083. And the third factor weighs in favor of finding Section 552(a)(4)(B) jurisdictional because the specifically defined districts where Congress authorized plaintiffs to bring FOIA lawsuits is a condition on the federal government's waiver of sovereign immunity.

Finally, Plaintiffs' arguments interpreting Section 552(a)(4)(B) as nonjurisdictional are unsupported and inaccurate. Plaintiffs' first claim is that Section 552(a)(4)(B) "cabins the district courts' subject matter authority to 'enjoin' . . . and 'order'" (Opp. at 5), but they offer only their own interpretation of this sentence and point to no case law or legislative history to support their position. Second, Plaintiffs argue that Section 552(a)(4)(B) "lacks any unusually emphatic phrasing" (*id.*), but that is not a factor in the Ninth Circuit's test to determine whether a statutory provision is jurisdictional (*see Yagman*, 868 F.3d at 1083) and, even if it were, Section 552(a)(4)(B) clearly ties its grant of "jurisdiction" to the specific forums in which Congress authorized FOIA claims to be pursued. Finally, Plaintiffs assert that Section 552(a)(4)(B) "speaks to the procedural obligations of individuals filing suit under the FOIA, not a court's adjudicatory authority" (Opp. at 5-6), but that is contradicted by the statute itself—the forum

requirements of Section 552(a)(4)(B) are not pre-suit procedural obligations (*e.g.*, administrative exhaustion), but rather dictate the specifically listed courts in Section 552(a)(4)(B) that have the authority to grant relief under the FOIA. In Plaintiffs' parlance, Section 552(a)(4)(B) "speaks to the . . . court's adjudicatory authority" under the FOIA. *Id.*

In short, Plaintiffs' interpretation of Section 552(a)(4)(B) flies in the face of clear, on-point Ninth Circuit guidance as well as the Ninth Circuit's *Yagman* test for analyzing whether a statutory provision is jurisdictional. The forum elements of Section 552(a)(4)(B) are jurisdictional, and this Court should follow the Ninth Circuit's guidance on this exact issue. *Yagman*, 868 F.3d at 1082-83; *Hajro*, 811 F.3d at 1100-01; *Rosiere*, 693 F. App'x at 557. Accordingly, García and Ainab cannot bring their FOIA claims in this forum because this Court does not have jurisdiction over those claims. Plaintiffs also cannot bring a nationwide FOIA class action in this District because, under Section 552(a)(4)(B), Congress did not waive sovereign immunity to allow this Court to enjoin Defendants on behalf of out-of-District class members.

B. Plaintiffs Cannot Manufacture Jurisdiction Under The APA By Bringing Their FOIA Claims In The Wrong Forum

APA claims are permitted *only* where "there is no other adequate remedy in a court.'" *Citizens for Responsibility & Ethics in Washington v. United States DOJ*, 846 F.3d 1235, 1241 (D.C. Cir. 2017) ("*CREW*") (quoting 5 U.S.C. § 704); *see also* Mot. at 6-7. Here, Plaintiffs agree that the FOIA provides "an adequate remedy" for their pattern or practice claim. Opp. at 2-4 & 13. That should be the end of the analysis. Plaintiffs' APA claims are precluded by the FOIA because the FOIA provides an adequate remedy. *See CREW*, 846 F.3d at 1241; *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("the general grant of review in the APA ought not duplicate existing procedures for review of agency action or provide additional judicial remedies in situations where Congress has provided special and adequate review procedures"). Indeed, the APA cannot be used to challenge an alleged pattern or practice that violates the FOIA because the FOIA itself provides the "adequate remedy in a court." *See, e.g.*, *Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 229 (D.D.C. 2011) (finding that an APA claim challenging an alleged practice of violating the procedural requirements of the FOIA "is foreclosed here" because "the Court has the power under FOIA" to provide adequate remedies); *Khan v. U.S. Dep't of Homeland Sec.* No. 22-cv-2480, 2023 WL 6215359, at *8 (D.D.C. Sept. 25, 2023) (holding that the fact "that such a [pattern or

practice claim] exists under the FOIA is why an analogous APA claim *cannot stand*") (emphasis added); *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 266 (D.D.C. 2012) (same). Plaintiffs do not attempt to distinguish these cases, all of which were discussed by Defendant in the Motion. *See* Mot. at 7-8.

Plaintiffs do not contest that they are seeking the precise remedy through the APA that they could achieve through the FOIA, albeit in a different district. But Plaintiffs argue for an unprecedented expansion of APA jurisdiction in FOIA cases by interpreting "adequate remedy" to mean "adequate remedy in the forum of their choosing." Opp. at 13-16. But that is not how the APA's waiver of sovereign immunity works, and Plaintiffs cannot manufacture APA jurisdiction by bringing their FOIA claims in the wrong forum. Instead, the APA's limited waiver of sovereign immunity applies only to claims "for which there is no other adequate remedy in *a* court." 5 U.S.C. § 704 (emphasis added). Here, there is no question that the FOIA would provide an adequate remedy for a meritorious pattern or practice claim, and that a forum to bring the FOIA claim (the District of Columbia, *i.e.*, "a court") is available. It does not follow from Plaintiffs' voluntary decision to bring their FOIA lawsuit in the wrong forum that Plaintiffs can ignore (and, further, ask this Court to ignore) the limitations on the APA's waiver of sovereign immunity, which must be "strictly construed, in terms of its scope, in favor of the sovereign." *Vacek v. United States Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006) (citation and quotation marks omitted). In short, even though *this* Court lacks jurisdiction over certain aspects of Plaintiffs' FOIA claims, *a* court (*i.e.*, the District of Columbia) unquestionably has that jurisdiction. Thus, Plaintiffs' APA claims must be dismissed as precluded by the FOIA.

The fallacy of Plaintiffs' argument is further exposed by the fact that the Opposition does not identify a single FOIA pattern or practice case in which a court permitted a parallel APA challenge to that same alleged pattern or practice—here, allegedly delayed responses to FOIA requests. Plaintiffs' cited cases instead involve whether the FOIA provides an adequate remedy for the vindication of *different* legal rights: (1) public interest disclosure obligations under 10 C.F.R. 1004.1, *see Andrus v. U.S. Dep't of Energy*, 200 F. Supp. 3d 1093, 1108 (D. Idaho 2016), (2) publication of indices, *see Pa. Dep't of Pub. Welfare v. United States*, No. 99-175, 2001 U.S. Dist. LEXIS 3492 (W.D. Pa. Feb. 7, 2001), and (3) publication of descriptions of major information systems, *see Pub. Citizen, Inc. v. Lew*, 127 F. Supp. 2d 1, 8-9 (D.D.C. 2000). None of these cases involves an attempt to use the APA, as Plaintiffs do here,

in a wholly duplicative attempt to redress a *FOIA* injury. Plaintiffs' cited cases thus are entirely inapplicable to the issue before the Court.

Plaintiffs also advance the argument that the APA waives the federal government's sovereign immunity even if the APA claims are dismissed. Opp. at 8-9. But that argument is fundamentally flawed because the APA cannot waive sovereign immunity in this FOIA pattern or practice lawsuit because the APA claims are precluded and Plaintiffs' only remedy is under the FOIA. Mot. at 6-9; 5 U.S.C. § 704; *CREW*, 846 F.3d at 1241. Indeed, Plaintiffs' argument would have the impermissible effect of writing the forum elements of Section 552(a)(4)(B) out of the statute because it would allow a plaintiff to evade the FOIA's jurisdictional requirements simply by including a sham APA claim in the complaint. But that result cannot be true generally, and it is especially untrue in the context of the government's waiver of sovereign immunity, which, again, must be "strictly construed" in favor of the sovereign. *Vacek*, 447 F.3d at 1250.

At base, Plaintiffs' lawsuit, including the First Amended Complaint's addition of APA claims that are clearly barred by the FOIA, is a transparent effort to manufacture jurisdiction where jurisdiction does not exist. But there is no need for Plaintiffs to tie themselves up in knots in this manner. The FOIA indisputably authorizes Plaintiffs to bring their FOIA pattern or practice claim in the District of Columbia, and the FOIA grants the District of Columbia the authority to fashion adequate remedies if Plaintiffs can prove their pattern or practice claim. 5 U.S.C. § 552(a)(4)(B) (authorizing FOIA lawsuits "in the District of Columbia"); *In re Scott*, 709 F.2d 717, 720 (D.C. Cir. 1983) (the District of Columbia is "an all-purpose forum in FOIA cases"); *Sierra Club v. TVA*, 905 F. Supp. 2d 356, 359 (D.D.C. Nov. 29, 2012) (the District of Columbia is the "'universal' venue for FOIA lawsuits") (quoting Dep't of Justice, Guide to the Freedom of Information Act § 3-17.100B (2012)). As such, rather than continuing their campaign to bring this FOIA lawsuit in the wrong forum (where jurisdiction does not exist), Plaintiffs' FOIA claims should be adjudicated in the District of Columbia, which unquestionably has jurisdiction.

III. Even If Section 552(a)(4)(B) Is Nonjurisdictional, Venue Does Not Lie In The Northern District Of California For García's And Ainab's FOIA Claims

Because the forum elements of Section 552(a)(4)(B) are jurisdictional, it is unnecessary for this Court to analyze the parties' venue arguments to resolve Defendants' Motion.

But even if Section 552(a)(4)(B) were interpreted as solely a venue statute, the Opposition's venue arguments fail because they are premised on the general venue statute in 28 U.S.C. § 1391(e), and not the FOIA's special forum provision, Section 552(a)(4)(B). Opp. at 18-20. Section 1391(e) does not apply to FOIA claims. *Friends of the River v. United States Army Corps of Eng'rs*, No. 16-cv-05052-YGR, 2016 WL 6873467, at *2 (N.D. Cal. Nov. 22, 2016). And García and Ainab cannot pursue a backdoor path to venue in this District under Section 1391(e) through their APA claims because the APA claims are precluded by the FOIA and thus subject to dismissal. *Supra* Part II.B; Mot. at 16-17; *CREW*, 846 F.3d at 1241. Accordingly, Plaintiffs' entire discussion of Section 1391(e) has no bearing on this FOIA lawsuit.

Plaintiffs further argue that Section 552(a)(4)(B) "does not require each plaintiff to satisfy venue for FOIA claims, so long as venue is proper for one plaintiff," but Plaintiffs cite no case that has issued such a holding. Opp. at 19. To the contrary, as Defendants set forth in their Motion, settled case law establishes the exact opposite: under the FOIA, "venue must be proper for each claim and as to each party." *See* Mot. at 13 (quoting *Abissi v. USCIS*, No. 23-cv-03176, 2024 WL 1485887, at *1 (D. Md. Apr. 5, 2024) and citing 14D Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3807 (4th ed. 2023)). The Opposition does not distinguish these authorities.

Finally, Plaintiffs assert that the Court should exercise pendent venue over García's and Ainab's FOIA claims, but they again fail to cite a single decision from anywhere in the country that has exercised pendent venue in the FOIA context. Opp. at 19. The one case Plaintiffs cite, *Serv. Women's Action Network v. Mattis*, 320 F. Supp. 3d 1082, 1089 (N.D. Cal. 2018), is not a FOIA case and was decided under the venue provisions of Section 1391(e), which, as noted above, does not apply in this FOIA lawsuit. Opp. at 19. Defendants, in contrast, cite multiple cases declining to apply pendent venue in the FOIA context and establishing that pendent venue is inappropriate in the FOIA context. Mot. at 13-14 (citing *Abissi*, 2024 WL 1485887, at *3; *Holmes-Hamilton v. FBI*, No. 21-cv-00702, 2021 WL 5166376, at *4 (D. Md. Nov. 5, 2021); and *Boggs v. United States*, 987 F. Supp. 11, 18 n.4 (D.D.C. 1997)). Indeed, one of those cases observed that "the Court is unaware of any authority showing that other courts have exercised pendent venue in a FOIA records action in a similar circumstance. In fact, at least one court has previously cautioned against doing so because of concerns over forum shopping." *Holmes-Hamilton*, 2021 WL 5166376, at *4. Plaintiffs attempt to distinguish *Holmes-Hamilton* by stating the decision does

"not involve such closely related claims," but that assertion says nothing about whether pendent venue is available under Section 552(a)(4)(B) in the first place; it is not. Opp. at 19. In any event, Plaintiffs' characterization of *Holmes-Hamilton* as not involving "closely related claims" ignores the plain language of that decision, which found that the properly venued and improperly venued FOIA claims at issue in that case were "nearly identical." *Holmes-Hamilton*, 2021 WL 5166376, at *4. Notwithstanding the "nearly identical" nature of those claims, *Holmes-Hamilton* refused to apply pendent venue in the FOIA context. *Id.* The result in this case should be the same. Pendent venue does not apply to claims brought under the FOIA's special forum provision.

Finally, Plaintiffs contend that exercising pendent venue over García's and Ainab's FOIA claims would not "defeat Congressional intent" because Congress provided the District of Columbia as an alternative FOIA forum that could be selected "*at the complainant's option*." Opp. at 20 (emphasis in original). While it is true that García and Ainab have the "option" to choose the District of Columbia under Section 552(a)(4)(B), García and Ainab *do not* have the option to select a forum that is not authorized by Section 552(a)(4)(B). But that is precisely what Plaintiffs are trying to do by bringing this lawsuit in the Northern District of California—they are attempting to force a non-existent option to litigate their FOIA claims here, which is in contravention of the forum requirements of Section 552(a)(4)(B). Congress simply did not authorize García and Ainab FOIA to pursue their FOIA claims in this District.

IV. This Court Does Not Have Jurisdiction Over Parts Of Plaintiffs' FOIA Lawsuit, And The Entire Case Thus Should Be Transferred To The District Of Columbia

As discussed above, García and Ainab cannot pursue their FOIA claims in this District, and those claims accordingly should be transferred to the District of Columbia under 28 U.S.C. § 1631 for lack of jurisdiction or 28 U.S.C. § 1406(a) for improper venue. Plaintiffs claim that the remaining Plaintiffs' FOIA claims should not be transferred to the District of Columbia under 28 U.S.C. § 1404(a), but their arguments are not persuasive.

First, Plaintiffs argue that a plaintiff's choice of forum can be afforded "less weight" "only where 'the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter.'" Opp. at 21 (quoting *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)). But Plaintiffs misquote the *Lou* decision. The language in *Lou* quoted by Plaintiffs has nothing to do with providing

"less weight" to class plaintiffs' choice of forum, but rather with *Lou*'s separate holding that a plaintiff's choice of forum "is entitled to only minimal consideration" where the underlying facts are untethered to the forum. *Lou*, 834 F.2d at 739. As relevant to this putative class action, *Lou* clearly held that a class action plaintiff's choice of forum is "given less weight." *Id.* That holding applies with full force here, and Plaintiffs' forum choice thus is afforded "less weight" in this putative nationwide class action.

Second, Plaintiffs contend that the convenience of parties, the witnesses' convenience, and the ease of access to evidence weigh in Plaintiffs' favor, but Plaintiffs fail to advance even one argument as to why this assertion is true. Opp. at 21-22. Instead, the Opposition dwells on the location and convenience of Plaintiffs' counsel and argues that it is not a valid consideration. *Id.* But this is a red herring. Whether or not the location of Plaintiffs' counsel is relevant, Plaintiffs do not demonstrate that the factors they concede *should* be considered weigh against transfer. Thus, Plaintiffs wholly fail to address the fact that, in this pattern or practice lawsuit, (1) the overwhelming volume of evidence is located in the District of Columbia or surrounding areas, (2) almost all of the relevant witnesses with knowledge of CBP's FOIA processing are located in the District of Columbia or surrounding areas, and (3) Defendants are both headquartered in the District of Columbia, while Plaintiffs are spread across at least three separate states (Massachusetts, Texas, and California). In short, the Opposition does not rebut Defendants' showing that all the relevant factors—the convenience of parties, the witnesses' convenience, and the ease of access to evidence—weigh strongly in favor of transfer.

Third, Plaintiffs assert that "the judicial interest in consolidation of claims . . . is inapplicable because García and Ainab's FOIA claims do not merit transfer." Opp. at 23. But, again, that assertion is belied by Ninth Circuit case law, and this Court simply does not have jurisdiction over García's and Ainab's FOIA claims or, in the alternative, venue is improper in this District for García's and Ainab's FOIA claims. *Supra* Parts II-III. As such, those claims cannot be adjudicated in this District, and, absent transfer of Plaintiffs' other claims, this case will proceed simultaneously in two different forums.

Fourth, the Opposition fails to address the fact that the District of Columbia has a greater local interest in this putative nationwide class action than the Northern District of California because it is the default forum for FOIA lawsuits and many federal agencies (including both Defendants in this case) are headquartered in or near that district.

Finally, while Defendants did not—and do not—question this Court's familiarity with the FOIA or ability to hear "purely federal claims" (Opp. at 22), it remains true that the District of Columbia is widely acknowledged as having significant and specialized expertise in working with the FOIA. *Whitaker v. DOC*, 970 F.3d 200, 206 n.25 (2nd Cir. 2020).

In sum, García's and Ainab's FOIA claims should be transferred to the District of Columbia because they cannot be pursued in this District. And the factors courts consider while analyzing a discretionary transfer under Section 1404(a) weigh heavily in favor of transferring the remaining Plaintiffs' claims to the District of Columbia as well.

V. To The Extent This Court Retains Some Of Plaintiffs' FOIA Claims, The Nationwide Class Allegations Should Be Dismissed For Lack Of Jurisdiction

Plaintiffs' nationwide class allegations fail in this District for the same reason García's and Ainab's FOIA claims cannot be litigated here: this Court does not have jurisdiction over out-of-District plaintiffs under Section 552(a)(4)(B). The Opposition cites a number of cases certifying nationwide class actions where not all named plaintiffs reside in this District but none of those were FOIA cases, and in none of those cases did the residency of the class plaintiffs divest the Court of jurisdiction under the statutory authority at issue. Opp. at 10 (citing cases). In this case, however, Section 552(a)(4)(B) has that precise impact—under Section 552(a)(4)(B), this Court does not have authority to enjoin Defendants on behalf of putative class plaintiffs who do not reside in or have their principal place of business in the Northern District of California. The class action device cannot confer jurisdiction that the Court does not otherwise have, *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975), but that is what Plaintiffs seek by bringing a putative nationwide FOIA class action lawsuit in this District.

Again, however, the fact that this Court does not have jurisdiction under the FOIA over a nationwide class does not mean that no court would. Indeed, the jurisdictional hurdles to pursuing a nationwide FOIA class action in this District do not apply in the District of Columbia. As such, Plaintiffs are not left without an opportunity to seek class certification; they just cannot do so in *this* District.

VI. Plaintiffs Did Not Submit FOIA Requests To DHS And, As A Result, They Cannot Pursue Their FOIA Claims Against DHS

Federal jurisdiction under the FOIA cannot be invoked unless an agency has (1) "improperly,"

(2) "withheld," (3) "agency records." *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 150 (1980). And an agency cannot be considered to have improperly withheld records if it did not receive a FOIA request for those records in compliance with the agency's published regulations. *LaVictor v. Trump*, No. 19-cv-01900, 2020 WL 2527192, at *2 (D.D.C. May 18, 2020); *Ghassan v. U.S. DOJ*, No. 22-cv-1615, 2023 WL 1815650, at *2 (D.D.C. Feb. 8, 2023). Those two legal propositions demonstrate that Plaintiffs' claim against DHS cannot proceed because Plaintiffs do not allege that they submitted FOIA requests to DHS. Mot. at 23-25.

Plaintiffs contend that they can maintain FOIA claims against DHS because "DHS bears responsibility for its systemic failure to timely make FOIA determinations," but that argument ignores the threshold issue in this case. Opp. at 11. The relevant inquiry is not who "bears responsibility" but rather which entity is an authorized defendant under the FOIA. Here, Plaintiffs can have no FOIA cause of action against DHS unless they first submit a valid FOIA request to DHS; they have not done so. *Kissinger*, 445 U.S. at 150; *LaVictor*, 2020 WL 2527192, at *2. As such, any FOIA claim against DHS is subject to dismissal.

Plaintiffs suggest that two other courts in this District have rejected the argument made by DHS in this Motion, but that contention is based on incorrect interpretations of those authorities, which do not support the principle for which Plaintiffs cite them. Plaintiffs first cite various passages in *Brown v. United States Customs & Border Prot.*, 132 F. Supp. 3d 1170 (N.D. Cal. 2015), but none of the cited statements relate to the dismissal argument made by DHS in this Motion. For example, Plaintiffs quote *Brown* as holding "[t]his argument flies in the face of FOIA's plain meaning and several cases finding that unexcused delay is a perfectly valid claim" (Opp. at 12 n.4), but that language referred to an argument about whether "violation of the FOIA response deadline is not a cognizable claim"—DHS does not advance that argument in this Motion. *See Brown*, 132 F. Supp. 3d at 1172. Plaintiffs also quote *Brown* for the statement "[t]his argument is tantamount to a willful misreading of *CREW*" (Opp. at 12 n.4), but that language referred to an argument that "the failure to meet FOIA's deadline has no legal consequence"—again, that is not an argument that DHS makes in this Motion. *See Brown*, 132 F. Supp. 3d at 1173. Plaintiffs further quote *Brown* as holding "[Defendants'] position is bereft of support" (Opp. at 12 n.4), but that statement referred to the contention that "plaintiffs cannot sue on a pattern and practice

of FOIA delay"—again, not an argument made by DHS here. *See Brown*, 132 F. Supp. 3d at 1174. Finally, Plaintiffs quote *Brown* as finding "[t]his argument is ill considered" (Opp. at 12 n.4), but that assertion referred to the argument that a pattern or practice claim "should be dismissed because plaintiffs do not identify a 'discrete policy or practice' behind the delayed responses"; once again, that is not an argument advanced by DHS in this Motion. *Brown*, 132 F. Supp. 3d at 1174. In short, Plaintiffs repeatedly cite strong language from the *Brown* decision, but *none* of that language relates to the dismissal argument actually made by DHS in this Motion (*i.e.*, the FOIA claim against DHS should be dismissed because Plaintiffs did not submit a FOIA request to DHS in compliance with its published regulations).

Plaintiffs similarly quote language in *Nightingale v. U.S. Citizenship & Immig. Servs.*, 507 F. Supp. 3d 1193, 1201 (N.D. Cal. 2020), describing an argument made by the defendants in that case as "nonsense." Opp. at 12. The argument that *Nightingale* found to be "nonsense" related to the level of oversight DHS headquarters has over component FOIA operations. *Nightingale*, 507 F. Supp. 3d at 1204 n.10. The *Nightingale* court's finding has no bearing on whether a plaintiff can bring a claim under the FOIA without first submitting a valid FOIA request to the agency in compliance with the agency's published regulations—that question was not before the *Nightingale* court. Here, Plaintiffs do not allege that they submitted a FOIA request to DHS in compliance with its published regulations, and they therefore cannot maintain a FOIA claim against DHS.

VII. Staying An Order Transferring This Case To Allow Plaintiffs To Seek Certification For Interlocutory Review Under 28 U.S.C. § 1292(b) Is Not Warranted

In a footnote on the last page of the Opposition, Plaintiffs ask the Court to stay its decision to allow Plaintiffs to move the Court to certify the order for interlocutory review under 28 U.S.C. § 1292(b) if "the Court grants Defendants' motion to transfer, in whole or in part[.]" Opp. at 23 n.9. But a stay is not warranted here because Plaintiffs identify no basis to certify a transfer decision for interlocutory review.

Certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) provides a means for litigants to bring an immediate appeal of a non-dispositive order with the consent of both the district court and the court of appeals. 28 U.S.C. § 1292(b); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). A district court may certify an order for interlocutory appellate review under Section 1292(b) if the following three requirements are met: "(1) there is a controlling question of law, (2) there are

substantial grounds for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation." *Id.* at 1026; 28 U.S.C. § 1292(b). "[T]he legislative history of 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement Antitrust Litig.*, 673 F.2d at 1026 (citing *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966)). "The party seeking certification has the burden of showing that exceptional circumstances justify a departure from the 'basic policy of postponing appellate review until after the entry of a final judgment.'" *Fukuda v. County of Los Angeles*, 630 F. Supp. 228, 229 (C.D. Cal. 1986) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)).

Here, Plaintiffs do not—and cannot—meet their burden of showing that exceptional circumstances justify certifying an interlocutory appeal under Section 1292(b), much less that the Court should stay a transfer order to allow Plaintiffs to seek such a certification. Indeed, none of the factors this Court must consider weighs in favor of certifying an interlocutory appeal.

First, there would be no controlling question of law in a decision transferring Plaintiffs' FOIA claims to the District of Columbia. An issue is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at 1026. Any transfer order that Plaintiffs would seek to certify for interlocutory appeal does not meet this standard because it would not "materially affect the outcome." All a transfer order would do is force Plaintiffs to litigate their FOIA claims in a forum that properly possesses jurisdiction over the FOIA claims. It would not impact the scope of Plaintiffs' lawsuit at all. And Plaintiffs' suggestion that transfer to the District of Columbia in and of itself would "materially affect the outcome" of this case is not well taken in light of Plaintiffs' position elsewhere in the Opposition that "all federal courts are equally suited to hear purely federal claims." Opp. at 22.

Second, there is no substantial grounds for difference of opinion. "[A] substantial ground for difference of opinion exists where 'the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (internal quotation marks and citation omitted). "That settled law might be applied differently does

not establish a substantial ground for difference of opinion." *Id.* Here, the Ninth Circuit already has spoken on this point (repeatedly) and found that Section 552(a)(4)(B) is jurisdictional. *See Rosiere*, 693 F. App'x at 557; *Yagman*, 868 F.3d at 1082-83; *Hajro*, 811 F.3d at 1100-01. As such, there are no substantial grounds for difference of opinion that would justify an interlocutory appeal.

Third, an immediate appeal would only delay the ultimate termination of the litigation. Indeed, multiple courts in this Circuit have found that interlocutory appeals of transfer orders under Section 1292(b) are not appropriate because they "would not materially advance the termination of . . . litigation, but merely delay its progress." *Gilburd v. Rocket Mortg. LLC*, No. 23-cv-00010, 2023 WL 8480062, at *7 (D. Ariz. Dec. 7, 2023); *see also Doe v. CRST Expedited, Inc.*, No. 21-cv-1117, 2023 WL 3564785, at *2 (C.D. Cal. Apr. 25, 2023) ("Even if CRST were successful on appeal, a decision would delay, not advance, the ultimate termination of the litigation.").

VIII. Conclusion

For these reasons, the Court should dismiss the APA claims for lack of subject matter jurisdiction, dismiss the FOIA claim against DHS, and transfer the remaining FOIA claims to the District of Columbia.

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Respectfully submitted,

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