UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

ESTATE OF ASHLI BABBITT and AARON BABBITT, individually and on behalf of the ESTATE OF ASHLI BABBITT,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.
/

Case No. 1:24-cv-01701-ACR

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION TO RETRANSFER VENUE TO THE SOUTHERN DISTRICT OF CALIFORNIA

Plaintiffs Estate of Ashli Babbitt and Aaron Babbitt, individually and on behalf of the Estate of Ashli Babbitt, respectfully move for an order retransferring venue to the Southern District of California so that they can seek review of that Court's order transferring this case to the District of Columbia in a mandamus proceeding in the U.S. Court of Appeals for the Ninth Circuit. The grounds for this motion are set forth in the accompanying memorandum of points and authorities. A proposed order is attached.

Dated: July 20, 2024

Respectfully submitted,

JUDICIAL WATCH, INC.

By: */s/ Robert Patrick Sticht.*

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO RETRANSFER VENUE TO THE SOUTHERN DISTRICT OF CALIFORNIA

BACKGROUND

Air Force veteran Ashli Babbitt was shot and killed inside the U.S. Capitol building by Lieutenant Michael Byrd of the United States Capitol Police at 2:44 p.m. on January 6, 2021. Aaron Babbitt, Ashli Babbitt's husband and personal representative and administrator of her estate, filed this wrongful death and survival lawsuit on behalf of the estate and himself on January 5, 2024. It alleges assault and battery and various negligence claims against the United States of America under the Federal Tort Claims Act.

Plaintiffs filed this lawsuit in the Southern District of California, their home forum, pursuant to a special venue provision for tort claims against the United States. The purpose of the provision is to protect plaintiffs from abuse by the United States forcing them to litigate the controversy in an inconvenient forum. There is no judicial district more convenient to Plaintiffs than the district in which they reside.[1] On March 1, 2024, Defendant filed a motion to transfer venue to the District of Columbia, which Plaintiffs opposed. The Court granted the motion in an order filed on June 12, 2024.

ARGUMENT

Plaintiffs Estate of Ashli Babbitt and Aaron Babbitt, individually and on behalf of the Estate of Ashli Babbitt, respectfully move for an order retransferring venue to the Southern District of California so that they can seek review of that Court's order transferring this case to the District of Columbia in a mandamus proceeding in the U.S. Court of Appeals for the Ninth Circuit.

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[1] Plaintiffs' attorney is located in Los Angeles, California.

The Southern District of California transferred this case to the District of Columbia pursuant to 28 U.S.C. § 1404(a), without a hearing, against the will of Plaintiffs, contrary to law in their view, and, as indicated in the Court's docket,[2] electronically on June 12, 2024, which is the same day the transfer order, dated June 10, 2024, was filed and served on the parties – a process that by any measure of fairness deprived Plaintiffs a fair opportunity to even read and consider the transfer order much less seek mandamus review of it in the Ninth Circuit. As explained below, that review has to happen prior to the physical transfer of the record when jurisdiction ceases to exist in the Ninth Circuit.

This hasty process afforded Plaintiffs no opportunity to seek a stay of the order or petition for mandamus relief from the order although they clearly had a right to do both. *See e.g., A.J. Industries, Inc. v. United States Dist. Court for Cent. Dist.*, 503 F.2d 384, 386 (9th Cir. 1974) (after granting defendant's motion to transfer, district court entertained and denied motion to certify transfer order for interlocutory appeal and motion to stay transfer, whereupon petition for mandamus was filed and stay of transfer was ordered by the court of appeals.); *In re Sui*, 2013 U.S. Dist. LEXIS 208061, **4-5 (C.D. CA 2013) (power to stay proceedings is part of district court's "traditional equipment for the administration of justice" and "incidental to the power of every court to manage the schedule of caes on its docket to ensure fair and efficient adjudication"); *United States v. Fitzgerald*, 884 F.Supp. 376, 377 (D.D.C. 1995) (granting stay pending appeal).

By this motion, Plaintiffs are simply asking this Court to retransfer this case to the Southern District of California in the interest of justice and fair play. It is well-settled that this Court cannot directly review the transfer order itself. *See Starnes v. McGuire*, 512 F.2d 918, 924

[2] *See* Exhibit A hereto.

(D.C. Cir. 1974) (*en banc*) ("it is well-established that the transferee court cannot directly review the transfer order itself."). It is equally clear that the physical transfer of the record to this Court deprives the Ninth Circuit of jurisdiction to review the transfer order. *Id*. ("it is equally clear that physical transfer of the original papers in a case to a permissible transferee forum deprives the transferor circuit of jurisdiction to review the transfer.") "This state of the law makes it essential that procedures be adopted and observed that will provide plaintiffs a fair opportunity to seek review in the transferor circuit prior to the physical transfer of the record." *Id*.

When, as here, physical transfer of the record has already taken place, the D.C. Circuit instructs that the appropriate course of action is a new proceeding seeking retransfer in this Court. *Id*. ("the appropriate course of action when physical transfer has already taken place at the time the petition for mandamus is filed is a new proceeding seeking retransfer in the transferee court"). By this motion, Plaintiffs are following this guidance from the D.C. Circuit and initiating this new proceeding in this Court seeking retransfer to the Southern District of California so that they can seek mandamus review of that court's intercircuit transfer order in the Ninth Circuit.

"Although the D.C. Circuit has said little about retransfer motions," *En Fuego Tobacco Shop LLC v. United States FDA*, 356 F.Supp.3d 1, 8 (D.D.C. 2019), its guidance clearly supports providing a party a fair opportunity to seek review of the transfer order in the transferor circuit. *See Starnes*, 512 F.2d at 924 ("the law makes it essential that procedures be adopted and observed that will provide plaintiffs a fair opportunity to seek review in the transferor circuit"); *see also Fine v. McGuire*, 433 F.2d 499, 500 n.1 (D.C. Cir. 1970) (informal procedure employed to return the file from the District of Maryland to the D.C. Circuit for consideration of petition for mandamus relief from erroneous transfer order); *Preston Corp. v. Raese*, 335 F.2d 827, 828

(4th Cir. 1964) (similar).

At the same time, the decisions in this circuit, the Ninth Circuit, and elsewhere clearly do not support depriving a party a forum to which she is entitled, denying that party review in a mandamus proceeding in the transferor forum, and prejudicing that party who is timely objecting to a venue deficiency before a trial on the merits. *See Wiren v. Laws*, 194 F.2d 873, 874 (D.C. Cir. 1951) ("If we were to hold even unauthorized orders of transfer to lie beyond our control, the effect would be to deprive litigants of forums to which they are entitled."); *ibid* ("The only appealable order which would ultimately issue in the wake of such a disclaimer on our part would then be in the forum to which the cause had been transferred and perhaps only after the case had been disposed of on the merits."); *Whittier v. Emmet*, 1960 U.S. App. LEXIS 4186, **11-12 (D.C. Cir. 1960) ("Once the case has been heard fully and fairly on the merits, the reasons for reversing the judgment on grounds of improper venue are substantially diminished"); *Kasey v. Molybdenum Corp. of America*, 408 F.2d 16, 20 (9th Cir. 1969) ("If, on appeal, it is determined that the 1404(a) motion was improperly ruled upon, a new trial is necessary. Alternatively, and perhaps more persuasively, it may be that the abuse is not susceptible to correction on appeal and, by postponing review, courts are denying effective appeal.") Clearly, the fair opportunity to challenge a venue transfer order effectively is not a trivial or insubstantial matter.

Plaintiffs face prejudice in this circuit in yet another important respect. The D.C. Circuit, like most circuits, lacks jurisdiction to review an intercircuit transfer order upon final judgment, which means the transfer order here will effectively become immune from appellate scrutiny in this circuit. "Once a case is transferred most circuits have found that they lack jurisdiction to review a transfer order from a court outside of their circuit upon final judgment." *Hill v.*

Henderson, 195 F.3d 671, 676-677 (D.C. Cir. 1999) *citing e.g., In re Briscoe*, 976 F.2d 1425, 1426 (D.C. Cir. 1992) (noting that absent exceptional circumstances a transfer order should not be reviewed by transferee circuit and "therefore may effectively become immune from appellate scrutiny"). This is not the rule in the Plaintiffs' home forum. The Ninth Circuit exercises appellate jurisdiction to review intercircuit transfer orders upon final judgment. *See American Fidelity Fire Ins. Co. v. United States Dist. Ct.*, 538 F.2d 1371, 1377 n.4 (9th Cir. 1976) ("On appeal from a final judgment we may exercise our appellate jurisdiction to review a district court's transfer order, even if the transferor court is not within our circuit."), *citing Gulf Research & Dev. Co. v. Harrison*, 185 F.2d 457 (9th Cir. 1950).

The D.C. Circuit in *Hill* clearly did not intend such prejudice. It said, "[a] possible explanation for finding transfer orders nonreviewable in the transferee circuit is that such orders are usually effectively subject to immediate review via mandamus in the circuit of the transferring court." *Hill*, 195 F.3d at 677. The *Hill* court is correct in this case. The intercircuit transfer order in this case is interlocutory and not an appealable final judgment, but it is reviewable in the Ninth Circuit on a petition for writ of mandamus relief. *See e.g., Shapiro v. Bonanza Hotel Co.*, 185 F.2d 777 (9th Cir. 1950); *Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949 (9th Cir. 1968). And but for the immediate, electronic and, perhaps, inadvertent transfer of the record from the Southern District of California to the District of Columbia on the same day that the transfer order was entered, Plaintiffs would have sought a stay of that order and mandamus relief from it in the Ninth Circuit.

In *Hill*, the D.C. Circuit paved the way forward in these circumstances. It said, "In any event, a party transferred against its will can indirectly secure at least partial review of the transfer in the transferee circuit by filing a motion for retransfer[.]" *Id*.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion to retransfer this case to the Southern District of California so that they can seek review of that Court's order transferring this case to the District of Columbia in a mandamus proceeding in the U.S. Court of Appeals for the Ninth Circuit.

Dated: July 20, 2024

Respectfully submitted,

JUDICIAL WATCH, INC.

By: */s/ Robert Patrick Sticht.*

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Attorney for Plaintiffs Estate of Ashli Babbitt and Aaron Babbitt

CERTIFICATE OF CONFERRAL

Pursuant to LCvR 7(m) and paragraph 7(h) of this Court's Standing Order in Civil Cases, counsel for Plaintiffs states that he conferred with all counsel for Defendant by telephone on July 9, 2024 regarding this motion, the grounds for same, and the authorities in support hereof, and was advised by email on July 10, 2024 simply that the government will oppose the relief requested herein.

Dated: July 20, 2024

/s/ Robert Patrick Sticht.

ROBERT PATRICK STICHT

Attorney for Plaintiffs Estate of Ashli Babbitt and Aaron Babbitt

EXHIBIT A

CLOSED

U.S. District Court
Southern District of California (San Diego)
CIVIL DOCKET FOR CASE #: 3:24−cv−00033−BAS−DDL

Estate of Ashli Babbitt v. United States of America
Assigned to: Judge Cynthia Bashant
Referred to: Magistrate Judge David D. Leshner
Demand: $9,999,000
Cause: 28:2671 Federal Tort Claims Act (Definitions)

Date Filed: 01/05/2024
Date Terminated: 06/12/2024
Jury Demand: None
Nature of Suit: 360 P.I.: Other
Jurisdiction: U.S. Government Defendant

Plaintiff

Estate of Ashli Babbitt

represented by **Robert Patrick Sticht**
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Email: rsticht@judicialwatch.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Aaron Babbitt
individually and on behalf of the Estate of Ashli Babbitt

represented by **Robert Patrick Sticht**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

United States of America

represented by **U S Attorney CV**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/05/2024	1	COMPLAINT against United States of America (Filing fee $ 405 receipt number ACASDC−18474179). Filed by Estate of Ashli Babbitt, Aaron Babbitt. (Attachments:

		# 1 Civil Cover Sheet) The new case number is 3:24−cv−33−BAS−DDL. Judge Cynthia Bashant and Magistrate Judge David D. Leshner are assigned to the case. (Sticht, Robert)(sjt) (Entered: 01/05/2024)
01/05/2024	2	Summons Issued. **Counsel receiving this notice electronically should print this summons and serve it in accordance with Rule 4, Fed.R.Civ.P and LR 4.1.** (sjt) (Entered: 01/05/2024)
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03/01/2024	5	MOTION to Change Venue by United States of America. (Attachments: # 1 Memo of Points and Authorities in Support of Motion to Transfer Venue)(Boyd, Brian)Attorney Brian J. Boyd added to party United States of America(pty:dft) (mjw). (Entered: 03/01/2024)
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06/13/2024	15	Transfer Letter Received from District of Columbia. Case number in other court is 1:24cv01701 (jpp) (Entered: 06/14/2024)

CERTIFICATE OF SERVICE

I certify that on the date set forth below, the foregoing motion was filed using this Court's CM/ECF system, which will electronically serve notice on all counsel of record.

I further certify that I caused the foregoing motion to be served via U.S. mail, postage pre-paid, on the following persons:

Honorable Cynthia Bashant
United States District Judge
James M. Carter and Judith N. Keep
United States Courthouse
333 West Broadway, Suite 1280
San Diego, CA 92101

Dated: July 20, 2024

/s/ Robert Patrick Sticht.
ROBERT PATRICK STICHT

Attorney for Plaintiffs Estate of Ashli Babbitt and Aaron Babbitt

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Jury Demand: None
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Plaintiff

Estate of Ashli Babbitt

represented by **Robert Patrick Sticht**
Judicial Watch, Inc.
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individually and on behalf of the Estate of Ashli Babbitt

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LEAD ATTORNEY
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V.

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United States of America

represented by **U S Attorney CV**
U S Attorneys Office Southern District of California
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ESTATE OF ASHLI BABBITT and AARON BABBITT, individually and on behalf of the ESTATE OF ASHLI BABBITT,

Plaintiffs,

Case No. 1:24-cv-01701-ACR

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

E E

The Court has reviewed and considered Plaintiffs' Motion to Retransfer Venue to the Southern District of California. For the reasons stated therein, and for good cause, it is hereby

E E as follows:

1. The motion is **A TE** .

2. The Clerk of this Court shall transfer this matter to the United States District Court for the Southern District of California forthwith.

E E this _____ day of _____, 2024.

_____
HONORABLE ANA C. REYES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTATE OF ASHLI BABBITT, and AARON BABBITT, individually and on behalf of the ESTATE OF ASHLI BABBITT, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	)	Case No. 1:24cv1701-ACR

DEFENDANT'S PRE-MOTION NOTICE

In accordance with Paragraph 7(f) of this Court's Standing Order and this Court's Minute Order dated July 17, 2024, Defendant United States of America submits this notice to request a pre-motion conference regarding the partial motion to dismiss it seeks to file in this case.

On January 6, 2021, a U.S. Capitol Police Officer fatally shot Ashli Babbitt when she tried to climb through a broken sidelight into the Speaker's Lobby during the riot at the U.S. Capitol. Aaron Babbitt, individually and on behalf of the Estate of Ashli Babbitt, sues the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346; 2671-2680 (2018), seeking damages for her death. Three of his seven claims allege negligent acts or omissions by federal officials other than the officer who shot Ms. Babbitt. ECF No. 1 (Compl.). Count III faults nearby federal officers for not taking action with respect to rioters who broke out the panel of the sidelight Ms. Babbitt tried to climb through. Counts IV and V fault Capitol Police for negligent retention, supervision, discipline, and training. The United States seeks dismissal of those claims for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). Immediate dismissal of those claims will simplify discovery and streamline the litigation. *Cf.* FED. R. CIV. P. 26(b)(1).

The FTCA waives sovereign immunity for certain tort claims, however it "did not waive the sovereign immunity of the United States in all respects." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). Relevant here, the FTCA waives immunity, and vests district court jurisdiction, only "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The FTCA also excepts from the sovereign-immunity waiver any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Accordingly, "in the unique context of the FTCA," section 1346(b)(1) requires a plaintiff to invoke subject matter jurisdiction by plausibly alleging "all elements of a meritorious claim," *Brownback v. King*, 592 U.S. 209, 217 (2021), while section 2680(a) requires pleading conduct outside the FTCA's discretionary-function exception. *See Shuler v. United States*, 531 F.3d 930, 933-34 (D.C. Cir. 2008); *Donahue v. United States*, 870 F. Supp. 2d 97, 104 n.4 (D.D.C. 2012). When evaluating a facial challenge to subject matter jurisdiction, the court assumes the complaint's factual allegations and draws all reasonable inferences in the plaintiff's favor. *See RELX, Inc. v. Baran*, 397 F. Supp. 3d 41, 47 (D.D.C. 2019).

Private Person Analog. Count III alleges negligent acts or omissions by eight officers who were nearby when Ms. Babbitt came to harm. The complaint alleges the officers breached a duty to "protect [Ms. Babbitt] from harm," Compl. ¶ 63, when they failed to "control, de-escalate, or stop" the two rioters who broke the window Ms. Babbitt tried to climb through. *Id.* ¶¶ 69-72. That theory does not plausibly allege circumstances in which a private person would be liable under D.C. law.

Under section 1346(b)(1), a court must "look to the law of the local jurisdiction—in this case, the District of Columbia[.]" *Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 508 (D.C. Cir. 2009). Under D.C. law generally "no liability exists in tort for harm resulting from the criminal acts of third parties[.]" *Hall v. Ford Enterprises, Ltd.*, 445 A.2d 610, 611 (D.C. 1982); *see Workman v. United Methodist Comm.,* 320 F.3d 259, 262 (D.C. Cir. 2003). The eight officers, therefore, had no "duty to protect" Ms. Babbitt from consequences allegedly traceable to the criminal acts of the two rioters. The only potentially relevant exception to D.C.'s general rule depends on establishing a "defendant's increased awareness of the danger of a particular criminal act" that "was so foreseeable that it became the defendant's duty to guard against" it. *Bd. of Trustees of Univ. of D.C. v. DiSalvo*, 974 A.2d 868, 872 (D.C. 2009) (citations omitted). The complaint has not plausibly alleged any increased awareness of the danger to Ms. Babbitt from the particular criminal acts of two other rioters. Mr. Babbitt has not alleged, for example, harm resulting from a similar crime in the same place. *See id*. at 873-74.

Alternatively, even if the duty at issue was that of a "reasonably prudent officer," as Mr. Babbitt asserts, Compl. ¶ 63, the same result would lie. The public duty doctrine holds that police officers are under "no general duty to provide … police protection to any particular individual." *Klahr v. Dist. of Columbia*, 576 A.2d 718, 720 (D.C. 1990) (cleaned up). When a "governmental entity undertakes to furnish police services, it assumes a duty only to the public at large and not to individual members of the community." *Warren v. Dist. of Columbia*, 444 A.2d 1, 3 (D.C. 1981) (en banc). The eight officers in this case therefore had no duty "to protect [Ms. Babbitt] from harm," Compl. ¶ 63, because they had "a duty only to the public at large," *Warren*, 444 A.2d at 3.

Discretionary-Function Exception. Count III and Mr. Babbitt's negligent supervision, discipline, and retention (Count IV) and negligent training (Count V) claims are all barred by the FTCA's discretionary-function exception. 28 U.S.C. § 2680(a). The discretionary-function exception immunizes the government from a tort claim when the challenged action involves an element of judgment or choice and that judgment or choice is "susceptible" to policy analysis. *Gaubert v. United States*, 499 U.S. 315, 322, 325 (1991).

Courts have long recognized that personnel decisions typically involve a host of judgments that are susceptible to policy analysis. Accordingly, negligent supervision, discipline, retention, and training claims fall within the discretionary-function exception. *See Burkhart v. Washington Metro. Area Transit Auth*., 112 F.3d 1207, 1217 (D.C. Cir. 1997); *Smith v. United States*, 157 F. Supp. 3d 32, 42 (D.D.C. 2016); *Bostic v. U.S. Capitol Police*, 644 F. Supp. 2d 106, 110 (D.D.C. 2009). Likewise, the type of negligence claim Mr. Babbitt brings in Count III—faulting eight nearby officers for not taking action with respect to the rioters who smashed the sidelight before Ms. Babbitt tried to climb through it—is also barred by the exception. Decisions regarding when to arrest or to take or refrain from taking certain actions to protect others are the kind of discretionary government decisions, "rife with considerations of public policy, that Congress did not want the judiciary second-guessing." *Shuler*, 531 F.3d at 934 (cleaned up); *Olaniyi v. Dist. of Columbia*, 763 F. Supp. 2d 70, 88-89 (D.D.C. 2011).

The United States respectfully requests that the Court schedule a pre-motion conference in anticipation of its motion.

Dated: July 24, 2024

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

ESTATE OF ASHLI BABBITT and AARON BABBITT, individually and on behalf of the ESTATE OF ASHLI BABBITT,

Case No. 1:24-cv-01701-ACR

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.
/

PLAINTIFFS' RESPONSE TO DEFENDANT'S PRE-MOTION NOTICE

Plaintiffs' Motion to Retransfer Venue. On July 20, 2024, Plaintiffs moved for an order retransferring venue to the Southern District of California so that they can seek review of that Court's order transferring this case to the District of Columbia in a mandamus proceeding in the U.S. Court of Appeals for the Ninth Circuit. ECF 21. Defendant's response to the motion is due August 5, 2024. LCvR 7(b). Plaintiffs' reply would be due August 12, 2024. LCvR 7(d). Oral argument is requested. No hearing date has been set.

A Pre-motion Conference regarding Defendant's partial motion to dismiss has been set on August 6, 2024. Notice of Hearing, July 26, 2024. However, it makes more sense to resolve venue before requiring the parties to brief a dismissal motion, to avoid the potential waste of time and resources and duplication of effort and promote judicial efficiency. ECF 6 (Dft's App. for Ext. of Time to Respond to Complaint) at 3 ("But it makes little sense to require the parties to spend time, energy, and resources briefing a dismissal motion before knowing in which venue the case will proceed."); *see also* ECF 8 (Order Granting Def's App.) at 2. Also, a motion to dismiss should be decided by the district court in which the case will ultimately proceed as there

may be a conflict of law between the two circuits. *Id*.; *Moore v. Valder*, 65 F.3d 189, 195 n.9 (D.C. Cir. 1995). Accordingly, Plaintiffs request that the motion to dismiss be held in abeyance until their motion to retransfer is decided and venue is ultimately resolved.

Private Person Analog. It is important to properly and fairly characterize Count III as negligence when police officers are using deadly force. ECF 1 (Compl.) ¶¶ 22, 25-27, 62, and cases cited therein; *Hayes v. County of San Diego*, 57 Cal. 4th 622 (2013). One must consider the totality of the circumstances. *Id*. Lt. Byrd did not act alone when he shot Ashli Babbitt. Many officers were involved in the killing, including eight officers identified in Count III. Plaintiffs allege their negligence, not criminal acts of two rioters, caused Ashli's death. This case is thus readily distinguishable from Defendant's cases, *Hall v. Ford Enterprises, Ltd.*, 445 A.2d 610 (D.C. 1982), *Workman v. United Methodist Comm.*, 320 F.3d 259 (D.C. Cir. 2003), *Bd. of Trustees of Univ. of D.C. v. DiSalvo*, 974 A.2d 868 (D.C. 2009), *Klahr v. District of Columbia*, 576 A.2d 718 (D.C. 1990), and *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981), which all involve victims of criminal assaults by third parties.

Shifting blame to the two rioters fails also because of the special relationship between Ashli, the U.S. Capitol, and the Capitol Police, Compl. ¶ 66 ("Call fucking help!"), and the heightened foreseeability of an assault on the lobby doors, *id*. ¶ 49(c) ("barricade of heavy furniture and chairs," "all units go there and hold the glass"), *id*. ¶ 49(d) ("shots fired through the House main door"). *See Hall*, 445 A.2d at 611 n.4 (traditional special relationships); *Workman*, 320 F.3d at 262 (""plaintiff is not … required to show 'previous occurrences of the particular type of harm'"), *id*. at 263 ("defendant should be held liable as a matter of policy" as being "in the better position to know about security threats and to protect against them."); *DiSalvo*, 974 A.2d at 871 n.2 ("existence of a duty is also shaped by considerations of fairness"). The two

rioters' crime "was so foreseeable that it became [Defendant's] duty to guard against it." *DiSalvo*, 974 A.2d at 872 (internal quotes and citation omitted).

Similarly, the public duty doctrine does not apply because Capitol Police assumed a special duty to Ashli by affirmative conduct that led her into the broken window where she was shot and killed, including directing her movement to the House, Compl. ¶ 11, guarding the lobby doors, *id*. ¶ 64, inducing reliance on police protection, *id*. ¶ 66, and abandoning the lobby doors, *id*., ¶ 67-70. *See Warren v. District of Columbia*, 444 A.2d 1, 10-12 (D.C. 1981) (*en banc*) (Kelly, J. dissenting).

"[A]n officer possesses an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers." *Moore v. District of Columbia*, 79 F. Supp. 3d 121, 134-35 (D.D.C. 2015) (collecting cases). The eight officers thus had an affirmative duty to protect Ashli Babbitt from being shot by Lt. Byrd as the shooting was an unlawful seizure under the Fourth Amendment. Compl. ¶ 22.

Discretionary Function Exception. While negligent supervision, discipline, retention, and training claims may fall within the DFE, such determinations turn on whether actions taken were discretionary or whether regulations, statutes, the constitution, or internal policies contain mandatory actions that were not followed. Discovery is necessary to determine the existence of such rules and procedures, whether they allow for discretion, and whether Capitol Police violated any mandatory actions. A merits ruling on the DFE regarding Counts IV and V should await Plaintiffs' discovery. *Briscoe v. United States*, 268 F. Supp. 3rd 1, 12-14 (D.D.C. 2017).

Similarly, jurisdictional discovery is necessary to determine if Lt. Byrd engaged in any prior acts of misconduct involving use of a firearm, including intentional or non-intentional discharge of a firearm when on or off duty. The DFE "does not provide a blanket immunity

against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription." *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016). Plaintiffs allege Lt. Byrd violated a constitutional standard on deadly force set forth in *Graham v. Connor,* 490 U.S. 386 (1989) and *Tennessee v. Garner*, 471 U.S. 1 (1985) when he shot Ashli Babbitt. Compl. ¶ 22. Plaintiffs also allege a prior off-duty shooting by Lt. Byrd that was found to be not justified, Compl. ¶ 80, and a prior use of force matter that was sustained, *id*. ¶ 81. The DFE does not shield officials who retain an officer with a propensity to violate a legal or constitutional mandate.

Similar discovery of training materials and records is necessary to determine whether officer training meets the constitutional standard. Plaintiffs allege Lt. Byrd told a worldwide media audience he followed his training when he shot Ashli. Compl. ¶ 88, p.12 n.3. This portends a constitutional deficiency in training not shielded by the DFE. Records of how Capitol Police handled all prior instances of intentional or non-intentional discharges of a firearm by officers on or off duty are necessary to determine whether a pattern exists and thus a policy of ignoring a constitutional standard. *See City of Canton v. Harris*, 489 U.S. 378 (1989).

Regarding Count III, while decisions pertaining to arrests may fall within the DFE, negligent or reckless conduct is not protected. *Coulthurst v. United States*, 214 F.3d 106, 109 (2nd Cir. 2000). Discovery is necessary to determine whether the conduct of the eight officers and decisions they made are shielded by the DFE. *Id*. (given "numerous potential ways" in which negligence may trigger the alleged injury, the nature of the asserted conduct is potentially determinative of the applicability of the DFE); *Woodriffe v. United States*, 2020 U.S. Dist. LEXIS 107761, *4, *17 (D.D.C. 2020); *Sledge v. Fed. Bureau of Prisons*, 2013 U.S. App. LEXIS 25940, *14 (D.C. Cir. 2013) (officer's "decision to pack up early" on the clock is unprotected.)

Dated: July 31, 2024 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the date set forth below, the foregoing response was filed using this Court's CM/ECF system, which will electronically serve notice on all counsel of record.

Dated: July 31, 2024

/s/ Robert Patrick Sticht.
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