

District Judge Richard A. Jones

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

E.L.A. and O.L.C.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. C20-1524-RAJ

UNITED STATES' MOTION TO
PARTIALLY DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION

Noted for consideration:
December 9, 2022

Defendant United States of America respectfully moves for an order partially dismissing the complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).¹

I. INTRODUCTION

Plaintiffs E.L.A. and O.L.C. bring this suit against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-2680 ("FTCA"), seeking damages based on Plaintiff E.L.A.'s detention and separation from his son, O.L.C., who was seventeen years of age when they both entered the United States unlawfully near McAllen, Texas in June of 2018. Plaintiffs

¹ This case is substantially related to *S.M.F., et al. v. United States*, Case No. 2:22-cv-01193, also before this Court. In that case, the United States recently filed a substantially similar motion asserting the same 12(b)(1) legal arguments regarding the Zero-Tolerance Policy. See United States' Motion to Dismiss, Dkts. 12-13, *S.M.F., et al. v. United States*, Case No. 2:22-cv-01193.

1 originally asserted four causes of action under Texas law for intentional infliction of emotional
 2 distress (“IIED”), abuse of process, negligence related to family separation, and negligence related
 3 to alleged mistreatment of O.L.C. while he resided at Lincoln Hall Center for Boys in New York.
 4 The Court dismissed Plaintiffs’ abuse of process and negligence-family separation claims, and this
 5 motion only address Plaintiffs’ intentional infliction of emotional distress claim.²

6 The United States has denounced the prior practice of separating children from their
 7 families at the United States–Mexico border and “condemn[ed] the human tragedy” that occurred
 8 because of the Zero-Tolerance Policy.” *Establishment of Interagency Task Force on the*
 9 *Reunification of Families*, Exec. Order 14,011, § 1, 86 Fed. Reg. 8273, 8273 (Feb. 5, 2021). And
 10 this Administration has committed the federal government to “protect family unity and ensure that
 11 children entering the United States are not separated from their families, except in the most extreme
 12 circumstances where a separation is clearly necessary for the safety and well-being of the child or
 13 is required by law.” The Court should not, however, reach the merits of Plaintiffs’ remaining
 14 intentional infliction of emotional distress claim regarding family separation for several reasons.

15 First, Plaintiffs’ IIED claim is barred by the discretionary function exception to the FTCA,
 16 28 U.S.C. § 2680(a), which shields the United States from liability for discretionary decision-
 17 making relating to the enforcement of federal criminal and immigration law. Second, that claim
 18 is barred by the FTCA’s exception for actions taken while reasonably executing the law, as the
 19 governmental actions that resulted in the separation were authorized by federal law. *Id.* Third,
 20 there is no private analogue for Plaintiffs’ IIED claim, as required for a waiver of sovereign
 21 immunity under 28 U.S.C. § 1346(b)(1), because it arises out of the enforcement of federal statutes,

22
 23
 24 ² Plaintiffs also allege that O.L.C. was physically and sexually abused while he resided at Lincoln Hall, asserting a
 separate negligence claim (Fourth Claim) related to these allegations. Compl. at ¶¶ 48-75, 98-102. Plaintiffs’
 allegations necessitate discovery and accordingly, the Government does not move to dismiss this claim.

1 determinations relating to immigration status, and decisions regarding confinement, which are
 2 activities in which only the federal government, and not private parties, may engage. The parties
 3 met and conferred regarding this motion but were unable to reach a resolution. Declaration of
 4 Nickolas Bohl, dated November 14, 2022 (“Bohl Decl.”), at ¶ 2.

5 **II. FACTUAL AND LEGAL BACKGROUND**

6 **A. Statutory Framework for Noncitizens³ Entering the Country.**

7 Under Section 1325 of Title 8 of the U.S. Code, when an individual enters the United States
 8 between official ports of entry, he or she may be subject to prosecution for criminal immigration
 9 violations, including entering the United States “at any time or place other than as designated by
 10 immigration officers” and eluding “examination or inspection by immigration officers.” 8 U.S.C.
 11 § 1325(a). Section 1325(a) is a misdemeanor that is punishable by a fine and “imprison[ment] not
 12 more than 6 months” for a first infraction. *Id.* When a parent and child are encountered together
 13 and the parent is transferred to criminal custody for prosecution, there is no parent or legal guardian
 14 available to provide care and physical custody for the minor. Therefore, the minor becomes
 15 unaccompanied and thus subject to the provisions of the Trafficking Victims Protection
 16 Reauthorization Act of 2008 (“TVPRA”), 8 U.S.C. § 1232(b)(3). The TVPRA requires the minor
 17 to be transferred into the custody of the Department of Health and Human Services’ Office of
 18 Refugee Resettlement (“ORR”). 8 U.S.C. § 1232(b)(3).

19 All noncitizens who arrive in the United States, including those who arrive between ports
 20 of entry, are considered “applicant[s] for admission” and are “inspected by immigration officers”
 21 to determine their admissibility to the United States. 8 U.S.C. §§ 1225(a)(1), (a)(3), (b).
 22 Individuals arriving in or present in the United States who, following inspection, are deemed
 23

24 ³ This brief uses the term “noncitizen” as equivalent to the statutory term “alien.” *See Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. § 1101(a)(3)).

1 inadmissible also are subject to removal from the United States and, as appropriate, detention
2 pending such removal. *See id.* § 1225(b)(1)(A)(i). These provisions apply to both adults and
3 children. In some cases, the Department of Homeland Security (“DHS”) may exercise its
4 discretion to release a noncitizen from custody. *See, e.g.*, 8 U.S.C. §§ 1182(d)(5), 1226(a)(2).

5 **B. Statutory Framework for Immigration Custody Relating to Unaccompanied Minors.**

6 Federal immigration law authorizes the United States to provide for the custody and care
7 of minor children entering the United States without authorization. Specifically, ORR is charged
8 with “the care and placement of unaccompanied alien children who are in federal custody by
9 reason of their immigration status.” 6 U.S.C. §§ 279(a), (b)(1)(A), (b)(1)(C); *see also* 8 U.S.C. §
10 1232(b)(1). The term “unaccompanied alien child” or “UAC” is defined as a child who: (1) “has
11 no lawful immigration status in the United States”; (2) “has not attained 18 years of age”; and (3)
12 “with respect to whom . . . there is no parent or legal guardian in the United States [or] no parent
13 or legal guardian in the United States is available to provide care and physical custody.” 6 U.S.C.
14 § 279(g)(2).

15 Under the TVPRA, “[e]xcept in the case of exceptional circumstances, any department or
16 agency . . . shall transfer the custody of such child to [ORR] not later than 72 hours after
17 determining that such child is an unaccompanied alien child.” 8 U.S.C. § 1232(b)(3). ORR seeks
18 to place UACs “in the least restrictive setting that is in the best interest of the child.” *Id.* §
19 1232(c)(2)(A). However, ORR “shall not release such children upon their own recognizance.” 6
20 U.S.C. § 279(2)(B). Rather, once in ORR custody, there are detailed statutory and regulatory
21 provisions that must be applied before the child is released to an approved sponsor. *See* 8 U.S.C.
22 § 1232(c)(3). Congress requires that “an unaccompanied alien child may not be placed with a
23 person . . . unless the Secretary of Health and Human Services makes a determination that the
24 proposed custodian is capable of providing for the child’s physical and mental well-being” and

1 that “[s]uch determination shall, at a minimum, include verification of the custodian’s identity and
2 relationship to the child, if any, as well as an independent finding that the individual has not
3 engaged in any activity that would indicate a potential risk to the child.” *Id.* § 1232(c)(3)(A). In
4 some instances, a home study is required. *Id.* § 1232(c)(3)(B).

5 **C. Flores Agreement Requirements.**

6 In 1996, the federal government entered into a settlement agreement referred to as the
7 “Flores Agreement.” *See, e.g., Flores v. Sessions*, No. 85-cv-4544 (C.D. Cal. Feb. 2, 2015) (ECF
8 No. 101). The Flores Agreement “sets out nationwide policy for the detention, release, and
9 treatment of minors in the custody of the [immigration authorities].” *Flores v. Lynch*, 828 F.3d
10 898, 901 (9th Cir. 2016) (citing Flores Agreement ¶ 9). Under a binding interpretation of the Ninth
11 Circuit, the Flores Agreement “unambiguously” applies both to unaccompanied minors and to
12 minors who are encountered together with their parents or legal guardians. *Id.* at 901. Under the
13 Flores Agreement, the government must expeditiously transfer any minor who cannot be released
14 from custody to a non-secure, licensed facility. *Id.* at 902-03 (quoting Flores Agreement ¶ 12)).
15 The government must also “make and record the prompt and continuous efforts on its part toward
16 . . . release of the minor.” *Flores v. Rosen*, 984 F.3d 720, 738 (9th Cir. 2020) (quoting Flores
17 Agreement ¶ 14).

18 Notably, the Flores Agreement applies only to minors. *Flores*, 828 F.3d at 901. It “does
19 not address . . . the housing of family units and the scope of parental rights for adults apprehended
20 with their children[.]” and it “does not contemplate releasing a child to a parent who remains in
21 custody, because that would not be a ‘release.’” *Flores*, 828 F.3d at 906; *see also United States v.*
22 *Dominguez-Portillo*, No. 17-MJ-4409, 2018 WL 315759, at *9 (W.D. Tex. Jan. 5, 2018) (“[*Flores*]
23 does not provide that parents are entitled to care for their children if they were simultaneously
24 arrested by immigration authorities[.]”). Nor does the Flores Agreement provide any rights to

1 adult detainees, including any rights of release. *Flores*, 828 F.3d at 908; *see also Dominguez-*
2 *Portillo*, 2018 WL 315759, at *14-15; *Bunikyte v. Chertoff*, No. 07-164, 2007 WL 1074070, at *16
3 (W.D. Tex. Apr. 9, 2007). Although the Flores Agreement gives preference to release of minors
4 to a parent, this preference “does not mean that the government must also make a parent available;
5 it simply means that, if available, a parent is the first choice.” *Flores*, 828 F.3d at 908.

6 **D. Executive Branch Directives Regarding Immigration Enforcement.**

7 During the time period relevant to this action, the Executive Branch issued several
8 directives regarding enforcement of federal immigration laws. First, Executive Order 13767, (“EO
9 13767”), was issued in January 2017. *See* § 1, 82 Fed. Reg. 8793 (Jan. 30, 2017). EO 13767 stated
10 “[i]t is the policy of the executive branch to ... detain individuals apprehended on suspicion of
11 violating Federal or State law, including Federal immigration law, pending further proceedings
12 regarding those violations[.]” *Id.* § 2(b). EO 13767 directed DHS to “ensure the detention of
13 aliens apprehended for violations of immigration law pending the outcome of their removal
14 proceedings or their removal from the country to the extent permitted by law,” *id.* § 6, and to
15 exercise its parole authority “only on a case-by-case basis in accordance with the plain language
16 of the statute ... and in all circumstances only when an individual demonstrates urgent
17 humanitarian reasons or a significant public benefit derived from such parole.” *Id.* § 11(d).

18 Second, on April 11, 2017, DOJ issued guidance to all federal prosecutors regarding a
19 renewed commitment to criminal immigration enforcement and directed that federal law
20 enforcement prioritize the prosecution of several immigration offenses, including illegal entry
21 under 8 U.S.C. § 1325. *See* U.S. DOJ Memorandum on Renewed Commitment to Criminal
22 Immigration Enforcement (April 11, 2017), available at [https://www.justice.gov/opa/press-](https://www.justice.gov/opa/press-release/file/956841/download)
23 [release/file/956841/download](https://www.justice.gov/opa/press-release/file/956841/download).

1 Third, on April 6, 2018, DOJ issued a “Memorandum for Federal Prosecutors along the
2 Southwest Border.” U.S. DOJ News Release: Attorney General Announces Zero-Tolerance Policy
3 for Criminal Illegal Entry (April 6, 2018), DOJ 18-417, 2018 WL 1666622 (the “Zero-Tolerance
4 Memorandum”). The memorandum directed federal prosecutors along the Southwest border “to
5 the extent practicable, and in consultation with DHS, to adopt immediately a zero-tolerance policy
6 for all offenses referred for prosecution under section 1325(a).” *Id.* In addition, on May 4, 2018,
7 the DHS Secretary approved the referral of noncitizens who had illegally entered the United States
8 to U.S. Attorney’s Offices for prosecution, including those arriving as family units. Consistent
9 with EO 13767 and the April 2018 Zero-Tolerance Memorandum, DHS began to refer for
10 prosecution increased numbers of adults – including those traveling with children – who
11 unlawfully entered the United States on the Southwest border in violation of Section 1325. *See*
12 *generally* EO 13767. Minor children of those adults were transferred to ORR custody as required
13 by the TVPRA. *See generally* William Wilberforce Trafficking Victims Protection
14 Reauthorization Act (2013).

15 **E. Relevant Allegations.**

16 According to the complaint, Plaintiffs E.L.A. and O.L.C. are a father and son from
17 Guatemala, who crossed the United States-Mexico border on or around June 18, 2018. Dkt. 1
18 (“Compl.”), at ¶¶ 15-16, 20. Shortly after crossing the border into Texas, they were apprehended
19 by U.S. Customs and Border Protection (“CBP”) Border Patrol Agents and initially held in a CBP
20 facility in Texas. *Id.* at ¶¶ 20-21. CBP continued to detain E.L.A. in Texas and O.L.C. was
21 transferred to Lincoln Hall Center for Boys in New York on June 20, 2018, a private facility that
22 contracts with the Department of Health and Human Services’ Office of Refugee Resettlement
23 (“ORR”) for the care and custody of unaccompanied minors. *Id.* at ¶¶ 50-51.

24 E.L.A. alleges that he was subjected to inhumane conditions during his detention, including

1 extreme air conditioning, cells with no access to food, drinking water, or natural light, and no
2 ability to shower or brush his teeth. *Id.* at ¶¶ 26-29. In mid-July, E.L.A. was convicted of illegal
3 entry into the United States under 8 U.S.C. § 1325 and removed to Guatemala. *Id.* at ¶¶ 31, 56.
4 On or about March 2, 2019, E.L.A. presented himself at the Calexico West Port of Entry in
5 Calexico, California and was admitted pursuant to federal court order in *Ms. L. v. U.S. Immigration*
6 *and Customs Enforcement*, Case No. 18-cv-428 (S.D. Cal.). *Id.* at ¶¶ 43, 45. Plaintiffs allege they
7 were reunited in Seattle, Washington in March 2019. *Id.* at ¶ 46.

8 **F. Subsequent Policy Changes.**

9 After assuming office, President Biden took action to undo the policies that led to
10 Plaintiffs' separation and to reunify the families that were affected by those policies. On February
11 2, 2021, the President issued an Executive Order that condemned the "human tragedy" of the prior
12 Administration's Zero-Tolerance Policy, and that committed the United States government to
13 "protect family unity and ensure that children entering the United States are not separated from
14 their families, except in the most extreme circumstances where a separation is clearly necessary
15 for the safety and well-being of the child or is required by law." Family Reunification Task Force
16 EO § 1. That Order created a Task Force to identify and reunify families separated under the Zero-
17 Tolerance Policy, and to make recommendations for the potential provision of immigration
18 benefits and mental-health services to those separated families. *Id.* § 4. In May 2022, the Task
19 Force issued a report showing that 2,521 families had been reunified and that 331 additional
20 families were in the process of reunification. Interim Progress Report, Interagency Task Force on
21 the Reunification of Families, May 31, 2022, available at
22 https://www.dhs.gov/sites/default/files/2022-06/22_0531_ftf_interim-progress-report-final.pdf.

III. PROCEDURAL HISTORY

Plaintiffs bring this action against the United States under the FTCA, 28 U.S.C. §§ 1346(b)(1), 2671-2680, seeking damages for intentional infliction of emotional distress (First Claim), abuse of process (Second Claim), negligence for family separation (Third Claim), and negligence for O.L.C.'s time in ORR custody (Fourth Claim). Compl. at ¶¶ 83-102. Plaintiffs allege they “suffered significant physical and emotional harm as a direct result of Defendant’s unlawful conduct and violation of Plaintiffs’ constitutional and statutory rights.” *Id.* at ¶ 7.

On January 19, 2021, the United States filed a Motion to Transfer Venue and Partial Motion to Dismiss Plaintiffs’ abuse of process claim (Second Claim) and negligence claim regarding family separation policy (Third Claim) for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Dkt. 15. The motion was held in abeyance for several months while the United States, along with a group of counsel coordinating negotiations on behalf of plaintiffs and administrative claimants, engaged in an effort to settle district court cases and pending administrative tort claims arising from family separations at the U.S./Mexico border. Dkts. 25-32. A nationwide resolution was ultimately not possible, and the stay was lifted on December 27, 2021. Dkts. 33-34.

On June 3, 2022, the Court denied the United States’ motion to transfer venue but granted the partial motion to dismiss with respect to Plaintiffs’ abuse of process and negligence-family separation claims. Dkt. 36. Plaintiffs filed a motion to reconsider the Court’s order dismissing the abuse of process claim but did not challenge the dismissal of their negligence-family separation claim. Dkt. 37. On October 19, 2022, the Court denied Plaintiffs’ request but provided them an opportunity to file an amended complaint no later than 10 days from the date of the order. Dkts. 37, 40. Plaintiffs did not file an amended complaint. Accordingly, there are two claims remaining: intentional infliction of emotional distress (First Claim) and negligence regarding O.L.C.’s time in ORR custody (Fourth Claim).

1 **IV. STANDARD OF REVIEW**

2 A defendant may move to dismiss a complaint for lack of subject matter jurisdiction under
3 Federal Rule of Civil Procedure 12(b)(1). *See Savage v. Glendale Union High Sch., Dist. No. 205,*
4 *Maricopa Cty.*, 343 F.3d 1036, 1039-40 (9th Cir. 2003). Courts must consider the threshold issue
5 of jurisdiction before addressing the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523
6 US 83, 94 (1998). Plaintiffs bear the burden of establishing jurisdiction because, by filing a
7 complaint in federal court, they seek to invoke it. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511
8 U.S. 375, 377 (1994).

9 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for Everyone v.*
10 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The Court may dismiss an action under Rule 12(b)(1)
11 if the complaint does not allege facts sufficient to establish subject matter jurisdiction on its face
12 or, even if the complaint asserts grounds for jurisdiction on its face, the evidence does not support
13 a finding of jurisdiction. *Thornhill Publishing Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733
14 (9th Cir. 1979). A facial attack “asserts that the allegations contained in a complaint are
15 insufficient on their face to invoke federal jurisdiction.” *Safe Air for Everyone*, 373 F.3d at 1039.
16 A factual challenge allows the court to look beyond the complaint without “presum[ing] the
17 truthfulness of the plaintiff’s allegations.” *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). The
18 Court also can hear evidence outside the pleadings and resolve factual disputes, if necessary,
19 without treating the motion as one for summary judgment. *Robinson v. United States*, 586 F.3d
20 683, 685 (9th Cir. 2009); *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1997). “Once
21 challenged, the party asserting subject matter jurisdiction has the burden of proving its existence,”
22 and the plaintiff’s allegations carry no presumption of truthfulness. *Robinson*, 586 F.3d at 685.
23 Whether a facial or factual attack, because “[f]ederal courts ... have only that power that is
24 authorized by Article III of the Constitution and the statutes enacted by Congress,” *Bender v.*

1 *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (citation omitted), the Court presumes
2 the action lies outside its limited jurisdiction, and the burden is on the party asserting jurisdiction
3 to establish that it exists. *Kokkonen*, 511 U.S. at 377.

4 A district court cannot hear a suit against the United States unless the government has
5 waived sovereign immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). “Sovereign immunity
6 is jurisdictional in nature,” meaning that a party’s failure to establish a waiver of sovereign
7 immunity is properly resolved on a motion to dismiss for lack of subject matter jurisdiction under
8 Fed. R. Civ. P. 12(b)(1). *See Robinson*, 586 F.3d at 685; *Sierra Club v. Whitman*, 268 F.3d 898,
9 905-06 (9th Cir. 2001).

10 **V. ARGUMENT**

11 **A. Plaintiffs’ First Claim Is Barred By the Discretionary Function Exception.**

12 **1. Legal Standard for Discretionary Function Exception Analysis.**

13 The United States, as a sovereign entity, is immune from suit except insofar as it has
14 specifically and expressly consented to be sued. *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981)
15 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). “[T]he terms of [the government’s]
16 consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *Lehman*, 453
17 U.S. at 160 (internal quotes and citations omitted). Absent a specific, express waiver, sovereign
18 immunity bars a suit against the government for lack of subject matter jurisdiction. *See F.D.I.C.*,
19 510 U.S. at 475-76.

20 The FTCA is “a limited waiver of sovereign immunity.” *Gonzalez v. United States*, 814
21 F.3d 1022, 1026 (9th Cir. 2016). The statute allows individuals to sue the United States when a
22 federal employee’s conduct, within the scope of his or her employment, causes “injury, loss of
23 property, or personal injury or death.” 28 U.S.C. § 1346(b)(1). However, the FTCA’s waiver of
24 sovereign immunity is subject to exceptions. *See* 28 U.S.C. § 2680. When an exception applies,

1 the United States retains its sovereign immunity, the court lacks jurisdiction, and the claim must
2 be dismissed. *See Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000).

3 One such exception – the “discretionary function exception” (“DFE”) – bars “[a]ny claim”
4 that is “based upon the exercise or performance or the failure to exercise or perform a discretionary
5 function or duty on the part of a federal agency or an employee of the Government, whether or not
6 the discretion involved be abused.” 28 U.S.C. § 2680(a); *see also Gaubert v. United States*, 499
7 U.S. 315, 325 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

8 The Supreme Court has set forth a two-part test to determine if the DFE applies. *Gaubert*,
9 499 U.S. at 328-32. Courts must first ask whether the challenged conduct “‘involve[s] an element
10 of judgment or choice,’ as determined by the ‘nature of the conduct, rather than the status of the
11 actor.’” *Teplin v. United States*, No. 17-cv-02445-HSG, 2018 WL 1471907, at *4 (N.D. Cal. Mar.
12 26, 2018) (quoting *Gaubert*, 499 U.S. at 322); *see also Berkovitz*, 486 U.S. at 536; *Chadd v. United*
13 *States*, 794 F.3d 1104, 1109 (9th Cir. 2015). The first prong is met unless “‘a federal statute,
14 regulation, or policy specifically prescribes a course of action for an employee to follow.’” *Sabow*
15 *v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996) (quoting *Berkovitz*, 486 U.S. at 536); *see also*
16 *Kelly v. United States*, 241 F.3d 755, 761 (9th Cir. 2001) (“[A] general regulation or policy. . .
17 does not remove discretion unless it specifically prescribes a course of conduct.”); *Reed ex rel.*
18 *Allen v. U.S. Dep’t of Interior*, 231 F.3d 501, 504 (9th Cir. 2000) (since “[n]o federal statute,
19 regulation, or policy require[d] a particular course of action,” the agency’s actions “could be no
20 other way than by the exercise of discretion”).

21 Where no federal statute, regulation or policy prescribes a specific course of action to
22 follow, the challenged conduct involves an element of judgment. *See Berkovitz*, 486 U.S. at 536.
23 Even if a regulation contains a mandate to do something, if that mandate involves judgment or
24 choice, the discretion element is satisfied. *See GATX/Airlog Co. v. United States*, 286 F.3d 1168,

1 1174-75 (9th Cir. 2002). Further, where the policies that inform the conduct at issue allow the
2 exercise of discretion, the agency’s acts or failures to act are presumed to be discretionary. *Lam*
3 *v. United States*, 979 F.3d 665, 674 (9th Cir. 2020). Finally, the applicable policies and authorities
4 must be considered in context because “the presence of a few, isolated provisions cast in mandatory
5 language does not transform an otherwise suggestive set of guidelines into binding agency
6 regulations.” *Id.* at 677 (citing *Gonzalez*, 814 F.3d at 1030).

7 Second, if the conduct involves choice or discretion, courts must next determine whether
8 “the judgment of the government employee [is] ‘of the kind that the discretionary function
9 exception was designed to shield.’” *Teplin*, 2018 WL 1471907, at *4 (quoting *Gaubert*, 499 U.S.
10 at 322-23). The DFE is designed to “‘prevent judicial second-guessing of legislative and
11 administrative decisions grounded in social, economic, and political policy’ through a tort action”
12 – therefore, courts construe it as “protect[ing] only governmental actions and decisions based on
13 considerations of public policy.” *Id.*; see also *United States v. Varig Airlines*, 467 U.S. 797, 814
14 (1984). Thus, the focus of this inquiry is “whether the ‘nature of the actions taken,’ pursuant to an
15 exercise of discretion, ‘are susceptible to policy analysis.’” *Teplin*, 2018 WL 1471907, at *4
16 (quoting *Gaubert*, 499 U.S. at 325); see also *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th
17 Cir. 2005) (the discretion must be “susceptible to social, economic, or political policy analysis”);
18 *Nurse*, 226 F.3d at 1001 (explaining that the decision “‘need not actually be grounded in policy
19 considerations’ so long as it is, ‘by its nature, susceptible to a policy analysis.’”) (quoting *Miller*
20 *v. United States*, 163 F.3d 591, 593 (9th Cir. 1998)).

21 The government need not “prove that it considered these factors and made a conscious
22 decision on the basis of them.” *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1028 (9th
23 Cir. 1989). Indeed, under the second prong, the government actor’s subjective motive is
24 immaterial because “the focus of the inquiry is not on the agent’s subjective intent in exercising

1 the discretion conferred by statute or regulation” but rather “on the nature of the actions taken and
2 on whether they are *susceptible* to policy analysis.” *Gonzalez*, 814 F.3d at 1027-28 (quoting
3 *Gaubert*, 499 U.S. at 325) (emphasis added). Where the relevant policies provide for discretion,
4 it must be presumed that the government’s actions are grounded in policy when exercising that
5 discretion. *Lam*, 979 F.3d at 681 (citing *Gaubert*, 499 U.S. at 324; *Chadd*, 794 F.3d at 1104). And
6 the FTCA’s statutory text confirms that the exception applies “whether or not the discretion
7 involved [was] abused” by United States officials. 28 U.S.C. § 2680(a); *see also Reynolds v.*
8 *United States*, 549 F.3d 1108, 1112 (7th Cir. 2008) (the DFE applies where there are allegations
9 of “malicious and bad faith conduct” because “subjective intent is irrelevant to our analysis”).

10 If both prongs of the *Gaubert/Berkowitz* test are met, the DFE applies, the United States
11 retains its sovereign immunity, the court lacks jurisdiction, and the claim must be dismissed. *See*
12 *Nurse*, 226 F.3d at 1000. This result applies even where the government may have been negligent
13 in the performance of such discretionary acts, as “negligence is irrelevant to the discretionary
14 function inquiry.” *Routh v. United States*, 941 F.2d 853, 855 (9th Cir. 1991). As the legislative
15 history of the FTCA explains, the statute’s limited waiver of sovereign immunity was “not
16 intended to authorize suit for damages to test the validity of or provide a remedy on account of
17 such discretionary acts even though negligently performed and involving an abuse of discretion.”
18 H.R. Rep. No. 77-2245, 77th Cong., 2d Sess., at 10.

19 **2. The Decision to Detain Plaintiffs Separately Is Subject to Discretion Grounded**
20 **in Policy Considerations.**

21 Although Plaintiffs allege harm stemming from the government’s decisions to apprehend
22 E.L.A. and to prosecute him for unlawful entry and to separate E.L.A. from O.L.C., the DFE
23 applies to the government decisions at issue in Plaintiffs’ complaint because they involved an
24 element of judgment or choice, and are susceptible to policy analysis.

1 First, the decisions described in Plaintiffs' complaint are discretionary. As the Supreme
2 Court has recognized, "[t]he Attorney General and United States Attorneys retain 'broad
3 discretion' to enforce the Nation's criminal laws." *United States v. Armstrong*, 517 U.S. 456, 464
4 (1996). Indeed, "[t]he Supreme Court has long recognized that 'the Executive Branch has
5 exclusive authority and absolute discretion to decide whether to prosecute a case.'" *In re Sealed*
6 *Case*, 829 F.2d 50, 63 (D.C. Cir. 1987) (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974));
7 *Smith v. United States*, 375 F.2d 243, 247 (5th Cir. 1967) ("decisions concerning enforcement" are
8 matters of "discretion").

9 Concerns about "subjecting the prosecutor's motives and decision making to outside
10 inquiry" are magnified in the immigration context. *Reno v. Am.-Arab Anti-Discrimination Comm.*,
11 525 U.S. 471, 490 (1999). There, the federal government possesses the express statutory authority
12 to "arrange for appropriate places of detention for aliens detained pending removal or a decision
13 on removal." 8 U.S.C. § 1231(g)(1). "Congress has placed the responsibility of determining where
14 aliens are detained within the discretion of the [Secretary]." *Comm. Of Cent. Am. Refugees v.*
15 *I.N.S.*, 795 F.2d 1434, 1440 (9th Cir. 1986); *see also Gandarillas-Zambrana v. BIA*, 44 F.3d 1251,
16 1256 (4th Cir. 1995) ("The INS necessarily has the authority to determine the location of detention
17 of an alien in deportation proceedings ... and therefore, to transfer aliens from one detention center
18 to another."); *Sasso v. Milhollan*, 735 F. Supp. 1045, 1046 (S.D. Fla. 1990) (holding that the
19 Attorney General has discretion over the location of detention); *Van Dinh v. Reno*, 197 F.3d 427,
20 433 (10th Cir. 1999) (holding that the "Attorney General's discretionary power to transfer aliens
21 from one locale to another, as she deems appropriate, arises from" statute).

22 Decisions relating to noncitizens, including placement and detention, are so "vital and
23 intricately interwoven with contemporaneous policies [and] so exclusively entrusted to the
24 political branches of government as to be largely immune from judicial inquiry or interference."

1 *United States v. Lopez-Flores*, 63 F.3d 1468, 1474 (9th Cir. 1995) (quoting *Harisiades v.*
2 *Shaughnessy*, 342 U.S. 580, 588-89 (1952)); *Mirmehdi v. United States*, 662 F.3d 1073, 1081-82
3 (9th Cir. 2011) (“Because the decision to detain an alien pending resolution of immigration
4 proceedings is explicitly committed to the discretion of the Attorney General and implicates issues
5 of foreign policy, it falls within this [FTCA] exception.”); *Hernandez v. United States*, 83 F. App’x
6 206 (9th Cir. 2003) (security measures pertaining to prisoners in a detention center are within the
7 FTCA’s DFE); *see also Cohen v. United States*, 151 F.3d 1338, 1342 (11th Cir. 1998) (decisions
8 where to place prisoners are policy-based decisions protected by the DFE); *Bailor v. Salvation*
9 *Army*, 51 F.3d 678, 685 (7th Cir. 1995) (decisions whether to detain or release are policy-based
10 decisions protected by the DFE); *Lipsey v. United States*, 879 F.3d 249, 255 (7th Cir. 2018)
11 (placement decisions are susceptible to policy analysis); *Santana-Rosa v. United States*, 335 F.3d
12 39, 44 (1st Cir. 2003) (“assignment to particular institutions or units ... must be viewed as falling
13 within the discretionary function exception to the FTCA”).

14 This discretion necessarily entails decisions regarding with whom noncitizens are detained,
15 including decisions regarding whether adults and minors can be detained in the same facility and
16 whether to detain family members together. *See Peña Arita v. United States*, 470 F. Supp. 3d 663,
17 691-92 (S.D. Tex. 2020) (decisions by DHS to separate family members are protected by the DFE).
18 Moreover, the Flores Agreement does not require release of a parent or mandate that parents be
19 housed with a child. *Flores*, 828 F.3d at 908; *see also Dominguez-Portillo*, 2018 WL 315759, at
20 *14-15; *Bunikyte v. Chertoff*, No. 07-164, 2007 WL 1074070, at *16 (W.D. Tex. Apr. 9, 2007);
21 *see supra* at pgs. 5-6. In this case, Plaintiffs do not allege that government officials violated any
22 statute or regulation prescribing a specific course of action to follow in connection with the
23 prosecution and detention of E.L.A. and his resulting separation from O.L.C. in this case. Instead,

1 the challenged decisions were the result of the exercise of discretion, thus satisfying the first prong
2 of the DFE.

3 Second, as other courts have recognized, policies related to the immigration custody of
4 adults as well as the Zero-Tolerance Memorandum – which was subsequently revoked – “amount[]
5 to exercise of the prosecutorial discretion that Congress and the Constitution confer on the
6 Attorney General.” *Mejia-Mejia v. ICE*, No 18-1445 (PLF), 2019 WL 4707150, at *5 (D.D.C.
7 Sept. 26, 2019); *see also Peña Arita*, 470 F. Supp. 3d at 686-87. The Court should decline to
8 engage in the sort of “second-guessing” and inquiry into government actors’ intent in making
9 decisions that the DFE was designed to prevent. *Berkovitz*, 486 U.S. at 536; *see also Lam*, 979
10 F.3d at 673 (citing *Varig*, 467 U.S. at 814). In determining the applicability of the DFE, the Court
11 looks only at the nature of the conduct or decision at issue from a general and objective perspective
12 – subjective intent is not part of the analysis. *Gonzalez*, 814 F.3d at 1032. Here, however, the
13 government’s decisions were not merely “susceptible to” policy analysis, but the government
14 spelled out the policies it sought to further through its enforcement efforts in a series of Executive
15 Branch directives. Indeed, notwithstanding the merit of these prior policy choices, they were
16 policy choices nonetheless, even as described by the complaint. *See, e.g.*, Compl. at ¶¶ 1-4, 29,
17 32-35.

18 In *Peña Arita*, 470 F. Supp. 3d 663, the court dismissed FTCA claims similarly arising
19 from the Zero-Tolerance Policy. In dismissing the claims, the *Peña Arita* court agreed with the
20 government that the “family separation policy itself and its implementation by officers in the field
21 are discretionary.” *Id.* at 687 (“prosecutorial judgment is a matter of choice, and obviously
22 grounded in considerations of public policy – such as the United States Attorney General’s
23 priorities and United States Attorneys’ discretion – that is intended to be shielded by the
24 discretionary function exception.”). The court concluded that the challenged decision-making was

1 “grounded in social, economic, and policy” considerations that the court was “without
2 jurisdiction to second-guess.” *Id.* (quoting *Gaubert*, 499 U.S. at 323). The *Peña Arita* court held
3 that, “to the extent Plaintiffs attempt to bring a constitutional tort claim against the United States
4 under the Federal Tort Claims Act, or assert that the Constitution itself furnishes a nondiscretionary
5 standard of medical care that is actionable under the FTCA in the event such care is not provided,
6 such claim is entirely jurisdictionally barred.” *Id.* at. 688.

7 **3. E.L.A.’s Claim Based on the Conditions of his Confinement are Barred by the**
8 **DFE.**

9 Plaintiffs’ complaint alleges E.L.A. suffered harm related to the conditions of his
10 confinement. For example, Plaintiffs allege that E.L.A. was subject to inhumane conditions
11 including, but not limited to, extreme air conditioning, cells with no access to food, drinking water,
12 or natural light, and no ability to shower or brush his teeth. Compl. at ¶¶ 26-29.

13 While the government is committed to safe and humane treatment of every individual in
14 detention, Plaintiffs’ conditions-of-confinement claims are barred by the DFE. Courts have
15 repeatedly held that these other challenged “conditions of confinement” acts or omissions are
16 independently barred by the DFE because they involve discretionary decisions susceptible to
17 policy considerations. *See, e.g., Bultema v. United States*, 359 F.3d 379, 384 (6th Cir. 2004)
18 (decision not to provide bed rails susceptible to policy considerations); *Campos v. United States*,
19 888 F.3d 724, 733 (5th Cir. 2018) (deficiencies in computer database that failed to reveal
20 immigration status protected by discretionary function exception); *Cosby v. Marshals Service*, 520
21 F. App’x 819, 821 (11th Cir. 2013) (detainee decisions involve “several policy considerations ...
22 including prison security, the allocation of finite resources, and the logistics of prisoner
23 transportation if transfer to an off-site facility is an option”); *Patel v. United States*, 398 F. App’x
24 22, 29 (5th Cir. 2010) (the DFE shielded decision to transfer prisoner); *Antonelli v. Crow*, No. 08-

1 261, 2012 WL 4215024, at *3 (E.D. Ky. Sept. 19, 2012) (collecting cases in which a myriad of
2 conditions of confinement claims, including claims based on temperature and crowding, are barred
3 by the DFE); *Lineberry v. United States*, No. 3:08-cv-0597, 2009 WL 763052, at *6 (N.D. Tex.
4 Mar. 23, 2009) (“Plaintiff’s allegation of negligent overcrowding falls within the discretionary
5 function exception”); *Harrison v. Fed. Bureau of Prisons*, 464 F. Supp. 2d 552, 559 (E.D. Va.
6 2006) (“[T]he BOP’s provision of telephone services is a matter committed to its discretion that
7 will not be second-guessed through an FTCA claim.”).

8 **4. Plaintiffs’ Vague Assertion of Unconstitutional Conduct Does Not Preclude**
9 **Application of the DFE in this Case.**

10 A plaintiff cannot circumvent the DFE simply by alleging a violation of a constitutional
11 right. In *Gaubert*, the Supreme Court held that, where “a federal statute, policy, or regulation
12 specifically prescribes a course of action for an employee to follow,” there is no further discretion
13 to exercise. 499 U.S. at 322. And in *Nurse*, the Ninth Circuit held that a constitutional violation
14 “may” remove conduct from discretion but expressly left open the question of “the level of
15 specificity with which a constitutional proscription must be articulated to remove the discretion of
16 a federal actor.” 226 F.3d at 1002 n.2; *see also Fazaga v. Fed. Bureau of Investigation*, 916 F.3d
17 1202, 1251 (9th Cir. 2019) (“[I]f the district court instead determines that Defendants did violate
18 a nondiscretionary federal constitutional ... directive, the FTCA claims may be able to proceed to
19 that degree.”); *accord Garza v. United States*, 161 F. App’x 341, 343 (5th Cir. 2005) (holding that
20 the Eighth Amendment’s prohibition against cruel and unusual punishment did not define a course
21 of action “specific enough to render the discretionary function exception inapplicable”).

22 Here, Plaintiffs do not allege the violation of any constitutional provision with the requisite
23 degree of specificity required by *Gaubert*. Plaintiffs instead vaguely describe Defendant’s conduct
24

1 as “unlawful conduct and [a] violation of Plaintiffs’ constitutional and statutory rights.” Compl.
2 at ¶ 7. On that basis alone, Plaintiffs’ allegation cannot defeat the applicability of the DFE.

3 **B. The Decision to Detain E.L.A. Separately From O.L.C. Is Barred by the FTCA’s**
4 **Exception for Actions Taken While Reasonably Executing Law.**

5 Plaintiffs’ claims relating to the decision to detain them separately are independently
6 precluded because the FTCA prevents the United States from being held liable for “[a]ny claim
7 based upon an act or omission of an employee of the Government, exercising due care, in the
8 execution of a statute or regulation, whether or not such statute or regulation be valid.” 28 U.S.C.
9 § 2680(a). Thus, “[w]here government employees act pursuant to and in furtherance of
10 regulations, resulting harm is not compensable under the act[.]” *Dupree v. United States*, 247 F.2d
11 819, 824 (3d Cir. 1957); *see also Accardi v. United States*, 435 F.2d 1239, 1241 (3d Cir. 1970)
12 (claim based on “enforcement of ‘rules and regulations’” barred by § 2680(a)).

13 This exception “bars tests by tort action of the legality of statutes and regulations.”
14 *Dalehite v. United States*, 346 U.S. 15, 33 (1953); *see also* H.R. Rep. No. 77-2245, 77th Cong., 2d
15 Sess., at 10 (noting that it was not “desirable or intended that the constitutionality of legislation,
16 or the legality of a rule or regulation should be tested through the medium of a damage suit for
17 tort”); *Powell v. United States*, 233 F.2d 851, 855 (10th Cir. 1956) (The FTCA does not waive
18 sovereign immunity for claims based on employees’ acts “performed under and in furtherance of
19 the regulation ... even though the regulation may be irregular or ineffective”). Thus, where a
20 government employee’s actions are authorized by statute or regulation – even if that statute or
21 regulation is later found unconstitutional or invalid – this exception applies, and the claim must be
22 dismissed for lack of subject matter jurisdiction. *See Borquez v. United States*, 773 F.2d 1050,
23 1053 (9th Cir. 1985); *FDIC v. Citizens Bank & Trust Co. of Park Ridge, Ill.*, 592 F.2d 364, 366
24 (7th Cir. 1979); *Sickman v. United States*, 184 F.2d 616, 619 (7th Cir. 1950).

1 Here, the United States was required to “transfer the custody” of children to the care of
2 ORR “not later than 72 hours after” determining that there is no parent available to provide care
3 and physical custody, absent exceptional circumstances. 8 U.S.C. § 1232(b)(3). In this case, the
4 government made the determination that E.L.A. was unable to provide care and physical custody
5 for O.L.C. The government made the discretionary decisions to prosecute E.L.A. and to detain
6 him in a secure immigration detention facility separate from O.L.C. Once those protected
7 discretionary determinations had been made, the TVPRA – which Plaintiffs do not challenge –
8 required that O.L.C. be transferred to ORR custody. The enforcement of that statutory command
9 cannot form the basis of an FTCA claim.

10 **C. There Is No Private-Person Analogue.**

11 Plaintiffs’ claims also fail because the government acts that Plaintiffs challenge have no
12 private person analogue. The FTCA’s waiver of sovereign immunity is limited to “circumstances
13 where the United States, if a private person, would be liable to the claimant in accordance with the
14 law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). The statute
15 authorizes tort recovery against the United States only “in the same manner and to the same extent
16 as a private individual under like circumstances.” 28 U.S.C. § 2674. The FTCA does not waive
17 sovereign immunity for claims against the United States based on governmental “action of the type
18 that private persons could not engage in and hence could not be liable for under local law.” *Chen*
19 *v. United States*, 854 F.2d 622, 626 (2d Cir. 1988) (internal quotes omitted). The FTCA “requires
20 a court to look to the state-law liability of private entities, not to that of public entities, when
21 assessing liability under the FTCA.” *United States v. Olson*, 546 U.S. 43, 45-46 (2005). Though
22 the private analogue need not be exact, a plaintiff must offer “a persuasive analogy” showing that
23 the government actor sued would be subject to liability under state law if it were a private person.
24 *Westbay Steel, Inc. v. United States*, 970 F.2d 648, 650 (9th Cir. 1992).

1 Because only the federal government has the authority to enforce federal criminal and
2 immigration laws and make detention determinations, there is no private-person analogue that
3 would support a claim under the FTCA. The alleged harms here stem from the federal
4 government’s decisions to enforce federal immigration laws, criminally prosecute certain
5 individuals, and hold E.L.A. in custody pending immigration proceedings or prosecution, resulting
6 in O.L.C.’s placement in the care and custody of ORR. The United States has not waived its
7 sovereign immunity for such decisions to enforce federal law, as they have no private-person
8 counterpart. *See, e.g., Elgamal v. Bernacke*, 714 F. App’x 741, 742 (9th Cir. 2018) (“[B]ecause
9 no private person could be sued for anything sufficiently analogous to the negligent denial of an
10 immigration status adjustment application, that claim must be dismissed as well.”); *Elgamal v.*
11 *United States*, No. 13-00967, 2015 WL 13648070, at *5 (D. Ariz. July 8, 2015) (recognizing that
12 “immigration matters” are “an inherently governmental function”); *Bhuiyan v. United States*, 772
13 F. App’x 564, 565 (9th Cir. 2019) (“[T]here is, as a general matter, no private analogue to
14 governmental withdrawal of immigration benefits.”).

15 **VI. CONCLUSION**

16 For the foregoing reasons, Defendant respectfully requests that the Court dismiss Plaintiffs’
17 First Claim for lack of subject matter jurisdiction, allowing only Plaintiffs’ Fourth Claim to
18 proceed to discovery.

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1 DATED this 14th day of November, 2022.

2 Respectfully submitted,

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