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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

C.M., on her own behalf and on behalf of her
minor child, B.M.; L.G., on her own behalf and
on behalf of her minor child, B.G.; M.R., on her
own behalf and on behalf of her minor child,
J.R.; O.A. on her own behalf and on behalf of
her minor child, L.A.; and V.C., on her own
behalf and on behalf of her minor child, G.A.,

Plaintiffs,

v.

United States of America,

Defendant.

Case no. 2:19-CV-05217-SRB

**MOTION AND MEMORANDUM IN
SUPPORT OF THE UNITED STATES OF
AMERICA’S MOTION TO DISMISS**

Defendant United States of America respectfully moves this Court to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The grounds for this motion are set forth in the below memorandum in support.

INTRODUCTION

Plaintiffs – five adult female aliens suing on behalf of themselves and their respective alien children – bring this action under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b)(1), 2671-2680, seeking damages from the United States based on the separation of “each

1 Plaintiff mother from her child when they were detained at various immigration centers in
2 Arizona.” Compl. ¶ 5. Plaintiffs assert state-law claims for intentional infliction of emotional
3 distress and negligence arising out of such separations.

4 This action must be dismissed for lack of subject matter jurisdiction because Plaintiffs’
5 claims are barred by the due care and discretionary function exceptions to the FTCA, 28 U.S.C. §
6 2680(a), and Plaintiffs have failed to allege claims for which there is a private person analog or
7 for which a private person could be held liable under applicable state law. 28 U.S.C. §
8 1346(b)(1).
9

10 **BACKGROUND**

11 Plaintiffs crossed into the United States with their children between ports of entry in
12 Arizona in May 2018. Compl. ¶¶ 71, 119, 171, 236, 305. Apprehensions of Plaintiffs and their
13 children by U.S. Customs and Border Protection (“CBP”), a component of the U.S. Department
14 of Homeland Security (“DHS”), occurred during a time when DHS had been directed by the
15 President of the United States to end “catch and release” practices, and for DHS to exercise its
16 Federal statutory authority to detain aliens during the pendency of their immigration
17 proceedings. Compl. ¶ 24. Further, such apprehensions occurred following the Attorney
18 General’s direction to Federal prosecutors to adopt a “zero-tolerance” policy for immigration
19 offenses referred for prosecution under 8 U.S.C. § 1325(a) as well as other immigration statutes.
20 Compl. ¶¶ 5, 26, 71, 119, 171, 236, 305.
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22 Upon their unlawful entry into the United States between ports of entry, Plaintiffs were
23 amenable to prosecution under 8 U.S.C. § 1325(a). Plaintiffs and their minor children were
24 separated by CBP, with Plaintiffs subsequently detained by U.S. Immigration and Customs
25 Enforcement (“ICE”), another component of DHS, in secure adult detention facilities, and their
26 minor children, rendered unaccompanied due to Plaintiffs being amenable to criminal
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1 prosecution, placed in the care and custody of the Office of Refugee Resettlement (“ORR”), a
2 component of the U.S. Department of Health and Human Services (“HHS”). Compl. ¶¶ 47-48,
3 100, 152, 211, 282, 355. After being separated for approximately two months, Plaintiffs and
4 their children were re-unified and released.¹

5
6 **LEGAL FRAMEWORK**

7 **I. Relevant Immigration Statutory and Regulatory Framework**

8 Under the Immigration and Nationality Act (“INA”), any alien present in the United
9 States without being admitted or paroled is inadmissible and subject to removal from the United
10 States. See 8 U.S.C. § 1182(a)(6)(A)(i). Individuals in DHS custody subject to immigration
11 proceedings under the INA also may be amenable to criminal prosecution, either for criminal
12 immigration violations – e.g., 8 U.S.C. § 1324 (alien smuggling), § 1325 (unlawful entry), and §
13 1326 (unlawful reentry after removal) – or for other criminal violations. Those immigration
14 statutes authorize DHS to refer individuals to the Department of Justice (“DOJ”) for prosecution.
15

16 In this action, each Plaintiff was deemed an applicant for admission under 8 U.S.C. §
17 1225(a)(1). See 8 U.S.C. § 1225(a)(1) (defining as “applicant for admission” an alien who
18 “arrives in the United States” or is “present in the United States” but “has not been admitted.”);
19 Compl. ¶¶ 70-71, 119-121, 171-172, 235-236, 304-305. As such, Plaintiffs and their children
20 were required to “be inspected by immigration officers[.]” 8 U.S.C. § 1225(a)(3). Under §
21 1225(b)(1), aliens who are inadmissible for lack of documentation or for fraud or
22 misrepresentation under 8 U.S.C. §§1182(a)(6)(C) or (a)(7) are subject to removal “without
23 further hearing or review.” 8 U.S.C. § 1225(b)(1)(A)(i) (referred to as “expedited removal”).
24 Aliens covered by 8 U.S.C. § 1225(b)(2) include all applicants for admission other than those
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27 ¹ Plaintiffs’ Complaint contains allegations specific to each Plaintiff. For purposes of this
28 motion, a summary of those allegations is not necessary. For purposes of this motion only, the
United States assumes the truth of Plaintiffs’ factual allegations.

1 processed for expedited removal pursuant to § 1225(b)(1). Congress has mandated the detention
2 of certain inadmissible applicants for admission pending removal proceedings and removal, *see* 8
3 U.S.C. § 1225(b)(1)(B)(iii)(IV) and 8 U.S.C. § 1225(b)(2)(A); *see also Jennings v. Rodriguez*,
4 138 S. Ct. 830, 842 (2018) (§ 1225 detention provisions “mandate detention of applicants for
5 admission until certain [removal] proceedings have concluded.”). Such individuals may be
6 released only if they are granted parole under narrowly prescribed circumstances. 8 U.S.C. §
7 1182(d)(5); 8 C.F.R. §§ 235.3(b)(2)(iii) and 235.3(b)(4)(ii) (parole permitted if required to meet
8 a “medical emergency or is necessary for a legitimate law enforcement objective” for aliens
9 subject to expedited removal); *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1133 (N.D. Ill. 2018).
10 In addition to 8 U.S.C. § 1225(b), the detention of aliens is statutorily authorized pursuant to 8
11 U.S.C. § 1226, which states that “[o]n a warrant issued by the [Secretary of DHS], an alien may
12 be arrested and detained pending a decision on whether the alien is to be removed from the
13 United States.” 8 U.S.C. § 1226(a).

16 **II. Legal Framework for the Immigration Custody and Release of Minor Aliens**

17 The immigration custody and release of alien minors is governed by two statutory
18 provisions, 6 U.S.C. § 279 and 8 U.S.C. § 1232, and the *Flores* Settlement Agreement. *See D.B.*
19 *v. Cardall*, 826 F.3d 721, 731 (4th Cir. 2016).²

20 In 2002, Congress enacted the Homeland Security Act (“HSA”), which created the
21 Department of Homeland Security and transferred to DHS responsibility for immigration
22 enforcement and transferred to ORR the responsibility for “the care and placement of
23 unaccompanied alien children who are in Federal custody by reason of their immigration status.”
24 6 U.S.C. § 279(a), (b)(1)(A), (b)(1)(C); *see also* 8 U.S.C. § 1232(b)(1) (“the care and custody of
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27 ² The *Flores* Settlement Agreement may be found at *Flores v. Sessions*, No. 85-cv-4544
28 (C.D. Cal. Feb. 2, 2015) (ECF No. 101). DHS has promulgated regulations to implement the
relevant terms of the Agreement, and those regulations are currently the subject of litigation in
Flores. Such regulations, however, were not in effect at the time the events in this lawsuit.

1 all unaccompanied alien children, including responsibility for their detention, where appropriate,
2 shall be the responsibility of” ORR). The term “placement” means “the placement of an
3 unaccompanied alien child in either a detention facility or an alternative to such a facility.” 6
4 U.S.C. § 279(g)(1).

5 The term “unaccompanied alien child” is defined as a child who: (1) “has no lawful
6 immigration status in the United States”; (2) “has not attained 18 years of age”; and (3) “with
7 respect to whom . . . there is no parent or legal guardian in the United States [or] no parent or
8 legal guardian in the United States is available to provide care and physical custody.” 6 U.S.C. §
9 279(g)(2). Under the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”),
10 “[e]xcept in the case of exceptional circumstances, any department or agency . . . shall transfer
11 the custody of such child to [ORR] not later than 72 hours after determining that such child is an
12 unaccompanied alien child.” 8 U.S.C. § 1232(b)(3). ORR must place unaccompanied alien
13 children “in the least restrictive setting that is in the best interest of the child.” 8 U.S.C.
14 1232(c)(2)(A). However, ORR “shall not release such children upon their own recognizance.” 6
15 U.S.C. § 279(2)(B). ORR may place children in a secure facility, but only if it determines that
16 the child poses a danger to herself or others, or has been charged with a criminal offense. 8
17 U.S.C. § 1232(c)(2)(A).

18 In addition to the TVPRA, the *Flores* Settlement Agreement governs the care and
19 custody of alien minors. The *Flores* Settlement Agreement “sets out nationwide policy for the
20 detention, release, and treatment of minors in the custody of the INS.” *Flores v. Lynch*, 828 F.3d
21 898, 901 (9th Cir. 2016) (citing *Flores* Settlement Agreement ¶ 9); *see also Bunikyte v. Chertoff*,
22 2007 WL 1074070, *2 (W.D. Tex. Apr. 9, 2007) (“[I]t appears that *Flores* is the only binding
23 legal standard directly applicable to the detention of minor aliens by the United States
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1 government.”). The Ninth Circuit has held that the *Flores* Settlement Agreement applies to both
2 accompanied and unaccompanied minors. *Flores*, 828 F.3d at 905.

3 Pursuant to the *Flores* Settlement Agreement, “[w]ithin five days of arrest, [DHS] must
4 transfer the minor to a non-secure, licensed facility; but ‘in the event of an emergency or influx
5 of minors into the United States,’ [DHS] need only make the transfer as expeditiously as
6 possible.” *Flores*, 828 F.3d at 902-03 (quoting *Flores* Agreement ¶ 12).³ The *Flores* Settlement
7 Agreement “does not address the potentially complex issues involving the housing of family
8 units and the scope of parental rights for adults apprehended with their children[,]” and it “does
9 not contemplate releasing a child to a parent who remains in custody, because that would not be
10 a ‘release.’” *Id.* at 906; *see also United States v. Dominguez-Portillo*, 2018 WL 315759, *9
11 (W.D. Tex. Jan. 5, 2018) (“The *Flores* Settlement does not provide that parents are entitled to
12 care for their children if they were simultaneously arrested by immigration authorities[.]”).

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14 Moreover, the *Flores* Settlement Agreement does not address or provide any rights to
15 adult detainees, including rights of release. *Flores*, 828 F.3d at 908; *see also Dominguez-*
16 *Portillo*, 2018 WL 315759 at *14-15 (“nor does [the *Flores* Settlement Agreement] express a
17 preference for releasing parents charged with criminal offenses.”); *Bunikyte*, 2007 WL 1074070
18 at *16 (“The *Flores* settlement, however, does not provide any particular rights or remedies for
19 adult detainees. . . . [It] deals with the rights of minor aliens in detention, not with the rights of
20 detained parents.”). “The fact that the Settlement grants [alien minors] a right to preferential
21 release to a parent over others does not mean that the government must also make a parent
22 available; it simply means that, if available, a parent is the first choice.” *Flores*, 828 F.3d at 908;
23 *Bunikyte*, 2007 WL 1074070 at *16 (“Though family unification is a stated goal of both the
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27 ³ DHS’s regulations provide additional protections to minors by requiring that they must
28 be detained “in the least restrictive setting appropriate to the juvenile’s age and special needs . . .
.” 6 C.F.R. § 115.14(a).

1 *Flores* Settlement and U.S. immigration policy generally, nothing in the settlement agreement
2 expresses a preference for releasing parents who have violated immigration laws.”).

3 **III. Executive Branch Directives Regarding Immigration Enforcement**

4 During the time period relevant to Plaintiffs’ lawsuit, there were several executive branch
5 directives relating to the enforcement of Federal immigration laws. In January 2017, Executive
6 Order No. 13767 (“EO 13767”) directed Federal agencies to comply with Federal statutes and
7 regulations regarding the detention of aliens pending criminal and removal proceedings.
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9 Specifically, EO 13767 stated that “[i]t is the policy of the executive branch to . . . detain
10 individuals apprehended on suspicion of violating Federal or State law, including Federal
11 immigration law, pending further proceedings regarding those violations[.]” EO 13767 § 2(b),
12 82 Fed. Reg. 8793 (Jan. 30, 2017). Further, EO 13767 directed that DHS “shall immediately
13 take all appropriate actions to ensure the detention of aliens apprehended for violations of
14 immigration law pending the outcome of their removal proceedings or their removal from the
15 country to the extent permitted by law.” *Id.* § 6. EO 13767 further declared that “[i]t is the
16 policy of the executive branch to end the abuse of parole and asylum provisions currently used to
17 prevent the lawful removal of removable aliens[.]” *id.* § 11, and directed that DHS “shall take
18 appropriate action to ensure that parole authority under section 212 of the INA (8 U.S.C. §
19 1182(d)(5)) is exercised only on a case-by-case basis in accordance with the plain language of
20 the statute, and in all circumstances only when an individual demonstrates urgent humanitarian
21 reasons or a significant public benefit derived from such parole.” *Id.* § 11(d).
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24 On April 11, 2017, DOJ issued guidance to all Federal prosecutors regarding a renewed
25 commitment to criminal immigration enforcement, and directed that Federal law enforcement
26 prioritize the prosecution of several immigration offenses, including illegal entry under 8 U.S.C.
27 § 1325. *See* U.S. Department of Justice, *Memorandum on Renewed Commitment to Criminal*
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1 *Immigration Enforcement* (April 11, 2017), available at [https://www.justice.gov/opa/press-](https://www.justice.gov/opa/press-release/file/956841/download)
2 [release/file/956841/download](https://www.justice.gov/opa/press-release/file/956841/download).

3 On April 6, 2018, a Presidential Memorandum was issued entitled “Ending ‘Catch and
4 Release’ at the Border of the United States and Directing Other Enhancements to Immigration
5 Enforcement.” 83 Fed. Reg. 16179 (Apr. 13, 2018). This Presidential Memorandum noted that
6 EO 13767 had “directed the Secretary of Homeland Security to issue policy guidance regarding
7 the appropriate and consistent use of detention authority under the Immigration and Nationality
8 Act (INA), including termination of the practice known as ‘catch and release,’ whereby aliens
9 are released in the United States shortly after their apprehension for violations of our
10 immigration laws.” The Presidential Memorandum also directed the Secretary of Homeland
11 Security to submit a report, in coordination with other executive branch officials, “detailing all
12 measures their respective departments have pursued or are pursuing to expeditiously end ‘catch
13 and release’ practices.” *Id.*

14 On April 6, 2018, to address an increase in unauthorized individuals crossing the
15 Southwest border into the United States, the Attorney General issued a “Memorandum for
16 Federal Prosecutors along the Southwest Border.” U.S. Department of Justice, *News Release:*
17 *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry* (April 6, 2018),
18 DOJ 18-417, 2018 WL 1666622 (hereinafter referred to as “Zero Tolerance Memorandum”).
19 The Attorney General’s memorandum directed Federal prosecutors along the Southwest border
20 to immediately accept for prosecution, to the extent practicable, all § 1325(a) offenses referred
21 for prosecution.

22 Consistent with EO 13767, the April 2018 Presidential Memorandum, and the Attorney
23 General’s Zero Tolerance Memorandum, DHS referred for prosecution to the Department of
24 Justice adult aliens – including those traveling with children – who unlawfully entered the United
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States on the Southwest border in violation of § 1325 or other criminal immigration statutory provisions. Compl. ¶¶ 34-48. Plaintiffs’ alien minor children were transferred to ORR. *Id.*

ARGUMENT

I. Plaintiffs’ Claims Are Barred By the FTCA’s Due Care and Discretionary Function Exceptions

A. Overview of the Due Care and Discretionary Function Exceptions

The United States is immune from liability absent its consent, and the terms of that consent define a court’s jurisdiction to entertain a suit against the United States. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). Absent a specific waiver, sovereign immunity bars the suit for lack of subject matter jurisdiction. *See FDIC v. Meyer*, 510 U.S. 471, 475-76 (1994). The terms of the United States’ consent to be sued as delineated in the FTCA define the parameters of a federal court’s jurisdiction to entertain such suits. *See United States v. Orleans*, 425 U.S. 807, 814 (1976) (“[T]he United States can be sued only to the extent that it has waived its immunity[.]”). The FTCA is a limited waiver of sovereign immunity that authorizes suits against the United States for:

money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances 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’s waiver of sovereign immunity is subject to several exceptions set forth in 28 U.S.C. § 2680. These exceptions “are designed to protect certain important governmental functions and prerogatives from disruption.” *Molzof v. United States*, 502 U.S. 301, 311 (1992); *see also Richards v. United States*, 369 U.S. 1, 13 n.28 (1962).

1 Foremost among these exceptions are those in section 2680(a), which provides that the
2 waiver of sovereign immunity set forth at 28 U.S.C. § 1346(b)(1) shall not apply to:

3 Any claim [1] based upon an act or omission of an employee of the Government,
4 exercising due care, in the execution of a statute or regulation, whether or not
5 such statute or regulation be valid, or [2] based upon the exercise or performance
6 or the failure to exercise or perform a discretionary function or duty on the part of
7 a federal agency or an employee of the Government, whether or not the discretion
8 involved be abused.

9 28 U.S.C. § 2680(a) (bracketed numerals added).

10 The first part of section 2680(a) sometimes is referred to as the FTCA’s “due care
11 exception,” and the second part often is referred to as the “discretionary function exception.” As
12 the legislative history of section 2680(a) states:

13 The bill is not intended to authorize a suit for damages to test the validity of or
14 provide a remedy on account of such discretionary acts even though negligently
15 performed and involving an abuse of discretion. Nor is it desirable or intended
16 that the constitutionality of legislation, or the legality of a rule or regulation
17 should be tested through the medium of a damage suit for tort.

18 H.R. Rep. No. 77-2245, 77th Cong., 2d Sess., at 10.

19 The due care exception “bars tests by tort action of the legality of statutes and
20 regulations.” *Dalehite v. United States*, 346 U.S. 15, 33 (1953). “Where government employees
21 act pursuant to and in furtherance of regulations, resulting harm is not compensable under the
22 act[.]” *Dupree v. United States*, 247 F.2d 819, 824 (3d Cir. 1957) (citations omitted); *Accardi v.*
23 *United States*, 435 F.2d 1239, 1241 (3d Cir. 1970) (claim arising out of “the enforcement of
24 ‘rules and regulations’” barred by due care exception). The due care exception was created
25 because the “Tort Claims Act did not contemplate that the constitutionality of legislation, or the
26 legality of a rule or regulation should be tested through the medium of a damage suit for tort.
27 Nor did it contemplate a remedy for damages sustained by reason of the application of invalid
28 laws or regulations.” *Dupree*, 247 F.2d at 824 (citation and internal quotation marks omitted);
see also Dalehite, 346 U.S. at 42 (“[T]he [agency’s] regulations, for instance, could not be

1 attacked by claimants under the Act by virtue of the first phrase of s 2680(a.)”); *Powell v. United*
2 *States*, 233 F.2d 851, 855 (10th Cir. 1956) (due care exception barred claims based upon “acts of
3 the agents and representatives of the Government . . . performed under and in furtherance of the
4 regulation . . . even though the regulation may be irregular or ineffective”). Thus, the FTCA
5 precludes a claim based upon the actions of employees carrying out a statutory or regulatory
6 scheme.

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8 Regarding the discretionary function exception, the Supreme Court has enunciated a two-
9 prong test for determining whether a claim is barred by the discretionary function exception.
10 First, courts must determine whether the act “involv[es] an element of judgment or choice.”
11 *United States v. Gaubert*, 499 U.S. 315, 322 (1991). Pursuant to this first prong, courts look to
12 whether “a federal statute, regulation or policy specifically prescribes a course of action for an
13 employee to follow[.]” *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz v. United States*, 486 U.S.
14 531, 536 (1988)). To survive a motion to dismiss, the plaintiff must identify a statute, regulation
15 or policy that is both specific and mandatory, as well as conduct that violates said statute,
16 regulation, or policy. *See Doe v. Holy See*, 557 F.3d 1066, 1084 (9th Cir. 2009) (citation
17 omitted).

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19 Second, if the conduct does involve judgment or choice, courts then look to “whether that
20 judgment is of the kind that the discretionary function exception was designed to shield.”
21 *Gaubert*, 499 U.S. at 322-23 (quoting *Berkovitz*, 486 U.S. at 536). “The basis for the
22 discretionary function exception was Congress’ desire to ‘prevent judicial “second-guessing” of
23 legislative and administrative decisions grounded in social, economic, and political policy
24 through the medium of an action in tort.” *Berkovitz*, 486 U.S. at 536-537 (quoting *United States*
25 *v. Varig Airlines*, 467 U.S. 797, 814 (1984)). Thus, the exception protects “governmental actions
26 and decisions based on considerations of public policy.” *Gaubert*, 499 U.S. at 323 (citation and
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1 internal quotation marks). It is immaterial whether various policy considerations actually were
2 considered, because “[t]he focus of the inquiry is not on the agent’s subjective intent in
3 exercising the discretion conferred by statute or regulation, but on the nature of the actions taken
4 and on whether they are susceptible to policy analysis.” *Gaubert*, 499 U.S. at 325; *see also*
5 *Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000) (“Notably, to be protected from suit,
6 the challenged decision ‘need not actually be grounded in policy considerations’ so long as it is,
7 ‘by its nature, susceptible to a policy analysis.’”) (quoting *Miller v. United States*, 163 F.3d 591,
8 593 (9th Cir. 1998)); *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1028 (9th Cir. 1989)
9 (the Government need not “prove that it considered these factors and made a conscious decision
10 on the basis of them”). Furthermore, “[w]hen established governmental policy, as expressed or
11 implied by statute, regulation, or agency guidelines, allows a Government agent to exercise
12 discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that
13 discretion.” *Gaubert*, 499 U.S. at 324; *Nurse*, 226 F.3d at 1001. Also, the discretionary function
14 exception applies even if the government’s conduct was negligent or an abuse of discretion.
15 *Gaubert*, 499 U.S. at 323.

18 **B. The Due Care and Discretionary Function Exceptions Bar Plaintiffs’ Claims**

19 According to Plaintiffs, the Federal government wrongfully “separated each Plaintiff
20 mother from her child while they were detained at various immigration holding centers in
21 Arizona.” Compl. ¶ 5. Plaintiffs acknowledge, however, that their separations from their minor
22 children stemmed from the executive branch’s enforcement of Federal criminal immigration
23 laws. *See* Compl. ¶¶ 26, 47-48.

25 Plaintiffs, who entered the United States between ports of entry and thus were amenable
26 to prosecution, *see* Compl. ¶¶ 70-71, 119-121, 171-172, 235-236, 304-305, appropriately do not
27 contest any criminal referrals or charging decisions pursuant to 8 U.S.C. § 1325 or ensuing
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1 criminal custody, because prioritizing enforcement of Federal law and subsequent prosecutorial
2 decisions are classic discretionary functions shielded by the FTCA’s discretionary function
3 exception and prosecutorial immunity.⁴ Nor do they challenge their immigration detentions
4 pending their removal proceedings. *See Ms. L v. ICE*, 302 F. Supp. 3d 1149, 1159 n.3 (C.D.
5 Cal. 2019);⁵ *see also W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1133 (N.D. Ill. 2018) (noting
6 there is no authority for “the proposition that the substantive due process to family integrity
7 dictates release of the parents (as distinct from reunification).”). Rather, Plaintiffs’ claims are
8 based on the separations of Plaintiffs from their minor children because the former were
9 amenable to criminal prosecution pursuant to the execution Federal immigration statutes. Strict
10 enforcement of the Nation’s immigration laws in accordance with Federal statutes renders minor
11 aliens unaccompanied when their parents are unavailable “to provide care and physical custody.”
12 6 U.S.C. § 279(g)(2); 8 U.S.C. § 1232(b)(3). Thus, because the separations stemmed from the
13 government’s execution of its Federal statutory authorities, Plaintiffs’ claims are barred by the
14 due care exception.
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18 ⁴ *See Mejia-Mejia v. ICE*, Case No. 18-1445, 2019 WL 4707150, *5 (D.D.C. Sept. 26,
19 2019) (zero tolerance policy “amounts to exercise of the prosecutorial discretion that Congress
20 and the Constitution confer on the Attorney General”); *see also United States v. Armstrong*, 517
21 U.S. 456, 464 (1996) (“The Attorney General and United States Attorneys retain ‘broad
22 discretion’ to enforce the Nation’s criminal laws.”); *General Dynamics Corp. v. United States*,
139 F.3d 1280, 1283 (9th Cir. 1998); *Smith v. United States*, 375 F.2d 243, 247-48 (5th Cir.),
cert. denied, 389 U.S. 841 (1967).

23 ⁵ Plaintiffs assert that they are members of the class that brought suit in *Ms. L v. ICE*.
24 Compl. ¶ 62. In *Ms. L*, the plaintiffs challenged the government’s separation of alien parents and
25 their minor children when both are held in immigration detention and when there has been no
26 showing that the parent is unfit or poses a danger to the child. *Ms. L*, 302 F. Supp. 3d at 1162.
27 They did not challenge the government’s initial separation of parent and child when the parent is
28 arrested for violating the Nation’s criminal laws. *Id.* Nor did the plaintiffs challenge the
decision to detain adult aliens while in removal proceedings for the “sound reasons” that the law
calls for mandatory detention with the discretion for parole in strictly limited circumstances. *Ms.*
L, 302 F. Supp. 3d at 1159 n.3. Rather, the plaintiffs sought re-unification while the parent is in
immigration custody.

1 Particularly instructive is *Welch v. United States*, 409 F.3d 646 (4th Cir. 2005), in which
2 the Fourth Circuit held that the due care exception barred the plaintiff’s wrongful detention
3 claim. The plaintiff, a lawful permanent resident, was detained pursuant to the mandate of 8
4 U.S.C. § 1226(c)(1)(B). *Id.* at 649.⁶ An immigration judge then ordered the plaintiff deported to
5 Panama pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), and the plaintiff continued to be detained
6 pursuant to 8 U.S.C. § 1226(c) pending a final removal determination. *Id.* at 649-50. While in
7 detention, the plaintiff filed a petition for writ of habeas corpus, which was granted on the
8 ground that his detention under § 1226(c) without a bail hearing violated his Fifth Amendment
9 Due Process rights. *Id.* at 650. The plaintiff then filed a claim under the FTCA for false
10 imprisonment, which the district court dismissed as barred by the due care exception. The
11 Fourth Circuit affirmed the district court’s dismissal, holding that the plaintiff’s detention
12 pending removal was mandatory under the relevant statute and the government exercised due
13 care in following the statute’s prescription. According to the Fourth Circuit, the due care
14 exception shielded the government’s execution of its duties under the statutory scheme, and the
15 fact that plaintiff’s detention was later determined to be unconstitutional did not render the due
16 care exception inapplicable. *Id.* at 652-53.

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19 Moreover, even if the alien minors had not been determined to be “unaccompanied” by
20 virtue of their mothers being amenable to prosecution, the families still would have been
21 separated because Plaintiffs were detained during the pendency of their removal proceedings. As
22 discussed above, *see* Legal Framework, Section II, compliance with the *Flores* Settlement
23 Agreement precluded detention of alien minors in adult detention facilities, and thus necessitated
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27 ⁶ Pursuant to 8 U.S.C. § 1226(c)(1)(B), the “Attorney General shall take into custody any
28 alien who . . . is deportable by reason of having committed an offense covered in section . . .
1227(a)(2)(C) of this title.”

1 the minors' release to relatives, friends, or placement in foster care.⁷ The court in *Bunikyte*
2 observed that to comply with the *Flores* Settlement Agreement, ICE must "releas[e] the children
3 to adult relatives not in custody, adult friends designated by their parents, or even state-operated
4 foster care[.]". *Bunikyte*, 2007 WL 1074070 at *16. Accordingly, under any of the options
5 described in *Bunikyte*, separation of parent and child occurs.

6
7 Plaintiffs also cannot avoid the due care exception by arguing that the government
8 somehow could have exercised discretion at some point to avoid the challenged separations. For
9 the due care exception to apply, the government need only be authorized by statute or regulation
10 to take the course of action that caused the harm. In *Borquez v. United States*, 773 F.2d 1050
11 (9th Cir. 1985), two plaintiffs drowned and one was injured as they attempted to walk across a
12 diversion dam. The plaintiffs alleged that the government was negligent in its maintenance of
13 the dam. However, responsibility for the care and maintenance of the dam was transferred to a
14 water-users' association pursuant to a Federal statute, which provided that:

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16 Whenever any legally organized water-users' association or irrigation district
17 shall so request, the Secretary of the Interior is *authorized, in his discretion*, to
18 transfer to such water-users' association or irrigation district the care, operation,
and maintenance of all or any part of the project works, subject to such rules and
regulations as he may prescribe.

19 43 U.S.C. § 499 (emphasis added). The Ninth Circuit held the due care exception barred any
20 claim based on the Federal government's decision to transfer such maintenance responsibility,
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24 ⁷ The district court in *Ms. L* recognized that another option to address the influx of
25 arriving aliens with children – family detention facilities – was "limited." *Ms. L.*, 310 F. Supp.
26 3d at 1139. According to the district court in *Ms. L.*, "[g]overnment counsel represented to the
27 Court that the "total capacity in [family] residential centers" was "less than 2,700." *Id.* at 1139.
28 Even if there was sufficient capacity at family detention facilities, detention of family units still
would need to comply with the *Flores* Settlement Agreement. Although the *Flores* Settlement
Agreement is currently the subject of litigation, neither the Agreement itself nor judicial
decisions interpreting it during the time relevant to this case permitted extended detention of
minors, either accompanied or unaccompanied.

1 because such decision was authorized by Federal statute. *Borquez*, 773 F.2d. at 1053.⁸ Thus, as
2 relevant to the instant suit, even if Federal statutes arguably gave the government the ability to
3 exercise discretion that could have avoided Plaintiffs’ harms, the due care exception nevertheless
4 applies. In any event, EO 13767 expressly instructed DHS to exercise its statutory authority to
5 detain aliens during the pendency of their immigration proceedings.

6
7 Nor can Plaintiffs avoid the due care exception by arguing that the government erred in
8 interpreting Federal law to determine the minor aliens to be “unaccompanied minor children.” 6
9 U.S.C. § 279(g)(2); 8 U.S.C. § 1232(b)(1). The Ninth Circuit has stated unequivocally that a
10 challenge to an agency’s interpretation of a statute as “arbitrary or contrary to law may not be
11 tested in an action under the FTCA. The legislative history of the FTCA makes it clear that
12 Congress did not intend that ‘the constitutionality of legislation, or the legality of a rule or
13 regulation should be tested through the medium of a damage suit for tort.’” *Baie v. Sec’y of*
14 *Defense*, 784 F.2d 1375, 1376-77 (9th Cir.), *cert. denied*, 479 U.S. 823 (1986) (citing H.R. Rep.
15 No. 1287, 79th Cong., 1st Sess., 6 (1945)). Thus, in this Circuit, any claims under the FTCA that
16 necessarily turn on a plaintiff’s challenge to the manner in which an agency interpreted a Federal
17 statute are categorically barred by 28 U.S.C. § 2680(a).

18
19 Even in Circuits where courts permit an inquiry into whether an agency exercised “due
20 care” in its interpretation of the statute or regulation at issue, the due care exception still applies
21 when at the time of such interpretation there existed no controlling legal authority clearly
22 precluding that particular interpretation. *See Nwozuzu v. United States*, 712 Fed. App’x 31, 33
23 (2d Cir. 2017) (because of “legal uncertainty” at the time, the Government’s interpretation of the
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⁸ *Accord Doe v. DiGenova*, 779 F.2d 74, 88 n.26 (D.C. Cir. 1985) (actions authorized by regulations protected by due care exception); *Powell v. United States*, 233 F.2d 851, 855 (10th Cir. 1956) (actions taken pursuant to and in furtherance of regulations protected by the due care exception).

1 derivative citizenship statute at section 321(a) of the INA as requiring lawful permanent resident
2 (“LPR”) status protected by the due care exception); *Doe v. Stephens*, 851 F.2d 1457, 1462 (D.C.
3 Cir. 1988 (decision by VA to follow regulations that had invalidated by statute protected by due
4 care exception, because the agency could not be faulted for its “failure to predict the precise
5 statutory interpretation that led [a court] to reject the agency’s” understanding of that statute). At
6 the time of the challenged separations in this action, there was no authority clearly contrary to
7 alien minors whose parents were amenable to criminal prosecution being unaccompanied alien
8 children. Rather, precedent in this context permits a broad interpretation of what it means for a
9 parent to be unavailable to “provide care and physical custody.” *See D.B.*, 826 F.3d at 734 (court
10 of appeals upheld determination that minor was “unaccompanied alien child” and transfer to
11 ORR custody notwithstanding that minor actually lived with mother in their family home,
12 because mother’s lack of fitness precluded her from being able to “provide what is necessary for
13 the child’s health, welfare, maintenance, and protection” and thus was not “available”); *accord*
14 *Dominguez-Portillo*, 2018 WL 315759 at *6 (addressing the issue of parental rights while an
15 adult alien is detained and noting “the lack of clearly established parental rights in these
16 circumstances and under case law.”).⁹

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19 Finally, Plaintiffs allege that during their approximately two-month separations, “the
20 government provided only limited information to each mother about her child’s whereabouts and
21 well-being and afforded only minimal opportunities for each mother and child to
22 communicate[.]” Compl. ¶ 5; *see also* Compl. ¶ 58. However, the due care exception’s bar of
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26 ⁹ Notably, even though the district court in *Ms. L* found there to be a likelihood that the
27 separation of families while adult aliens were in immigration detention violated the plaintiffs’
28 substantive Due Process rights, the court acknowledged that one of the children was rendered
unaccompanied as a result of her mother being placed in immigration detention. *Ms. L*, 310 F.
Supp. 3d at 1138.

1 Plaintiffs' claims based upon the physical separations of alien parents and children likewise bars
2 any other claims that are inextricably tied to such physical separations, including Plaintiffs'
3 challenges to limited communications between and about family members while the adult aliens
4 were in secure detention facilities. *See Sloan v. H.U.D.*, 236 F.3d 756, 762 (D.C. Cir. 2001)
5 (claims that are "inextricably tied" or "inextricably linked" to the conduct protected by section
6 2680(a) are also barred). This is so because the harms from the allegedly lacking
7 communications are a direct consequence of the physical separations. *See Moore v. Valder*, 65
8 F.3d 189, 196-97 (D.C. Cir. 1995) (claims not "sufficiently separable" from those protected by §
9 2680(a) are also barred); *Johnson v. U.S. Dep't of Interior*, 949 F.2d 332, 339 (10th Cir. 1991)
10 (claims that cannot be considered apart from each other are both barred); *Ostera v. United States*,
11 769 F.2d 716, 718 (11th Cir. 1985) (same). Moreover, any challenge to the frequency of
12 communications between and about separated family members is barred by the discretionary
13 function exception. Plaintiffs have identified no mandatory directives prescribing in specific
14 terms the regularity with which detained alien adults must be permitted to communicate with
15 their children. Further, claims relating to the conditions of one's detention in a secure facility are
16 in essence a challenge to discretionary, policy-based decision-making regarding conditions of
17 confinement that is shielded by the discretionary function exception. *See Antonelli v. Crow*, No.
18 08-261, 2012 WL 4215024, *3 (E.D. Ky. Sept. 19, 2012) (citing cases in which myriad
19 conditions of confinement claims barred by the discretionary function exception).
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23 Further, Plaintiffs allege that the government failed to adequately track alien minors who
24 were separated from their parents because the computer tracking systems within DHS were
25 inadequately designed or did not sufficiently interface with other systems. *See Compl.* ¶¶ 54, 64-
26 67. Because Plaintiffs do not allege that these alleged deficiencies caused their separations or
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1 hindered their reunifications, such alleged tracking failures are of no moment.¹⁰ In any event, an
2 agency's decisions regarding the design and maintenance of its computer systems and databases
3 is a policy-based discretionary function involving, among other things, considerations of how to
4 "allocate resources among various objectives." *Cruz v. United States*, 684 F. Supp. 2d 217, 224
5 (D.P.R. 2010) (dismissing claim that VA negligently designed and maintained inadequate
6 computer systems and safeguards). As such, any challenge by Plaintiffs to the government's
7 allegedly deficient tracking systems is barred by the discretionary function exception. *See also*
8 *Campos v. United States*, 888 F.3d 724, 733 (5th Cir. 2018) (deficiencies in computer database
9 system that failed to reveal immigration status protected by discretionary function exception);
10 *Smith v. United States*, Case No. 2:11-cv-00616, 2014 WL 4638918, *4 (S.D. Ohio Sept. 16,
11 2014) (design of computer system involved balancing user needs with limited resources and thus
12 was shielded by exception).

13 14 **II. No Private Person Analog Exists for the Enforcement of Federal Immigration 15 Law or the Conditions of Confinement of Detainees**

16 FTCA jurisdiction exists only if a plaintiff alleges "circumstances where the United
17 States, if a private person, would be liable to the claimant in accordance with the law of the place
18 where the act or omission occurred." 28 U.S.C. § 1346(b)(1); 28 U.S.C. § 2674 (FTCA allows
19 for tort recovery against United States only "in the same manner and to the same extent as a
20 private individual under like circumstances."). The provision is known as the "private analog"
21 requirement. Because only the Federal government has the authority to enforce the Nation's
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27 ¹⁰ Notably, four of the five Plaintiffs were reunified with their children within the thirty-
28 day period ordered by the court in *Ms. L*. *See* Compl. ¶¶ 105, 156, 213-218, 360. Although
Plaintiff O.A. was not reunified until sometime later with L.A., L.A. was living with a family
member. Compl. ¶ 264.

1 immigration laws and applicable state law does not impose liability on private persons for failing
2 to enforce Federal law, no private analog exists here.

3 The FTCA “requires a court to look to the state-law liability of private entities, not to that
4 of public entities, when assessing the Government’s liability under the FTCA [even] in the
5 performance of activities which private persons do not perform.” *United States v. Olson*, 546
6 U.S. 43, 46 (2005) (internal quotation marks omitted). It does not waive sovereign immunity for
7 claims against the United States based on governmental “action of the type that private persons
8 could not engage in and hence could not be liable for under local law.” *Chen v. United States*,
9 854 F.2d 622, 626 (2d Cir. 1988) (internal quotation marks omitted); *Liranzo v. United States*,
10 690 F.3d 78, 86 (2d Cir. 2012).

11
12 Only the Federal government is in the position, and has the authority, to enforce the
13 Nation’s immigration laws. As discussed *supra*, Plaintiffs’ alleged harms stem from the Federal
14 government’s decision to enforce the Nation’s immigration laws. Such enforcement resulted in
15 referrals for criminal prosecution and the immigration detention of alien adults during removal
16 proceedings, thereby rendering the alien minors “unaccompanied alien children” which, by
17 operation of law, resulted the separation of the adults and their children. The United States has
18 not waived its sovereign immunity for such decisions to enforce Federal law because such
19 decisions have no private person counterpart. *See Sea Air Shuttle Corp. v. United States*, 112
20 F.3d 532, 537 (1st Cir.1997) (holding that claimed failure of Secretary of Transportation and
21 Federal Aviation Administration to take enforcement action was not conduct for which private
22 individual could be held liable, and thus did not give rise to a FTCA action); *see also Elgamal v.*
23 *United States*, 2015 WL 13648070 at *5 (D. Ariz. July 8, 2015) (recognizing that “immigration
24 matters” are “an inherently governmental function”), *aff’d by Elgamal v. Bernacke*, 714 Fed.
25 App’x 741 (9th Cir. 2018).
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1 Furthermore, even if considered separately from the executive branch’s decision to
2 enforce Federal law, any determination that Plaintiffs’ minor children were rendered
3 “unaccompanied alien children” because their parents were amenable to criminal prosecution or
4 subsequently subject to immigration detention in secure adult detention facilities and thus not
5 “available to provide care and physical custody” also is non-cognizable under the FTCA. Any
6 such determination is an immigration-related function exclusively vested in the Federal
7 government for which there is no private person analog.

8 The Second Circuit’s opinion in *Akutowicz v. United States*, 859 F.2d 1122, 1125-26 (2d
9 Cir. 1988), is particularly instructive. *Akutowicz* involved a citizen who challenged the
10 Department of State’s wrongful revocation of his U.S. citizenship. *Id.* at 1124. The Department
11 of State initiated a five-year investigation into whether Akutowicz had expatriated himself under
12 the provisions of § 349(a)(1) of the INA, 8 U.S.C. § 1481(a)(1) (1982). *Id.* at 1123. The
13 Department of State determined that he did, and therefore revoked his U.S. citizenship. *Id.*
14 Akutowicz appealed the revocation, and the Department’s Board of Appellate Review reversed
15 the Department’s decision and reinstated Akutowicz’s citizenship. *Id.* at 1124. Akutowicz then
16 filed suit under the FTCA alleging, *inter alia*, that the State Department negligently deprived him
17 of his citizenship. *Id.*

18 Applying the familiar standard that “for liability to arise under the FTCA, a plaintiff’s
19 cause of action must be ‘comparable’ to a ‘cause of action against a private citizen’ recognized in
20 the jurisdiction where the tort occurred,” *id.* at 1125 (quoting *Chen v. United States*, 854 F.2d
21 622 (2d Cir.1988)), the Second Circuit held that no such private person analogy existed. In
22 particular, the Court held that:

23 [A]s to certain governmental functions, the United States cannot be held liable,
24 for no private analog exists. [Q]uasi-legislative or quasi-adjudicative action by an
25 agency of the federal government is action of the type that private persons could
26 not engage in and hence could not be liable for under local law.
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1 *Id.* (quoting *C.P. Chemical Co. v. United States*, 810 F.2d 34, 37-38 (2d Cir.1987) (citations and
2 internal quotation marks omitted); *see also Jayvee Brand v. United States*, 721 F.2d 385, 390
3 (D.C. Cir.1983). That the State Department allegedly erred in its interpretation and application
4 of the pertinent provisions of the INA was of no moment. The Second Circuit held that “the
5 withdrawal of a person’s citizenship constitutes a quasi-adjudicative action for which no private
6 analog exists.” *Id.* at 1126. Accordingly, it affirmed the dismissal of the FTCA action for lack of
7 subject matter jurisdiction.
8

9 The Ninth Circuit likewise has held that there is no private person analog to the Federal
10 government’s administration and enforcement of the Nation’s immigration laws. In *Bhuiyan v.*
11 *United States*, 2017 WL 2837023 (D.N.Mar.I. June 30, 2017), the plaintiff, a citizen of
12 Bangladesh residing in a U.S. territory, brought suit under the FTCA alleging that the Federal
13 government improperly classified his immigration status, resulting in the plaintiff being placed in
14 removal proceedings. Relying on *Akutowicz*, the district court dismissed the FTCA claims on the
15 ground that there is no private person analog for the alleged duty of the government to accurately
16 administer Federal immigration benefits. *Id.* at *4. The Ninth Circuit affirmed the dismissal of
17 the action, holding that “there is, as a general matter, no private analogue to governmental
18 withdrawal of immigration benefits.” *Bhuiyan v. United States*, 772 Fed. App’x 564, 565 (9th
19 Cir. 2019); *see also Elgamal*, 714 Fed. Appx. at 742 (“[B]ecause no private person could be sued
20 for anything sufficiently analogous to the negligent denial of an immigration status adjustment
21 application, that claim must be dismissed as well.”).¹¹
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26 ¹¹ *See also Figueroa v. United States*, 139 F.Supp.2d 138, 142 (E.D.N.Y.2010)
27 (dismissing FTCA claim for negligent issuance of passport for lack of a private analog); *Mazur*
28 *v. United States*, 957 F. Supp. 1041, 1042–43 (N.D.Ill.1997) (in matters relating to the
naturalization of aliens, “only the United States has the power to act,” and, “[a]ccordingly . . .
there is no private analog under state law”); *accord Appleton v. United States*, 180 F. Supp. 2d
177, 185 (D.D.C. 2002) (“Reviewing applications for the purpose of determining whether the

1 Moreover, a private person analog for Plaintiffs’ claims is lacking because “[p]rivate
2 persons cannot establish facilities to detain other persons – only the government can, either on its
3 own or through a governmental contractor.” *McGowan v. United States*, 825 F.3d 118, 127(2d
4 Cir. 2016). Notably, Plaintiffs do not contest the lawfulness of their immigration detention;
5 rather they claim that family members should have been detained together. In other words,
6 Plaintiffs challenge *where* and *with whom* they were detained. There can be no private person
7 analog, though, for claims challenging where or with whom one’s immigration detention occurs
8 because such decisions regarding the location and terms of detention cannot be performed by
9 private persons. *See McGowan*, 825 F.3d at 126-127 (wrongful confinement claim for Federal
10 prisoner who moved from halfway house to a Special Housing Unit in a detention facility was
11 not cognizable under the FTCA because decisions relating to location and conditions of
12 detention cannot be made by private persons).

13 **III. Plaintiffs Have Not Stated An Actionable Claim Under Arizona Law**

14 Plaintiffs contend that the acts or omissions giving rise to their claims occurred in
15 Arizona, and thus Arizona law applies to this action pursuant to 28 U.S.C. § 1346(b)(1). Compl.
16 ¶¶ 5, 10. Under Arizona law, a person has not suffered a legally cognizable injury when that
17 person is lawfully incarcerated and the alleged harm flows solely from the incarceration. *Muscat*
18 *by Berman v. Creative Innervisions LLC*, 244 Ariz. 194, 199 (2017).

19 In *Muscat*, the plaintiff, whose mental disabilities included a severe lack of impulse
20 control, was on probation for inappropriately touching a minor. The plaintiff was living in a
21 group home that was responsible for his supervision. Left unattended at an event, the plaintiff
22 followed a minor into a restroom. The plaintiff was charged with attempted kidnapping and
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27 _____ applicant is authorized to import ammunition is exclusively a governmental function governed
28 by federal regulations administered by BATF without any private counterpart.”).

1 attempted molestation, pleaded guilty, and was sentenced to several years in prison. He brought
2 a negligence claim against the company responsible for his supervision, alleging that its
3 negligent supervision failed to prevent him from committing the crimes which resulted in his
4 incarceration. He claimed to suffer harm including mental and emotional anguish and anxiety as
5 a result of the incarceration. *Id.* at 196-97, 198. The court held that while the company had a
6 duty under Arizona law to supervise him, the plaintiff did not suffer a legally cognizable injury
7 because he experienced no injury distinct from the consequences of his lawful incarceration. *Id.*
8 at 198. The court explained, “[n]o properly-convicted criminal has a legally protected interest in
9 being free from the inherent consequences of the resulting sentence[,]” and “recognizing the
10 legal consequences of a ward’s criminal conduct as a legally cognizable injury would distort the
11 long-established public policy of personal accountability for criminal behavior.” *Id.* at 198-99.

12
13 *Muscat* bears directly on Plaintiffs’ claims in this action. Plaintiffs crossed into the
14 United States in criminal violation of Federal immigration law, and, consequently, were
15 amenable to criminal prosecution and also subject to immigration detention. As a direct
16 consequence, their minor children were separated from Plaintiffs pursuant to the dictates of
17 Federal statutes. Plaintiffs allege that the separations themselves caused their harms. Compl. ¶¶
18 1, 2, 26, 27. Because the alleged harms were a direct consequence of the lawful detention of
19 Plaintiffs, no legally cognizable injury under Arizona law exists.

20 21 CONCLUSION

22
23 For the foregoing reasons, this action must be dismissed for lack of subject matter
24 jurisdiction.

25 Dated: December 23, 2019

Respectfully Submitted,

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27 JAMES G. TOUHEY, JR.
28 Director, Torts Branch

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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