IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

D. A., A.A., and Lucinda del Carmen Padilla-Gonzales, Plaintiffs, v. The United States of America, Heartland Alliance for Human Needs and Human Rights, and Heartland Human Care Services, Inc., Defendants.	)	Case No. 20-cv-3082 Hon. Martha M. Pacold

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS

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INTRODUCTION

This lawsuit alleges that immigration officers working for the Department of Homeland Security ("DHS") subjected Plaintiffs Lucinda Padilla-Gonzalez, and her minor children A.A. and D.A.—an immigrant family escaping violence—to treatment so harsh and deliberately cruel that it could be fairly described as torturous. Plaintiffs bring suit under the Federal Tort Claims Act ("FTCA") based on various state common law torts, including negligence, breach of fiduciary duty and intentional infliction of emotion distress. The government has filed a motion to dismiss arguing that because it generally has authority to enforce immigration laws, there is no remedy for the DHS agents' gross misconduct. The government's arguments are without merit.

FACTUAL BACKGROUND

Plaintiff Lucinda Padilla-Gonzalez and her two children, five and fourteen years old, fled political violence in their native Honduras and arrived in the United States seeking asylum. FAC (Dkt. 35) ¶19. The DHS agents they encountered, however, subjected them to sustained mistreatment, much of it inflicted for the specific purpose of traumatizing the family. *Id.* ¶¶5, 25.

DHS agents insulted the children and their mother, calling them liars and telling them that the officers were tired of immigrants. *Id.* ¶19. From the first day of captivity, the family was held together in a "*hielera*" ("icebox"), named for its infamous cold temperatures. *Id.* ¶¶20-22. Lucinda's leg had been injured, but when doctors gave her crutches to use, officers took them away. *Id.* ¶¶22-23. Then, the officers separated Lucinda and her children without warning or explanation, preventing them from even hugging each other to say goodbye. *Id.* ¶24. The purpose for this separation, and attendant treatment, was to inflict trauma on the family, and DHS agents used the separation to try to coerce Lucinda into giving up their asylum claims. *Id.* ¶¶24-26. DHS agents sent A.A. and D.A. alone to a refugee center in Chicago, despite the fact that Lucinda's husband (and the children's father) Luis was in the United States and was desperate to take custody

of the children. *Id.* ¶27-51. The children were separated from their family and held by strangers for more than a month, without any communication with their mother. *Id.*

Meanwhile, federal officials continued to mistreat Lucinda. She was charged with misdemeanor unlawful entry, for which she was "sentenced" to probation a few days later. *Id*. ¶53. DHS agents then shackled her and put her in a van to drive her to a deportation plane. *Id.* ¶55. They did not buckle her in, and along the way a sudden stop threw her against the bars of the vehicle, causing her to suffer a traumatic brain injury. *Id.* ¶¶55, 57. DHS agents denied her access to medical care for the injuries they caused, allowing her to languish with severe symptoms while fellow detainees cared for her. *Id.* ¶58.

The children remained in a shelter for more than a month before finally being released to their father, and eventually reunited with their mother. Lucinda continues to suffer from her untreated concussion, and both children remain extremely traumatized by their terrifying, and purposeful, separation from their parents. *Id.* ¶¶56, 61-65.

ARGUMENT

At the motion to dismiss stage, the Court must "accept as true all of the well-pleaded facts in the complaint and draw all reasonable inferences in favor of the plaintiff." *Calderon-Ramirez v. McCament*, 877 F.3d 272, 275 (7th Cir. 2017). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *NewSpin Sports v. Arrow Electronics, Inc.*, 910 F.3d 293, 299 (7th Cir. 2018).

I. Contrary to the Government's Mischaracterization, Plaintiffs Are Not Seeking to Recover for Constitutional Torts

The government leads its brief with an argument that Plaintiff is seeking to use the FTCA to pursue claims based on constitutional violations, not common law torts. Dkt. 41 at 8-10. The

government's argument is wholly without merit. The Amended Complaint clearly sets out the common law torts on which Plaintiffs' claims are based. FAC ¶¶95-168 (identifying in the counts each common law theory of liability against the United States, including intentional infliction of emotional distress ("IIED"), breach of fiduciary duty, negligence, abuse of process, and loss of consortium). And critically, the government does not argue in its motion that Plaintiffs have failed to state a claim as to any of those claims. Indeed, the government fails to mention, let alone address, these expressly identified common law theories of liability on which Plaintiffs' FTCA claims are based.

Instead, the government points to references in the Amended Complaint to certain constitutional obligations on government officials. Dkt. 41 at 8-9. But those allegations do not "constitutionalize" Plaintiffs' case, and they are not the basis of Plaintiffs' claims. They are relevant to whether DHS agents had the discretion to act as they did, and thus whether the discretionary function exception should apply here. *See infra* at II.A. Their presence in the Amended Complaint does not wipe from existence the common law torts on which Plaintiff's FTCA claim expressly rests. The government's argument should be rejected. See *C.M. v. United States*, CV-19-05217-PHX-SRB, 2020 WL 1698191, at *4 (D. Ariz. Mar. 30, 2020) (in nearly identical circumstances, permitting FTCA case to go forward on similar state common law theories of liability for DHS agents' conduct); *A.P.F. v. United States*, CV-20-00065-PHX-SRB, Dkt. 36 (D. Ariz. July 27, 2020) (attached here as Exhibit A) (same).

II. The Discretionary Function Exception Is Inapplicable Here

The federal immigration agents that acted to separate D.A. and A.A. from their mother Lucinda are not protected by the discretionary function exception ("DFE"). The DFE bars claims based on governmental actions that (1) involve an element of judgment or choice, and (2) involve

public policy considerations. *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991). The DFE is an affirmative defense to liability under the FTCA that the government bears the burden to plead and prove. *Keller v. United States*, 771 F.3d 1021, 1023 (7th Cir. 2014); *Bunch v. United States*, 880 F.3d 938, 942 (7th Cir. 2018). At the motion to dismiss stage, the government's burden is especially onerous: the Court can dismiss the complaint "only if under no set of facts consistent with that complaint could [the plaintiff] circumvent the discretionary function exemption." *Palay v. United States*, 349 F.3d 418, 432 (7th Cir. 2003). The government has not met that burden here because its actions fail to satisfy either prong of the DFE.

A. The Challenged Actions Are Not Susceptible to Policy Analysis

The DFE was "designed to shield . . . legislative and administrative decisions grounded in social, economic, and political policy." *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). But the government's assertion that action falls within the DFE does not make it so; the government must instead establish that the conduct act issue "amounted to a permissible exercise of policy judgment." *Mayorov v. United States*, 84 F. Supp. 3d 678, 693 (N.D. Ill. 2015). The government action at issue here cannot be characterized as such a policy judgement, and the DFE accordingly does not apply.

Given the government's attempts to rewrite the complaint, Dkt. 41 at 10-20, it is important to make clear what this case is not about: this is not a case about "the crisis at the Southern border"; federal immigration policy; the authority of federal prosecutors to criminally charge asylum seekers crossing the border; or which facility of many to place Plaintiff children into. The parties do not dispute that the Government has the power and authority to set policy in these areas.

Rather, as the Amended Complaint alleges, this is a case about the actions of individual DHS agents who deliberately subjected a mother and her children to torturous treatment: detaining

them in freezing cold and other harsh conditions; separating the children from their mother without warning or explanation; cutting off all communication between them for weeks; subjecting them to threats, insults and abuse; denying the mother access to needed medical care, including for injuries DHS agents themselves caused; and placing the children thousands of miles away in a shelter instead of with their father, who was anxious to take custody of them.

These are not decisions susceptible to policy analysis. They are not policy decisions at all. Even if the high-level decision to implement a "zero-tolerance" policy to detain individuals like Plaintiffs and subject parents to criminal prosecution may have been "grounded in policy considerations," the decision of individual DHS agents to deliberately subject Plaintiffs to cruel treatment was not. *See Marlys Bear Med. v. United States ex rel. Sec'y of Dep't of Interior*, 241 F.3d 1208, 1215 (9th Cir. 2001) ("The *decision* to adopt safety precautions may be based in policy considerations, but the *implementation* of those precautions is not." (emphasis added)); *Keller*, 771 F.3d at 1025 (refusing to apply DFE where record permitted inference that government actions were based on laziness or inattentiveness rather than "grounded in public policy considerations"); *Mayorov*, 84 F. Supp. 3d at 693 (rejecting DFE where ICE agent "was not tasked with incorporating policy-related judgments into his detainer decisions").

Ruiz v. United States is particularly instructive. *See* 2014 WL 4662241, at *5 (E.D.N.Y. Sept. 18, 2014). There, a father who brought IIED and negligence claims under the FTCA arising from CBP's detention of his four-year-old daughter, a U.S. citizen. The court rejected the government's DFE defense, reasoning that CBP officers' "treatment of" the child during her detention "cannot be said to be susceptible to policy analysis." *Id.* at *8. The court could not "discern how deciding to wait fourteen hours before contacting [the child's] parents and to only provide the child with a cookie and a soda over twenty hours could constitute a considered

judgment grounded in social, economic, or political policies." *Id.*; *see also Gaubert*, 499 U.S. at 324-25 n.7 (remarking that while a government agent may exercise "discretion" in driving a car, any decisions made to drive the car are not grounded in public policy, rendering DFE inapplicable); *Marlys Bear Med*, 241 F.3d at 1215 ("[O]nce the Government has undertaken responsibility for the safety of a project, the execution of that responsibility is not subject to the [DFE]."). Here too, the DHS agents' mistreatment of Plaintiffs was not a policy judgment.

Notably, the government makes almost no mention of the harsh treatment to which Plaintiffs were subjected and the manner in which they were separated. Nor does it contain any argument that *those particular actions* were policy determinations. For good reason: as set forth below, DHS agents lacked discretion to act as they did. The government has failed in its burden to establish that the actions actually at issue in the Amended Complaint are susceptible to policy analysis, and on that basis alone, this Court should find the DFE inapplicable.

B. The Challenged Actions Do Not Involve any Element of Judgment or Choice

The government also fails the first prong of the DFE because the challenged actions do not involve any element of judgment or choice. The government may have discretion in choosing how strictly to enforce immigration laws, and whether to criminally prosecute people who cross the border. Federal immigration agents do not, however, have discretion to engage in the numerous torturous actions alleged in the Amended Complaint and outlined above.

All of these actions were proscribed by the government's obligations under the *Flores* agreement, by directives issued by DHS and its agencies, and by the Constitution of the United States. Plaintiffs' Amended Complaint details how these authorities deprived the federal agents in this case of discretion to act as they did. FAC ¶¶66-84. The government's response never addresses any of these authorities directly. It instead merely recites general principles of executive authority and discretion in the areas of immigration and criminal prosecution that are undisputed and

irrelevant. Indeed, even where the government cites to executive orders and Department of Justice guidance specific to the so-called "zero tolerance policy," conspicuously absent from those citations is any statement whatsoever granting discretion to separate parents from minor children, to do so in torturous fashion, or to deviate from the strictures of *Flores*, agency rules, or the Constitution.

1. Numerous Government Directives Deprived DHS Agents of Discretion to Treat Plaintiffs in the Cruel Manner That They Did

The DHS agents here violated multiple, non-discretionary duties intended to protect immigrant detainees, and in particular children like D.A. and A.A. The violation of these duties precludes application of the DFE. *Berkovitz*, 486 U.S. at 544 ("When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply."); *Palay*, 349 F.3d at 431 (discretionary function exception would not apply to conduct in contravention of agency directives); *Faber v. United States*, 56 F.3d 1122, 1125-26 (9th Cir. 1995) (same); *Chess v. United States*, 836 F. Supp. 2d 742, 750 (N.D. Ill. 2011) (same).

Here, federal regulations required DHS agents to prioritize release to family members, and CBP rules required agents to maintain family unity "absent a legal requirement or an articulable safety concern that requires separation." FAC ¶¶75-77 (citing 8 C.F.R. § 1236.3, CBP's TED Standards). Likewise, various CBP rules prohibited the freezing temperatures, insulting and demeaning treatment, and other harsh conditions Plaintiffs faced. FAC ¶¶79-87. Moreover, federal regulations and CBP directives prohibited DHS agents from using harsh treatment and threats to pressure Lucinda into giving up her immigration claims. FAC ¶¶93-94. And finally, the DHS agents violated agency rules when they transported Lucinda in dangerous fashion in a vehicle without a seat belt, recklessly caused an accident, and then denied her the medical care she needed for the injuries she sustained. FAC ¶¶84-85.

Courts have recognized that the DFE does not apply to government conduct that violates these kinds of non-discretionary regulations. *See, e.g.*, *Chess*, 836 F.Supp.2d at 750. The government offers no cases to the contrary and raises no argument that the regulations and directives discussed in Plaintiffs' Amended Complaint do not apply. Their invocation of the DFE should accordingly be rejected.

2. The *Flores* Consent Decree Deprived DHS Agents of Discretion to Act as They Did in Separating A.A. and D.A. from their Mother

DHS agents also have a well-established legal obligation to preserve family unity whenever possible, and to ensure the prompt release of minors held in immigration custody. *See Flores v. Reno*, CV 85-cv-4544, Dkt. No. 177 (C.D. Cal. July 24, 2015); 8 C.F.R. § 1236.3. The *Flores* class action litigation, brought on behalf of minor children held in immigration detention, resulted in a 1997 consent decree that remains binding on the United States. The decree, under which the government assumed responsibility to ensure that children placed in ORR custody are in "facilities that are safe" and acknowledged "the particular vulnerability of minors," also significantly limits the circumstances, duration, and manner of immigration detention of minor children such as Plaintiffs D.A. and A.A. FAC ¶¶67-73.

Plaintiffs have plausibly alleged that federal agents violated the requirements of *Flores* in their treatment of D.A. and A.A. Among other things, DHS agents separated Plaintiffs in cruel fashion as punishment to Lucinda and not based on any reason to believe that she was an unfit parent; they placed the children in a shelter rather than with their father whose desperation to take custody of his children was known to DHS agents within hours of Plaintiffs' detention;[1] they

[1] The Government argues that the reason for the five-week delay in releasing the children to their father was "occasioned by discretionary decisions regarding the protection of the health and safety of children in the government's custody and care." Dkt. 41 at 14. This claim directly contradicts the allegations in the Amended Complaint that there was no uncertainty about the parentage or fitness of either of A.A. and D.A.'s parents. FAC ¶¶30, 77. The government simply rejects these allegations, and instead offers

subjected the children to freezing cold and other harsh conditions over multiple days; and they denied the children the ability to call their mother and severely limited their communication with their father. FAC ¶¶67-73. All of these actions violated *Flores*.

In fact, under *Flores* the DHS agents did not have discretion to separate the children from their mother and transfer them to ORR custody, rather than releasing them to the care of their father, without Lucinda's consent. As the judge overseeing the *Flores* consent decree explained, the *Flores* agreement created a right to have children placed into ORR custody and out of family detention. But a parent could always waive that option. In other words, *a detained parent* could choose whether to maintain family unity in detention, have the children released to a shelter overseen by ORR, or have the children released to the care of a relative; "[government agents] may not make this choice for them." *Flores v. Sessions,* 2018 WL 4945000, at *4 (C.D. Cal. July 9, 2018).[2]

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unsubstantiated and disputed justifications for the failure to place the children with their father. Its argument must be rejected. Its purported justifications are to be tested in discovery, not accepted as true on a motion to dismiss.

[2] The Government justifies its action by labeling Plaintiffs A.A. and D.A. as "Unaccompanied Alien Children" ("UACs"). But that is not the case. To be a UAC, the child must be one for whom "there is no parent or legal guardian in the United States or no parent or legal guardian in the United States is available to provide care and physical custody." Dkt. 41 at 3; *see also* 8 U.S.C. § 1232(g) (TVPA uses the same definition). Plaintiffs were accompanied by their mother, and their father was available to provide care. Contrary to the Government's claim, neither *Flores* nor the Trafficking Victims Protection Reauthorization Act required treating Plaintiffs A.A. and D.A. as UACs or separating them. *See Flores*, 2018 WL 4945000 at *4 (rejecting government's argument that *Flores* agreement required them to separate detained parents and children); *Bunikyte ex rel. Bunikiene v. Chertoff*, 2007 WL 1074070, at *2 (W.D. Tex. Apr. 9, 2007) ("[C]hildren who are apprehended by DHS while in the company of their parents are not in fact 'unaccompanied' and if their welfare is not at issue, they should not be placed in ORR custody.").

That Lucinda was charged with a criminal misdemeanor does not change the analysis. *See Jacinto-Castanon de Nolasco v. U.S. Immigration & Customs Enf't*, 319 F. Supp. 3d 491, 495 n.2 (D.D.C. 2018) (holding that even though the plaintiff mother was prosecuted, her children were "not true unaccompanied minors"). Even if this Court were to disagree and conclude that DHS agents had discretion to separate A.A. and D.A. from their mother (and place them in a shelter rather than with their father) while Lucinda was in BOP custody, there was still no excuse not to reunite Plaintiffs when Lucinda's criminal case ended and she was returned to immigration detention. Whatever discretion may have existed to separate them

Through *Flores* and the agency rules discussed above, the Government took responsibility for the care of vulnerable minors and immigrant detainees coming across the American border. And in doing so, it placed restrictions on DHS agents and deprived them of discretion to take certain actions. Because DHS agents did not have the discretion to take the actions challenged here, the DFE is inapplicable.

3. The Constitution Deprived DHS Agents of Discretion to Act as They Did

The DFE is also inapplicable here because DHS agents violated Plaintiffs' constitutional rights and government officials do not have the "discretion" to violate the Constitution. *See Anderson v. Cornejo*, 284 F. Supp. 2d 1008, 1037 (N.D. Ill. 2003) ("As the United States concedes, this [DFE] does not apply to any conduct that violates the Constitution."); *see also Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1065 (9th Cir. 2020) ("[T]he Constitution can limit the discretion of federal officials such that the FTCA's [DFE] will not apply.")); *Martinez v. United States*, 822 F. App'x 671, 676 (10th Cir. 2020) ("Most circuits also have held conduct is not discretionary when it 'exceeds constitutional bounds.'"); *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001); *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987); *Myers & Myers Inc. v. USPS*, 527 F.2d 1252, 1261 (2d Cir. 1975); *see also C.M.,* 2020 WL 1698191, at *4 (on nearly identical facts, finding Constitution limited discretion of DHS agents and refusing to apply DFE); *A.P.F,* Dkt. 36 (same).[3]

previously was gone at that time, and they should have been immediately reunited with their mother, which they were not.

[3] The Seventh Circuit has not addressed the question of whether discretion can be limited by the Constitution for purposes of assessing the applicability of the DFE. The government claims that the DFE applies "even where the government acted unconstitutionally," citing to *Linder v. United States*, 937 F.3d

Plaintiffs have plausibly pled that the government's separation of families was unconstitutional because it violated the Plaintiffs' Fifth Amendment rights to family integrity. FAC ¶¶ 255-58, 296. The Supreme Court has long recognized family integrity to be a core interest protected by the Constitution. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality op.) ("[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court." (collecting cases)); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (there is "a fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)).

Recently, three courts have affirmed the application of this fundamental right to the separation of immigrant children and parents, granting inunctions ordering their reunification. *See Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133, 1142–44 (S.D. Cal. 2018); *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1126 (N.D. Ill. 2018); *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 499. In *Ms. L.*, the court found that the government's "practice of separating

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1087 (7th Cir. 2019) and *Kiiskila v. United States*, 466 F.2d 626, 627 (7th Cir. 1972), Dkt. 41 at 18-19, but those cases do not contradict the consensus across circuits that federal agents do not have discretion to violate the Constitution. Instead, these cases merely held that where a statute or regulation expressly grants discretion, the DFE will apply to government officials exercising that discretion, even where such exercise ultimately violated the Constitution, or the regulation or directive was itself invalid.

Kiiskila, for example, concerned a military colonel's exclusion of a civilian possessing anti-war pamphlets from a military post, *where military regulations expressly granted discretion to prohibit protests and political speech*. 466 F.2d at 628, n.2. *Linder* concerned a case in which the United States Marshal instructed those under his command not to communicate with a fellow officer facing indictment. The court found that agency regulations expressly granted discretion to the Marshal, and the court was persuaded by the Marshal's faithful attempt to follow them. 937 F.3d at 1090. Stating it plainly, the court said: "The upshot of [the DFE] is that, *when some legal doctrine creates discretion*, the fact that the discretion was misused and a tort ensued does not lead to liability for the Treasury." *Id.* at 1091 (emphasis added). Here, no statute, regulation or other directive created discretion for the DHS agents to separate Plaintiffs and act in the matter they did. *Kiiskila* and *Linder* are therefore inapposite.

class members from their minor children, and failing to reunify class members with those children, without any showing the parent is unfit or presents a danger to the child is sufficient to find Plaintiffs have a likelihood of success on their [substantive] due process claim." 310 F. Supp. 3d at 1145; *see also Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1167 (S.D. Cal. 2018). In *W.S.R.*, a case from this District, Judge Chang held that "the government's insistence on keeping these boys from their fathers can only be deemed arbitrary and conscience shocking," and therefore the plaintiffs were likely to succeed on the merits of their Fifth Amendment substantive due process claims. 318 F. Supp. 3d at 1126. And in, *Jacinto-Castanon*, the court "easily conclude[d] that Ms. Jacinto-Castanon and her sons are likely to succeed on at least one of their claims – namely their substantive due process claim that their continued separation . . . violates their right to family integrity under the Fifth Amendment." 319 F. Supp. 3d at 499.

Plaintiffs have also plausibly pled that the federal immigration agents' actions violated their constitutional right to equal protection under the law. FAC ¶¶90-93. As with the fundamental right to family integrity, the constitutional right to equal protection under the law has long been recognized as "extend[ing] to anyone, citizen or stranger, who is subject to the laws of a State," even those not lawfully present. *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

As alleged in the Amended Complaint, the federal agents' actions here were motivated by discriminatory animus towards Latino immigrants of Central American origin as a means to deter them from pursuing legitimate immigration claims and deter Central American families from seeking asylum in the United States. Indeed, more than 95 percent of individuals subjected to the same harsh treatment and separation as Plaintiffs were from Central American countries. *Id.* ¶¶90-91. Taking these allegations as true, as required at this stage, the federal agents' actions constitute

a clear equal protection violation. *Brown v. Budz*, 398 F.3d 904, 916 (7th Cir. 2005); *cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

Finally, Plaintiffs have plausibly pled that DHS agents violated their procedural due process rights by using family separation, threats and other harsh treatment to pressure and coerce Lucinda into abandoning her immigration claims. FAC ¶¶93-94. Such actions are straightforward violations of procedural due process. *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1020 (7th Cir. 2000); *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 485 (7th Cir. 2011).

Because the Constitution deprived DHS agents of the discretion to pursue the course of action they did against Plaintiffs, their conduct cannot be deemed to have involved "an element of judgment or choice," and the DFE cannot apply.

Finally, the government cherry-picks specific allegations in the Amended Complaint in an attempt to reframe Plaintiffs' case as one about conditions of confinement or choice of facilities. Dkt. 41 at 12, 15, n.8. That is wrong. Plaintiffs' allegations must be taken together with all others in the Amended Complaint. Together, they give rise to Plaintiff's underlying state tort claims, including IIED, breach of fiduciary duty, negligence, and assault and battery. FAC ¶¶96-168. The court in *C.M.* rejected a nearly identical challenge by the government. *See C.M.*, 2020 WL 1698191, at *4, n.5. The Court declined to "parse the Complaint to assess whether claims with respect to individual factual allegations are barred," noting that the complaint incorporated all facts into each count, and that evaluation of which facts could or could not prove a claim would be premature. *Id.* at *4. The same conclusion applies here. FAC. ¶¶95-168.[4]

[4] Likewise, the government singles out allegations about the DHS agents' deliberate cruelty and argue that such cruelty does not defeat application of the DFE. Maybe so, but they do not support it either. The allegations are relevant to establishing the elements of the underlying torts like IIED, for example—it requires intentional and outrageous conduct—and to the applicability of the DCE, *infra*. And in fact, they *are* relevant to demonstrating that the DHS agents here were not engaged in policy decisions related to the zero tolerance policy, which the government to its credit has not argued granted discretion to treat

III. The Due Care Exception Has No Application to the Facts Here

The due care exception to the FTCA ("DCE") bars claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a *statute or regulation*, whether or not such *statute or regulation* be valid." 28 U.S.C. § 2680(a) (emphases added). The government bears the burden to prove this exception applies. *See Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992).

The Seventh Circuit has not set forth a test for the DCE, but the prevailing test used in other circuits is set forth in *Welch v. United States*, 409 F.3d 646, 652 (4th Cir. 2005). *See, e.g.*, *C.M.*, 2020 WL 1698191 at *3; *Ferguson v. United States*, 2016 WL 4793180, at *7 (S.D. Cal. Sept. 14, 2016); *Kwai Fun Wong v. Beebe*, 2006 WL 977746, at *7-8 (D. Or. Apr. 10, 2006); *Moher v. United States*, 875 F. Supp. 2d 739, 764 (W.D. Mich. 2012). Applying *Welch*, first the government must show that the "*statute or regulation* in question *specifically pr[e]scribes* a course of action for an officer to follow." *Welch*, 409 F.3d at 652 (emphasis added) In other words, the exception applies only when the official was "executing the *mandates* of" a statute or regulation. *Id.* at 651-52 (emphasis added); *accord Buchanan v. United States*, 915 F.2d 969, 970-71 (5th Cir. 1990); *Gonzalez v. United States*, 2013 WL 942363, at *3-4 (C.D. Cal. Mar. 11, 2013). Second, the government must show that the official "exercised due care in following the dictates of that statute or regulation." *Welch*, 409 F.3d at 653; *see also Buchanan*, 915 F.2d at 970-71.[5] Here, the government cannot satisfy its burden to establish either prong of the due care exception.

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immigrant detainees cruelly or inhumanely; but instead, in executing that policy, they acted inappropriately and outside the scope of any discretion they had.

[5] The government does not mention the prevailing test set forth in *Welch*. Instead, it cites instead to a 1950s case from the Third Circuit, *Dupree v. United States*, 247 F.2d 819, 824 (3d Cir. 1957). Dkt. 41 at 20. Plaintiffs respectfully submit that this Court should look to the modern test set forth in *Welch* and applied by the majority of federal courts. In any event, *Dupree* is not inconsistent with *Welch's* requirement that a government employee must act pursuant to a statutory or regulatory mandate for the DCE to apply.

A. No Statute or Regulation Mandated the DHS Agents' Cruel Treatment and Separation of Plaintiffs

The government fails to satisfy the first prong of the DCE in two ways: it cannot (a) identify any *statute or regulation* that (b) *mandated* the cruel treatment and separation of Plaintiffs upon their entry into the United States.

By the government's own admission, it did not separate Plaintiffs based on a statute or regulation; its argument is that it did so pursuant to its *policy* of zero tolerance. Dkt. 41 at 13-14. But the DCE does not apply where an executive order setting forth a policy, rather than a statute or regulation, directed the conduct at issue. *See Garcia-Feliciano v. United States*, 2014 WL 1653143, at *4 n.8 (D.P.R. Apr. 23, 2014) (DCE "would not apply here . . . because a policy—not a statute or regulation—pr[e]scribed the deputy's conduct" (citing *Welch*, 409 F.3d at 652)); *Gonzalez*, 2013 WL 942363, at *3-4 (DCE inapplicable "[b]ecause Plaintiff's detention was not the result of a statutorily prescribed course of action"). The government cites no authority to justify ignoring the plain language of the DCE and expanding it beyond statutes and regulations.

The government's brief makes passing reference to several statutes in its DCE argument, but those provisions only lay out general areas of authority in the immigration realm. None of them come close to mandating the separation of Plaintiffs or the treatment to which the DHS agents subjected them. Indeed, the government cites 8 U.S.C. § 1225, a broad provision about the procedures for screening, inspecting and processing arriving aliens and considering eligibility for asylum; §1226(a), a provision about the mandatory detention of suspected terrorists and habeas corpus; and §1231(g)(1), a provision that requires the Attorney General to provide appropriate places for detaining aliens and authorizes expenditures to do so. Those statutes are plainly

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The *Dupree* court held that the DCE applies where the government employees "act *pursuant to and in further of* regulations." *Id.* at 824 (emphasis added).

irrelevant to the analysis. The only other statutes the government cites are 8 U.S.C. §§1232(b)(3), 1232(c)(2)(A), and 8 U.S.C. §279(g), all of which concern the safe and secure placement of unaccompanied alien children. But as set forth above, *supra* at 9, Plaintiffs A.A. and D.A. were not UACs.

It is indisputable that none of the statutory provisions the government cites makes any reference to separating families, or subjecting them to cruel, harsh and threatening treatment, let alone that they *mandate* such conduct. *See C.M.*, 2020 WL 1698191, at *3 ("The United States cites no statute or regulation mandating the separation"); *Watson v. United States*, 179 F. Supp. 3d 251, 270-71 (E.D.N.Y. 2016). In fact, neither the general statutes the government cites nor any others could mandate family separations because if they did, then the government presently would be violating the law it claims it must follow: Although the government cites no relevant change in statute or regulation, DHS claims that family separations are no longer occurring except where the agency determines that there is an issue of parentage or danger to the child.[6]

Lastly, the government erroneously contends that the DCE applies where "a government employee's actions are authorized by statute or regulation." Dkt. 41 at 20. No court has ever interpreted the DCE to bar FTCA claims whenever officials' conduct was merely "authorized" by stature or regulation, and the government cites none.[7] To the contrary, under *Welch*, courts of

[6] Any notion that separation was mandated by statute or regulation is also inconsistent with DHS's authority to release on parole an individual subject to expedited removal. *See* 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. §§ 235.3(b)(2)(iii), (b)(4)(ii).

[7] The government cites *Sickman v. United States*, 184 F.2d 616, 619 (7th Cir. 1950), in support of its proposed expansion of the DCE, but that case lends no support. *Sickman*, a case from 1950, involved an FTCA claim brought by landowners for the loss of crops destroyed by migrating Canada geese. *Sickman* contains no discussion of whether actions merely authorized by statute are covered by the DCE. In its limited analysis of the DCE, the court simply concluded that "plaintiffs are in reality charging negligence of the United States acting through Congress, rather than any lack of due care by an employee of the United States." *Id.* at 619. *Sickman* is accordingly not relevant to this Court's analysis.

appeals and district courts have consistently held that the DCE applies only where a statute or regulation "mandated"—*i.e.*, "specifically prescribed"—the conduct at issue. *See Welch*, 409 F.3d at 652; *Buchanan*, 915 F.2d at 970-71; *Gonzalez*, 2013 WL 942363, at *3-4. In any event, no statute or regulation even so much as authorized DHS agents to separate Plaintiffs and subject them to harsh treatment without any articulable concerns about parental fitness or safety; rather, *Flores*, agency directives and the Constitution all prohibited such actions. *See supra* at II.B.

B. The Government Fails to Establish that DHS Agents Exercised "Due Care"

Even if a statute or regulation mandated the separations (and none did), the DCE would not bar Plaintiffs' claims because the government failed to exercise "due care" in "following the dictates of" such mandate. *Welch*, 409 F.3d at 652. In considering whether federal officers acted with due care, "[t]he relevant question is one of reasonableness." *Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1161 (1st Cir. 1987); *see also Hatahley v. United States,* 351 U.S. 173, 181 (1956) ("'Due care' implies at least some minimal concern for the rights of others."). Despite having the burden of proving the DCE applies, the government does not even address whether the DHS agents here exercised due care. The argument is forfeited, and on that basis alone the Court should reject the government's reliance on the DCE.

Moreover, accepting Plaintiffs' well-pleaded allegations, the government could not meet its burden: the actions of DHS agents in separating Plaintiffs reflects an inherent lack of due care. Plaintiffs allege that the DHS agents here deliberately traumatized them, insulted them, denied them access to food and water, kept them in torturous conditions, separated them without warning or explanation, denied them access to information or communication, threatened Lucinda to get her to give up her family's asylum claims, placed her in danger while transporting her, denied her access to medical care for injuries suffered because of their misconduct, and deliberately delayed releasing the children to their anxiously awaiting father. FAC ¶¶19-30, 47-60,71-72, 80-85, 94.

These are not things a "reasonable law enforcement agency [would] have done under [any] circumstances[.]" *Hydrogen Tech. Corp.*, 831 F.2d at 1161.

Accepting Plaintiffs' allegations and all reasonable inferences, the DHS agents did not act reasonably or show a minimal degree of concern for Plaintiffs. Any disputes about these allegations are for discovery. At the motion to dismiss stage, the government has failed to prove the DCE should apply. *See, e.g., C.M.*, 2020 WL 1698191, at *4 (rejecting DCE, stating that "discussion of the extent to which certain facts could or could not prove a claim . . . would be premature"); *Moher*, 875 F. Supp. 2d at 764.

IV. Plaintiffs' Claims Satisfy the Private Analog Inquiry

The government next contends that Plaintiffs' claims should be dismissed because there is no private person analog, and their claims are thus not authorized by the FTCA. Dkt. 41 at 22 (citing 28 U.S.C. § 2674). Notably, the government does not directly address *any* of the common law torts Plaintiffs allege. Instead, it again broadly characterizes all of Plaintiffs' claims as relating to "the authority to enforce federal criminal and immigration laws and make determinations concerning detention[.]" Dkt. 41 at 31. The Court should reject this argument: it urges a result rejected by the Supreme Court and misconstrues Plaintiffs' Amended Complaint.

The Supreme Court has made clear that the private analog doctrine, which provides that the United States is liable "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, must be interpreted broadly. *See Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955). The FTCA's requirement that a claim address "*like* circumstances" does not mean "under the *same* circumstances," *id.* at 64 (emphasis added), and the private analogy "should be applied broadly so as to achieve the intended purpose of putting the federal government on equal footing with private entities." *Belluomini v. United States*, 64 F.3d 299, 303 (7th Cir. 1995); *see also United States v. Olson*, 546 U.S. 43, 46 (2005) (words "like

circumstances" in Section 2674 do "not restrict the court's inquiry to the *same circumstances*, but require it to look further afield."); *Mayorov*, 84 F. Supp. 3d at 698.

The government argues that there is no private analog because it exclusively has the ability to perform the actions at issue, but the Supreme Court has repeatedly held that the United States can be liable for activities over which the federal government has exclusive authority. *Olson*, 546 U.S. at 47 (claims against federal mine inspectors likely have private analog despite fact that United States exclusively performs inspections of state mining sites); *United States v. Muniz*, 374 U.S. 150, 159-62, 165-66 (1963) (FTCA claim available for negligence by federal prison officials despite fact that imprisonment is an exclusive government function); *Tekle v. United States*, 511 F.3d 839, 852 (9th Cir. 2007) ("Even if the conduct entails uniquely governmental functions, the court is to examine the liability of private persons in analogous situations."). In *Indian Towing*, for example, the Supreme Court found a private analog in a claim against the U.S. Coast Guard, which was singularly responsible for operation of lighthouses in the coastal United States, for negligently checking the operations of various parts of a lighthouse and failing to give warning that the light was inoperable. 350 U.S. at 62. The Supreme Court held that this claim was "analogous to allegations of negligence by a private person 'who undertakes to warn the public of danger and thereby induces reliance.'" *Olson*, 546 U.S. at 47 (quoting *Indian Towing*, 350 U.S. at 64-65).

For these reasons, courts have allowed FTCA claims to proceed despite the uniquely governmental nature of immigration enforcement. In *Mayorov*, for example, a sister court in this District permitted FTCA claims based on negligence (also alleged here), to go forward against federal immigration agents for their improper issuance of an immigration detainer. 84 F. Supp. 3d 678; *see also Xue Lu v. Powell*, 621 F.3d 944, 947-50 (9th Cir. 2010) (rejecting the government's private analog defense and allowing the plaintiffs' IIED claim where an asylum officer conditioned

outcomes in the plaintiffs' immigration proceedings on satisfaction of demands for money and sexual favors); *Liranzo v. United States*, 690 F.3d 78, 80-81, 94-95 (2d Cir. 2012) (finding private analog in state tort law allowing claims against private individuals for detention without "legal privilege to do so" in immigration detention context); *C.M.*, 2020 WL 1698191, at *4 (permitting FTCA claims to go forward on nearly identical facts about DHS agents' actions in separating immigrant parents and children); *Avalos-Palma v. United States*, 2014 WL 3524758, at *12 (D.N.J. July 16, 2014) (private analog doctrine did not bar claims arising from wrongful deportation). The government cites no caselaw that reaches the holding it necessarily seeks: that immigration officers are inherently immune from suit under the FTCA.

In this case, Plaintiffs seek recovery for the physical, mental, and emotional damages they suffered as a result of DHS agents' deliberately malicious and cruel treatment, including subjecting them to insults, taunts and threats, removing D.A. and A.A. from their mother's care in Texas without explanation or warning, denying them any communication with one another, and denying Lucinda medical care for injuries DHS agents caused. Texas courts have held private persons liable in tort under analogous circumstances.[8]

In *Silcott v. Oglesby*, 721 S.W.2d 290, 292 (Tex. 1986), the Texas Supreme Court recognized that a parent has a cause of action in tort when "someone entices away or harbors his minor child." *See also id.* at 293 (formally adopting Restatement (Second) of Torts, § 700 (1977)); *Smith v. Smith*, 720 S.W.2d 586, 600 (Tex. Civ. App.—Houston 1986) (recognizing a Texas statute that permits suit against an individual who takes possession of a child or conceals the child's whereabouts, Tex. Fam. Code § 42.002, and finding that the statute does not displace or diminish

[8] "FTCA claims are governed by the substantive law of the state where the alleged tort occurred." *Kaniff v. United States*, 351 F.3d 780, 790 (7th Cir. 2003). In this case, Plaintiffs' claims arise out of misconduct that occurred in Texas and Illinois. *See generally* FAC.

other available common law causes of action); *Weirich v. Weirich*, 796 S.W.2d 513, 515 n.3 (Tex. Civ. App.—San Antonio 1990), *rev'd on other grounds* 833 S.W.2d 942 (Tex. 1992) (same).

Texas courts have also long recognized a cause of action for assault and battery against a private individual who engages in reckless behavior, like the reckless operation of the vehicle that caused Lucinda's injuries. *Brown v. State*, 91 S.W.3d 353, 357-58 (Tex. Civ. App.—Eastland 2002) (affirming defendant's conviction for assault based on his reckless operation of a utility truck that injured a third party);[9] *see also Carcamo-Lopez v. Does 1 Through 20*, 865 F. Supp. 2d 736, 761-62 (W.D. Tex. 2011) (recognizing the availability of an FTCA claim for assault and battery based on the reckless operation of a vehicle). Similarly, there can be no dispute about the availability of a cause of action for the failure by private individuals to provide access to medical care when they are in a position of control. *See, e.g.*, *Texas Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 34-36 (Tex. 2002) (private company that operated a home for intellectually disabled individuals had "right to control" its residents, giving rise to a duty to supervise them); *St. Paul Med. Ctr. v. Cecil*, 842 S.W.2d 808, 813 (Tex. Civ. App.—Dallas 1992) (hospital negligent for failing to provide patients access to staff who were qualified to perform required medical tasks).

Plaintiffs' claims for negligent supervision and breach of fiduciary duty are also analogous to claims recognized by courts in Texas and Illinois. *See, e.g., THI of Texas at Lubbock I, LLC v. Perea*, 329 S.W.3d 548, 573 (Tex. Civ. App.—Amarillo 2010) (negligent supervision tort imposes liability if employer had a duty to supervise competent employees, breached that duty, and thereby proximately caused the plaintiffs' injuries); *see also Holcombe v. United States*, 388 F. Supp., 3d 777, 807 (W.D. Tex. 2019) (recognizing the existence of a negligent supervision claim under the FTCA); *see also Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 581 (5th Cir. 2015) (to establish

[9] In Texas, "[t]he elements for a cause of action for assault and battery are the same in civil and criminal suits." *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 801 n.4 (Tex. 2010).

a breach of fiduciary duty under Texas law, the plaintiff must provide the existence of a fiduciary relationship that was breached and caused injury to the plaintiff) (citing *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. Civ. App.—Dallas 2010))); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002) (fiduciary duty "applies to any person who occupies a position of peculiar confidence towards another"); *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996) (recognizing fiduciary relationship between parent and minor); *Parks v. Kownacki*, 737 N.E.2d 287, 291 (Ill. 2000) (once individual "accepted the responsibility of plaintiff's care and education, he took on the role of guardian, even though he was not given that title by a court").

The government ignores the state law causes of action that subject private individuals to liability for the same misconduct alleged in Plaintiffs' Amended Complaint. Its argument is therefore forfeited. *Great Nn. Ins. Co. v. Amazon.com Inc.*, 2019 WL 3935038, at *3 (N.D. Ill. Aug. 20, 2019) (citing *Narducci v. Moore*, 572 F.3d 313, 324 (7th Cir. 2009)). The government instead repeats its refrain about its general authority to enforce the immigration laws, but that argument is inapplicable to the analysis that this Court is required to undertake in assessing whether there is a private analog under Texas or Illinois law to Plaintiffs' common law theories under the FTCA. *See Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1290 (7th Cir. 1984) (in undertaking private analog inquiry, courts should "focus on the behavior involved, not the legal labels applied, and then look for analogies to private conduct").[10]

The government's reliance on *Akutowicz v. United States*, 859 F.2d 1122, 1125-26 (2d Cir. 1988), is similarly inapposite. There, the Second Circuit held that a decision about whether or not

[10] Defendant cites *McGowan v. United States*, 825 F.3d 118, 126 (2d Cir. 2016), but in *McGowan*, the Second Circuit undertook the necessary inquiry into the causes of actions available under state law and found nothing analogous. *Id.* at 126 ("[Plaintiff] cites no authority for the proposition that private contractors can be held liable for wrongful confinement under New York law."). And that case concerned a claim for prisoners subjected to punitive segregation, irrelevant here. *Id.* at 126.

to afford an individual citizenship—necessarily discretionary and governmental in nature—was a "quasi-adjudicative action for which no private analog exists." 859 F.2d at 1125-26. In *Liranzo*, the Second Circuit made clear its decision in *Akutowicz* applied only to the determination *of citizenship*, "which only the federal government is capable of altering." 690 F.3d at 96. And *Liranzo* confirmed the critical point: that FTCA claims regarding misconduct by immigration officers may proceed even though immigration, and the actions of immigration officials, are uniquely governmental. *Liranzo*, 690 F.3d at 94-95; *see also supra* at 19.[11]

Because Texas and Illinois law satisfy the broad private analog inquiry required by the FTCA as interpreted by the Supreme Court and numerous other courts, the government's motion to dismiss on this basis should be denied.

V. Defendant Has Offered No Reasonable Basis Upon Which to Dismiss Plaintiffs' Amended Complaint Based on Vague Assertions of "Public Policy"

Finally, the government contends that Plaintiffs' FTCA claims should be dismissed because Lucinda pled guilty to a misdemeanor, and so Plaintiffs' injuries resulted not from the DHS agents' deliberately cruel treatment as alleged in the Amended Complaint, but instead "from [Ms. Padilla-Gonzales's] criminal conduct." Dkt. 41 at 32. This argument is as meritless as it is disturbing.

[11] Most of the cases the government cites are irrelevant because they also involve quasi-adjudicative actions, which—unlike the misconduct in this case—private persons cannot engage in. *See Bhuiyan v. United States*, 2017 WL 2837023, at *4 (N.M.I. June 30, 2017); *Elgamal v. United States*, 2015 WL 13648070, at *2 (D. Ariz. July 8, 2015); *Figueroa v. United States*, 739 F. Supp. 2d 138, 142 (E.D.N.Y. 2010); *Appleton v. United States*, 180 F. Supp. 2d 177, 185 (D.D.C. 2002). The court in *Mazur v. United States* declined to address the private analog argument because it found the plaintiff's action to be time-barred. 957 F. Supp. 1041, 1043 (N.D. Ill. 1997). And the remaining cases, Dkt. 41 at 31-32, merely stand for the uncontroversial proposition that the FTCA does not apply to action based solely on the government's violation of federal regulations. *See Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 537-38 (1st Cir. 1997) (conduct at issue "wholly concern[ed] the [FAA's] alleged failure to perform its regulatory functions" under federal statutes); *Chen v. United States*, 854 F.2d 622, 626-27 (2d Cir. 1988) (dismissing FTCA claim predicated on government's failure to abide by its own procurement regulations).

As an initial matter, the government cites no Texas caselaw to support its argument, despite the applicability of Texas law to Plaintiffs' claims. Moreover, the Seventh Circuit has never dismissed an FTCA case because the misconduct at issue followed the commission of a crime. To the contrary, the Seventh Circuit has repeatedly recognized the viability of FTCA claims brought by prisoners who alleged mistreatment while in federal custody, despite the fact that the misconduct by federal agents occurred only because the plaintiff was in federal custody as part of their arrest or conviction. *See, e.g., Keller*, 771 F.3d at 1022 (prisoners have ability under the FTCA "to recover damages . . . for personal injuries sustained during confinement in a federal prison, by reason of the negligence of a government employee"); *Palay*, 349 F.3d at 434 (reversing dismissal of negligence claims by prisoner at pretrial detention facility pending trial on federal charges). The government has not identified a single case in which a federal court dismissed FTCA claims on this basis, and Plaintiffs have identified none.[12]

To the extent "public policy" should be a consideration in this Court's analysis, it favors Plaintiffs. The government's arguments throughout its brief, taken to their logical conclusion, seek broad immunity from the FTCA for immigration agents. In nearly every section of its brief, the government relies on the general (and undisputed) authority of the United States to enforce immigration laws as the centerpiece of its argument, without ever engaging with Plaintiffs' actual

[12] The cases the government does cite have no bearing on the allegations at issue here. In *Cole v. Taylor*, 301 N.W.2d 766, 767 (Ia. 1981), the Iowa Supreme Court held that "social policy grounds" barred a claim by a woman against her psychiatrist for failing to prevent her from committing a murder. The Iowa Supreme Court dismissed the claim because it was the very criminal act—the murder for which she was lawfully convicted—that formed the basis of her claim to damages. *Id.* at 768. Understandably, the court found that was a bridge too far. *Id.* Similarly, the Indiana and Illinois appellate courts in *Rimert v. Mortell*, 680 N.E.2d 867, 876 (Ind. App. Ct. 1997), and *Boruschewitz v. Kirts*, 554 N.E.2d 1112, 1115 (Ill. App. Ct. 1990), found that mentally ill individuals found guilty of murder could not maintain negligence claims for damages against their prior mental health providers because the basis of damages was inherently the damage caused to the individuals by the murders themselves. And in *Farley v. Greyhound Canada Transp. Co.*, 2009 WL 1851037, at *3 (W.D.N.Y. June 26, 2009), the New York district court found that New York state law expressly precluded the award of damages "to a plaintiff who is injured *during the course* of knowingly and intentionally committing serious criminal acts."

claims about the treatment to which DHS agents actually subjected them. The natural consequence of the government's argument is that there is no limitation on the level of cruelty or harm that DHS agents could inflict on immigrant detainees, because they are acting within the realm of immigration. And so the discretionary function exception always applies, even without identifying any actual delegation of discretion and regardless of limitations placed by federal law. And so the due care exception applies, even without identifying any statute or regulation mandating their conduct and regardless of whether they acted recklessly instead of with due care. And so there is no private analog, even without addressing any of the state-law theories on which Plaintiffs' claims are based. The government's argument is repugnant. There is no carveout in the FTCA for immigration officers, or immigration in general; the government cites no legal authority creating or even implying such a carveout, and as set forth above numerous cases reject the government's untenable position.[13]

CONCLUSION

The government presents no legitimate basis to dismiss Plaintiffs' FTCA claims. Its motion to dismiss should be denied.

[13] The government does not challenge Lucinda's claims of assault and battery and medical negligence that stem from the traumatic brain injury DHS agents caused and their denial of medical care. Those claims must go forward. To the government's credit, it does not attempt to assert that its general authority in the areas of immigration and prosecution permit it to inflict harm and deny medical care. Indeed, the DHS agents' failure to transport Lucinda safely and with a seatbelt is classic negligence, and violated a clear directive rendering the DCE and DFE inapplicable. FAC ¶84. Likewise, denials of medical care in federal facilities are claims routinely permitted under the FTCA. *See Gipson v. United States*, 631 F.3d 448, 450-51 (7th Cir. 2011) (reversing summary judgment against federal prisoner who raised medical malpractice claim in FTCA suit); *Ford-Sholebo v. United States*, 980 F. Supp. 2d 917, 979-81 (N.D. Ill. 2013) (deciding FTCA claim for medical malpractice in plaintiff's favor following a bench trial).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anand Swaminathan, an attorney, hereby certify that I caused a copy of the foregoing Plaintiffs' Response in Opposition to the United States' Motion to Dismiss to be filed on November 13, 2020, electronically via CM/ECF, which effected service on all counsel of record.

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