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9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 OAKLAND DIVISION

13 J.R.G., et al.,)	CASE NO. 4:22-cv-05183-KAW
14 Plaintiffs,)	NOTICE OF MOTION AND MOTION TO TRANSFER; MOTION TO DISMISS PLAINTIFFS' COMPLAINT
15 v.)	
16 UNITED STATES OF AMERICA,)	
17 Defendant.)	Date: February 16, 2023
)	Time: 1:30 p.m.
)	Place: Remote via Zoom
18)	The Hon. Kandis A. Westmore

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1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that on February 16, 2023, at 1:30 p.m., or as soon thereafter as the
3 parties may be heard, in the above-entitled Court, before the Honorable Kandis A. Westmore, United
4 States Magistrate Judge, Defendant United States of America (“Defendant”) will and hereby does move
5 this Court for an order transferring this matter to the Western District of Texas pursuant to 28 U.S.C. §
6 1404(a), or, in the alternative, dismissing Plaintiffs’ Complaint. Defendant’s motion is based on this
7 Notice; the following Memorandum of Points and Authorities; the supporting Declaration of Kenneth
8 Brakebill submitted herewith; matters of which the Court takes judicial notice; and such oral argument
9 and additional evidence as the Court may permit.

10 **RELIEF REQUESTED**

11 Defendant seeks an order transferring this case to the Western District of Texas pursuant to 28
12 U.S.C. § 1404(a), or, in the alternative, dismissing the Complaint.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. INTRODUCTION**

15 This is an action under the Federal Tort Claims Act (“FTCA”) alleging injuries to a parent and
16 child caused by Defendant’s implementation of a policy to refer for prosecution all individuals suspected
17 of illegally entering the United States at the United States–Mexico border (referred to herein as the
18 “Zero-Tolerance Policy” or “ZTP Policy”) in May 2018. Plaintiffs assert three causes of action for
19 intentional infliction of emotional distress, abuse of process and wrongful child abduction arising out of
20 Plaintiffs’ separation after crossing into the United States. *See* ECF No. 1 (“Compl.”) ¶¶ 86-103.

21 The United States has denounced the prior practice of separating children from their families at
22 the United States–Mexico border and “condemn[ed] the human tragedy” that occurred because of the
23 ZTP Policy. Establishment of Interagency Task Force on the Reunification of Families, Exec. Order
24 14,011, § 1, 86 Fed. Reg. 8273 (Feb. 5, 2021). And this Administration has committed the federal
25 government to “protect family unity and ensure that children entering the United States are not separated
26 from their families, except in the most extreme circumstances where a separation is clearly necessary for
27 the safety and well-being of the child or is required by law.” *Id.* The Court should not, however, reach
28 the merits of Plaintiffs’ FTCA claims for two reasons.

1 First, the Western District of Texas is the most appropriate forum for this litigation, and the
 2 Court should transfer this action to that District pursuant to 28 U.S.C. § 1404(a). Plaintiffs crossed the
 3 United States–Mexico border into the state of Texas; the Plaintiff parent was separated from her child in
 4 Texas; the entirety of the Plaintiff parent’s detention occurred in Texas; and the Plaintiff child was
 5 placed in a shelter in Texas. All of the alleged tortious conduct occurred in the El Paso, Texas area.
 6 None of the actionable conduct challenged in Plaintiffs’ Complaint occurred in this District. The United
 7 States therefore respectfully requests that the Court transfer this action to the Western District of Texas
 8 for all further proceedings, for the convenience of the parties and witnesses, and in the interest of justice.

9 If the Court determines not to transfer this case, Defendant respectfully requests that the
 10 Complaint be dismissed for lack of subject-matter jurisdiction. Any injuries caused by the ZTP Policy
 11 and related initiatives are not compensable as torts under the FTCA because Congress has not waived
 12 the federal government’s sovereign immunity from claims for money damages in these circumstances.
 13 Although the United States recognizes that district courts adjudicating FTCA claims arising out of the
 14 ZTP Policy have to date reached differing conclusions on the threshold jurisdictional arguments
 15 presented in this motion to dismiss, the United States respectfully submits that on the better reading of
 16 the law, Congress has not waived sovereign immunity and Plaintiffs may not recover under the FTCA.

17 **II. FACTUAL AND LEGAL BACKGROUND**

18 **A. Statutory Framework for Noncitizens¹ Entering the Country.**

19 Under Section 1325 of Title 8 of the U.S. Code, when an individual enters the United States
 20 between official ports of entry, he or she may be subject to prosecution for criminal immigration
 21 violations, including entering the United States “at any time or place other than as designated by
 22 immigration officers” and eluding “examination or inspection by immigration officers.” 8 U.S.C.
 23 § 1325(a). A violation of § 1325(a) is a misdemeanor that is punishable by a fine and “imprison[ment]
 24 not more than 6 months” for a first infraction. *Id.*

25 All noncitizens who arrive in the United States, including those who arrive between ports of
 26 entry, are considered “applicant[s] for admission” and are “inspected by immigration officers” to

27
 28 ¹ This brief uses the term “noncitizen” as equivalent to the statutory term “alien.” *See Barton v. Barr*,
 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. § 1101(a)(3)).

1 determine their admissibility to the United States. *Id.* §§ 1225(a)(1), (a)(3), (b). Individuals arriving at
2 the border or found in the United States within 14 days and 100 miles of the border who, following
3 inspection, are deemed inadmissible also are subject to expedited removal from the United States and
4 detention pending such removal. *See id.* §§ 1225(b)(1)(A)(i), (b)(1)(B)(iii)(IV). In some cases, the
5 Department of Homeland Security (“DHS”) may exercise its discretion to release a noncitizen from
6 custody. *See, e.g.*, 8 C.F.R. § 235.3(b)(2)(iii).

7 **B. Statutory Framework for Immigration Custody For Unaccompanied Minors.**

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

17 Under the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), “[e]xcept in
18 the case of exceptional circumstances, any department or agency . . . shall transfer the custody of such
19 child to [ORR] not later than 72 hours after determining that such child is an unaccompanied alien
20 child.” 8 U.S.C. § 1232(b)(3). ORR seeks to place UACs “in the least restrictive setting that is in the
21 best interest of the child.” *Id.* § 1232(c)(2)(A). However, ORR “shall not release such children upon
22 their own recognizance.” 6 U.S.C. § 279(b)(2)(B). Rather, once in ORR custody, there are detailed
23 statutory and regulatory provisions that must be applied before the child is released to an approved
24 sponsor. *See* 8 U.S.C. § 1232(c)(3). Congress requires that “an unaccompanied alien child may not be
25 placed with a person . . . unless the Secretary of Health and Human Services makes a determination that
26 the proposed custodian is capable of providing for the child’s physical and mental well-being” and that
27 “[s]uch determination shall, at a minimum, include verification of the custodian’s identity and
28 relationship to the child, if any, as well as an independent finding that the individual has not engaged in

1 any activity that would indicate a potential risk to the child.” *Id.* § 1232(c)(3)(A). In some instances, a
2 home study is required. *Id.* § 1232(c)(3)(B).

3 **C. Flores Agreement Requirements.**

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

15 Notably, the Flores Agreement applies only to minors. *Flores II*, 828 F.3d at 901. It “does not
16 address . . . the housing of family units and the scope of parental rights for adults apprehended with their
17 children[.]” and it “does not contemplate releasing a child to a parent who remains in custody, because
18 that would not be a ‘release.’” *Id.* at 906; *see also United States v. Dominguez-Portillo*, No. 17-MJ-
19 4409, 2018 WL 315759, at *9 (W.D. Tex. Jan. 5, 2018) (“[Flores] does not provide that parents are
20 entitled to care for their children if they were simultaneously arrested by immigration authorities[.]”).
21 Nor does the Flores Agreement provide any rights to adult detainees, including any rights of release.
22 *Flores II*, 828 F.3d at 908; *see also Dominguez-Portillo*, 2018 WL 315759, at *14-15; *Bunikyte v.*
23 *Chertoff*, No. 07-164, 2007 WL 1074070, at *16 (W.D. Tex. Apr. 9, 2007). Although the Flores
24 Agreement gives preference to the release of minors to a parent, this preference “does not mean that the
25 government must also make a parent available; it simply means that, if available, a parent is the first
26 choice.” *Flores II*, 828 F.3d at 908.

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

28 During the time period relevant to this action, the Executive Branch issued several directives

1 regarding enforcement of federal immigration laws. First, Executive Order No. 13767 was issued in
2 January 2017 and stated that “[i]t is the policy of the executive branch to . . . detain individuals
3 apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending
4 further proceedings regarding those violations[.]” Executive Order 13767 § 2(b), 82 Fed. Reg. 8793
5 (Jan. 30, 2017) (“EO 13767”). That Executive Order directed DHS to “ensure the detention of aliens
6 apprehended for violations of immigration law pending the outcome of their removal proceedings or
7 their removal from the country to the extent permitted by law,” *id.* § 6, and to exercise its parole
8 authority “only on a case-by-case basis in accordance with the plain language of the statute . . . and in all
9 circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public
10 benefit derived from such parole,” *id.* § 11(d).

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

16 Third, on April 6, 2018, DOJ issued a “Memorandum for Federal Prosecutors along the
17 Southwest Border.” U.S. DOJ News Release: Attorney General Announces Zero-Tolerance Policy for
18 Criminal Illegal Entry (April 6, 2018), DOJ 18-417, 2018 WL 1666622 (the “Zero-Tolerance
19 Memorandum”). The memorandum directed federal prosecutors along the Southwest border “to the
20 extent practicable, and in consultation with DHS, to adopt immediately a zero-tolerance policy for all
21 offenses referred for prosecution under section 1325(a).” *Id.* In addition, on May 4, 2018, the DHS
22 Secretary directed officers and agents to ensure that all adults, including parents or legal guardians
23 traveling with minor children, deemed prosecutable for improper entry in violation of 8 U.S.C.
24 § 1325(a) be referred to the DOJ for criminal prosecution. Consistent with EO 13767 and the April 2018
25 Zero-Tolerance Memorandum, DHS began to refer for prosecution increased numbers of adults –
26 including those traveling with children – who unlawfully entered the United States on the Southwest
27 border in violation of Section 1325. *See generally* Executive Order 13767. Minor children of those
28 adults were designated as UACs and were transferred to ORR custody as required by the TVPRA. *See*

1 *generally* William Wilberforce Trafficking Victims Protection Reauthorization Act (2013).

2 **E. Detention, Separation and Reunification of Plaintiffs.**

3 According to the Complaint, Plaintiffs are a mother and daughter (using the pseudonyms J.R.G.
4 and M.A.R., respectively) who are citizens of El Salvador that fled “to seek refuge in the United States.”
5 Compl. ¶¶ 13-14. Plaintiffs entered the United States illegally on or about May 20, 2018 near El Paso
6 Texas. *Id.* ¶ 18. They were encountered and apprehended by Texas Border Patrol agents and then
7 transported to a nearby detention center. *Id.* Soon after J.R.G. and M.A.R. were taken into custody,
8 J.R.G. was transferred to the El Paso County Detention Facility pending her federal prosecution for
9 violation of 8 U.S.C. § 1325. *Id.* ¶¶ 25, 28. At the arraignment hearing, J.R.G. pled guilty and was
10 sentenced to one year of non-reporting and unsupervised probation. *Id.* ¶ 30. Following her federal
11 hearing and conviction, J.R.G. was transported to an immigration detention center in El Paso, Texas,
12 where she remained in DHS custody until her release in March 2019. *Id.* ¶¶ 34, 43, 47.

13 Upon J.R.G.’s transfer to federal criminal custody on or around May 21, 2018, the mother and
14 daughter were separated, and M.A.R. was designated an unaccompanied minor and taken to a shelter
15 operated by Upbring Transitional Foster Care in El Paso, Texas. Compl. ¶¶ 22, 65, 66. M.A.R. remained
16 in this El Paso program until she was released to her father on July 12, 2018 upon his submission of
17 proof of parentage. *Id.* ¶ 68-69. After her release, M.A.R. was able to speak to her mother during 10-
18 minute phone calls. *Id.* ¶ 57. M.A.R. was reunited with her mother on March 30, 2019 after a positive
19 credible-fear finding by DHS; prior to that time, there had been determinations in June 2018 by an
20 asylum officer and an immigration judge that J.R.G. did not meet the minimum legal threshold of
21 establishing a credible fear of returning to El Salvador. *Id.* ¶¶ 49, 73.

22 **F. Subsequent Policy Changes.**

23 After assuming office, President Biden took action to undo the policies that led to Plaintiffs’
24 separation and to reunify the families that were affected by those policies. On February 2, 2021, the
25 President issued an Executive Order that condemned the “human tragedy” of the prior Administration’s
26 ZTP Policy, and that committed the United States government to “protect family unity and ensure that
27 children entering the United States are not separated from their families, except in the most extreme
28 circumstances where a separation is clearly necessary for the safety and well-being of the child or is

1 required by law.” Family Reunification Task Force EO § 1. That Order created a Task Force to identify
2 and reunify families separated under the ZTP Policy, and to make recommendations for the potential
3 provision of immigration benefits and mental-health services to those separated families. *Id.* § 4. In
4 September 2022, the Task Force issued a report showing that 2,766 children had been reunified and that
5 191 additional children were in the process of being reunified by the Task Force. Interim Progress
6 Report, Interagency Task Force on the Reunification of Families 6 (Sep. 30, 2022).

7 **III. LEGAL STANDARDS**

8 **A. Transfer Under 28 U.S.C. § 1404(a).**

9 The FTCA provides an avenue for individuals to sue the federal government for conduct that
10 constitutes a tort under state law. The applicable substantive state law is “the law of the place where the
11 act or omission occurred.” 28 U.S.C. § 1346(b)(1). Venue for an FTCA claim is governed by Title 28,
12 Section 1402(b), which permits such a claim to be prosecuted “in the judicial district where the plaintiff
13 resides or wherein the act or omission complained of occurred.” 28 U.S.C. § 1402(b).

14 However, Section 1404(a) of Title 28 provides for transfer to another district court:

15 For the convenience of parties and witnesses, in the interest of justice, a district court
16 may transfer any civil action to any other district or division where it might have been
brought or to any district or division to which all parties have consented.

17 *See also Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western District of Texas*, 571 U.S. 49,
18 62-63 (2013). A district court’s analysis under Section 1404(a) considers “both private factors, which go
19 to the convenience of the parties and witnesses, and public factors which go to the interests of justice.”

20 *Smith v. Corizon Health, Inc.*, No. 16-cv-00517-WHA, 2016 WL 1275514, at *2 (N.D. Cal. Apr. 1,
21 2016). In undertaking this analysis, courts in the Ninth Circuit consider various case-specific factors:

22 (1) the location where the relevant agreements were negotiated and executed; (2) the state
23 that is most familiar with the governing law; (3) the plaintiff’s choice of forum; (4) the
24 respective parties’ contacts with the forum; (5) the contacts relating to the plaintiff’s
25 cause of action in the chosen forum; (6) the differences in the costs of litigation in the
two forums; (7) the availability of compulsory process to compel attendance of unwilling
non-party witnesses; and (8) the ease of access to sources of proof.

26 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). “No single factor is dispositive,
27 and a district court has broad discretion to adjudicate motions for transfer on a case-by-case basis.” *Ctr.*
28 *for Biological Diversity v. Kempthorne*, No. 08-cv-1339-CW, 2008 WL 4543043, at *2 (N.D. Cal. Oct.

1 10, 2008). The moving party bears the burden of establishing that the proposed transfer is appropriate.
2 *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979).

3 **B. Dismissal for Lack of Subject Matter Jurisdiction.**

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

10 A district court cannot hear a suit against the United States unless the government has waived
11 sovereign immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). “Sovereign immunity is jurisdictional
12 in nature,” *id.*, meaning that a party’s failure to establish a waiver of sovereign immunity is properly
13 resolved on a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), *see Sierra*
14 *Club v. Whitman*, 268 F.3d 898, 905-06 (9th Cir. 2001).

15 **IV. ARGUMENT**

16 **A. The Court Should Transfer This Action to the Western District of Texas.**

17 The United States moves to transfer this case to the Western District of Texas “[f]or the
18 convenience of parties and witnesses, [and] in the interest of justice.” 28 U.S.C. § 1404(a). Both steps of
19 the Section 1404(a) analysis are satisfied because (1) the Western District of Texas is the appropriate
20 forum for this dispute and (2) the balance of relevant factors favors litigating this action in that venue.

21 **1. Venue Is Proper in the Western District of Texas.**

22 Section 1404(a) permits transfer to any district where the case “might have been brought.” 28
23 U.S.C. § 1404(a). Pursuant to 28 U.S.C. § 1402(b), venue is proper in the Western District of Texas,
24 where all of the allegedly tortious acts or omissions occurred. *See, e.g., Barroca v. United States*, No.
25 19-cv-00699-MMC, 2019 WL 5722383, at *3 (N.D. Cal. Nov. 5, 2019) (granting motion to transfer
26 venue under § 1404(a) in FTCA case where majority of allegations in plaintiff’s complaint occurred in
27 the transferee state); *Koval v. United States*, No. 2:13-CV-1630-HRH, 2013 WL 6385595, at *4 (D.
28 Ariz. Dec. 6, 2013) (granting motion to transfer from District of Arizona to Eastern District of California

1 where “[t]he only connection that this case has to Arizona is that plaintiff happened to move there
2 sometime after the events upon which his claims are based occurred”); *see also* Part IV.A.2, *infra*.

3 **2. The Balance of Relevant Factors Strongly Favors Transfer.**

4 Section 1404(a) balances the convenience and interests of the parties and the judicial districts “in
5 addition to the convenience of the witnesses.” *See Barroca*, 2019 WL 5722383, at *2. Here, the
6 convenience of the parties and witnesses substantially favors transfer to Texas. Other than the two
7 Plaintiffs, who currently reside in this District, almost all of the anticipated witnesses are located outside
8 this District – indeed, many of them in the Western District of Texas. While the Complaint does not
9 name any individual agents or officers, it repeatedly alleges improper conduct by many different
10 government officials in connection with Plaintiffs’ arrests, separation, and detention, which all occurred
11 in Texas. It is indisputable that none of this conduct took place in this District.

12 **a. Almost All Operative Facts Alleged in Plaintiffs’ Complaint Occurred
13 in the Western District of Texas.**

14 Plaintiffs’ Complaint underscores that this is a case in which all of the allegedly tortious acts
15 occurred in the El Paso area of Texas, which is located in the Western District of Texas. First, Texas is
16 the state where the Plaintiffs illegally entered the United States. Compl. ¶ 18. Texas is also the state
17 where the Plaintiff parent and Plaintiff child were apprehended and detained and/or sheltered after
18 unlawful entry. *Id.* ¶¶ 4, 18-19, 47, 66, 68. Second, the alleged tortious act that is the centerpiece of
19 Plaintiffs’ Complaint—family separation—occurred in Texas. The Complaint highlights that Plaintiffs’
20 action is intended to address the alleged harms that flowed from the separation of the Plaintiff child from
21 the Plaintiff parent. *See, e.g., id.* ¶¶ 1, 5. And, as Plaintiffs acknowledge in their Complaint, Texas is the
22 state where they were separated. *Id.* ¶ 18-20.

23 Third, Texas is the state where all of the detentions for J.R.G. and M.A.R. occurred, including
24 where they were initially detained, where J.R.G. was held before and after her federal prosecution and
25 where M.A.R. was sheltered while in the custody and care of ORR. *See* Part II.E, *supra*. None of the
26 relevant complained-of acts occurred in this District. Simply put, the Complaint is devoid of any
27 allegation of contact between the Plaintiffs and this District, except for the singular allegation that after
28 J.R.G. was released in March 2019, she was reunited in Oakland with her daughter. Compl. ¶ 4.

1 presumed that employees of the government are available in any venue, this does not diminish the
2 burden to produce the numerous government witnesses for depositions and for trial in California.

3 Plaintiffs’ allegations that they experienced “lasting emotional distress and trauma,” suggesting
4 ongoing injuries in this District, *e.g., id.* ¶¶ 84, 102, do not alter the analysis. While these allegations
5 may be relevant to the issue of damages, that issue is less important than liability in a Section 1404(a)
6 transfer analysis in general tort cases. *See Morris v. Safeco Ins. Co.*, No. C 07-2890 PJH, 2008 WL
7 5273719, at *5 (N.D. Cal. Dec. 19, 2008) (noting greater importance of “material testimony tending to
8 establish a basis to impose civil liability” than testimony on “the severity of [plaintiff’s] emotional
9 distress (*i.e.*, plaintiff’s damages)” in Section 1404(a) transfer analysis); *Williams v. Bowman*, 157 F.
10 Supp. 2d 1103, 1108-09 (N.D. Cal. 2001) (damages witnesses in this district “not as important to the
11 litigation” as witnesses “relevant to the underlying question of liability” in the transferee district).

12 Factor six (“differences in cost of litigating in the two forums”) also favors transfer. It will cost
13 much more to litigate this case in the Northern District of California than it would in the Western
14 District of Texas. The United States anticipates that, if this case proceeds past the motion-to-dismiss
15 stage, a significant amount of discovery will concern initial detention or sheltering facilities located in
16 the El Paso, Texas area. Further, the United States may have to call a significant number of witnesses
17 relating to the detentions and separations that occurred at these facilities—including numerous CBP and
18 ICE officials, officers and agents as well as employees of the shelter where M.A.R. was housed—all of
19 which are in the Western District of Texas. Conducting site visits, meeting with witnesses, flying back
20 and forth from California to Texas while accommodating witness, site and attorney time will entail
21 substantial costs. *See, e.g., Nordquist v. Blackham*, No. C06-5433 FDB, 2006 WL 2597931, at *4 (W.D.
22 Wash. Sept. 11, 2006) (“Generally, litigation costs are reduced when venue is located near most of the
23 witnesses expected to testify or be deposed Here, all potential witnesses and parties, save one,
24 reside in northern Texas. Accordingly, this factor favors transfer.”); *see also Park v. Dole Fresh*
25 *Vegetables, Inc.*, 964 F. Supp. 2d 1088, 1095 (N.D. Cal. 2013) (similar analysis).

26 Factor seven (“the availability of compulsory process”) also favors transfer to the Western
27 District of Texas. As noted in the Complaint, the shelter run by Upbring Transitional Foster Care which
28 was utilized by ORR for the Plaintiff child was not a government facility, nor were the individuals

1 working there at the time government employees. Compl. ¶¶ 66-67. Accordingly, the government does
2 not control these non-party witnesses should they be unwilling to travel to California to testify;
3 compulsory process would not be available in the Northern District. *See* Fed. R. Civ. P. 45(c).

4 There is only one factor that possibly favors maintaining this action in this District: Plaintiffs’
5 choice of forum (factor three). However, deference to a plaintiff’s chosen venue is substantially reduced
6 where that locale lacks any real connection to the activities alleged in the complaint. “[W]here the
7 transactions giving rise to the action lack a significant connection to the plaintiff’s chosen forum, then the
8 plaintiff’s choice of forum is given considerably less weight, even if the plaintiff is a resident of the
9 forum.” *Joe Boxer Corp. v. R. Siskind & Co., Inc.*, No. C 98–4899 SI, 1999 WL 429549, at *9 (N.D. Cal.
10 June 8, 1999) (granting transfer); *see also Hansen v. Combined Transp., Inc.*, No. C13-1298RSL, 2013
11 WL 5969863 (W.D. Wash. Nov. 7, 2013); *Nordquist*, 2006 WL 2597931, at *4 (“A plaintiff’s choice of
12 forum is given much less weight when the forum lacks any significant contact with the activities alleged
13 in the complaint. As previously noted, the business is located in Texas, the Defendants reside in Texas,
14 and the Plaintiff resided in Texas while operating the business and during significant negotiations of the
15 sale. This factor weighs heavily in favor of transfer.”); *accord Sorensen v. Daimler Chrysler AG*, No. C
16 02-4752 MMC (EDL), 2003 WL 1888866, at *3 (N.D. Cal. Apr. 11, 2003). That is precisely the case
17 here. *See supra* at 6, 9 (noting lack of connection between the allegedly tortious conduct pled in
18 Plaintiffs’ Complaint and this District). Plaintiffs’ residency in this District cannot outweigh the
19 substantial contacts Plaintiffs and Defendant maintain with the Western District of Texas. By contrast,
20 the inconvenience to Defendant of litigating this case in the Northern District of California instead of
21 Texas would be significantly greater.

22 **c. The Interests of Justice Favor Transfer.**

23 Finally, the interests of justice also favor transfer. Plaintiffs’ allegations focus significantly on
24 the behavior of government agents operating in the Western District of Texas and the conditions of
25 facilities therein. The Western District of Texas has the greater interest in keeping the people located in
26 that District safe from alleged government wrongdoing. *See, e.g., Canal A Media Holding, LLC v.*
27 *USCIS*, No. 17-cv-6491, 2018 WL 7297829, at *4 (C.D. Cal. Sept. 30, 2018) (transferee district “has a
28 great interest in protecting its citizens from the unreasonable actions of a government agency”).

1 Defendant recognizes that this Court denied a similar motion to transfer in another case. *Wilbur*
2 *P.G. v. United States*, No. 4:21-cv-04457-KAW, 2022 WL 3024319, at *3-4 (N.D. Cal. May 10, 2022).
3 But transfer analysis is inherently fact-dependent, and the facts of the operative pleading in this case
4 differ from those presented in the *Wilbur P.G.* case. Unlike there, all of the allegations concerning
5 apprehension, detention and separation of parent and child occurred in the District to which Defendant
6 seeks transfer. Defendant respectfully suggests that this Court should follow the analysis of the Northern
7 District of Illinois, which recently transferred a similar case to the Western District of Texas. *D.A. v.*
8 *United States*, No. 1:20-cv-03082, ECF No. 85 (N.D. Ill. Aug. 11, 2022) (attached as Brakebill Decl. Ex.
9 A). As Judge Pacold explained there, “the location of material events weighs in favor of the Western
10 District of Texas,” because “the majority of critical events occurred in the Western District of Texas,
11 and that is where most of the challenged conduct took place.” Brakebill Decl. Ex. B at 8:19-25. Judge
12 Pacold emphasized that the plaintiffs were “originally arrested and detained,” “held at a holding center,”
13 and “separated” in the Western District of Texas. *Id.* at 9:8-17. Thus, “even though some events
14 occurred in the Northern District of Illinois, the bulk of events and the most important events occurred in
15 the Western District of Texas. This weighs in favor of transfer.” *Id.* at 10:6-9. Therefore, while “the
16 Northern District of Illinois is plaintiffs’ chosen forum,” “[t]he heart of this controversy is ultimately
17 based upon conduct and events in the Western District of Texas, and it would clearly be more
18 convenient and in the interests of justice for this litigation to proceed there.” *Id.* at 14:15-20.

19 So too here. Plaintiffs’ choice of forum is “entitled to ‘little deference,’” if any, given the lack of
20 connection between this District and the activities alleged in the Complaint. *See AV Media, Pte, Ltd. v.*
21 *OmniMount Sys., Inc.*, No. C 06-3805 JSW, 2006 WL 2850054, *3 (N.D. Cal. Oct. 5, 2006) (granting
22 motion to transfer where, despite some connections to the Northern District, “the facts giving rise to the
23 underlying causes of action have no material connection to this forum”). The heart of this controversy is
24 based on conduct and events that allegedly occurred *only* in the Western District of Texas, an even more
25 compelling reason for transfer in this case than in *D.A.*.

26 **B. In the Alternative, Plaintiffs’ Claims Should Be Dismissed For Lack of Subject**
27 **Matter Jurisdiction.**

28 The government does not defend the merits of the policies at issue in this case, which have now

1 been repudiated. Indeed, President Biden has condemned the “human tragedy” that resulted from the
2 ZTP Policy. Family Reunification Task Force EO § 1. But Plaintiffs cannot prevail on their FTCA
3 claims because this Court lacks subject-matter jurisdiction under established legal principles.

4 **1. Plaintiffs’ Claims Are Barred By the Discretionary Function Exception.**

5 **a. Legal Standard for Discretionary Function Exception Analysis.**

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

12 The FTCA is “a limited waiver of sovereign immunity.” *Gonzalez v. United States*, 814 F.3d
13 1022, 1026 (9th Cir. 2016). The statute allows individuals to sue the United States when a federal
14 employee’s conduct, within the scope of his or her employment, causes “injury or loss of property, or
15 personal injury or death.” 28 U.S.C. § 1346(b)(1). However, the FTCA’s waiver of sovereign immunity
16 is subject to exceptions. *See id.* § 2680. When an exception applies, the United States retains its
17 sovereign immunity, the court lacks jurisdiction, and the claim must be dismissed. *See Nurse v. United*
18 *States*, 226 F.3d 996, 1000 (9th Cir. 2000). One such exception—the “discretionary function exception”
19 (“DFE”)—bars “[a]ny claim” that is “based upon the exercise or performance or the failure to exercise
20 or perform a discretionary function or duty on the part of a federal agency or an employee of the
21 Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a); *see also United*
22 *States v. Gaubert*, 499 U.S. 315, 325 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

23 The Supreme Court has set forth a two-part test to determine if the DFE applies. *Gaubert*, 499
24 U.S. at 328-32. Courts must first ask whether the challenged conduct “‘involve[s] an element of
25 judgment or choice,’ as determined by the ‘nature of the conduct, rather than the status of the actor.’”
26 *Teplin v. United States*, No. 17-cv-02445-HSG, 2018 WL 1471907, at *4 (N.D. Cal. Mar. 26, 2018)
27 (quoting *Gaubert*, 499 U.S. at 322); *see also Berkovitz*, 486 U.S. at 536; *Chadd v. United States*, 794
28 F.3d 1104, 1109 (9th Cir. 2015). The first prong is met unless “‘a federal statute, regulation, or policy

1 specifically prescribes a course of action for an employee to follow.” *Sabow v. United States*, 93 F.3d
2 1445, 1451 (9th Cir. 1996) (quoting *Berkovitz*, 486 U.S. at 536); *see also Kelly v. United States*, 241
3 F.3d 755, 761 (9th Cir. 2001) (“[A] general regulation or policy . . . does not remove discretion unless it
4 specifically prescribes a course of conduct.”); *Reed ex rel. Allen v. U.S. Dep’t of Interior*, 231 F.3d 501,
5 504 (9th Cir. 2000) (since “[n]o federal statute, regulation, or policy require[d] a particular course of
6 action,” the agency’s actions “could be no other way than by the exercise of discretion”).

7 Thus, where no federal statute, regulation or policy prescribes a specific course of action to
8 follow, the challenged conduct involves an element of judgment. *See Berkovitz*, 486 U.S. at 536. Even if
9 a regulation contains a mandate to do something, if that mandate involves judgment or choice, the
10 discretion element is satisfied. *See GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174-75 (9th Cir.
11 2002). Further, where the policies that inform the conduct at issue allow the exercise of discretion, the
12 agency’s acts or failures to act are presumed to be discretionary. *Lam v. United States*, 979 F.3d 665,
13 674 (9th Cir. 2020). Finally, the applicable policies and authorities must be considered in context—“the
14 presence of a few, isolated provisions cast in mandatory language does not transform an otherwise
15 suggestive set of guidelines into binding agency regulations.” *Id.* at 677.

16 Second, if the conduct involves choice or discretion, courts must next determine whether “the
17 judgment of the government employee [is] ‘of the kind that the discretionary function exception was
18 designed to shield.’” *Teplin*, 2018 WL 1471907, at *4 (quoting *Gaubert*, 499 U.S. at 322-23). The DFE
19 is designed to “‘prevent judicial second-guessing of legislative and administrative decisions grounded in
20 social, economic, and political policy’ through a tort action”—therefore, courts construe it as
21 “protect[ing] only governmental actions and decisions based on considerations of public policy.” *Id.*; *see also*
22 *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). Thus, the focus of this inquiry is
23 “whether the ‘nature of the actions taken,’ pursuant to an exercise of discretion, ‘are susceptible to
24 policy analysis.’” *Teplin*, 2018 WL 1471907, at *4 (quoting *Gaubert*, 499 U.S. at 325); *see also*
25 *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005); *Nurse*, 226 F.3d at 1001.

26 The government need not “prove that it considered these factors and made a conscious decision
27 on the basis of them.” *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1028 (9th Cir. 1989).
28 Indeed, under the second prong, the government actors’ subjective motive is immaterial because “the

1 focus” of the inquiry “is ‘not on the agent’s subjective intent in exercising the discretion conferred by
2 statute or regulation,’ but rather ‘on the nature of the actions taken and on whether they are susceptible
3 to policy analysis.’” *Gonzalez*, 814 F.3d at 1027-28. Where the relevant policies provide for discretion,
4 it must be presumed that the government’s actions are grounded in policy when exercising that
5 discretion. *Lam*, 979 F.3d at 681. And the statutory text confirms that the exception applies “whether or
6 not the discretion involved [was] abused” by United States officials. 28 U.S.C. § 2680(a); *see also*
7 *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008) (the DFE applies even where there are
8 allegations of “malicious and bad faith conduct” because “subjective intent is irrelevant to [the]
9 analysis”); *Routh v. United States*, 941 F.2d 853, 855 (9th Cir. 1991) (“Negligence is irrelevant to the
10 discretionary function inquiry.”); H.R. Rep. No. 77-2245, 77th Cong., 2d Sess., at 10. If both prongs of
11 the *Gaubert/Berkovitz* test are met, the DFE applies, the United States retains its sovereign immunity,
12 the Court lacks jurisdiction, and the claim must be dismissed. *Nurse*, 226 F.3d at 1000.

13 **b. The Decision to Detain Plaintiffs Separately Is Subject to Discretion**
14 **Grounded in Policy Considerations.**

15 Although Plaintiffs allege harm stemming from the government’s decisions to apprehend the
16 parent Plaintiff, to prosecute her for unlawful entry, and to separate her from her child, the government
17 decisions at issue in Plaintiffs’ Complaint are subject to the DFE because they involved an element of
18 judgment or choice and are susceptible to policy analysis.

19 First, the decisions described in Plaintiffs’ Complaint are discretionary. As the Supreme Court
20 has recognized, “[t]he Attorney General and United States Attorneys retain ‘broad discretion’ to enforce
21 the Nation’s criminal laws.” *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Indeed, “[t]he
22 Supreme Court has long recognized that ‘the Executive Branch has exclusive authority and absolute
23 discretion to decide whether to prosecute a case.’” *In re Sealed Case*, 829 F.2d 50, 63 (D.C. Cir. 1987)
24 (Williams, J., concurring in part) (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)); *Smith v.*
25 *United States*, 375 F.2d 243, 247 (5th Cir. 1967) (“decisions concerning enforcement” are matters of
26 “discretion”). And that prosecutorial discretion was in fact exercised here, where the Plaintiff parent was
27 criminally prosecuted. *See* Compl. ¶¶ 26, 29.

28 Indeed, concerns about “subjecting the prosecutor’s motives and decision making to outside

1 inquiry” are magnified in the immigration context. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525
 2 U.S. 471, 490 (1999). There, the federal government possesses the express statutory authority to
 3 “arrange for appropriate places of detention for aliens detained pending removal or a decision on
 4 removal.” 8 U.S.C. § 1231(g)(1).² “Congress has placed the responsibility of determining where aliens
 5 are detained *within the discretion* of the [Secretary].” *Comm. of Cent. Am. Refugees v. I.N.S.*, 795 F.2d
 6 1434, 1440 (9th Cir. 1986) (emphasis added); *see also Gandarillas-Zambrana v. BIA*, 44 F.3d 1251,
 7 1256 (4th Cir. 1995) (“The INS necessarily has the authority to determine the location of detention”);
 8 *Sasso v. Milhollan*, 735 F. Supp. 1045, 1046 (S.D. Fla. 1990) (Attorney General has discretion over the
 9 location of detention); *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999) (recognizing the “Attorney
 10 General’s discretionary power to transfer aliens from one locale to another, as she deems appropriate”).

11 Decisions relating to noncitizens, including placement and detention, are so “vitally and
 12 intricately interwoven with contemporaneous policies [and] so exclusively entrusted to the political
 13 branches of government as to be largely immune from judicial inquiry or interference.” *United States v.*
 14 *Lopez-Flores*, 63 F.3d 1468, 1474 (9th Cir. 1995) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580,
 15 588-89 (1952)); *see also Mirmehdi v. United States*, 689 F.3d 975, 984 (9th Cir. 2012) (“Because the
 16 decision to detain an alien pending resolution of immigration proceedings is explicitly committed to the
 17 discretion of the Attorney General and implicates issues of foreign policy, . . . it falls within [the
 18 DFE.]”); *accord Lipsey v. United States*, 879 F.3d 249, 255 (7th Cir. 2018) (placement decisions are
 19 susceptible to policy analysis); *Santana-Rosa v. United States*, 335 F.3d 39, 44 (1st Cir. 2003)
 20 (“[A]ssignment to particular institutions or units . . . must be viewed as falling within the discretionary
 21 function exception to the FTCA”); *Cohen v. United States*, 151 F.3d 1338, 1342 (11th Cir. 1998)
 22 (decisions where to place prisoners are policy-based decisions protected by the DFE); *Bailor v.*
 23 *Salvation Army*, 51 F.3d 678, 685 (7th Cir. 1995) (decisions whether to detain or release are policy-
 24 based decisions protected by the DFE); *Murillo v. United States Dep’t of Justice*, No. CV 21-00425-
 25 TUC-CKJ, 2022 WL 16745333, at *7 (D. Ariz. Nov. 7, 2022) (“[T]he Ninth Circuit has consistently
 26 concluded that actions taken in prisons fall under the discretionary function exception.”).

27
 28 ² Following the Homeland Security Act of 2002, many references in the INA to the “Attorney General”
 mean the Secretary of Homeland Security. *See Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

1 This discretion necessarily entails decisions regarding with whom noncitizens are detained,
2 including decisions regarding whether adults and minors can be detained in the same facility and
3 whether to detain family members together. *See Peña Arita v. United States*, 470 F. Supp. 3d 663, 691-
4 92 (S.D. Tex. 2020) (decisions by DHS to separate family members are protected by the DFE).
5 Moreover, the Flores Agreement does not require release of a parent or mandate that parents be housed
6 with a child. *Flores II*, 828 F.3d at 908; *see also Dominguez-Portillo*, 2018 WL 315759, at *14-15;
7 *Bunikyte v. Chertoff*, No. 07-164, 2007 WL 1074070, at *16 (W.D. Tex. Apr. 9, 2007); *see* Part II.C,
8 *supra*. In this case, the only legal requirement Plaintiffs allege government officials violated (*see* Compl.
9 ¶ 50) does not operate to mandate a specific course of action to have been followed in connection with
10 J.R.G.’s prosecution and her subsequent separate detention from her child.³ Instead, the challenged
11 decisions resulted from the exercise of discretion, satisfying the first prong of the DFE.

12 For similar reasons, the decision to determine that the children were “unaccompanied” within the
13 meaning of the TVPRA is a decision covered by the DFE. *See* 6 U.S.C. § 279(g)(2). Whether a parent is
14 “available to provide care and physical custody” is a policy question vested in federal officials. *See D.B.*
15 *v. Poston*, 119 F. Supp. 3d 472, 482-83 (E.D. Va. 2015) (“Federal agencies are afforded discretion under
16 the statutory scheme when classifying juveniles as unaccompanied alien children.”), *aff’d in part and*
17 *vacated in part*, 826 F.3d 721 (4th Cir. 2016); *see also Baie v. Sec’y of Def.*, 784 F.2d 1375, 1377 (9th
18 Cir. 1986) (“[I]nterpretation of the statute is a plainly discretionary administrative act the ‘nature and
19 quality’ of which Congress intended to shield from liability under the FTCA.”); *Medina v. United States*,
20 259 F.3d 220, 227 (4th Cir. 2001). Here, the Plaintiff parent was detained and transferred into criminal
21 custody for prosecution, prosecuted, and thereafter turned over to ICE for housing in secure immigration
22 detention. In such circumstances, the DFE protects the officials’ determination that the children should
23 have been deemed unaccompanied and thus transferred to the custody of ORR. *See Fisher Bros. Sales,*
24 *Inc. v. United States*, 46 F.3d 279, 287 (3d Cir. 1995) (DFE protects decision when it “necessarily
25 reflects the decisionmaker’s judgment that it is more desirable to make a decision based on the currently
26 available information than to wait for more complete data or more confirmation of the existing data.”).

27
28 ³ Plaintiffs allege the June 26, 2018 *Ms. L* injunction “required Defendant to reunify J.R.G. and M.A.R. within thirty days.” Compl. ¶ 50. But M.A.R. was released within 30 days thereof. *Id.* ¶ 43.

1 Second, as other courts have recognized, *policies* related to the immigration custody of adults as
2 well as prosecution policy set forth in the Zero-Tolerance Memorandum—which was subsequently
3 revoked—“amount[] to exercise of the prosecutorial discretion that Congress and the Constitution confer
4 on the Attorney General” such that the analysis is not exclusively a question of whether front-line
5 employees tasked with implementing the policy possessed some element of choice. *Mejia-Mejia v. ICE*,
6 No 18-1445 (PLF), 2019 WL 4707150, at *5 (D.D.C. Sept. 26, 2019); *see also Peña Arita*, 470 F. Supp.
7 3d at 686-87 (“[E]ven if the Attorney General’s policy is mandatory, faithful implementation by agents
8 in the field is protected by the discretionary function exception.”). The Court should decline to engage in
9 the sort of “second-guessing” and inquiry into government actors’ intent in making decisions that the
10 discretionary function exception was designed to prevent. *Berkovitz*, 486 U.S. at 536; *see also Lam*, 979
11 F.3d at 673 (citing *Varig*, 467 U.S. at 814). In determining the applicability of the DFE, the Court looks
12 only at the nature of the conduct or decision at issue from a general and objective perspective—
13 subjective intent is not part of the analysis. *Gonzalez*, 814 F.3d at 1032. Here, however, the
14 government’s decisions were not merely “susceptible to” policy analysis, but the government spelled out
15 the policies it sought to further through its enforcement efforts in a series of Executive Branch
16 directives. Notwithstanding the merit of those prior policy choices, they were policy choices
17 nonetheless, as the Complaint specifically alleges. *See, e.g.*, Compl. ¶¶ 36-40.

18 In *Peña Arita*, 470 F. Supp. 3d 663, the court dismissed FTCA claims similarly arising from the
19 ZTP Policy. As here, the plaintiffs alleged that the practices at issue were unlawful and challenged
20 various associated conditions of confinement. *Id.* at 686-87. In dismissing the claims, the *Peña Arita*
21 court agreed with the government that the “family separation policy itself and its implementation by
22 officers in the field are discretionary.” *Id.* at 687 (“[P]rosecutorial judgment is a matter of choice, and
23 obviously grounded in considerations of public policy—such as the United States Attorney General’s
24 priorities and United States Attorneys’ discretion—that is intended to be shielded by the discretionary
25 function exception.”). The court concluded that the challenged decision-making was “grounded in
26 social, economic, and policy” considerations that the court was “without jurisdiction to second-guess.”
27 *Id.* (quoting *Gaubert*, 499 U.S. at 323). The *Peña Arita* court thus held that, “to the extent Plaintiffs
28 attempt to bring a constitutional tort claim against the United States under the Federal Tort Claims Act,

1 or assert that the Constitution itself furnishes a nondiscretionary standard of medical care that is
2 actionable under the FTCA in the event such care is not provided, such claim is entirely jurisdictionally
3 barred.” *Id.* at. 688. The same analysis applies here.

4 **c. Plaintiffs’ Assertion of Unconstitutional Conduct Does Not Preclude**
5 **Application of DFE in this Case.**

6 A plaintiff cannot circumvent the DFE simply by alleging a violation of a constitutional right.
7 Congress did not create the FTCA to address constitutional violations, but rather to address violations of
8 state tort law committed by federal employees. *See Meyer*, 510 U.S. at 477 (recognizing that “§ 1346(b)
9 does not provide a cause of action for” a “constitutional tort claim”). In *Gaubert*, the Supreme Court
10 held that, where “a federal statute, policy, or regulation specifically prescribes a course of action for an
11 employee to follow,” there is no further discretion to exercise. 499 U.S. at 322. The Constitution is no
12 different: in some cases, the Constitution may establish such a specific prescription that it removes an
13 official’s discretion, but the requirement of specificity applies with the same force whether the
14 prescription is found in the Constitution or a statute. And in *Nurse*, the Ninth Circuit held that a
15 constitutional violation “may” remove conduct from discretion but expressly left open the question of
16 “the level of specificity with which a constitutional proscription must be articulated to remove the
17 discretion of a federal actor.” 226 F.3d at 1002 n.2; *see also Fazaga v. Fed. Bureau of Investigation*, 965
18 F.3d 1015, 1065 (9th Cir. 2020) (“[I]f the district court instead determines that Defendants did violate a
19 nondiscretionary federal constitutional . . . directive, the FTCA claims may be able to proceed to that
20 degree.”), *rev’d on other grounds*, 142 S. Ct. 1051 (2022); *accord Garza v. United States*, 161 F. App’x
21 341, 343 (5th Cir. 2005) (holding that Eighth Amendment’s prohibition against cruel and unusual
22 punishment did not define a course of action “specific enough to render [DFE] inapplicable”).

23 Here, Plaintiffs do not allege the violation of any constitutional provision with the degree of
24 specificity required by *Gaubert*. Plaintiffs offer no specificity, instead simply making the bald assertion
25 that “Plaintiffs suffered significant physical and emotional harm as a direct result of Defendant’s
26 unlawful conduct and violation of Plaintiffs’ constitutional and statutory rights.” Compl. ¶ 5. Further,
27 while the Constitution may establish in some cases such a specific prescription that it eliminates a
28 government official’s discretion, Plaintiffs also do not allege the violation of a specific Constitutional

1 right that was clearly established at the times relevant to their Complaint. *See Reyna as next friend of*
2 *J.F.G. v. Hott*, 921 F.3d 204, 210-11 (4th Cir. 2019) (“[W]e . . . have been unable to find a substantive
3 due process right to family unity in the context of immigration detention pending removal.”); *W.S.R. v.*
4 *Sessions*, 318 F. Supp. 3d 1116, 1133 (N.D. Ill. 2018) (there is no authority for “the proposition that the
5 substantive due process [right] to family integrity dictates release of the parents (as distinct from
6 reunification)”); *Ms. L v. ICE*, 302 F. Supp. 3d 1149, 1159 n.3 (C.D. Cal. 2018) (plaintiffs did not
7 challenge the decision to detain adult noncitizens while in removal proceedings for the “sound reasons”
8 that the law calls for mandatory detention, with parole available in strictly limited circumstances);
9 *Payne-Barahona v. Gonzalez*, 474 F.3d 1, 2 & n.1 (1st Cir. 2007) (“The circuits . . . have uniformly held
10 that a parent’s otherwise valid deportation does not violate a child’s constitutional right.”).

11 Thus, even if the conduct in question were later found unconstitutional, the DFE would still
12 apply here. As the Supreme Court has long recognized, conduct may be discretionary even if it is later
13 determined to have violated the Constitution. The common-law doctrine of official immunity thus
14 applies to the exercise of “discretionary functions” even when conduct violates the Constitution, so long
15 as the constitutional right was not defined sufficiently at the time of the act so that the official should
16 have known the act was unconstitutional. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)
17 (discretionary functions shielded from liability insofar as conduct “does not violate clearly established
18 statutory or constitutional rights of which a reasonable person would have known”). Whether, in
19 retrospect, the separations at issue here violated such a right has no bearing on the application of the
20 DFE in this case. *See Denson v. United States*, 574 F.3d 1318, 1137-38 (11th Cir. 2009).⁴

21 Indeed, even before it specifically addressed the qualified immunity standards applicable to
22 federal employees, the Supreme Court in *Butz v. Economou*, 438 U.S. 478 (1978), explicitly recognized
23 that DFE would apply even if alleged conduct might later be held unconstitutional. The Court held that
24 officials sued for violations of constitutional rights were entitled to qualified, but not absolute immunity.
25 The Court explained that were it otherwise, the recently recognized *Bivens* remedy would be illusory,

26
27 ⁴ In other cases, district courts have held that the DFE is inapplicable because the plaintiffs allege that
28 the Constitution was violated. *E.g., A.P.F. v. United States*, 492 F. Supp. 3d 989, 996 (D. Ariz. 2020).
But those cases failed to follow the rule, established in *Gaubert*, that an official loses discretion only if a
source of law “specifically prescribes” the course of conduct.

1 and, as relevant here, “no compensation would be available from the Government, for the Tort Claims
 2 Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been
 3 abused.” *Id.* at 505. *Butz* and subsequent decisions thus leave no doubt that conduct that violates the
 4 Constitution may constitute the type of abuse of discretion that falls within the scope of the DFE.

5 The Ninth Circuit has declined to decide “the level of specificity with which a constitutional
 6 proscription must be articulated in order to remove the discretion of a federal actor.” *Nurse*, 226 F.3d at
 7 1002 n.2; *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1251 (9th Cir. 2019) (“[I]f the district
 8 court instead determines that Defendants did violate a nondiscretionary federal constitutional . . .
 9 directive, the FTCA claims may be able to proceed to that degree.”), *rev’d on other grounds*, 142 S. Ct.
 10 1051 (2022). A court should require the same level of specificity that would be required in determining
 11 whether a statute left an employee with “no discretion to abuse.” In any event, whatever the precise
 12 standard, it is not satisfied here. Regardless of whether some or all of the alleged acts reflected an abuse
 13 of discretion, Plaintiffs have identified nothing in the decisions of the Supreme Court or the Ninth
 14 Circuit that removed any official’s discretion with respect to any of the categories of asserted actions by
 15 “specifically prescribe[ing] a course of action for an employee to follow.” *Gaubert*, 499 U.S. at 322.
 16 Indeed, as the Fourth Circuit observed, “we . . . have been unable to find a substantive due process right
 17 to family unity in the context of immigration detention pending removal.” *Hott*, 921 F.3d at 210-11.

18 **2. Plaintiffs’ Claims Relating to the Decision to Detain The Adult Separately**
 19 **From Her Child Are Barred by the FTCA’s Exception for Actions Taken**
 20 **While Reasonably Executing Law.**

21 Plaintiffs’ claims relating to the decision to detain the parent separately from the child are
 22 independently precluded because the FTCA prevents the United States from being held liable for “[a]ny
 23 claim based upon an act or omission of an employee of the Government, exercising due care, in the
 24 execution of a statute or regulation, whether or not such statute or regulation be valid.” 28 U.S.C.
 25 § 2680(a). Thus, “[w]here government employees act pursuant to and in furtherance of regulations,
 26 resulting harm is not compensable under the act[.]” *Dupree v. United States*, 247 F.2d 819, 824 (3d Cir.
 27 1957); *see also Accardi v. United States*, 435 F.2d 1239, 1241 (3d Cir. 1970) (claim based on
 28 “enforcement of ‘rules and regulations’” barred by § 2680(a)).

This exception “bars tests by tort action of the legality of statutes and regulations.” *Dalehite v.*

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

11 Here, the United States is required to “transfer the custody” of children to the care of ORR “not
 12 later than 72 hours after” determining that there is no parent available to provide care and physical
 13 custody, absent exceptional circumstances. 8 U.S.C. § 1232(b)(3). In this case, the government made the
 14 determination that because the Plaintiff parent was referred for criminal prosecution and transferred to
 15 the El Paso County Detention Facility for criminal detention, she was unable to provide care and
 16 physical custody for the Plaintiff child. The government made the discretionary decision to prosecute the
 17 adult Plaintiff and once that protected discretionary determination had been made, the TVPRA—which
 18 Plaintiffs do not challenge—required that the child be transferred to ORR custody. The enforcement of
 19 that statutory command cannot form the basis of an FTCA claim.⁵

20 **3. Plaintiffs’ Claims Are Barred Because There Is No Private-Person Analogue.**

21 Plaintiffs’ claims also fail because the government acts that Plaintiffs challenge have no private-
 22 person analogue. The FTCA’s waiver of sovereign immunity is limited to “circumstances where the
 23 United States, if a private person, would be liable to the claimant in accordance with the law of the place
 24 where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). The statute authorizes tort recovery against
 25 the United States only “in the same manner and to the same extent as a private individual under like
 26 _____

27 ⁵ In ruling otherwise, district courts have stated no statute or regulation “require[es] the separation of
 28 Plaintiffs upon their entry into the country.” *A.P.F.*, 492 F. Supp. 3d at 996. But federal law does require
 that children be placed into ORR custody if their parents are unable to provide care and physical
 custody. And as described, the decision to detain those parents is quintessentially discretionary.

1 circumstances.” 28 U.S.C. § 2674. The FTCA thus does not waive sovereign immunity for claims
 2 against the United States based on governmental “action of the type that private persons could not
 3 engage in and hence could not be liable for under local law.” *Chen v. United States*, 854 F.2d 622, 626
 4 (2d Cir. 1988) (internal quotes omitted). The FTCA “requires a court to look to the state-law liability of
 5 private entities, not to that of public entities, when assessing liability under the FTCA.” *United States v.*
 6 *Olson*, 546 U.S. 43, 45-46 (2005). Though the private analogue need not be exact, a plaintiff must offer
 7 “a persuasive analogy” showing that the government actor sued would be subject to liability under state
 8 law if it were a private person. *Westbay Steel, Inc. v. United States*, 970 F.2d 648, 650 (9th Cir. 1992).

9 Because only the federal government has the authority to enforce federal criminal and
 10 immigration laws and make related detention determinations, there is no private-person analogue that
 11 would support a claim under the FTCA. The alleged harms here stem from the federal government’s
 12 decision to enforce federal immigration laws, criminally prosecute certain individuals, and hold the
 13 Plaintiff parent in custody pending criminal prosecution or immigration proceedings, resulting in the
 14 Plaintiff child’s placement in ORR’s care and custody. The United States has not waived its sovereign
 15 immunity for such decisions to enforce federal law, as they have no private-person counterpart. *See, e.g.*,
 16 *Bhuiyan v. United States*, 772 F. App’x 564, 565 (9th Cir. 2019) (“[T]here is, as a general matter, no
 17 private analogue to governmental withdrawal of immigration benefits.”); *Elgamal v. Bernacke*, 714 F.
 18 App’x 741, 742 (9th Cir. 2018) (“[B]ecause no private person could be sued for anything sufficiently
 19 analogous to the negligent denial of an immigration status adjustment application, that claim must be
 20 dismissed as well.”); *Elgamal v. United States*, No. 13-00967, 2015 WL 13648070, at *3 (D. Ariz. July
 21 8, 2015) (recognizing that “immigration matters” are “an inherently governmental function”).⁶

22 4. Plaintiffs’ Claims Are Impermissible Direct Liability, Systemic Tort Claims.

23 The FTCA’s limited waiver of sovereign immunity allows a plaintiff to sue the United States for
 24 damages arising from certain torts committed by federal employees acting within the scope of their
 25

26 ⁶ Two courts found an analogue to nursing home employees, relying on *Est. of Smith v. Shartle*, No. CV-
 27 18-00323-TUC-RCC, 2020 WL 1158552, *2 (D. Ariz. Mar. 10, 2020). *C.M. v. United States*, No. CV-
 28 19-05217-PHX-SRB, 2020 WL 1698191, *3 (D. Ariz. Mar. 30, 2020); *A.P.F.*, 492 F. Supp. 3d at 995.
Shartle analogized to a nursing home’s state-law duty to protect vulnerable adults. But a nursing home’s
 duty to safeguard against neglect is wholly different from the federal government’s enforcement of
 federal criminal and immigration laws and is not a “persuasive analogy” required for FTCA jurisdiction.

1 employment. *Valdez v. United States*, 56 F.3d 1177, 1179 (9th Cir. 1995). As the Ninth Circuit has held,
 2 the terms “person” and “employee of the government,” as used in the FTCA, mean individuals and
 3 natural persons, not institutions or corporate entities. *Adams v. United States*, 420 F.3d 1049, 1052-55
 4 (9th Cir. 2005). Hence, a plaintiff cannot assert systemic claims or seek to hold the United States
 5 directly liable under the FTCA, but must instead allege tortious conduct by individual federal
 6 employees, acting within the scope of their employment, for whom the United States has assumed
 7 liability under the FTCA. *Lee v. United States*, No. CV 19-08051-PCT-DLR (DMF), 2020 WL 6573258,
 8 at *6 (D. Ariz. Sept. 18, 2020) (applying *Adams*; dismissing claims of “generalized negligence”).

9 As in *Lee*, Plaintiffs seek to raise direct liability and institutional tort claims against the United
 10 States, attributing the alleged tortious conduct to the government as a whole, referring to “the United
 11 States,” “the U.S. government,” “the federal government,” and “the government” rather than alleging
 12 specific tortious conduct by specific federal employees for whom the United States must assume
 13 liability. Compl. ¶¶ 1-2, 6, 77. The FTCA’s limited waiver of sovereign immunity does not encompass
 14 such systemic, institutional tort claims or “generalized theories” of tortious conduct “asserted against the
 15 staff and employees of federal institutions as a whole.” *Lee*, 2020 WL 6573258, at *6; Brakebill Decl.
 16 Ex. C (Order, *E.C.B. v. United States*, No. 2:22-cv-00915, ECF No. 24 at 9 (D. Ariz. Nov. 8, 2022))
 17 (“claims against the United States for the tortious misconduct of the government itself or government
 18 agencies, i.e., claims based on executive orders, memoranda, or policies regarding the separation of
 19 families entering the United States without authorization” are non-actionable under the FTCA).

20 V. CONCLUSION

21 For the foregoing reasons, Defendant respectfully requests that the Court transfer this action to
 22 the Western District of Texas or, in the alternative, dismiss Plaintiffs’ Complaint.

23 Dated: December 5, 2022

Respectfully submitted,

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 United States Attorney

25 /s/ Kenneth Brakebill
 26 Kenneth Brakebill
 27 Assistant United States Attorney
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