The Honorable Richard A. Jones

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

E.L.A. and O.L.C., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	CASE NO. 2:20-cv-01524-RAJ UNITED STATES' REPLY IN FURTHER SUPPORT OF MOTION TO PARTIALLY DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION Noted for Consideration: December 9, 2022

Defendant United States submits the following Reply to Plaintiffs' Response ("Response" or "Resp.") (Dkt. 46) to the United States' Motion to Partially Dismiss for Lack of Subject Matter Jurisdiction ("Motion" or "Mot.") (Dkt. 42).

I. ARGUMENT

A. Plaintiffs' Claims Are Barred By the Discretionary Function Exception ("DFE").

Plaintiff E.L.A. alleges that he was separated from his minor son, O.L.C., after crossing the United States-Mexico border into Texas, in violation of 8 U.S.C. § 1325. *See generally* Dkt. 1 ("Compl."). After crossing the U.S.-Mexico border in June of 2018, O.L.C. was transferred to Lincoln Hall Boys Haven in Lincolndale, New York, while E.L.A. was detained in a federal detention facility in Texas. Compl. at ¶¶ 20-22; 41-42, 50-51. Because the decision regarding

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"where [noncitizens] are detained" is explicitly committed to "the discretion of the [Secretary]," *Comm. Of Cent. Am. Refugees v. I.N.S.*, 795 F.2d 1434, 1440 (9th Cir. 1986), *see also* Mot., 14-17, and because Plaintiffs do not allege in their complaint that the government violated a clearly established Constitutional right, the government's decision "falls within th[e] [discretionary function] exception," *Mirmehdi v. United States*, 689 F.3d 975, 984 (9th Cir. 2012).

1. Defendant Satisfies the First Prong of the DFE Test.

i. Plaintiffs Cannot Circumvent the DFE By Broadly Alleging a Constitutional Violation.

Not every allegation of unlawful or unconstitutional conduct negates the DFE. Rather, a plaintiff must show that the government official's discretion was limited by a *specific, clearly established* directive, accompanied by plausible assertions that the specific directive was violated. Plaintiffs fail to do so here.

The discretion element is met unless "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996) (quoting *Berkovitz v. United States,* 486 U.S. 531, 536 (1988)); *see also Kelly v. United States,* 241 F.3d 755, 761 (9th Cir. 2001) ("[A] general regulation or policy … does not remove discretion unless it specifically prescribes a course of conduct."). The Constitution is no different: in some cases, the Constitution may establish such a specific prescription that it removes an official's discretion, but the requirement of specificity applies with the same force whether the prescription is found in the Constitution or a statute.

In *Butz v. Economou*, 438 U.S. 478 (1978), the Supreme Court recognized that immunity for discretionary acts would not be vitiated simply because alleged conduct might later be held unconstitutional. *Id*. at 506-07 (acknowledging need to protect officials exercising discretion subject to "clearly established constitutional limits"). In *Butz*, the Supreme Court held that

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officials sued for violations of constitutional rights were entitled to qualified, but not absolute, immunity. *Id*. at 507. Were it otherwise, "no compensation would be available from the Government, for the Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused." *Id*. at 505. *Butz* and subsequent decisions leave no doubt that conduct that violates the Constitution may constitute the type of abuse of discretion that falls within the scope of the DFE.

Since *Butz*, the Supreme Court has expressly held that government officials who exercise discretionary functions are, under certain circumstances, entitled to qualified immunity in damages suits for violating the Constitution while exercising their discretion. In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Court summarized this immunity as striking a balance between two competing interests and, ultimately, turning on the "clearly established law" at the time the official actions were taken. *Id*. at 1866 (citations omitted). Thus, the Supreme Court has long recognized that conduct may be "discretionary" even if it later is determined to have violated the Constitution.

Plaintiffs' allegations and their Response do not state what "clearly established" right was violated here. Here, Plaintiffs refer generally to a right to "family integrity" in their complaint, but do not identify any specific directive that removed an official's discretion. Plaintiffs instead rely on the district court's decision in *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1142 (S.D. Cal. 2018) to satisfy their burden. Even assuming the holding in *Ms. L.* excuses Plaintiffs from satisfying their burden (it does not), the holding in *Ms. L.* post-dates the conduct at issue in this case, rendering it immaterial to whether those rights were clearly established at the time of the challenged conduct. It also applies in the context of a preliminary injunction, where the district court held only that "the context and circumstances in which this practice of family separation were being implemented support a finding that Plaintiffs have a likelihood of success on their due

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process claim." *Id.* at 1143. And decisions of district judges do not demonstrate that a right is "clearly established." *See Camreta v. Greene*, 563 U.S. 692, 708 n.7 (2011); *see also Sharp v. Cnty. of Orange,* 871 F.3d 901, 911 (9th Cir. 2017).

Contrary to Plaintiffs' assertion, the Ninth Circuit has reserved the question of what level of specificity is necessary before a constitutional provision will preclude the exercise of discretion by a Government official. *Nurse v. United States*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (expressly declining to decide "the level of specificity with which a constitutional proscription must be articulated in order to remove the discretion of the actor"). In *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020), the Court suggested that the same level of specificity is required regardless of whether a federal constitutional or statutory directive is at issue. *Id*. at 1065 (remanding issue of the DFE's applicability, which must include a determination of whether "any federal constitutional or statutory directives" specifically prescribed a nondiscretionary course of action), *rev'd on other grounds*, 142 S. Ct. 1051 (2022).

Whatever the precise standard, it is not satisfied here. Regardless of whether some or all of the allegedly tortious acts reflected an abuse of discretion, Plaintiffs have identified nothing in the decisions of the Supreme Court or the Ninth Circuit that removed any official's discretion with respect to any of the categories of asserted actions by "specifically prescrib[ing] a course of action for an employee to follow." *United States v. Gaubert*, 499 U.S. 315, 322 (1991). Indeed, as the Fourth Circuit observed, "we . . . have been unable to find a substantive due process right to family unity in the context of immigration detention pending removal." *Reyna as next friend of J.F.G. v. Hott*, 921 F.3d 204, 210-11 (4th Cir. 2019). And while some decisions, including decisions in this District, have concluded that constitutional allegations made the exception inapplicable, no decision has analyzed the relevant standards set out in the Supreme Court's FTCA decisions and

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in its decisions involving official immunity, let alone a case in which no specific constitutional violation was alleged. Those principles make clear that the discretionary function exception bars Plaintiffs' claims.

Plaintiffs' Response also incorrectly asserts that their detailed allegations about "unlawful acts" are sufficient to support their allegation that their constitutional rights were generally violated. Resp., 4-7. To the contrary, this is insufficient because courts have used the "clearly established" standard when assessing whether DFE is applicable. For example, in *Bryan v. United States*, 913 F.3d 356 (3d Cir. 2019), the Third Circuit concluded that CBP officers were entitled to qualified immunity with respect to the plaintiffs' *Bivens* claims because, even if their search of the plaintiffs' cruise ship cabin had violated the Fourth Amendment, the plaintiffs' right to be free from such a search was not "clearly established" as of the date the search was executed. *See id.* at 362-63. Having concluded that the officers did not violate the plaintiffs' clearly established rights under the Fourth Amendment, the Court went on to hold that the DFE barred plaintiffs' FTCA claims. *See id.* at 364 ("Because … the CBP officers did not violate clearly established constitutional rights, the FTCA claims also fail" under the DFE.); *see also Garza v. United States*, 161 F. App'x 341, 343 (5th Cir. 2005) (Eighth Amendment did not define a course of action "specific enough to render the discretionary function exception inapplicable"); *Ahern v. United States*, 2017 WL 2215633, at *10 (S.D. Tex. May 19, 2017) (holding "rights afforded to Plaintiff under the Fifth Amendment . . . fail to define a set course of conduct . . . would be considered to be non-discretionary"); *McElroy v. United States*, 861 F. Supp. 585, 593 (W.D. Tex. 1994) ("[T]he statutory or constitutional mandate that eliminates discretion must be specific and intelligible so that the officer knows or should know he loses discretion when the particular circumstances arise which the mandate controls").

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ii. Plaintiff Cannot Circumvent the DFE By Alleging Systemic Torts.

Plaintiffs also attempt to circumvent prong one of the DFE by arguing that "the systemic, involuntary separation of thousands of children from their parents was not the product of discretionary choices made by rank-and-file DHS officers" because those officers were purportedly "following the family-separation policy dictated by high-ranking officials of the Trump administration." Resp., 12-13. But the United States has not waived its sovereign immunity for systemic torts. Consistent with the FTCA's text and the principles articulated in *Adams v. United States*, 420 F.3d 1049 (9th Cir. 2005), this "systemic" tort described by Plaintiffs does not fall within the FTCA's limited waiver of sovereign immunity since it was not committed by an individual government employee(s), acting within the scope of his employment, for which he could otherwise be held personally liable. *See* 28 U.S.C. § 1346(b); *Adams*, 420 F.3d at 1054; *Lee v. United States*, 2020 WL 6573258, at *6-7 (D. Ariz. Sept. 18, 2020). Thus, the Court lacks jurisdiction over "claims based on executive orders, memoranda, or policies regarding the separation of families entering the United States without authorization." *E.C.B., et al. v. USA*, No. CV 22-00915 (Dist. Ariz.), Dkt. 24, Order at p. 9.

2. Defendant Satisfies the Second Prong of the DFE Test.

Plaintiffs do not dispute the second prong of the DFE test and in fact argue that Defendant's officers followed a "clear policy directive" (Resp., 12). The governmental conduct at issue is without a doubt "susceptible to policy analysis." When "established governmental policy, as expressed or implied by statute . . . allows a [g]overnment agent to exercise discretion"—as federal laws do here—"it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324. "The decision need not actually be grounded in policy

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considerations so long as it is, by its nature, susceptible to a policy analysis." *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002) (emphasis in original).

Here, the separation of O.L.C. from E.L.A. occurred as a result of a discretionary decision to refer E.L.A. for criminal prosecution. This rendered him unavailable to provide care and physical custody of O.L.C., who could not be held in secure detention under the Flores Agreement. As explained in Defendant's Motion, the government's classification and placement decisions, including decisions regarding whether to detain adults and minors together, are quintessential discretionary judgments susceptible to policy considerations—as, of course, are the decisions of this Administration repudiating and reversing the policies of which Plaintiffs complain. Mot., 14-18.

3. The DFE Bars Plaintiffs' Conditions-Related Allegations.

For the reasons stated in Defendant's Motion, Plaintiffs' conditions-of-confinement claims are also barred by the DFE. Mot., 18-19 (citing cases). Furthermore, the exhibits cited by Plaintiffs that purport to mandate certain government actions are either mischaracterized or inapplicable. Resp., 14-15. For example, Plaintiffs' allegations that ICE's Performance-Based National Detention Standards 2011 (Ex. E to Resp., Dkt. 47-5) require facility staff to permit a detainee to speak by telephone with an immediate family member detained in another facility do not apply here because E.L.A. was not "detained in another facility;" rather, he was transferred to Lincoln Hall in Lincolndale, New York. Plaintiffs also argue that a 2008 CBP Memorandum Re: Hold Rooms and Short Term Custody (Ex. A to Resp., Dkt. 47-1) and CBP's National Standards on Transport, Escort, Detention, and Search ("NSTEDS") (Ex. C to Resp., Dkt. 47-3) require potable drinking water be provided to detainees but acknowledge in their allegations that drinking water was generally available in the facility. Compl. at ¶ 28.

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Moreover, Plaintiffs fail to identify a directive with sufficient specificity to abrogate the discretionary function exception. Provisions that indicate that conditions should be "reasonable" or "adequate," *see* Resp. at 14-15, or that "reasonable efforts" will be made, do not eliminate officials' discretion to determine the particular conditions of a facility. *See* Exh. A at 9 ("Agents will make reasonable efforts to provide a shower…"); Exh. C at 17 ("Reasonable efforts will be made to provider showers…"). Similarly, DHS policies that merely explain what "[g]enerally" should occur and what should be done "[w]hen it is within CBP control,", or "[w]hen available," *e.g.*, Exh. C, §§ 4.7, 5.6, 4.12, do not divest an officer of all discretion.

B. The Exception for Actions Taken While Reasonably Executing a Statute Applies.

Plaintiffs argue that the FTCA's exception for actions taken to execute the law is inapplicable because the separation "was neither mandated by statute or regulation…." Resp., 17. That argument conflates the issues. First, it was within the government's discretion to determine O.L.C. was unaccompanied as demonstrated above. *See* 6 U.S.C. § 279(g)(2). Second, once that determination was made, the Trafficking Victim Protection Reauthorization Act of 2008 ("TVPRA"), 8 U.S.C. § 1232(b)(3), required the government to transfer O.L.C. to the Office of Refugee Resettlement ("ORR") custody within 72 hours after determining he was "unaccompanied." Mot., 13-15.[1]

Whether a parent is "available to provide care and physical custody" is a policy question vested in federal officials. *See D.B. v. Poston*, 119 F. Supp. 3d 472, 482-83 (E.D. Va. 2015). Here, E.L.A. was prosecuted for unlawful entry and detained in secure detention facilities, rendering him

[1] Plaintiffs incorrectly argue that the Flores Agreement does not justify separation because the Agreement permits parents to affirmatively waive their children's rights to prompt release. Resp., 9 (citing Flores-related orders). But Plaintiffs fail to acknowledge that the district court orders they refer to post-date S.M.F. and A.R.M.'s separation in May 2018 before the waiver option was available.

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unavailable to provide care and physical custody to his child. In this circumstance, the DFE applies to the government's determination that O.L.C. should be deemed unaccompanied and transferred to the custody of ORR. *See Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 287 (3d Cir. 1995) (holding decision subject to DFE when it "reflects the decisionmaker's judgment that it is more desirable to make a decision based on the currently available information than to wait for more complete data or more confirmation of the existing data"). And once the decision to prosecute E.L.A. was made, which Plaintiffs do not dispute was discretionary, the TVPRA *required* that O.L.C. be transferred to ORR custody while E.L.A. was undergoing criminal prosecution and held in secure immigration detention. *See* Compl., ¶¶ 29-31.

Plaintiffs do not contend that the government deviated from the statutory requirements of the TVPRA in transferring O.L.C. to ORR custody after making the discretionary decision that he was unaccompanied, and in fact recognize the laudable purpose of the TVPRA. Resp., 17 (explaining the statute is "designed to protect children"). Rather, Plaintiffs challenge the separation pursuant to the proper enforcement of federal statutes—and that is precisely the type of claim the FTCA excepts. One cannot "test[] by tort action of the legality of statutes and regulations." *Dalehite v. United States*, 346 U.S. 15, 33 (1953); *see also* H.R. Rep. No. 77-2245, 77th Cong., 2d Sess., at 10 (noting that it was not "desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort"); *Powell v. United States*, 233 F.2d 851, 855 (10th Cir. 1956) (FTCA does not waive sovereign immunity for claims based on employees' acts "performed under and in furtherance of the regulation . . . even though the regulation may be irregular or ineffective"). Thus, Plaintiffs cannot challenge the government's enforcement of the TVPRA's statutory command through the FTCA.

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C. There is No Private Person Analogue for Plaintiffs' Claims.

Plaintiffs' claims also fail because the government conduct that Plaintiffs challenge has no private analogue. No private party could bring an analogous cause of action under Texas law because Plaintiffs' claims arise out of federal statutory authority that only the federal government possesses. This is especially true, where, as here, the statutory authority is based on the enforcement of federal immigration laws—namely, those relating to whether and where to detain noncitizens pending immigration proceedings. *See Ryan v. ICE*, 974 F.3d 9, 26 (1st Cir. 2020) ("Controlling immigration and the presence of noncitizens within the country are duties and powers vested exclusively in the sovereign."). For example, in *Lopez-Flores v. Ibarra*, 2018 WL 6577955, at *3 (S.D. Tex. Mar. 12, 2018), the district court found that there was a private analogue for conduct such as false arrest or imprisonment, which are private torts, but not for abuse of process "because a private or state entity "could not conceivably" invoke, or likewise abuse, the process of removing or deporting an individual from the United States. The federal government alone bears this unique responsibility." *Id.* at *4 ("[W]here the government in fact is the only entity that performs the actions complained of, Courts are required to look 'further afield' to find a private analog under state law."), *see also id.* at n.6 (analyzing cases).

Plaintiffs do not dispute that E.L.A. was lawfully held in secure adult immigration detention pending his immigration proceedings. Plaintiffs' claims are essentially a challenge to where and with whom deportable noncitizens are detained. Such decisions are made pursuant to federal statutory authority and are in the sole province of the federal government; there is no private person counterpart.

There can be no Texas state private right of action because Texas, like all states, is preempted from regulating noncitizen entry, registration, and, importantly for these purposes,

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enforcement. "The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. It was designed as a harmonious whole…Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Arizona v. United States*, 567 U.S. 387, 401-03 (2012) (invalidating Arizona state law that created a conflict with federal immigration law, including enforcement). Plaintiffs try to overcome this by arguing that the federal government's exclusive authority does not permit it to commit a tort. That presupposes the threshold issue, however, of whether the conduct could first be considered a tort, specifically a tort as between private parties. Because it cannot, Plaintiffs' argument is unavailing.

Plaintiffs' causes of action stem from the federal government's decision to enforce its immigration laws, criminally prosecute certain individuals, and hold parents in custody, resulting in their children's placement in the custody of ORR. That is the essential difference between this matter and the non-family separation cases on which Plaintiffs rely. In those instances, the conduct at issue was analogous to some private conduct that could form the basis of a state tort. Resp., 20; *see, e.g.*, *Vargas Ramirez v. United States*, 93 F. Supp. 3d 1207, 1218 (W.D. Wash. 2015) (discussing false arrest under state law). Here, Plaintiffs seek to challenge the government's enforcement of a policy of enforcing federal law. *See, e.g.*, Resp., 5 ("The complaint cites government reports confirming that the family separation was a specific, intentional federal policy."); *id.* at 17 ("Defendant's employees separated Plaintiffs pursuant to an executive *policy*.") (emphasis in original).

While the United States has disavowed the zero-tolerance policy, such decisions are made pursuant to federal statutory authority and are in the sole province of the federal government. There is no private-person counterpart here. The government recognizes that numerous courts

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have found private-person analogues in the context of the zero-tolerance policy, but it respectfully disagrees with those decisions—none of which are binding on this Court. Those cases did not identify an analogue of a private person being involved in devising, promulgating, or executing a policy of enforcing uniquely federal law.

II. CONCLUSION

Accordingly, for the reasons set forth above and in Defendant's Motion to Partially Dismiss, the Court should dismiss Plaintiffs' First Claim for lack of subject matter jurisdiction, allowing only Plaintiffs' Fourth Claim to proceed to discovery.

DATED this 9th day of December, 2022.

Respectfully submitted,

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