The Honorable Benjamin H. Settle

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

KAREN ESTEFFANY MADRIGALES VASQUEZ; JONATHAN HIDELBERTO ZETINO AGUIRRE; S.Z.M.; and T.Z.M., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Case No. 3:23-cv-5397-BHS UNITED STATES' MOTION TO DISMISS COMPLAINT Noted for Consideration: September 1, 2023

I. INTRODUCTION

Early 2021 saw a sudden surge in the number of people crossing into the United States. U.S. Customs and Border Protection (CBP), which has a mandate to apprehend and process those who enter the country without authorization, piloted a Temporary Outdoor Processing Site (TOPS) under the Anzalduas International Bridge near Granjeno, Texas, in order to accommodate so many individuals. TOPS was meant primarily for migrant families and was outdoors to help minimize COVID-19 exposure. At TOPS, CBP provided families with meals, snacks, beverages, and medical screening, among other things. The hope was to hold families only as long as necessary to process them, ideally, less than eight hours. But because so many

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people were apprehended during that time, CBP's operations were overwhelmed and the processing time sometimes exceeded the goal.

Plaintiffs here are a family of four from Guatemala who illegally entered the United States in February 2021. CBP apprehended and then processed them at TOPS. Their temporary detention lasted about 40 hours before they were released to a shelter. As a result of their brief detention, they bring two claims under the Federal Tort Claims Act (FTCA) for negligence and intentional infliction of emotional distress (IIED) based on the creation of TOPS generally and alleged deficiencies during their short time in custody.

But CBP had the discretion to establish TOPS and to transfer Plaintiffs there for processing; thus, Plaintiffs' claims are barred by the discretionary function exception (DFE). Furthermore, CBP acted within its discretion when staffing and supplying TOPS. Even if the conditions were less than ideal, CBP used its best efforts to provide temporary shelter to people and give them food, supplies, and medical care while trying to efficiently move them through an ever-increasing queue. There is no private-person analogue for this scenario and Plaintiffs fail to allege how their claims are anything other than institutional tort claims against CBP for which subject-matter jurisdiction is lacking.

Even if the Court has subject-matter jurisdiction over this case, the alleged facts fail to state a claim. Under Texas law, negligence requires a physical injury, and here Plaintiffs allege none other than cold or flu symptoms, which is not enough. And they cannot circumvent this deficiency by cloaking their negligence claim as an IIED claim. Among the numerous reasons IIED fails is that Plaintiffs must show that CBP employees intentionally acted so outrageously as to shock the conscience. But being uncomfortable, cold, or only getting two meals when you want three is not so beyond the bounds of human decency so as to create liability. Plaintiffs had to be held and processed somewhere, either at an overwhelmed indoor facility or at TOPS.

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Neither situation is ideal. Nevertheless, CBP did its best to provide for those at TOPS and no reasonable mind could find that TOPS was created to inflict emotional distress on Plaintiffs.

Should every grievance or frustration with government conduct equate to tort liability, the government couldn't operate effectively. CBP has to make hard decisions about how to execute its responsibilities along a vast frontier, handling situations and individuals with widely varying needs and circumstances, and in the midst of historic immigration trends. The law takes these considerations into account and imposes pleading standards and specific requirements that Plaintiffs' allegations do not meet.

For these reasons, the Court should dismiss Plaintiffs' complaint with prejudice.

II. BACKGROUND

A. CBP's decision to create TOPS.

All noncitizens who enter the United States, including those like Plaintiffs who enter between ports of entry, are considered "applicant[s] for admission" and are "inspected by immigration officers" to determine their admissibility to the United States. 8 U.S.C. §§ 1225(a)(1), (a)(3), (b). As part of that inspection, immigration officers can question any noncitizen or person believed to be a noncitizen as to their right to be or to remain in the United States, or to arrest any noncitizen attempting to enter into or remain in the United States unlawfully. 8 U.S.C. § 1357; 8 C.F.R. 287.5.

In February 2021, CBP operated TOPS as an extension of its McAllen Station in the Rio Grande Valley (RGV) Sector. *See* Declaration of Abelino Reyna ("Reyna Decl."), ¶¶6-8. Located under the Anzalduas International Bridge in Granjeno, Texas, CPB used TOPS to process family units with children who were six years old or younger, including medical screenings, enrollment and records checks, and completion of immigration paperwork. *Id.*; *see also id.* at ¶¶24-27. CBP established TOPS to accommodate the large number of migrant

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families entering the United States in this region to reduce transportation and processing wait times and to reduce or limit COVID-19 transmission or exposure for migrants and Border Patrol employees by being outside. *Id.* at ¶¶9-20. TOPS would alleviate capacity problems caused by the closure of one of RGV Sector's processing centers for renovation, the exclusive use of one processing center for unaccompanied juveniles, and the reduction of RGV Sector's housing and processing capacity to 25% due to COVID-19 restrictions. *Id.*

TOPS provided basic amenities, including portable bathrooms, hand-washing stations, ample lighting, security, weatherproofing, medical screening/services, heaters in the intake area, medical screening area, and processing area, blankets, surgical masks, certain hygiene products, infant care needs, extra clothing and change stations, hot meals, snacks, juice, and water. *Id.* at ¶¶22-23, 28. Snacks, juice, and water were openly available at TOPS and could be accessed as often as desired. *Id.* If individuals wanted additional hot food, they need only ask the Border Patrol Agents and more would be provided. *Id.*

CBP's target processing time at TOPS was eight hours. *Id.* at ¶29. In February 2021, the average processing time of family units at TOPS was approximately 10 hours. *Id.* After being processed at TOPS, family units were usually released and transported to local non-profit organizations. *Id.* at ¶30. The overall purpose of TOPS was to safely and expeditiously process family units in Border Patrol custody so they could be released as soon as possible. *Id.* at ¶31.

B. Plaintiffs' 40-hour detention at TOPS.

Plaintiffs crossed the United States-Mexico border between two ports of entry on February 21, 2021 without prior authorization. Dkt. 1 ("Compl."), ¶¶1-2, 22. After crossing the border into Texas, they were apprehended by CBP Border Patrol Agents on February 21 at approximately 6:30 p.m. and escorted by CBP vehicle from their location of apprehension to TOPS. *Id.* at ¶¶23-24; Reyna Decl., ¶33. Plaintiffs were booked in at TOPS as a family unit on

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February 22 at 1:50 a.m.; their processing was completed on February 23 at 3:20 a.m.; and they were booked out and transferred as a family unit to a shelter at 10:59 a.m. on February 23. Reyna Decl., ¶33. Plaintiffs therefore spent a total of 40.5 hours in CBP's custody.[1]

C. Plaintiffs' Complaint.

Plaintiffs bring this action against the United States pursuant to the FTCA, 28 U.S.C. §§ 1346(b)(1), 2671-2680, seeking damages for negligence and IIED. Compl., ¶¶89-100. While not asserting independent constitutional tort claims against the United States, Plaintiffs also allege that their detention at TOPS violated the Fifth Amendment's Due Process Clause. *Id.* at ¶¶61-88.

As discussed in greater detail below, Plaintiffs challenge the general conditions of their confinement at TOPS and allege that the United States' employees caused them "severe physical, emotional, and psychological harm." *Id.* at ¶90. They seek $400,000 in compensatory damages. *Id.* at Prayer for Relief (pg. 16).

III. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1).

A defendant may move to dismiss a complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1039-40 (9th Cir. 2003). Plaintiffs bear the burden of establishing jurisdiction because, by filing a complaint in federal court, they seek to invoke it. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

"A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The Court may dismiss an action under Rule

[1] Plaintiffs allege they were detained for three days. Compl., ¶6. But they were detained for 40.5 hours across three days, from the evening of February 21 to the morning of February 23.

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12(b)(1) if the complaint does not allege facts sufficient to establish subject-matter jurisdiction on its face or, even if the complaint asserts grounds for jurisdiction on its face, the evidence does not support a finding of jurisdiction. *Id.* A facial attack "asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* A factual challenge allows the court to look beyond the complaint without "presum[ing] the truthfulness of the plaintiff's allegations." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). The Court can also hear evidence outside the pleadings and resolve factual disputes, if necessary, without treating the motion as one for summary judgment. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009). "Once challenged, the party asserting subject-matter jurisdiction has the burden of proving its existence," and the plaintiff's allegations carry no presumption of truthfulness. *Id.*

B. Federal Rule of Civil Procedure 12(b)(6).

A motion brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. Although a court must accept as true all well-pled factual allegations in a complaint, it need not credit allegations that are merely conclusory. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.*

IV. ARGUMENT

A. Plaintiffs' claims are jurisdictionally barred by DFE.

The FTCA's waiver of sovereign immunity is subject to statutory exceptions. *See* 28 U.S.C. § 2680. When an exception applies, the United States retains its sovereign immunity and the court lacks jurisdiction. *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000). These exceptions include any claim "based upon the exercise or performance…a discretionary function

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or duty…whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

The Supreme Court has established a two-part test to determine when DFE bars a claim. *United States v. Gaubert*, 499 U.S. 315, 328-32 (1991). First, a court must ask whether the challenged conduct was in fact "discretionary in nature"—that is, whether the conduct involved "an element of judgment or choice.' *Id.* at 322. The first prong is met unless "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *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.").

Second, if the challenged conduct involves judgment or choice, a court must next determine if it was "of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. Congress intended for DFE to "prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy" through a tort action. *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). "[T]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation" but rather "on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gonzalez v. United States*, 814 F.3d 1022, 1027-28 (9th Cir. 2016).

Plaintiffs base their claims on a variety of alleged conduct, which the government discusses separately below to demonstrate that almost all acts at issue were subject to DFE.

1. CBP's decision to open TOPS was an exercise of policy discretion.

Plaintiffs' claims cannot be based on either CBP's decision to open TOPS or to send Plaintiffs to TOPS for processing, because there is no statute, regulation, or policy specifically prescribing a course of action for where to process family units who are apprehended by CBP after entering the United States without authorization between two ports of entry. And, with

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respect to prong two, CBP's decision to open TOPS and use it for processing family units was susceptible to policy considerations.

Concerns about subjecting policy-based decision-making "to outside inquiry" are magnified in the immigration context. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999). In February 2021, the government was dealing with both the pandemic and a sudden and rapid migration surge, which was exacerbated by renovations being done to CBP's RGV processing center. Due to COVID-19 restrictions and the ongoing renovation of CBP's RGV processing center, the available indoor space was limited at a time when CBP suddenly had to process more people than it was used to on a daily basis. Reyna Decl., ¶¶10-14. Therefore the creation of TOPS "involve[ed] the allocation and deployment of limited governmental resources" and is "the type of administrative judgment that the [DFE] was designed to immunize from suit." *Fang v. United States*, 140 F.3d 1238, 1242 (9th Cir. 1998); *see also Daigle v. United States*, 972 F.2d 1527, 1541-42 (10th Cir. 1992) (decisions balancing readiness and available resources with need to address public health crisis were protected by DFE, which cannot be defeated by allegations that the agency "rushed into [its efforts] without proper planning" or "allegations of deficient planning and execution"). CBP's decision to create and utilize TOPS in February 2021 cannot form the basis for Plaintiffs' tort claims.

2. <u>CBP's decisions regarding conditions at TOPS were an exercise of policy discretion.</u>

Plaintiffs also allege that the conditions at TOPS were inadequate during their temporary stay. Compl., ¶¶29-45. But "conditions of confinement" challenges are also barred by DFE. How CBP chose to staff and supply TOPS involved discretionary decisions susceptible to policy considerations. *See, e.g.*, *Cosby v. Marshals Service*, 520 F. App'x 819, 821 (11th Cir. 2013) (detainee decisions involve "several policy considerations … including prison security, the

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allocation of finite resources, and the logistics of prisoner transportation if transfer to an off-site facility is an option"); *Patel v. United States*, 398 F. App'x 22, 29 (5th Cir. 2010) (DFE shielded decision to transfer prisoner); *Antonelli v. Crow*, No. 08-261, 2012 WL 4215024, at *3 (E.D. Ky. Sept. 19, 2012) (collecting cases in which a myriad of conditions of confinement claims, including claims based on temperature and crowding, are barred by DFE); *Lineberry v. United States*, No. 3:08-cv-0597, 2009 WL 763052, at *6 (N.D. Tex. Mar. 23, 2009).

Here, there are applicable guidelines for CBP to follow, and except for not providing bedding to the minor Plaintiffs, CBP either adhered to its non-discretionary guidelines or was afforded discretion on how to implement the guidelines.

i. Food (Compl., ¶¶35-38)

Plaintiffs allege that they were deprived of adequate food in accordance with CBP policies, but this is not true. The CBP's Hold Rooms and Short Term Custody memorandum, dated June 2, 2008 (HRSTCP), Exh. A to Compl., requires CBP to provide juveniles with a meal every six hours and to have regular access to snacks, milk, or juice. HRSTCP at 6.8; 6.24.9. And Section 5.6 of the National Standards on Transport, Escort, Detention, and Search, dated October 2015 (NSTEDS), Exh. B to Compl., requires the same. As to adults, the NSTEDS only states that adult detainees should be "provided with food at regularly scheduled meal times" without specifying what that means, or what kind of food should be provided. NSTEDS at 4.13.

CBP records reflect that adult Plaintiffs were provided four hot meals and drinks, and minor Plaintiffs were provided five hot meals and drinks, during their 40-hour stay. Reyna Decl., ¶¶35-37. Furthermore, TOPS had a location that was constantly stocked with juice and snacks that was accessible to all Plaintiffs at all times. *Id.* at ¶¶22-23. And CBP did not deny additional food to individuals upon request. *Id.* At most, Plaintiffs might point to a potential eight-hour gap between two of the children's hot meals. This however does not account for the

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other food that was constantly available, or that additional meals were available on request. Plaintiffs do not allege that they asked for more food and were denied any such requests.

CBP complied with applicable guidelines in feeding Plaintiffs during their short detention, and thus none of this conduct can form the basis for Plaintiffs' tort claims.

ii. Medical Care (Compl., ¶¶46-53)

Plaintiffs allege that CBP denied Madrigales Vasquez access to medical care in violation of its internal policies because she went to the medical tent twice to seek treatment for cold/flu symptoms, but nobody was there. To support their assertion, Plaintiffs allege that the NSTEDS obligated CBP to provide Madrigales Vasquez "appropriate medical care … in a timely manner." *Id.* at ¶53 (citing NSTEDS at 14, 23). But "appropriate" and "timely manner" are the opposite of a specifically prescribed course of action; this language creates an inherently discretionary determination as to how medical care should be provided. CBP had discretion to appropriately staff its medical facilities in light of the exigencies of that moment. Plaintiffs do not allege that CBP affirmatively refused them medical care, only that no one happened to be at the medical station the two times Madrigales Vasquez visited. Further, Plaintiffs received a medical screening when they were first brought to TOPS. Reyna Decl., ¶¶24, 28. Accordingly, DFE bars any claim based on a failure to treat Madrigales Vasquez's cold/flu symptoms.

iii. Bedding and Hygiene Articles (Compl., ¶¶34, 43)

The government acknowledges that minors S.Z.M. and T.Z.M. were not provided with mattresses while at TOPS despite that HRSTCP requires juveniles detained longer than 24 hours to be given access to "basic hygiene articles, a blanket, and a mattress (a pillow is optional), etc." HRSTCP at 6.24.6; *see also* NSTEDS at 4.12. Based on currently available evidence, it does not appear that DFE would apply to minor Plaintiffs' claims arising from lack of bedding. But "basic hygiene articles" is not defined in the HRSTCP, and a separate provision in the HRSTCP

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states that "[a]gents will make every reasonable effort to provide [] children who are held *more than 48 hours* with access to a shower and clean towel, clean clothing, and basic hygiene articles as soon as practicable." HRSTCP at 6.14 (emphasis added). Because the hand-washing stations also contained soap, Reyna Decl., ¶22, it cannot therefore be said that CBP violated a specific, non-discretionary directive pertaining to basic hygiene articles for the minor Plaintiffs.

There is also no non-discretionary prescription that specifically required CBP to give adult Plaintiffs mattresses or hygiene articles within a certain time period. The NSTEDS only states that adult detainees must be "provided with basic personal hygiene items, consistent with short term detention and safety and security needs" and that "[r]easonable efforts will be made to provide showers, soap, and a clean towel to detainees who are *approaching 72 hours* in detention." NSTEDS at 4.11 (emphasis added); *see also id.* ("Restrooms: Whenever operationally feasible, soap may be made available."). DFE therefore bars any claim asserted by the adult Plaintiffs arising out of a failure to receive bedding or hygiene products.

3. Plaintiffs cannot overcome DFE by alleging a constitutional violation.

Constitutional tort claims are not cognizable under the FTCA. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994). Yet Plaintiffs still devote a substantial portion of their complaint to allegations that their Fifth Amendment rights were violated even though they do not bring any constitutional claims. Compl., ¶¶61-88. These allegations are an attempt by Plaintiffs to protect their tort claims from being barred by DFE, as discussed above. The Ninth Circuit holds that a plausible constitutional violation may prevent application of DFE. *See Nurse*, 226 F.3d at 1002 n.2 (reversing the dismissal of FTCA claims pursuant to DFE where the plaintiff alleged a constitutional violation). Thus, Plaintiffs' claims can only survive if their allegations demonstrate that the government violated their constitutional rights under the Fifth Amendment's substantive due process clause. But Plaintiffs fail to plausibly allege such a

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violation and therefore their constitutional allegations are of no moment here.

Plaintiffs broadly pursue two Fifth Amendment due process theories in their complaint. First, Plaintiffs allege that their constitutionally protected right to reasonable care and safety was violated because CBP failed to provide "adequate food, shelter, clothing, and medical care." Compl., ¶¶74-78 (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982); *DeShaney v. Winnebago Cnty.*, 489 U.S. 189 (1989)). Second, Plaintiffs allege that the allegedly inhumane and unsafe conditions were "unconstitutionally punitive because they were deprived of adequate food and shelter without any legitimate government purpose." Compl., ¶¶79-87 (citing *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Demery v. Arpaio*, 378 F.3d 1020, 1030 (9th Cir. 2004); *Doe v. Kelly*, 878 F.3d 710, 714 (2017)). The facts do not support either theory.

There are no bright lines about what is constitutionally required. Rather, when the government detains an individual, "the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 200. What "some responsibility" means depends on the nature of the circumstances and the government's action should be presumed correct. *Youngberg*, 457 U.S. at 324–25. "Such a presumption is necessary to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function….The administrators, and particularly professional personnel, should not be required to make each decision in the shadow of an action for damages." *Id.* *DeShaney* and *Youngberg* were brought against States under the Fourteenth Amendment, but their analyses are applicable.

Plaintiffs do not define the precise right at issue or how it was violated. Nor can they. CBP created TOPS in order to process family units more efficiently given the limitations on transporting and housing migrant families at CBP facilities when families would be released after processing. Reyna Decl., ¶¶13-20, 30-31. CBP equipped TOPS to meet the basic needs for

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the many individuals that would need to be processed, including toilets, hand-washing stations, blankets, food, heaters, medical screenings, and security staff. *Id.* at ¶¶22-23. CBP's efforts to equip TOPS with basic necessities demonstrate it met its constitutional obligations and provided a significant measure of safety and well-being to Plaintiffs. CBP provided hot meals at set times and made snacks and juice available at all times. Individuals who requested additional hot meals would not be denied. *Id.* Plaintiffs never allege that they asked for and were denied clothing, additional hot meals, or other supplies. Similarly, a medical screening was performed and additional medical care was accessible, it just happened to not be available when Plaintiffs allege they twice sought it out. Compl., ¶¶47-50. An understaffed medical station, without more, does not amount to a substantive due process violation. *See Pastora v. County of San Bernardino*, No. 22-55617, 2023 WL 3734264, at *2 (9th Cir. May 31, 2023) (claim requires a showing of fault that is more culpable than mere negligence); *Vasquez v. Baca*, 323 Fed App'x 503, 504 (9th Cir. 2009) (affirming district court finding that allegations concerning treatment of a cold or a migraine did not implicate a serious medical need to support a claim of unconstitutional conditions of confinement).

Other than general exposure to COVID-19, the complaint is devoid of factual allegations supporting Plaintiffs' contention that conditions were dangerous or posed a threat to their safety. *See, e.g.*, *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 433 (N.D. Cal. 2017). At most, Plaintiffs allege that it became "very cold at night—for instance, as low as 35 degrees Fahrenheit on February 21, 2021." Compl., ¶30. Even if true, this does not amount to a constitutional violation without more. But Plaintiffs presumably refer to the temperature on the morning of February 21 *before* they encountered CBP Border Patrol Agents that evening. By the time they were apprehended and transferred to TOPS around 6:30 p.m. on February 21 (*id.* at ¶24; Reyna Decl., ¶33), and until their release on the morning of February 23, weather data maintained by

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NOAA shows that the temperature was usually above 60 degrees and never dropped below 48 degrees. *See* Declaration of Kristen R. Vogel, ¶¶3-7. TOPS also had heaters to provide additional warmth. Reyna Decl., ¶22.

Alternatively, Plaintiffs argue that their processing experience was unnecessarily punitive. But CBP has statutory authorization to apprehend and process individuals who make an illegal entry. It needed to process Plaintiffs somewhere. Doing so outside, without more, is not a substantive due process violation.

Detention can only be unconstitutionally punitive if it is done without any or well exceeds a legitimate government interest. Here, Plaintiffs' temporary time in custody was narrowly tailored to clear and worthwhile government interests. Using TOPS alleviated the pressures on CBP's indoor facilities that were overcrowded because of COVID-19 protocols and renovations. Reyna Decl., ¶¶9-20. Moreover, CBP wanted to minimize potential exposure to COVID-19 by processing family units outside instead of inside a cramped indoor facility. *Id.* Finally, CBP intended for TOPS to save resources by processing individuals closer to where they were apprehended, allowing individuals to be released faster. *Id.*

These are all legitimate purposes. In no reasonable approximation of these facts can TOPS be considered unconstitutionally punitive.

B. There is no subject-matter jurisdiction over institutional tort claims.

Plaintiffs' allegations only refer to CBP generally; their complaint is devoid of allegations that could be attributed to the misconduct of any individual employee. *See, e.g.*, Compl., ¶25 ("Under the bridge, CBP had set up a makeshift detention and processing site—a fenced area where hundreds of migrants were being held."); *id.* at ¶56 ("In recent years—including in 2021—CBP has set up and used other similar sites under international bridges to hold thousands of migrants in harsh and dangerous conditions."). Because the FTCA does not

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waive sovereign immunity for the tortious acts or omissions of the entire government or a federal agency, the Court lacks subject-matter jurisdiction here. *See* 28 U.S.C. § 2671 (defining "employees" within the FTCA as "persons acting on behalf of a federal agency").

C. There is no private-person analogue.

Plaintiffs' claims also fail because the government acts that Plaintiffs challenge have no private-person analogue. The FTCA's waiver of sovereign immunity is limited to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The FTCA does not waive sovereign immunity for claims against the United States based on governmental "action of the type that private persons could not engage in and hence could not be liable for under local law." *Chen v. United States*, 854 F.2d 622, 626 (2d Cir. 1988) (internal quotations omitted). The FTCA "requires a court to look to the state-law liability of private entities, not to that of public entities, when assessing liability under the FTCA." *United States v. Olson*, 546 U.S. 43, 45-46 (2005).

Because only the federal government has the authority to enforce immigration laws and process noncitizens who enter the United States, there is no private-person analogue that would support a claim under the FTCA. The alleged harms here stem from the government's decision to open TOPS and process family units there. There is no private-person counterpart under Texas common law. *See, e.g.*, *Elgamal v. United States*, No. 13-cv-867, 2015 WL 13648070, at *5 (D. Ariz. July 8, 2015) (recognizing that "immigration matters" are "an inherently governmental function"), *aff'd*, *Elgamal v. Bernacke*, 714 F. App'x 741, 742 (9th Cir. 2018) ("[B]ecause no private person could be sued for anything sufficiently analogous to the negligent denial of an immigration status adjustment application, that claim must be dismissed as well."). Consequently, Plaintiffs' claims must be dismissed for this reason as well.

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D. Plaintiffs fail to state a negligence claim.

The Court could sidestep the jurisdictional question completely because Plaintiffs' complaint fails to state a claim. Texas law applies to both the negligence and IIED claims. *See Washington v. U.S.*, 769 F.2d 1436, 1437 (9th Cir. 1985).

"Under Texas law, negligence consists of four essential elements: (1) a legal duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) an actual injury to the plaintiff; and (4) a showing that the breach was the proximate cause of the injury." *Gutierrez v. Excel Corp.*, 106 F.3d 683, 687 (5th Cir. 1997). A plaintiff must show some physical injury in order to bring an ordinary negligence claim. *See Temple-Inland Forest Prod. Corp. v. Carter*, 993 S.W.2d 88, 91 (Tex. 1999) ("Absent physical injury, the common law has not allowed recovery for negligent infliction of emotional distress except in certain specific, limited instances.").

Plaintiffs allege that they "experienced significant physical pain and discomfort, and they constantly felt cold, sore, famished, and exhausted." Compl., ¶8. They further allege they "suffered psychological damage" and "[t]hey felt extremely scared, anxious, and worried." *Id.* at ¶9. Plaintiff Madrigales Vasquez alleges that she "experienced symptoms of a cold or flu, including fever, coughs, and a sore throat." *Id.* at ¶47. But none of these alleged injuries rise to the level of serious bodily harm as required by Texas law for ordinary negligence claims.

In *Villafuerte v. United States*, No. 16-cv-619, 2017 WL 8793751 (S.D. Tex. Oct. 11, 2017), the plaintiff alleged she was subject to unsafe and inhumane conditions while kept in CBP custody. Among other conditions, plaintiff alleged cold food, overcrowding, painfully low temperatures, no bedding, dirty and unsanitary conditions, and sleep deprivation. *Id.* at **3-4. Due to those conditions plaintiff alleged she suffered physical and emotional harm, including headaches, burning eyes, aching stomach, and anxiety. *Id.* The court held that such harm was insufficient to establish a physical injury and thus the plaintiff had no plausible claim for

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negligence. *Id.* at *11; *see also Aguilar v. United States*, No. 16-cv-048, 2017 WL 6034652, at *3 (S.D. Tex. June 7, 2017) (holding that plaintiff's allegations of pain from prolonged exposure to extremely cold temperatures were not serious bodily injuries sufficient to state a claim for negligence).

Here, Plaintiffs allege feelings of discomfort, mental anguish, and symptoms of a cold or flu, but do not allege the type of physical injury required by Texas law. Their case should be dismissed for the same reasons set out in *Villafuerte* and *Aguilar*. *See also, e.g.*, *Holcombe v. United States*, No. 18-cv-555, 2021 WL 398842, at *5 (W.D. Tex. Feb. 3, 2021) (precluding recovery of mental anguish damages including PTSD symptoms); *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90, 95 (Tex. App. 1998) (precluding recovery for physical bruising and symptoms of pain).

Plaintiffs' negligence claim should also be dismissed because they fail to allege that any physical injury was caused by the government's negligence. Even if cold/flu symptoms were a physical injury, Plaintiffs do not allege that Madrigales Vasquez caught a cold or flu *because* of TOPS, only that she had cold/flu symptoms while at TOPS. Compl., ¶65 (Plaintiffs were "weak, sore, fatigued, malnourished, and dehydrated" *before* entering the United States). Applying Texas law, a court in this district has dismissed a similar negligence claim absent allegations of serious bodily injury. *See Luna v. United States*, 20-cv-1152-RSL, 2021 WL 673534, at *4 (W.D. Wash. Feb. 22, 2021) (dismissing plaintiff's FTCA negligence claim for failure to allege "serious bodily injury resulting from defendant's alleged failure to exercise reasonable care"). Plaintiffs' negligence claim should likewise be dismissed.

E. Plaintiffs fail to state an IIED claim.

To prove IIED, Plaintiffs must adequately allege that (1) CBP acted intentionally or recklessly; (2) CBP's conduct was extreme and outrageous; (3) CBP's actions caused Plaintiffs'

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emotional distress; and (4) Plaintiffs' emotional distress was severe. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998). Plaintiffs' complaint fails for almost every element.

1. IIED cannot be used to recover emotional damages from a negligence claim.

As a threshold matter, Plaintiffs cannot disguise their negligence claim as an IIED claim in order to seek damages for emotional distress. IIED is a "gap-filler" tort, intended to supplement existing causes of action to ensure that extraordinarily egregious conduct does not go unremedied, but it should not be used in order to sidestep the pleading deficiencies of another tort. *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004). "Where the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available." *Id.* (collecting cases). Because Plaintiffs' IIED claim rests on the same factual allegations as their negligence claim, it fails as a matter of law.

Here, the operative conduct for IIED is the same as that for negligence: CBP "detaining Plaintiffs under an international border bridge and subjecting them to inhumane and unsafe conditions for multiple days." Compl., ¶90. Everything flows from this common nucleus. In their complaint, Plaintiffs devote six paragraphs to alleging negligence. *Id.* at ¶¶95-100. Those conclusory paragraphs merely state the elements of negligence based on the "foregoing allegations" and say that the government owed Plaintiffs a duty while in government custody and that the government breached that duty. *Id.* at ¶¶96, 97. Because the entirety of Plaintiffs' claims for negligence and IIED rest on the same alleged conduct—that CBP improperly held them at an outdoor processing facility and did not provide adequate provisions—IIED cannot save Plaintiffs from the legal deficiencies of a negligence claim.

Nor are the claims distinguishable based solely on the measure of damages. Texas law does not allow IIED to gap-fill other causes of action just so one may recover for mental anguish.

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"The tort of IIED simply has no application when the actor intends to invade some other legally protected interest, even if emotional distress results." *Moser v. Roberts*, 185 S.W.3d 912, 915 (Tex. App. 2006) (cleaned up). This is true even if the plaintiff "cannot maintain an action for [the alternative tort], regardless of whether he chooses to assert the alternative claim, succeeds on the alternative claim, or the alternative claim is barred." *May v. City of Arlington*, No. 16-cv-1674, 2018 WL 1569888, *12 (N.D. Tex. Mar. 30, 2018).

Federal courts have dismissed IIED claims in similar circumstances, irrespective of whether the underlying negligence claim was separately cognizable. In *Barry v. United States*, No. 22-cv-150, 2023 WL 2996101 (S.D. Tex. March 31, 2023), which also involved allegations of improper detention at an immigration facility, the plaintiff sued under the FTCA for negligence, false imprisonment, and IIED. The plaintiff alleged that he was improperly detained as an adult because ICE erroneously said he was 25-years-old when he actually 17-years-old. *Id.* at *8. As a result of this error, the government placed him at an adult immigration detention facility for four months rather than a juvenile facility. *Id.*

The court dismissed the negligence claim because there was no alleged physical injury—same as here. Next, the court found that because the "gravamen" of plaintiff's claims all rested on the same set of facts, IIED must be dismissed so as to not overcome the limitations "placed on the mental recovery of mental anguish damages under more established tort doctrines." *Id.* at *9-10; *see also Griffin v. United States*, No. 18-cv-651, 2019 WL 1092741, at *7 (M.D. Fla. Jan. 23, 2019) (dismissing an IIED claim under Texas law that rested on the same facts as a medical malpractice claim: "the alleged emotional distress is merely incidental to [the negligence] claim.").

As in *Barry*, Plaintiffs base all their claims, including those for mental anguish, on the same underlying facts. "The fact that his IIED claim focuses solely on the recovery of emotional

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distress damages, and his other causes of action permit recovery for other types of injury, does not render the claims sufficiently distinct." *Id.*; *see also Quaker Petroleum Chemicals Co. v. Waldrop*, 75 S.W.3d 549, 555 (Tex. App. 2002). IIED cannot be a means to recover for what is not otherwise recoverable. Without some set of facts independent from the negligence claim, Plaintiffs' IIED cause of action fails.

2. Plaintiffs have not alleged CBP acted intentionally to cause emotional distress.

One also cannot substitute IIED for negligence because the two claims require different mental states. The first element of an IIED claim is that "the defendant acted intentionally or recklessly." *Johnson*, 985 S.W.2d at 65. Plaintiffs have not alleged sufficient facts to support this element. Texas law requires not just an intentional act, as all acts are on some level intentional, but an act intended to create emotional distress. Here, Plaintiffs allege: "Defendant's employees acted intentionally and/or recklessly in detaining Plaintiffs under an international border bridge…" Compl., ¶90. This is insufficient.

"[T]he tort of intentional infliction of emotional distress is available only in those situations in which severe emotional distress *is the intended consequence or primary risk of the actor's conduct*." *Johnson*, 985 S.W.2d at 67 (emphasis added). In *Johnson*, the Texas Supreme Court held that the plaintiff witnessed defendant's driver run into a parade killing one person and injuring two. *Id.* at 63. Despite suffering severe emotional distress, the plaintiff could not recover because there was no evidence that "the actor intended to cause severe emotional distress or severe emotional distress was the primary risk created by the actor's reckless conduct." *Id.* at 63. "Where emotional distress is solely derivative of or incidental to the intended or most likely consequence of the actor's conduct, recovery for such distress must be had, if at all, under some other tort doctrine." *Id.* at 67.

Nowhere do Plaintiffs allege that CBP intended to cause them emotional distress by

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creating TOPS or that severe emotional distress was the primary risk of housing migrants at TOPS. Nor could such an allegation be inferred by the pleadings. Such an inference seems implausible when Plaintiffs are not alleging false imprisonment so there is no allegation that CBP improperly held them. And because Plaintiffs did not present themselves at a port of entry, it is reasonable to assume they knew their apprehension and brief detention was a probable consequence of their unauthorized entry. Thus, the severe emotional distress would have to be based on being outside for a short period of time without mattresses or as much food or supplies as Plaintiffs desired. But that is what Plaintiffs allege they endured for weeks before reaching the United States. Specifically, Plaintiffs allege that they took "a long and arduous journey on foot and by bus" from Guatemala that left them "weak, sore, fatigued, malnourished, and dehydrated." Compl., ¶¶1, 65. Because their journey was rife with privation, it is reasonable to believe that TOPS, even if not ideal, provided some measure of improved circumstances and was a much shorter duration than their trip to the United States. Without specific allegations to the contrary, Plaintiffs cannot state a claim that CBP either created TOPS with the intent to cause extreme stress or that those who had already endured so much struggle and for so long would suffer severe emotional damage.

3. Plaintiffs have not alleged that CBP's conduct was extreme and outrageous.

Plaintiffs also fail to allege facts sufficient to show that CBP's creation of or use of TOPS was extreme and outrageous. Whether a defendant's conduct was extreme and outrageous is to be determined by a court in the first instance. *Hoffman-La Roche v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004).

IIED is intended only to capture the very worst of human behavior. A brief detention at an outdoor processing location is not that. Rather, recovery is only available "in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so

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unusual that the victim has no other recognized theory of redress." *Montemayor v. Ortiz*, 208 S.W.3d 627, 655 (Tex. App. 2006). To satisfy this element, a defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kroger Texas Ltd. v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006) (cleaned up). Even IIED claims based on "heinous acts" are rarely actionable except for "circumstances bordering on serious criminal acts." *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 818 (Tex. 2005).

Few cases have met that high threshold. For example, in *Morgan v. Anthony*, 27 S.W.3d 928 (Tex. 2000), a male defendant approached the female plaintiff who had experienced car troubles on the side of the highway. After he made unwelcome sexual advances, plaintiff repeatedly asked him to leave, but the defendant refused. *Id.* at 929-930. Even after she started her car, he blocked her with his truck on the highway almost a dozen times. *Id.* Based on such atrocious facts, the court held that the second prong was satisfied. In *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999), the plaintiff endured two years under a manager who "created a workplace that was a den of terror for the employees" by yelling, screaming, cursing, and being physically intimidating. *Id.* at 614-617. This conduct was actionable because of how long it continued despite employees' efforts to stop it. "It is the severity and regularity of [defendant's] abusive and threatening conduct that brings his behavior into the realm of extreme and outrageous conduct." *Id.* at 617. Both of these cases are examples of the worst of human behavior, intolerable in a civilized society.

Plaintiffs' allegations do not approach such outrageous conduct. The complaint does not specify exactly what behavior was outrageous, or to whom it would be attributed, but the complained of conduct includes:

- Being taken to a processing center under a bridge, Compl., ¶¶24, 25;

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- Waiting in line for processing and CBP not responding to questions, *id.* at ¶¶26, 27;
- Being outside and "forced to be in open air and exposed to the elements," *id.* at ¶29;
- Inadequate blankets, *id.* at ¶30;
- No beds, cots, mattresses, or chairs, *id.* at ¶31;
- Only having one or two meals a day and not regularly provided snacks or juice, *id.* at ¶¶35, 36;[2]
- Long lines for the portable toilets, *id.* at ¶¶40, 41;
- Being put at risk of getting COVID-19 because social distancing was difficult, *id.* at ¶¶44, 45; and
- Inadequately staffing the medical treatment area, *id.* at ¶¶48-51.

These allegations are not trivial, but none of this conduct, either separately or in the aggregate, is potential criminal behavior or repeated and severe punishment that is cognizable under Texas law.

i. *Creating TOPS was not extreme and outrageous.*

Indeed, TOPS was authorized by law, which should negate any IIED claim. The Fifth Circuit has held that "conduct which is required or authorized by law cannot be extreme or outrageous." *Hart v. O'Brien*, 127 F. 3d 424, 452 (5th Cir. 1997) (examining Texas caselaw) (*abrogated on other grounds by Wilson v. Stroman*, 33 F.4th 202, 210 (5th Cir. 2022)).

Even if that were not the case, being briefly held for processing after an unauthorized entry is not atrocious, but is the expected course of action following an unauthorized entry. The only difference is TOPS was outside because of CBP's limitations on indoor space and COVID-

[2] The government disputes these facts for purposes of its Rule 12(b)(1) motion, but accepts them as true for its Rule 12(b)(6) motion.

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19. Being outside for 40 hours in mild weather conditions is not so extreme or outrageous as to affront all norms of a civilized society. And detention, in and of itself, is not enough for an IIED claim. For example, in *Suberu*, the plaintiff was detained and prosecuted for shoplifting, but claimed that Kroger knowingly provided law enforcement with false information that led to her incarceration. Without some evidence of "bad relations, racial animus, or other ulterior motives," however, her claim was "legally insufficient to support a finding that Kroger's conduct was extreme and outrageous." *Id.* at 796-797; *see also Villafuerte*, 2017 WL 8793751, at *14. Plaintiffs' allegations do not sufficiently demonstrate that CBP's creation of TOPS was extreme or outrageous conduct under the law.

ii. *The alleged conditions at TOPS were not extreme and outrageous.*

The alleged insufficient accommodations may have been uncomfortable, but they are not outrageous. Based on the complaint, Plaintiffs had at most two nights sleeping on the ground and had only one or two meals a day. Such conditions are unfortunate, but not the type of conduct that amounts to IIED. For example, in *CreditWatch*, the plaintiff alleged that the defendant (her employer) forced plaintiff's landlord, who was also defendant's employee, to evict plaintiff in retaliation for plaintiff making sexual harassment claims against the defendant. Yet even this was insufficient: "Assuming all this is true, it was callous, meddlesome, mean-spirited, officious, overbearing, and vindictive—but not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Creditwatch*, 157 S.W.3d at 818. If being deprived of one's home, indefinitely and purposefully, does not go beyond all possible bounds of decency as a matter of law, then neither do the allegations here. Not having a mattress, chair, or enough blankets during immigration processing is far less extreme than being forced out of one's home.

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Plaintiffs also allege a lack of adequate medical care because Madrigales Vasquez was not treated for her cold/flu symptoms and due to Plaintiffs' general concerns about contracting COVID-19. An inadequately staffed medical station under these circumstances, if true, is similar to the uncomfortable circumstances discussed above. It is not conscience shocking. Plaintiffs' allegations regarding their inability to effectively social distance do not demonstrate conditions so outrageous as to maintain an IIED claim. Plaintiffs do not allege that they contracted COVID-19, only that they were worried about it. That is a concern many people had during 2021, no matter their circumstances. Here, there are no allegations that CBP withheld masks, forced Plaintiffs into close quarters with improper ventilation, or did anything purposeful to heighten Plaintiffs' risk of COVID-19 or with the intention of subjecting Plaintiffs to COVID-19. Without more, Plaintiffs allegations fall short of the exceedingly high threshold of extreme and outrageous conduct necessary.

4. Plaintiffs have not alleged that they suffered severe emotional distress.

The last element requires Plaintiffs to allege that they suffered *severe* emotional distress. "Severe emotional distress is so severe that no reasonable person could be expected to endure it." *McCarty v. Montgomery*, 290 S.W.3d 525, 538 (Tex. App. 2009). Texas courts base IIED claims on the Second Restatement of Torts, which discusses the heightened emotional distress necessary to maintain a claim. "Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity." Restatement (Second) of Torts § 46, comment c.

Plaintiffs allege that the experience made them feel "scared, anxious, and worried" and

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experience flashbacks. Compl., ¶¶85-86. These symptoms are not so severe that no person could be expected to endure them. "Feelings of anger, depression, and humiliation are insufficient evidence of severe distress." *Montemayor*, 208 S.W.3d at 658 n.22 (finding that symptoms of sleeplessness, depression, pains, and crying was "legally insufficient evidence that the distress she sustained constituted 'severe distress' as it is currently defined"). Plaintiffs' alleged emotional distress is disconcerting, but it does not rise to the high level to be "severe."

For these reasons, Plaintiffs fail to allege a claim for IIED.

V. CONCLUSION

At a time when CBP was faced with an unexpected increase of activity at the border and in the midst of a global pandemic, it did its best to carry out its mandate to apprehend and process individuals illegally crossing into the United States. TOPS was intended to streamline that process and allow CBP to process individuals without wasting time or government resources transporting them to an indoor facility and potentially increasing their risk to COVID-19. CBP designed and put in place an outdoor processing facility that was both secure and equipped with food and drinks, medical care, toilets, lights, heaters, and additional supplies upon request. If the efforts fell short of the goal, it was not because CBP employees intended to inflict emotional harm on Plaintiffs. Rather, it was because CBP was suddenly inundated with more migrants than it expected to handle. But falling short of a goal does not automatically trigger liability. That Plaintiffs had to wait 40 hours for processing instead of eight is lamentable, but not actionable.

CBP acted well within its discretion to design TOPS and implemented it pursuant to that discretion. Plaintiffs cannot bring claims that invade the government's discretion, and they have failed to plead any plausible constitutional violation to overcome that exception. Not can they bring institutional tort claims or claims where there is no private-person analogue.

Moreover, Plaintiffs' claim for negligence fails without allegations that support a serious

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bodily injury. And their IIED claim also fails because Plaintiffs have not plead sufficient facts to state a claim. Setting up an outdoor facility that tries to process and release detainees as fast as possible, while providing them food, drink, and safety, does not approach something that evokes the level of outrage or revulsion the law requires.

For the reasons set forth above, the motion should be granted, and Plaintiffs' FTCA claims against the United States should be dismissed.

DATED this 7th day of August, 2023.

Respectfully submitted,

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I certify that this memorandum contains 8,248 words, in compliance with the Local Civil Rules.