District Judge Benjamin H. Settle

UNITED STATES DISTRICT COURT
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

RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Note on Motion Calendar:
September 15, 2023

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Federal Tort Claims Act (FTCA) provides individuals a right to compensation where employees of the United States government commit tortious acts that cause harm. Here, Plaintiffs have pleaded facts demonstrating that they have a right to compensation for the harms they suffered. Defendant concedes that, in early 2021, Customs and Border Protection (CBP) "piloted a temporary Outdoor Processing Site (TOPS)" that was not intended to process "so many people," and that, as a result of the high number of apprehended migrants, its "operations were overwhelmed." Dkt. 6 at 1–2. However, Defendant errs in asserting its employees had discretion to violate federal policies and a settlement decree dictating the minimum standards for detention conditions. Thus, this lawsuit may properly proceed under the FTCA.

ARGUMENT

I. The discretionary-function exception is inapplicable to this case.

Defendant is incorrect that the discretionary-function exception (DFE) bars this Court's jurisdiction. The DFE bars claims based on actions that involve (1) an element of judgment or choice, and (2) public-policy considerations. *See United States v. Gaubert*, 499 U.S. 315, 322–23 (1991). The government bears the burden of proving that the DFE is applicable, and "the record must bear the weight of that burden." *Morales v. United States*, 895 F.3d 708, 716 (9th Cir. 2018). As the FTCA is a "remedial statute" "created by Congress . . . 'to compensate individuals harmed by government negligence,'" "its exceptions should be read narrowly." *Terbush v. United States*, 516 F.3d 1125, 1135 (9th Cir. 2008) (citation omitted).

Here, Defendant's argument that the DFE shields its employees' misconduct fails at the first prong, as Plaintiffs' injuries resulted from CBP officers' failure to follow federal mandates governing the minimum standards for immigration detention.[1] Moreover, the DFE is inapplicable here because federal officers violated Plaintiffs' constitutional rights—which they

[1] Contrary to Defendant's suggestion, Dkt. 6 at 2, 7–8, Plaintiffs are not challenging the creation of TOPS per se. Rather, they challenge the unsafe and inhumane conditions they endured while held there.

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lacked the discretion to do—and because their tortious conduct was not susceptible to policy analysis. Therefore, Defendant cannot meet its burden of proving that the DFE applies.

A. Ninth-Circuit precedent makes clear the government bears the burden of proving the DFE's applicability.

Defendant has the burden of demonstrating that the DFE applies here. While it is generally true that the plaintiff bears the burden of establishing subject-matter jurisdiction, Dkt. 6 at 5–6, the Ninth Circuit has repeatedly held that the United States has "the burden of proving the applicability of one of the exceptions to the FTCA's general waiver of immunity," including the DFE, *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992); *see also, e.g.*, *Lam v. United States*, 979 F.3d 665, 673 (9th Cir. 2020); *Chadd v. United States*, 794 F.3d 1104, 1108 (9th Cir. 2015). Placing this burden on the government is appropriate "[b]ecause an exception to the FTCA's general waiver of immunity, although jurisdictional on its face, is analogous to an affirmative defense." *Prescott*, 973 F.2d at 702.

Here, Plaintiffs have the burden to show "that [this Court] has subject matter jurisdiction under the FTCA's general waiver of immunity." *Id.* at 701. They have met this burden, as their complaint alleges "personal injur[ies] . . . caused by the negligent or wrongful act or omission" of federal "employee[s]" "while acting within the scope of [their] . . . employment," and identifies the applicable state torts under which the United States, "if a private person, would be liable." 28 U.S.C. § 1346(b)(1). Moreover, as explained below, Plaintiffs have "advance[d] . . . claim[s] that [are] facially outside the [DFE]." *Prescott*, 973 F.2d at 702 n.4. As Plaintiffs have successfully invoked the "FTCA's general waiver of immunity," Defendant "bears the ultimate burden of proving the [DFE's] applicability." *Id.* at 701–02.

B. Defendant's employees failed to follow various federal policies providing clear directives regarding detention conditions.

Defendant's argument as to the applicability of the DFE fails because federal policy "mandate[d] certain actions that [Defendant's] employee[s] failed to follow." *Lam*, 979 F.3d at

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674. Specifically, at the time of Plaintiffs' detention, CBP's internal policies—including the Hold Rooms and Short Term Custody policy ("Hold Rooms Policy") and the National Standards on Transport, Escort, Detention, and Search ("National Standards")—and the 1997 *Flores* settlement agreement prescribed various specific courses of action for federal immigration officers to follow. *See* Dkt. 1-2; Dkt. 1-3; Maltese Decl. Ex. H. As detailed below, Plaintiffs' injuries were directly caused by Defendant's employees' failure to adhere to these directives.

Defendant does not dispute the existence of these directives, but argues its officers "either adhered to [the] non-discretionary guidelines or [were] afforded discretion on how to implement" them. Dkt. 6 at 9. In support of that argument and to dispute Plaintiffs' allegations, Defendant submitted evidence concerning the conditions of Plaintiffs' detention at TOPS. *See generally* Dkt. 7–8. Plaintiffs dispute the veracity of that evidence and present extrinsic evidence of their own, which they are entitled to do in response to the government's factual attack. *See Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016). This evidence supports the factual allegations in the complaint, demonstrating Defendant's employees violated various federal directives while detaining Plaintiffs at TOPS. At a minimum, it further highlights that this case presents important "factual disputes," which "must be resolved in favor of Plaintiffs" at this stage. *Id.* Defendant cannot meet its burden of proving that the DFE applies.

1. Bedding

First, it is undisputed that Defendant's employees violated CBP policies relating to the provision of bedding to detained juveniles, as Plaintiffs S.Z.M. and T.Z.M.—who were only nine and three years old at the time of their detention, respectively—were forced to sleep on the bare dirt ground for two nights. *See* Dkt. 6 at 10 (Defendant acknowledging "that [the minor Plaintiffs] were not provided with mattresses while at TOPS," contrary to applicable policy); Dkt. 1 ¶¶ 31–34. In contrast, the Hold Rooms Policy mandates that "[j]uveniles detained longer than 24 hours will be given access to . . . a blanket[] and a mattress." Dkt. 1-2 at 11. Nor does their case appear to be an exception. *See* Maltese Decl. Exs. C–F (photos showing migrant

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children sleeping on the dirt ground at TOPS in March 2021). The DFE does not shield this violation of federal policy.

2. Food

Defendant's employees also violated federal directives relating to the provision of food. For instance, the Hold Rooms Policy requires that juveniles "be provided with meal service" "at least every six hours" "[r]egardless of the time in custody." Dkt. 1-2 at 8, 12. Moreover, juveniles must receive meals "at regularly scheduled meal times" and "must have regular access to snacks, milk, and juice." Dkt. 1-3 at 22. As for adults, CBP policies mandate that they be "provided with food at regularly scheduled meal times," *id*. at 18, and with "snacks and juice every four hours," Dkt. 1-2 at 8. These policies further indicate that adults should be provided a meal at least every 8 hours. *See id.* ("Detainees . . . will be provided a meal if detained for more than 8 hours or if their detention is anticipated to exceed 8 hours."); Dkt. 1-3 at 6 ("Meals and snacks will be made available during any transfer that exceeds . . . eight hours for adults.").

Plaintiffs have alleged unambiguous violations of these requirements. They, including minors S.Z.M. and T.Z.M., received "only one or two meals a day," and "often went without food for many hours." Dkt. 1 ¶ 35. The minor Plaintiffs were not provided with meal service at least every six hours at regularly scheduled meal times, and they were "never offered any snacks, milk, or juice, as required by CBP policies." *Id.* ¶¶ 37–38. And the adult Plaintiffs were neither provided with meals at regularly scheduled meal times (or every eight hours), nor did they receive snacks and juice every four hours. *Id.* ¶ 36.

In disputing these allegations, Defendant proffers the declaration of Border Patrol (BP) Associate Chief Abelino Reyna regarding the purported number of meals provided to each Plaintiff and their date and time. *See* Dkt. 7 ¶¶ 35, 37. The Court should accord little weight to this evidence, as the declaration contains several key factual assertions regarding the conditions at TOPS which appear to be misleading or inconsistent with Plaintiffs' evidence. *See, e.g.*, *infra* at 7–10.

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But even the information Agent Reyna provides compels the conclusion that Defendant's employees violated federal directives concerning meals. Plaintiffs were reportedly taken into CBP custody on February 21, 2021, at about 18:30, but the first time Defendant's employees provided S.Z.M. and T.Z.M. a meal was the next day at about 03:04. Dkt. 7 ¶¶ 33, 37. Thus, the minor Plaintiffs went without a meal for 8.5 hours, in violation of the policy requiring they be provided with a meal "at least every six hours." Dkt. 1-2 at 8, 12. They again did not receive any meals for over 8.5 hours between their last meal at TOPS on February 23rd at about 02:20, and their release from custody that same day at about 10:59. Dkt. 7 ¶¶ 37, 33. Furthermore, Agent Reyna's declaration indicates two other periods where S.Z.M. and T.Z.M. were not served a meal for over six hours, in violation of federal policy. *See id* ¶ 37. And while Defendant asserts that "[s]nacks, juice, and water were openly available at TOPS and could be accessed as often as desired," Dkt. 6 at 4, that was not Plaintiffs' experience, Dkt. 1 ¶¶ 36, 38. The Court must resolve this factual dispute in favor of Plaintiffs. *Edison*, 822 F.3d at 517.

Similarly, whereas federal policies required that adult detainees be provided with food at regularly scheduled meal times, or at least every eight hours, Agent Reyna's declaration states that the adult Plaintiffs went without a meal for 8.5 hours after being taken into CBP custody, and 10.5 hours prior to their release. Dkt. 7 ¶¶ 35, 33. They were also not provided with food at "regularly scheduled meal times": the intervals between their other meals at TOPS were ~6.5 hours, ~4 hours, and ~10.5 hours. *See id.* ¶ 35. Nor did they receive meals at the same times on each day. On February 22, they allegedly received meals at 03:04, 09:46, and 13:53. *Id.* But on the next day, they received only one meal at 00:26 and no other meals, despite remaining in custody for another 10.5 hours until 10:59. *Id.* ¶¶ 35, 33.

Contemporaneous media reports on the conditions at TOPS corroborate Plaintiffs' account. For example, the Los Angeles Times reported in March 2021 that hundreds of migrants, including many minors, were being detained at the site without adequate food. *See* Maltese Decl. Ex. A at 1 (reporting some families waited "over 12 hours without food and water"). At a

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minimum, this evidence—combined with Plaintiffs' well-pleaded allegations—creates a factual dispute that "must be resolved in favor of Plaintiffs" at this stage. *Edison*, 822 F.3d at 517.

The DFE thus does not shield Defendant's employees' failure to provide Plaintiffs with adequate food.[2]

3. Shelter & protection from the elements

Likewise, the DFE does not apply to Defendant's employees' failure to provide Plaintiffs with adequate shelter and protection from the elements.

The 1997 *Flores* settlement agreement—which applies to all minors in CBP custody—requires the agency to ensure "adequate temperature control." Maltese Decl. Ex. H at 7 (also requiring the government to "hold minors in facilities that are safe and sanitary[,] and that are consistent with . . . concern for the particular vulnerability of minors"). Similarly, the National Standards direct CBP officers/agents to "maintain hold room temperature within a reasonable and comfortable range," when it is "within CBP control." Dkt. 1-3 at 16.

Here too, Plaintiffs have alleged clear violations of these requirements. They assert that "there were no structures, walls, or even tents under the bridge" to provide any shelter, "[o]ther than a small area used for registration and processing, and another for medical services." Dkt. 1 ¶ 29. "As a result, Plaintiffs were forced to be in open air and exposed to the elements at all times." *Id.* While the weather became very cold at night—as low as 48 degrees Fahrenheit according to the data provided by Defendant, *see* Dkt. 8 ¶ 6—"Plaintiffs were given only a thin aluminum blanket, which was not enough to keep them warm," Dkt. 1 ¶ 30. Notably, 48 degrees is cold enough to cause hypothermia. *See* PeaceHealth, *Hypothermia and Cold Temperature Exposure* (July 11, 2023), https://www.peacehealth.org/medical-topics/id/aa53968spec

[2] Defendant also attempts to shield its officers' conduct by repeating that "additional meals were available on request." *See* Dkt. 6 at 9–10, 13. But the language of the applicable CBP policies makes clear that officers must affirmatively "provide[]" or "offer[]" meals to detainees according to the prescribed schedules. *See* Dkt. 1-2 at 8, 12; Dkt. 1-3 at 18, 22. In fact, with regard to minors, the Hold Rooms Policy states explicitly: "Juveniles *must receive* the next meal served." Dkt. 1-2 at 12 (emphasis added). CBP policies also contain separate provisions regarding requests for food. *See, e.g.*, *id.* at 8; Dkt. 1-3 at 18.

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("Hypothermia can occur when you are exposed to cold air, water, wind, or rain. Your body temperature can drop to a low level at temperatures of 50°F (10°C).") (last visited Sept. 11, 2023). As a result, Plaintiffs, especially nine-year-old S.Z.M. and three-year-old T.Z.M., suffered in the cold February weather. Dkt. 1 ¶¶ 33, 63.

Relying on Agent Reyna's declaration, Defendant states that TOPS "provided basic amenities, including . . . weatherproofing." Dkt. 6 at 4; *see also* Dkt. 7 ¶ 22. Not only do Plaintiffs' allegations flatly refute this assertion, but several photos from March 2021 show a very clear lack of *any* weatherproofing at the facility. *See* Maltese Decl. Exs. C–E, G. According to these photos, the area where migrants were being held was enclosed by only thin, flimsy plastic fences with large holes in them, providing virtually no protection from the elements. *See id.* Exs. C–E, G; *see also id.* Ex. B at 2 (2021 ACLU report) ("In addition to having no basic temperature controls, the TOPS has a bare-bones structure that lacks other minimal protections. Families are funneled through a series of outdoor areas surrounded by plastic fencing.") The photos also show migrants huddling together for warmth and sleeping on the bare dirt ground with only thin aluminum blankets over them. *See id.* Exs. C–E. Moreover, video footage of TOPS released by Project Veritas vividly demonstrates the cold and harsh conditions there, and further proves the lack of any weatherproofing at the site. *See id.* Ex. F;[3] *see also id.* Ex. A at 3, 8 (L.A. Times reporting in March 2021 that, "as the temperature dipped at night, [migrants] caught colds and began coughing," and "shiver[ed] under the bridge").

Defendant also claims TOPS "had heaters to provide additional warmth." Dkt. 6 at 13–14. But that was only "in the intake area, medical screening area, and processing area," Dkt. 7 ¶ 22, not the holding area where migrants spent their days and nights, *see* Maltese Decl. Exs. C–G (photos and video showing no heaters there). Considering this evidence and Plaintiffs'

[3] The video can be viewed at: https://www.projectveritas.com/news/breaking-secretly-recorded-video-shows-migrants-including-children-held.

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allegations, it is apparent heating was largely unavailable to Plaintiffs (and to most detainees there).

Plaintiffs' description of the conditions at TOPS is corroborated by the supporting evidence they submit today. *Compare* Dkt. 1 ¶¶ 29–33 *with* Maltese Decl. Exs. A–G. The DFE is inapplicable in this context.

4. Basic hygiene items

Defendant's employees also violated CBP policies requiring the provision of basic hygiene items. The National Standards state: "Detainees must be provided with basic personal hygiene items, consistent with short term detention and safety and security needs." Dkt. 1-3 at 17. Likewise, the Hold Rooms Policy requires that detainees be provided with "hygiene supplies," including "soap." Dkt. 1-2 at 3, 8; *see also id.* at 9, 11. In their complaint, Plaintiffs have alleged specific violations of these federal requirements. *See* Dkt. 1 ¶¶ 41–42 (asserting that "they were not provided with any soap, hand sanitizer, toothbrushes, or toothpaste," and "did not even have access to running water for hand-washing and other hygiene-related purposes").

Defendant's argument against these allegations fails for multiple reasons. First, contrary to Defendant's suggestion that federal policy required the provision of soap only to juveniles, *see* Dkt. 6 at 11, the Hold Rooms Policy explicitly mandates that *all* detainees be provided access to soap, without imposing any conditions relating to age or duration of detention, *see* Dkt. 1-2 at 8.

Second, contrary to Defendant's assertion that TOPS was equipped with hand-washing stations (i.e., running water and soap), *see* Dkt. 6 at 4, 11, 13, no such stations can be seen in any of the enclosed photos of the site or Project Veritas's video footage, supporting Plaintiffs' allegations, *see* Maltese Decl. Ex. C at 5, 18; Ex. D at 2, 6–7; Ex. E at 2–7; Ex. F at 2. Defendant's evidence to the contrary creates a factual dispute that, at this stage, "must be resolved in favor of Plaintiffs." *Edison*, 822 F.3d at 517.

Finally, Defendant has failed to show that its officers complied with the National Standards' general mandate that all detainees be provided with "basic personal hygiene items."

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Dkt. 1-3 at 17. While Defendant relies on Officer Reyna's declaration to claim that "certain hygiene products" were provided at TOPS, Dkt. 6 at 4, the declaration specifies that this meant "*feminine* hygiene products," Dkt. 7 ¶ 22 (emphasis added). Although the National Standards do not define the term "basic personal hygiene items," this term is commonly understood to include at least soap, a toothbrush, and toothpaste. *See, e.g.*, U.S. Immigr. & Customs Enf't, Nat'l Det. Standards for Non-Dedicated Facilities § 4.4 (2019) ("Each detainee shall receive, at a minimum, the following items: 1. One bar of bath soap, or equivalent; 2. One comb or equivalent; 3. One tube of toothpaste; 4. One toothbrush; 5. One bottle of shampoo, or equivalent; and 6. One container of skin lotion."); U.S. Immigr. & Customs Enf't, Performance-Based Nat'l Det. Standards 2011 § 4.5 (same). As Defendant's evidence does not contradict Plaintiffs' allegations that its employees violated federal policy by failing to provide "basic personal hygiene items," the Court should hold that the DFE does not apply to them.

5. Medical care

Defendant's employees failed to comply with CBP's medical care policies. For instance, the National Standards mandate that "appropriate medical care" be "provided or sought in a timely manner." Dkt. 1-3 at 14. Similarly, the Hold Rooms Policy requires that "[d]etainees have access to appropriate medical services, prescriptions, medications, and emergency medical treatment," Dkt. 1-2 at 7, and that "[d]etainees needing medical attention . . . be evaluated by qualified personnel," *id.* at 13.

While it is true that these policies do not define terms such as "appropriate" and "timely manner," Dkt. 6 at 10, that does not mean these terms confer boundless discretion to CBP officers. According to Plaintiffs, TOPS had just one tent where medical services were supposed to be provided. *See* Dkt. 1 ¶¶ 29, 48–50; *see also* Maltese Decl. Ex. G (March 2021 photo showing a single white tent). Although Ms. Madrigales visited the tent to seek medical care at two different times, she found no one inside it both times. Dkt. 1 ¶¶ 47–50. As a result, she continued to suffer from her illness during her detention, and she was never provided with the

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medical care she needed. *Id.* ¶ 51. Indeed, Defendant concedes that, at the time, CBP's operations were overwhelmed by the high number of people who were apprehended. Dkt. 6 at 1–2. At a minimum, these facts seriously call into question whether Defendant's employees complied with the directives requiring that ill detainees needing medical attention be provided with timely and appropriate care. *See* Dkt. 1-2 at 7, 13; Dkt. 1-3 at 14, 23.

Other evidence indicates that Ms. Madrigales's inability to receive any medical care at TOPS was likely a result of systemic non-compliance with the applicable federal policies. In interviews with news outlets, other migrants who were held at TOPS around the same time stated that they, too, were denied access to medical care. *See, e.g.*, Maltese Decl. Ex. A at 2–5. For instance, one former detainee and her six-year-old son reportedly "caught colds and began coughing, as did other migrants," due to the cold weather. *Id.* at 3. But when she and others asked agents for help, they refused to do anything. *Id.* at 3–4; *see also id.* Ex. B ("Mothers shared that [BP] denied their pleas for medical care for sick children."). According to another former detainee, a nurse there told them "he didn't have any medicine and that only migrants who were seriously ill would be taken to a hospital." Maltese Decl. Ex. A at 5. The aforesaid policies, however, require the timely provision of medical care to all detainees in need of medical attention, not just those who are seriously ill or in a medical emergency.

C. These violations of federal standards governing immigration detention are not "susceptible to policy analysis."

As none of the challenged conduct in this case "involv[e] an element of judgment of choice," Defendant's attempt to invoke the DFE fails at the first prong. *Gaubert*, 499 U.S. at 322 (alteration in original). But even if there were no specific federal directives on point, Defendant's argument would also fail at the second prong of the DFE analysis, for none of the challenged conduct involved "decisions grounded in social, economic, or political policy." *Bailey v. United States*, 623 F.3d 855, 861 (9th Cir. 2010) (citation omitted).

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Defendant's employees not only failed to follow their own policies, but also violated Plaintiffs' constitutional rights and their basic human dignity. *See infra* pp. 12–14. No legitimate policy considerations could justify such violations of basic dignity and constitutional rights. *Cf. Ruiz ex. rel. E.R. v. United States*, 2014 WL 4662241, at *8 (E.D.N.Y. Sept. 18, 2014) (holding that, "even if the binding guidance set by the *Flores* Agreement and the CBP's internal policies did not apply," the DFE would not shield CBP officers' failure to provide a detained minor with adequate food, because it "appear[ed] . . . to be the result of negligence or laziness," rather than a judgment "grounded in social, economic, or political policies").

Moreover, circumstantial evidence further shows that the tortious conduct of Defendant's employees resulted not from policy concerns, but rather from callousness, laziness, or negligence. For instance, when other migrants who were detained at TOPS around the same time fell sick from prolonged exposure to the cold weather, some of them asked Defendant's employees for help. *See* Maltese Decl. Ex. A at 3. However, the agents allegedly responded that "they're not required to do anything because [the migrants] chose to come" to the U.S. *Id.* And when some migrants "said they feared for their children's health," Defendant's employees allegedly replied, "They're not going to die." *Id.* at 4; *see also id.* Ex. B at 3 ("Mothers shared that [BP] denied their pleas for medical care for sick children . . . ."). CBP representatives gave visiting ACLU staff "conflicting answers about what, if any, detention standards appl[ied] to the site." *Id.* at 2.

Defendant offers specific policy considerations that allegedly underlay the creation of TOPS, *see, e.g.*, Dkt. 6 at 8, but Plaintiffs do not challenge the creation of TOPS per se. Nor does Defendant identify any policy considerations that might have justified the harsh, unsafe, and inhumane conditions there. Instead, Defendant merely states in a conclusory manner that "[h]ow CBP chose to staff and supply TOPS involved discretionary decisions susceptible to policy considerations," and then cites a few unpublished, out-of-circuit cases involving distinguishable

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fact patterns to suggest some of the policy considerations found therein might apply here as well. *Id.* at 8–9.

Under governing Ninth Circuit precedent, this is insufficient to satisfy the government's burden of proving the DFE's applicability. While *Gaubert* does not require any "actual evidence of policy-weighing in any given decision, there still must be some support in the record that the decisions taken are 'susceptible' to policy analysis for the [DFE] to apply." *Terbush*, 516 F.3d at 1134. For instance, in *Nanouk v. United States*, the Ninth Circuit vacated the dismissal of an FTCA claim based on the DFE, because the government did not "identif[y] any competing policy considerations" underlying the challenged conduct of its employees, and thus failed to meet its burden of proof. 974 F.3d 941, 950 (9th Cir. 2020). Here, too, Defendant has failed to identify any specific policy considerations that might have underlain its employees' tortious conduct. Instead, it appears to rely largely on "a general appeal to limited resources," which is disfavored under Ninth Circuit case law. *Id.*; *see also Terbush*, 516 F.3d at 1134. "Accordingly, at this stage of the proceedings, [Defendant] has failed to demonstrate that the [DFE] applies" to Plaintiffs' claims. *Nanouk*, 974 F.3d at 950.

D. Federal immigration officers have no discretion to violate the U.S. Constitution or other federal laws.

Lastly, the DFE cannot shield the challenged conduct of Defendant's employees because they did not have the discretion to violate the Constitution. *See, e.g.*, *Nieves Martinez v. United States*, 997 F.3d 867, 877 (9th Cir. 2021); *see also, e.g.*, *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) ("[G]overnmental conduct cannot be discretionary if it violates a legal mandate.").

Under the Fifth Amendment's Due Process Clause, all civil detainees—such as individuals in CBP custody—"enjoy[] constitutionally protected interests in conditions of reasonable care and safety." *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). As the Supreme Court has held, "the essentials of [such] care" include "adequate food, shelter, clothing, and

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medical care." *Id.* And whenever the government "restrains an individual's liberty" by detaining them "and at the same time fails to provide for [their] basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by . . . the Due Process Clause." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989). Thus, at a minimum, the Due Process Clause imposed on Defendant's employees an "affirmative duty" "to provide for [Plaintiffs'] basic human needs." *Id.*

Plaintiffs have unambiguously alleged that Defendant's employees violated their due-process rights by failing to discharge this duty. Dkt. 1 ¶¶ 73–78. Their complaint contains specific factual allegations that Defendant's employees detained them in unsafe and inhumane conditions, and failed to provide for their basic human needs, such as adequate food, shelter, and medical care. *See id.* ¶¶ 28–53, 61–72. Plaintiffs have also plausibly alleged violations of their due-process rights against unconstitutionally punitive conditions of detention. *See id.* ¶¶ 79–80.

Defendant's argument that "[t]here are no bright lines about what is constitutionally required" in civil detention, Dkt. 6 at 12, is directly at odds with the Supreme Court precedent holding that due process, at a minimum, requires the government "provide for [civil detainees'] basic human needs," including "food, clothing, shelter, medical care, and reasonable safety," *DeShaney*, 489 U.S. at 200.

Moreover, Plaintiffs' supporting evidence of the conditions at TOPS casts doubt on Defendant's assertions that TOPS detainees were provided with basic human necessities. Dkt. 6 at 13. This evidence, combined with Plaintiffs' well-pleaded allegations, portrays an unsafe and inhumane outdoor detention site, where hundreds of migrants were forced to live and sleep on the bare dirt ground for multiple days, without adequate food, shelter, or protection from temperatures cold enough to cause hypothermia, and without access to medical care or basic hygiene items. *See* Maltese Decl. Exs. A–G. According to former TOPS detainees, many migrants developed symptoms of respiratory illness due to their continuous exposure to the cold weather. *See, e.g.*, *id.* Ex. A. Photos and video also corroborate Plaintiffs' allegations that,

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despite the prevalence of COVID-19 at the time, social distancing was often impossible due to the high number of detainees packed in the holding area. *See, e.g.*, *id.* Exs. C–F.

Overall, the inhumane conditions at TOPS were repugnant to basic human dignity and the requirements of the Due Process Clause. *Cf. id.* Ex. A at 9 (a former TOPS detainee explaining that "her time under the bridge 'was the worst part of [her] journey, the lowest point,'" and that "[a]t no other time as she traversed Mexico did she sleep in the dirt, . . . not even when she stayed with smugglers near the Rio Grande"). Notably, under Ninth Circuit precedent, even "bare allegations" that the challenged governmental conduct was unconstitutional can be sufficient to defeat a motion to dismiss based on the DFE. *Nurse*, 226 F.3d at 1002; *see also, e.g.*, *F.R. v. United States*, No. CV-21-00339-PHX-DLR, 2022 WL 2905040, at *5 (D. Ariz. July 22, 2022) ("If such 'bare allegations' were sufficient to overcome a motion to dismiss in *Nurse*, the Court sees no reason why Plaintiffs should be held to a higher standard here."). As Plaintiffs have provided much more than "bare allegations" here, the DFE does not apply.

II. Plaintiffs challenge the actions of individual federal employees, not of the government itself.

Plaintiffs' allegations concern the conduct of individual government employees acting contrary to standards of care established by CBP policies—allegations that may be properly brought under the FTCA. *See* 28 U.S.C. § 1346(b)(1) (permitting claims "for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government"). Specifically, Plaintiffs allege that: "[i]mmigration officers" took them to "an area under the bridge" without explanation of what they were doing there, Dkt. 1 ¶ 24; "immigration officers" sent them outside to wait in subpar conditions, *id.* ¶ 27; "Defendant's employees violated CBP's internal policies" by failing to provide the plaintiff children with a mattress to sleep on, *id.* ¶ 34; "Defendant's employees plainly failed to abide by . . . requirements" concerning the frequency with which detainees had to be provided with food, *id.* ¶ 38; "Defendant's employees violated" internal policies regarding hygiene by failing to provide Plaintiffs with basic personal hygiene items, *id.*

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¶ 43; "Defendant's employees violated CBP's internal policies" when they failed to provide accessible medical care to Plaintiff Madrigales, *id.* ¶ 52; and immigration "officers" did not answer Plaintiffs' questions regarding "what was going to happen to them and what the procedure was for detaining and processing them," *id.* ¶ 83, or provided information for how and whether they would be able to apply for asylum, *id.* ¶ 84.

Defendant's contention that Plaintiffs' "complaint is devoid of allegations that could be attributed to the misconduct of any individual employee," Dkt. 6 at 14, is thus incorrect. As the complaint "makes specific allegations regarding individual federal employees and officers," this court has subject-matter jurisdiction over Plaintiffs' claims under the FTCA. *Fuentes-Ortega v. United States*, 640 F. Supp. 3d 878, 885 (D. Ariz. 2022); *see also, e.g.*, *J.P. v. United States*, --- F.Supp.3d ---, No. CV-22-00683-PHX-MTL, 2023 WL 4237331, at *5 (D. Ariz. June 28, 2023) (finding that allegation that "CBP Officers placed [the plaintiffs] in a cold, windowless, crowded cell where they could not lie down or use the restroom" was not a "systemic challenge[s]" to detention but an allegation of "tortious acts and omissions of individual federal employees over which this Court has subject-matter jurisdiction"); *F.R.*, 2022 WL 2905040, at *4 (declaring, in case where the complaint "plausibly can be read as alleging claims against the United States based either on tortious misconduct of entire agencies or based on tortious misconduct by individual employees working for those agencies," that it lacked subject-matter jurisdiction only over the former and not the latter). The Court should therefore deny Defendant's request that it dismiss this action as impermissibly challenging systemic torts.

III. There is a private-person analogue for Plaintiffs' claims.

The FTCA gives courts jurisdiction over claims "where the United States, if a private person, would be liable" under the applicable state law. 28 U.S.C. § 1346(b)(1); *see also id.* § 2674 (providing for government liability "in the same manner and to the same extent as a private individual under like circumstances"). Defendant argues that no private-person analogue exists to support Plaintiffs' FTCA claims "[b]ecause only the federal government has the

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authority to enforce immigration laws and process noncitizens who enter the United States." Dkt. 6 at 15. The Supreme Court, however, has rejected similar arguments that the FTCA should be read "as excluding liability in the performance of activities which private persons do not perform." *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955). To require otherwise "would give the federal government absolute immunity to violate the rights of those for whom it has sole decision-making authority, such as undocumented immigrants, with impunity" *Wilbur P.G. v. United States*, No. 4:21-CV-04457-KAW, 2022 WL 3024319, at *5 (N.D. Cal. May 10, 2022). "The fact that Defendant has exclusive authority to enforce immigration law does not give it carte blanche to commit torts against migrants in its custody." *E.S.M. v. United States*, No. CV-21-00029-TUC-JAS, 2022 WL 11729644, at *3 (D. Ariz. Oct. 20, 2022). Indeed, FTCA claims are regularly brought against immigration officers for tortious actions committed while performing enforcement functions that private persons are not authorized to perform. *See, e.g.*, *Arce v. United States*, 899 F.3d 796, 798, 801 (9th Cir. 2018) (finding jurisdiction for FTCA claim based on unlawful removal); *Vargas Ramirez v. United States*, 93 F. Supp. 3d 1207, 1227–29 (W.D. Wash. 2015) (federal government liable under FTCA for false arrest and false imprisonment by BP agent).

In assessing whether a private-person analogue exists, courts first "find the most reasonable analogy" to the challenged conduct and then assess whether the relevant state law imposes tort liability for it. *Dugard v. United States*, 835 F.3d 915, 919 (9th Cir. 2016) (quoting *LaBarge v. Mariposa Cnty.*, 798 F.2d 364, 367 (9th Cir. 1986)). Contrary to Defendant's assertion, *see* Dkt. 6 at 15, Plaintiffs' alleged harms resulted from the actions of immigration officers who failed to abide by the standard of care necessary to treat people in their custody, and who instead subjected them to conditions that were both negligent and inflicted emotional distress. The most reasonable analogy here is that of private individuals tasked with the custody or care of others, and there are private-person analogues for both these claims under Texas law.

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Texas courts have entertained negligence claims against private individuals in the context of: residents of "a private facility for the mentally impaired," *A.F.P. v. United States*, No. 121CV00780DADEPG, 2022 WL 2704570, at *10 (E.D. Cal. July 12, 2022) (quoting *Salazar v. Collins*, 255 S.W.3d 191, 198 (Tex. App. 2008)); a child in the custody of a day care center, *Applebaum v. Nemon*, 678 S.W.2d 533, 535 (Tex. App. 1984); and a patient at a nursing home, *C.M. v. United States*, --- F. Supp. 3d ---, No. 5:21-CV-0234-JKP-ESC, 2023 WL 3261612, at *19 (W.D. Tex. May 4, 2023). Based on these cases, courts applying Texas law have found that private analogues exist for negligence claims against immigration officials by immigrants in their custody. "Federal immigration officials, like employees at a private facility for the mentally impaired tasked with the care and custody of facility residents, also have a special relationship with detainees in that they are tasked with the care and custody of those they detain, and owe detainees at least a minimal level of care." *A.F.P.*, 2022 WL 2704570, at *10 (internal quotation and citation marks omitted); *see also B.Y.C.C. v. United States*, No. 3:22-cv-06586-MAS-DEA, 2023 WL 5237147, at *12 (D.N.J. Aug. 15, 2023) (finding a private analogue for negligence claim against CBP officers after declaring that "Texas courts have imposed duties of care on individuals and entities that assume custody and control of others"); *C.M.*, 2023 WL 3261612, at *19 (likening "the duty of care owed by immigration officials with the duty of care owed by private nursing home personnel" and finding "a sufficient private person analog" in the case of a "Texas jury verdict finding [a] nursing home liable for negligence in the care provided"); *Barry v. United States*, --- F. Supp. 3d ---, No. 1:22-CV-150, 2023 WL 2996101, at *6 (S.D. Tex. Mar. 31, 2023) (concluding a private analogue existed for plaintiff's negligence claims, which were based on the argument that, inter alia, the government owed him a "duty of ordinary care" as a minor in their care, upon finding that "various courts have recognized that the FTCA supports a cause of action in ordinary negligence under Texas law").

Courts applying Texas law have also permitted claims seeking damages for intentional acts causing "mental anguish" in the context of individuals charged with the care or custody of

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others. *See Hyde Park Baptist Church v. Turner*, No. 03-07-00437-CV, 2009 WL 211586, at *3 (Tex. App. Jan. 30, 2009) (jury finding that daycare teacher's "intentional act or acts proximately caused injury to" child in her care and awarding damages for, inter alia, "past . . . mental anguish"); *M.D.C.G. v. United States*, No. 7:15-CV-552, 2016 WL 6638845, at *12 (S.D. Tex. Sept. 13, 2016), *aff'd in part, vacated in part on other grounds*, 956 F.3d 762 (5th Cir. 2020) (permitting IIED claim to proceed against the United States for the actions of immigration agents under whose custody the plaintiffs were placed).

This Court should thus find that private-person analogues exist for Plaintiffs' claims under Texas law.[4]

IV. Plaintiffs have properly pled a negligence claim.

Plaintiffs have stated a claim of negligence under Texas law because they have alleged physical injury and because there was a special relationship between Defendant's employees and Plaintiffs that makes their mental anguish actionable.

Plaintiffs allege they suffered "significant physical pain and discomfort, as they were forced to live and sleep outside on the bare dirt ground for multiple days, without enough food or protection from the cold weather." Dkt. 1 ¶ 63. They allege these discomforts "significantly exceeded, or were independent of, the inherent discomforts of confinement." *Id.* ¶ 80 (citation and alterations omitted). That Plaintiffs had experienced other physical injuries on their way to the United States does not diminish the fact that the inhumane conditions of their confinement "significantly exacerbated their physical suffering." *Id.* ¶ 66. Plaintiff Madrigales, moreover, "suffered additional physical pain and discomfort due to her [cold/flu] symptoms," for which she

[4] The case Defendant relies on concerns the adjudication of immigration benefits, a circumstance that is not reasonably analogous to what happened here. *See Elgamal v. Bernacke*, 714 F. App'x 741, 742 (9th Cir. 2018) (denial of "immigration status adjustment application").

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was unable to obtain medical care. Dkt. 1 ¶ 64. Defendant's attempt to minimize Plaintiffs' harms and injuries, *see* Dkt. 6 at 16, yet such harms are real physical injuries.[5]

Even in the absence of physical injury, however, Texas law does recognize a "few situations in which a claimant who is not physically injured by the defendant's breach of a duty may recover mental anguish damages," including where there is a "special relationship between the two parties." *Temple-Inland Forest Prod. Corp. v. Carter*, 993 S.W.2d 88, 91–92 (Tex. 1999). Such a special relationship has been recognized in the context of "prison or jail officials ow[ing] a duty of reasonable care to protect inmates from harm when that harm is reasonably foreseeable." *Salazar*, 255 S.W.3d at 200. And a court applying Texas law recently found that a "special relationship" existed between federal immigration officials and those under their care, so as to permit recovery for emotional damages absent physical injury. *B.Y.C.C.*, 2023 WL 5237147, at *13 ("Plaintiffs sufficiently allege facts supporting the existence of a special relationship."); *cf. Cuevas v. Westerman*, No. 1:14-CV-133, 2018 WL 6579041, at *5 (S.D. Tex. June 15, 2018) (finding "special relationship" existed between immigration officer and detainee "because [she] was a detainee of the Government, and [the officer] was one of the officers guarding her"); *C.M.*, 2023 WL 3261612, at *47 (finding that plaintiffs had "alleged enough facts to plausibly state a negligence claim" against federal immigration officials under Texas law where they alleged "negligence grounded in a breach of the duty owed by federal agents to persons in their care"). Here, Plaintiffs have also pled sufficient facts supporting the existence of a special relationship stemming from their status as asylum seekers, *see* Dkt. 1 ¶¶ 3, 27, 84, and a family unit, *see id.* ¶ 72, in the care and custody of Defendant's employees.[6]

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[5] Defendant's attempts to call into question whether Plaintiffs' physical injuries were caused by its employees' negligence, Dkt. 6 at 17, are also unpersuasive, as Plaintiffs clearly allege that some of their injuries *worsened* as a result of that negligence, *see, e.g.*, Dkt. 1 ¶¶ 64–66.

[6] Neither the plaintiffs in *Holcombe v. United States*, No. SA-18-CV-555-XR, 2021 WL 398842, at *5 (W.D. Tex. Feb. 3, 2021), nor in *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90, 95 (Tex. App. 1998), alleged a special relationship with the defendants. Defendant's reliance on these cases, Dkt. 6 at 17, is thus inapposite. As for *Luna v. United States*, No. C20-1152RSL, 2021 WL 673534, at *1 (W.D. Wash. Feb. 22, 2021), the plaintiff's allegations concerned his "arrest, detention, and deportation," not the

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The Court should therefore deny Defendant's 12(b)(6) motion to dismiss Plaintiffs' negligence claim.

V. Plaintiffs have adequately stated a claim for intentional infliction of emotional distress (IIED) in the alternative.

A. Plaintiffs properly assert an alternative IIED claim to seek damages for emotional distress.

Plaintiffs have properly asserted an IIED claim as an alternative claim. Federal Rule of Civil Procedure 8(d) allows parties to allege two or more claims in the alternative, "regardless of consistency." Fed. R. Civ. P. 8(d). Importantly, "a pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case." *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1149 (9th Cir. 2007) (citation omitted).

Defendant relies on an incomplete reading of applicable caselaw in order to frame Plaintiffs' IIED claim as duplicative. In describing IIED as a "gap-filler," the Texas Supreme Court explained that "the tort's clear purpose is to supplement existing forms of recovery by providing a cause of action for egregious conduct 'that its more established neighbors in tort doctrine would technically fence out.'" *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998) (citation omitted). In *Hoffmann-La Roche Inc. v. Zeltwanger*, the court further explained that an IIED claim cannot "be used to evade legislatively-imposed limitations on statutory claims or to supplant existing common law remedies." 144 S.W.3d 438, 447 (Tex. 2004). Consistent with this principle, the *Hoffmann* court reasoned that an IIED claim was not available because the plaintiff had simultaneously asserted a claim under the Texas Commission on Human Rights Act (CHRA), a statute providing for "compensatory damages . . . specifically includ[ing], among other things, 'emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.'" *Id.* at 446 (citation omitted). Accordingly, the court found that "there was no gap to be filled" by the IIED claim, *id.* at 446, specifically

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conditions of his confinement, which more clearly implicate the special responsibilities owed by custodians to their charges.

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"[b]ecause the CHRA provides a remedy *for the same emotional damages* caused by essentially the same actions," *id.* at 450 (emphasis added).

In the same vein, a federal district court in Texas held that plaintiffs seeking damages for civil rights violations by local public officials under 42 U.S.C. § 1983 could not also seek to recover under an IIED state tort claim. *May v. City of Arlington, Texas*, No. 3:16-CV-1674-L, 2018 WL 1569888, at *12 (N.D. Tex. Mar. 30, 2018) ("In this action, Plaintiffs [sic] federal civil rights claim provides a remedy for Plaintiffs, and, therefore, the claim for intentional infliction of emotional distress is barred."). In another case Defendant cites for support, *Moser v. Roberts*, the court found that an IIED claim could not be maintained because the plaintiff asserted claims for slander, libel, and malicious prosecution, each of which separately "afforded her a remedy for any resulting emotional distress." 185 S.W.3d 912, 916 (Tex. App. 2006).

Defendant ignores this key reasoning in *Hoffmann*, *May*, and *Moser*, and miscites them to support the assertion that IIED cannot "gap-fill other causes of action just so one may recover for mental anguish." Dkt. 6 at 18. In *Villafuerte v. United States*, the court rejected the government's attempt to rely on the "[t]he 'gap-filler' argument," correctly recognizing that "[IIED's] 'gap-filler' status is meant to prevent plaintiffs' *double* recovery of mental anguish damages." No. 7:16-CV-619, 2017 WL 8793751, at *13 (S.D. Tex. Oct. 11, 2017) (emphasis added). The court found that the claims for negligence, assault, and battery "are not claims for mental anguish," and therefore that the IIED claim was not duplicative. *Id.* ("[The] IIED claim is filling a gap in her potential recovery and her claim for mental anguish damages is not barred by her other allegations against the Government").

Plaintiffs acknowledge there would be no basis to bring the IIED claim if this Court rejects Defendant's argument that the negligence claims are barred. However, if the Court dismisses the negligence claims, Plaintiffs then should be permitted to move forward with the IIED claims, as there would be no other causes of action that afford Plaintiffs a remedy for the emotional distress resulting from CBP's tortious conduct. It is incongruous for Defendant to

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argue both that Plaintiffs' claim of negligence is not viable, and that its existence requires the dismissal of the IIED claim as duplicative.

B. Plaintiffs adequately allege that Defendant's employees acted intentionally or recklessly to cause emotional distress.

As a threshold matter, Plaintiffs do not assert that Defendant's employees acted intentionally or recklessly solely by "detaining [them] under an international border bridge." Dkt. 6 at 20 (citing Dkt. 1 ¶ 90). Nor do they assert that Defendant committed IIED "by creating TOPS" or "housing migrants" there. *Id*. at 20–21. Instead, Plaintiffs allege that Defendant's employees acted intentionally or recklessly in failing to ensure safe and humane conditions and depriving them of access to basic human necessities while detaining them at TOPS. *See, e.g.*, Dkt. 1 ¶¶ 31–34 (deprivation of bedding to nine- and three-year-old child plaintiffs); 35–38 (adequate food); 39–43 (basic sanitation and hygiene); 46–53 (denial of medical care). These facts show that "severe emotional distress" was the "primary risk of [Defendant's employees'] conduct," *Johnson*, 985 S.W.2d at 67, especially because they were aware Plaintiffs were particularly vulnerable by virtue of their status as asylum seekers *and* as a family with young children, *see Vermillion v. Vermillion*, No. 07-20-00111-CV, 2022 WL 4799019, at *7 (Tex. App. Sept. 30, 2022) (in assessing IIED claims, "[c]ourts should consider the entire set of circumstances surrounding the conduct, such as the defendant's course of conduct, the context of the parties' relationship, whether the defendant knew the plaintiff was particularly susceptible to emotional distress, and the defendant's motive or intent"). This was not the first time that CBP had held people in such conditions. Dkt. 1 ¶ 56 n.4. Defendant's employees were certainly aware severe emotional distress is likely to result from unsafe and inhumane conditions.[7]

[7] Whether Plaintiffs suffered harsh conditions during their journey to the United States is irrelevant to this analysis. *See* Dkt. 6 at 21.

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C. Plaintiffs have adequately alleged that Defendant's employees' conduct was extreme and outrageous.

Contrary to Defendant's suggestion, Plaintiffs do not allege that they suffered severe emotional distress as the result of "[a] brief detention at an outdoor processing location." Dkt. 6 at 21. The unsafe and inhumane conditions and deprivation of basic needs that Plaintiffs suffered rise to the level of extreme and outrageous conduct, particularly considering their unique vulnerability to trauma as asylum seekers and that two of them were young children—ages nine and three—at the time. *See* Dkt. 1 ¶¶ 27, 18–19, 72. In addition, the deprivation of basic needs and safe conditions is extreme and outrageous in the context of the COVID-19 global pandemic, since the lack of access to medical care and the ability to maintain hygiene and social distancing posed a risk of serious illness and death. *Id.* ¶¶ 44, 67–70. Lastly, "[t]he extreme and outrageous character of the conduct may arise from an abuse of a position or a relation with the victim that gives the tortfeasor actual or apparent authority over the victim, or power to affect his or her interests." *Gonzales v. Willis*, 995 S.W.2d 729, 735 (Tex. App. 1999). Here, Defendant's employees were in a clear position of authority over Plaintiffs and had power to affect their interests in entering the country to seek asylum.

Plaintiffs' allegations sufficiently demonstrate, at minimum, that "reasonable minds may differ" as to "whether a defendant's conduct was extreme and outrageous." *Hoffmann*, 144 S.W.3d at 445. Accordingly, dismissal is not warranted.

D. Plaintiffs have adequately alleged severe emotional distress.

Plaintiffs plausibly allege that they suffered severe emotional and psychological harm as a result of Defendant's employees' conduct. Dkt. 1 ¶¶ 61, 85–87, 92. Defendant fails to demonstrate why Plaintiffs' allegations of emotional distress are implausible or insufficient for purposes of dismissal under Rule 12(b)(6). Instead, Defendant's attack is a conclusory assertion that "[f]eelings of anger, depression, and humiliation are insufficient evidence of severe distress." Dkt. 6 at 26 (quoting *Montemayor v. Ortiz*, 208 S.W.3d 627, 658 n.22 (Tex. App. 2006)). As the sufficiency of evidence of harm cannot be determined at the pleadings stage,

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dismissal is not warranted. *Cf. Johnson v. Boeing Co.*, No. C17-0706RSL, 2017 WL 5158312, at *4 (W.D. Wash. Nov. 7, 2017) (explaining that "Defendant's critique that plaintiff has failed to prove the alleged injuries is premature").

CONCLUSION

The Court should thus deny Defendant's motion to dismiss.

Dated this 11th day of September, 2023.

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Counsel hereby certify that this memorandum contains 8357 words, in compliance with the Local Civil Rules.