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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

C.M., on her own behalf and on behalf of  
her minor child, B.M.; L.G., on her own  
behalf and on behalf of her minor child,  
B.G.; M.R., on her own behalf and on  
behalf of her minor child, J.R.; O.A., on  
her own behalf and on behalf of her  
minor child, L.A.; and V.C., on her own  
behalf and on behalf of her minor child,  
G.A.,

Plaintiffs,

v.

United States of America,

Defendant.

No. 2:19-cv-05217-SRB

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT'S MOTION TO  
DISMISS**

(Oral Argument Requested)

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**INTRODUCTION**

To advance its immigration policy objectives, the government intentionally inflicted severe emotional trauma on children and parents by forcibly separating them for extended periods after they crossed the border. Plaintiffs are five mothers and their young children who fell victim to the government’s family separation policy. The government traumatized Plaintiffs by separating them for months, failing to provide them with information about each other’s whereabouts, failing to facilitate adequate communication between mothers and children, and failing to implement any tracking system to ensure that families could be reunited. The Federal Tort Claims Act (“FTCA”) provides individuals a right to compensation where the United States government commits tortious acts that cause harm, and Plaintiffs have a right to compensation for the extraordinary harms they suffered.

Defendant does not dispute that Plaintiffs properly plead that the government intentionally inflicted emotional trauma on Plaintiffs, or that the family separation policy generally, and in its application to Plaintiffs, violated the U.S. Constitution. Instead, Defendant argues that the FTCA’s “due care exception” bars this action. But the due care exception applies only where a “statute or regulation” mandates a specific course of action that a federal officer must follow. That is not the case here. No statute or regulation mandated the separation of Plaintiffs. Indeed, Defendant fails to explain why family separation purportedly was required by law in the spring of 2018, but was not required by law before or after. Nor does Defendant explain why Plaintiffs were ultimately reunited and released from detention if the law required that they be separated, or how President Trump could end family separation by issuing an Executive Order. Defendant also fails to address statements by government officials emphasizing that the government separated families not because the law required it, but as a policy to deter other immigrants from entering the United States. Family separation was never a legal *mandate*. It was a cruel and unconstitutional policy *choice* that the administration adopted and then scaled back when the public outcry

1 grew too loud. The due care exception also does not apply because the government  
2 did not exercise due care in implementing family separation. Government agents  
3 forcibly ripped Plaintiff children from their mothers' arms, laughed at the mothers,  
4 and failed to give the mothers information about their children.

5 Defendant's remaining arguments that the discretionary function exception and  
6 private analog doctrine bar Plaintiffs' claims, and that Plaintiffs fail to state a claim  
7 under Arizona law, rest on mischaracterizations of the law and facts. The motion to  
8 dismiss should be denied.

### 9 **BACKGROUND**

10 Curbing the number of people seeking asylum has been a central focus of the  
11 current administration's immigration policy. Compl. ¶ 21. In March 2017,  
12 Department of Homeland Security ("DHS") officials announced that DHS was  
13 considering a policy of separating parents and children who cross the border illegally,  
14 to deter families from migrating to the United States. *Id.* ¶ 28. In July 2017, the  
15 government began separating families in a pilot program in U.S. Customs and Border  
16 Protection's ("CBP") El Paso Sector. *Id.* ¶ 22. In December 2017, after the pilot  
17 program ended, Department of Justice ("DOJ") and DHS officials exchanged a memo  
18 titled "Policy Options to Respond to Border Surge of Illegal Immigration." *Id.* ¶ 23.  
19 Two of the policy options were titled: "Increased Prosecution of Family Unit Parents"  
20 and "Separate Family Units." *Id.* Under the prosecution policy, "parents would be  
21 prosecuted for illegal entry . . . and the minors present with them would be placed in  
22 [U.S. Department of Health and Human Services ("HHS")] custody as  
23 [unaccompanied alien children]." *Id.* Similarly, the separation policy would call for an  
24 announcement that adults would be placed in detention while children would be  
25 placed in HHS custody. *Id.* The memo asserted that "the increase in prosecutions  
26 would be reported by media and it would have substantial deterrent effect." *Id.*

27 On April 6, 2018, President Trump issued a memo titled "Ending 'Catch and  
28 Release' at the Border of the United States and Directing Other Enhancements to

1 Immigration Enforcement,” directing various government agencies to submit a report  
2 detailing measures to end “‘catch and release’ practices.” *Id.* ¶ 24. “Catch and  
3 Release” refers to prior administrations’ practice of allowing asylum-seekers, like  
4 Plaintiffs, to live in the community, rather than be held in custody, while awaiting  
5 immigration hearings. *Id.* ¶ 25. This practice is in accord with immigration law. *Id.*

6 Also on April 6, 2018, then Attorney General Jeff Sessions issued a memo  
7 directing U.S. Attorneys along the Southwest Border “to the extent practicable, and in  
8 consultation with [DHS]—to adopt immediately a zero-tolerance policy,” which  
9 would “supersede any existing policies” and which called for the prosecution of all  
10 persons who crossed the U.S. border between ports of entry. *Memorandum for Fed.*  
11 *Prosecutors Along the Southwest Border*, DEP’T OF JUSTICE (Apr. 6, 2018). To further  
12 its goal of deterrence, the government began separating families regardless of whether  
13 the parents were criminally prosecuted. Compl. ¶ 34. None of the Plaintiffs were ever  
14 charged with any crime. *Id.*

15 High-level officials admitted that family separation was a “new policy”  
16 designed to deter future asylum-seekers. *Id.* ¶ 31. When asked about the separation  
17 policy, John Kelly, President Trump’s then Chief of Staff, responded that “a big name  
18 of the game is deterrence. . . . It . . . would be a tough deterrent.” *Id.* Steven Wagner,  
19 Assistant Secretary of HHS, told reporters: “We expect that the *new policy* will result  
20 in a deterrence effect, we certainly hope that parents stop bringing their kids on this  
21 dangerous journey and entering the country illegally.” *Id.* (emphasis added). Although  
22 internal and external sources warned that family separation would cause severe  
23 emotional harm to children and parents, the administration forged ahead because  
24 traumatizing migrant families was the very point. *Id.* ¶¶ 27-28.

25 In May 2018, federal officers forcibly separated each Plaintiff mother from her  
26 child while they were detained at immigration holding centers in Arizona. *Id.* ¶¶ 5,  
27 70-71, 76-83, 127-31, 183-90, 239-49, 312-27. The children ranged in age from five  
28

1 to twelve, and were separated from their mothers for two-and-a-half to four months.  
2 *Id.* ¶¶ 11-15, 70, 105-06, 119, 156, 171, 218, 235, 287-88, 304, 359-61.

3 The manner in which immigration officers separated Plaintiffs was cruel and  
4 inhumane. An immigration officer laughed and said “Happy Mother’s Day” upon  
5 telling Plaintiff C.M. that the government would be taking her five-year-old son, B.M.  
6 *Id.* ¶¶ 71-72. Several days later, officers pried B.M away from his mother as he  
7 grabbed at her clothes. *Id.* ¶¶ 36-46; 76-83. Plaintiff L.G. watched immigration  
8 officers yank a boy from his mother’s arms before officers forced her to hand over her  
9 seven-year-old daughter and sobbed as they led her daughter away. *Id.* ¶¶ 127-32.  
10 Immigration officers told Plaintiff M.R. and other mothers that officers would take  
11 their children and the mothers would not know where to find them, before ordering  
12 M.R.’s twelve-year-old son, J.R., to leave the cell so that he could bathe. *Id.* ¶¶ 182-  
13 90. J.R. never returned; instead, M.R. watched through a window as immigration  
14 officers led him away. *Id.* ¶ 190-91. Immigration officers told Plaintiff O.A. she  
15 would be separated from her five-year-old daughter, L.A., shortly after they arrived at  
16 the immigration detention center. *Id.* ¶¶ 239-42. O.A. begged the officers not to  
17 separate them to no avail: the next morning immigration officers forcibly pulled a  
18 sobbing L.A. away from her mother and took her away. *Id.* ¶¶ 244-49. Plaintiff V.C.  
19 was forced to bathe her six-year-old son, G.A., while immigration officers mocked  
20 crying parents and children. *Id.* ¶¶ 314-17. As officers separated families, V.C. tried  
21 to comfort her son but she could barely speak through her tears. *Id.* ¶¶ 319-23. V.C.  
22 watched as officers led G.A away and out of her sight. *Id.* ¶¶ 326-27. The government  
23 transferred four of the children to shelters thousands of miles away in New York. *Id.*  
24 ¶¶ 99, 193, 281, 324.

25 Throughout the separations, the government provided only limited information  
26 to each mother about her child’s whereabouts and well-being, and afforded only  
27 minimal opportunities for each mother and child to communicate, sometimes at the  
28 mothers’ expense. *Id.* ¶¶ 84, 87, 91, 133, 136, 142, 145-51, 183, 195-202, 207, 250,

1 257-58, 261, 328, 348, 351, 358. The government exacerbated the trauma by failing to  
2 take even basic steps to record which children belonged with which parents, delaying  
3 reunification. *Id.* ¶¶ 53-58, 63-67. All Plaintiffs suffered, and continue to suffer,  
4 substantial trauma. *Id.* ¶¶ 109-18, 161-70, 223-34, 292-303, 365-86.

5 After widespread public condemnation of the family separation policy,  
6 President Trump signed an Executive Order on June 20, 2018 purporting to end it.  
7 *Id.* ¶ 59. The Order said it was the “policy of this Administration to maintain family  
8 unity, including by detaining alien families together where appropriate and consistent  
9 with law and available resources.” *Id.* ¶ 60. On June 26, a court issued an injunction in  
10 *Ms. L. v. Immigration and Customs Enforcement*, 310 F. Supp 3d 1133 (S.D. Cal.  
11 2018), finding a likelihood that the separations were unconstitutional and requiring  
12 reunification of all families (with exceptions not relevant here). Plaintiffs were  
13 reunited and released from detention prior to the completion of their immigration  
14 proceedings. Compl. ¶¶ 11-15, 108, 160, 222, 291, 364.

15 On February 11, 2019, Plaintiffs submitted administrative claims to DHS and  
16 HHS, which were deemed denied when the government did not respond within six  
17 months. *Id.* ¶ 9.

## 18 STANDARD OF REVIEW

19 The government moves to dismiss for lack of subject matter jurisdiction  
20 pursuant to Fed. R. Civ. P. 12(b)(1). Where, as here, defendant makes a facial attack  
21 on jurisdiction, the Court must accept as true all factual allegations in the complaint  
22 and draw all reasonable inferences in plaintiffs’ favor. *Wolfe v. Strankman*, 392 F.3d  
23 358, 362 (9th Cir. 2004) (citations omitted).

## 24 ARGUMENT

### 25 I. The Due Care Exception Does Not Apply Here

26 Defendant contends that Plaintiffs’ claims are barred by the FTCA’s “due care  
27 exception” (“DCE”) set forth in 28 U.S.C. § 2680(a), because the harms caused by the  
28 government’s forced separations purportedly “stemmed from the government’s

1 execution of its Federal statutory authorities” concerning criminal and immigration  
2 law. Dkt. 18 at 2, 13. Defendant’s position is incorrect for multiple reasons.

3 **A. The Due Care Exception Applies Only Where a Statute or**  
4 **Regulation Mandated the Official’s Course of Conduct and the**  
5 **Official Exercised “Due Care”**

6 The DCE bars claims “based upon an act or omission of an employee of the  
7 Government, exercising due care, in the execution of a *statute or regulation*, whether  
8 or not such *statute or regulation* be valid.” 28 U.S.C. § 2680(a) (emphases added).  
9 The government bears the burden to prove this exception applies. *See Prescott v.*  
10 *United States*, 973 F.2d 696, 702 (9th Cir. 1992) (“We thus hold explicitly that the  
11 United States bears the burden of proving the applicability of one of the exceptions to  
12 the FTCA’s general waiver of immunity.”).

13 Courts in this Circuit apply a two-part test set forth in *Welch v. United States*,  
14 409 F.3d 646, 652 (4th Cir. 2005), to determine whether the DCE applies. *See, e.g.,*  
15 *Ferguson v. United States*, 2016 WL 4793180, at \*7 (S.D. Cal. Sept. 14, 2016); *Kwai*  
16 *Fun Wong v. Beebe*, 2006 WL 977746, at \*7-8 (D. Or. Apr. 10, 2006). First, the  
17 government must show that the “*statute or regulation* in question *specifically*  
18 *pr[e]scribes* a course of action for an officer to follow.” *Welch*, 409 F.3d at 652; *see*  
19 *also Gonzalez v. United States*, 2013 WL 942363, at \*3-4 (C.D. Cal. Mar. 11, 2013)  
20 (DCE applies where a statute “require[s] a mandatory course of action”). In other  
21 words, the exception applies only when the official was “executing the *mandates* of” a  
22 statute or regulation. *Welch*, 409 F.3d at 651-52 (emphasis added); *see also Buchanan*  
23 *v. United States*, 915 F.2d 969, 970-71 (5th Cir. 1990) (DCE applies only to “actions  
24 mandated by statute or regulation”). Second, if a statute or regulation mandated an  
25 official’s course of action, the government must show that the official “exercised due  
26 care in following the dictates of th[e] statute or regulation.” *Welch*, 409 F.3d at 653;  
27 *see also Buchanan*, 915 F.2d at 970-71.

28 Here, Defendant fails to identify any statute or regulation that mandated the  
separation of Plaintiffs upon their entry into the United States. This failure is fatal to

1 the government’s defense. *See, e.g., Gonzalez*, 2013 WL 942363, at \*3-4 (“Because  
2 Plaintiff’s detention was not the result of a statutorily prescribed course of action,” his  
3 claims were not barred by the DCE.); *Watson v. United States*, 179 F. Supp. 3d 251,  
4 270-71 (E.D.N.Y. 2016) (concluding the DCE, which “applies to situations where a  
5 statute or regulation *requires* an action to be taken,” was inapplicable because the  
6 statutes the government cited did not *mandate* the conduct at issue—detention of  
7 plaintiff), *aff’d in part, rev’d in part on other grounds*, 865 F.3d 123 (2d Cir. 2017).  
8 Although Defendant cites *Welch*, Dkt. 18 at 14, it ignores this requirement.

9       Moreover, officials did not exercise “due care” in carrying out the separations.  
10 Indeed, Defendant does not even address this factor. Accordingly, the DCE does not  
11 bar Plaintiffs’ claims.

12       **B. No Statute or Regulation Mandated the Family Separations Here**

13       The government separated Plaintiffs pursuant to its *policy* to inflict emotional  
14 distress upon Plaintiffs and other migrants with the goal of deterring others from  
15 seeking asylum in the United States. Compl. ¶¶ 1-2, 23, 28(c), 31-33. The DCE does  
16 not apply where a policy, rather than a statute or regulation, mandated the conduct at  
17 issue. *Garcia-Feliciano v. United States*, 2014 WL 1653143, at \*4 n.8 (D.P.R. Apr.  
18 23, 2014) (citing *Welch*, 409 F.3d at 652) (DCE “would not apply here . . . because a  
19 policy—not a statute or regulation—pr[e]scribed the deputy’s conduct”).

20       Defendant contends that Plaintiffs’ separations were mandated because  
21 (1) Plaintiff mothers were “amenable to prosecution,” even though they were never  
22 criminally prosecuted, Dkt. 18 at 12-14; and (2) the *Flores* Agreement mandated  
23 separation “because [Plaintiff mothers] were detained during the pendency of their  
24 removal proceedings.” *Id.* at 14-15. Neither argument has merit. Further, Defendant’s  
25 arguments that separation was mandatory are belied by the President’s purported  
26 termination of the family separation policy and Plaintiffs’ reunification and release.

1                   **1. No Statute or Regulation Mandates Family Separation When**  
2                   **a Parent Is Merely “Amenable to Prosecution”**

3                   Defendant asserts that Plaintiff children were “unaccompanied minors”  
4 because their mothers were “amenable to prosecution” and therefore unable “to  
5 provide care and physical custody.” Dkt. 18 at 5, 13 (citing 6 U.S.C. § 279(g)(2); 8  
6 U.S.C. § 1232(b)(3)). But Plaintiffs were separated upon arrival in the United States,  
7 not as a result of any criminal prosecution. Indeed, Plaintiff mothers were never even  
8 charged. Compl. ¶ 34.

9                   Defendant thus contends that Plaintiff mothers were “unable to provide care  
10 and physical custody” to their children—requiring the government to take their  
11 children away—not because they were *actually* charged with a crime, but merely  
12 because it was *possible* the mothers *could have been* charged with a misdemeanor  
13 immigration offense. That is an alarming and incorrect proposition.

14                   Indeed, there is nothing in the statutes Defendant cites—or any other  
15 authority—to support its suggestion that being “amenable to prosecution” makes a  
16 parent “unavailable” thus rendering her child “unaccompanied,” and thereby requiring  
17 the government to take the child away.<sup>1</sup> To the contrary, court decisions interpreting  
18 “unaccompanied alien child” defeat Defendant’s argument. In *Jacinto-Castanon de*  
19 *Nolasco v. U.S. Immigration & Customs Enforcement*, 319 F. Supp. 3d 491, 495 n.2  
20 (D.D.C. 2018), plaintiff was separated from her children and pled guilty to a  
21 misdemeanor charge of illegal entry. The court concluded that, even though the  
22 plaintiff mother was prosecuted (unlike Plaintiffs), her children were “not true

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23                   <sup>1</sup> Neither of the statutes Defendant cites provides that a parent who is “amenable to  
24 prosecution” is “unavailable” thus rendering her child “unaccompanied.” Dkt. 18 at  
25 13. The Homeland Security Act of 2002 defines the term “unaccompanied alien  
26 child” (“UAC”) as including a child “with respect to whom—(i) there is no parent or  
27 legal guardian in the United States; or (ii) no parent or legal guardian in the United  
28 States is available to provide care and physical custody.” 6 U.S.C. § 279(g). The  
Trafficking Victims Protection Reauthorization Act (“TVPRA”), which governs  
transfer of UACs to the care of the Office of Refugee Resettlement (“ORR”), uses the  
same definition. 8 U.S.C. § 1232(g).



1 unaccompanied minors within the meaning of the [TVPPRA].” *Id.* In other words, the  
2 government could not designate the children unaccompanied minors simply because it  
3 forcibly separated them from their mother.<sup>2</sup> *Id.* at 500.

4 Similarly, in *Bunikyte v. Chertoff*, which Defendant cites, *see* Dkt. 18 at 14-15,  
5 the court observed that a Congressional committee had rejected the definition of  
6 “unaccompanied” that Defendant advances here: “Children who are apprehended by  
7 DHS while in the company of their parents are not in fact ‘unaccompanied’ and if  
8 their welfare is not at issue, they should not be placed in ORR custody.” 2007 WL  
9 1074070, \*1-2 (W.D. Tex. Apr. 9, 2007) (citing H. REP. NO. 109-79, at 38 (2006)).<sup>3</sup>

10 *Welch*—on which Defendant relies, *see* Dkt. 18 at 14—is an entirely different  
11 case. There, the plaintiff contended that the United States was liable under the FTCA  
12 because his immigration detention under 8 U.S.C. § 1226(c)(1) constituted false  
13 imprisonment. 409 F.3d at 649. The Fourth Circuit held that the DCE barred the  
14 plaintiff’s claims because, unlike Plaintiffs here, a federal *statute* mandated the very  
15 action he challenged—his immigration-related detention. Here, no federal *statute*  
16 mandated separating Plaintiff mothers from their children.

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18 <sup>2</sup> The court also rejected the government’s argument that because the plaintiff mother  
19 was “in lawful immigration custody” she was “unavailable to provide care and  
20 physical custody” for purposes of the TVPPRA. *Id.*

21 <sup>3</sup> Defendant’s citation to *Baie v. Sec’y of Defense*, 784 F.2d 1375 (9th Cir. 1986), for  
22 the proposition that a “challenge to an agency’s interpretation of a statute as ‘arbitrary  
23 or contrary to law may not be tested’” in an FTCA action, Dkt. 18 at 16, is misplaced.  
24 *Baie* did not even address the DCE. *Baie*, 784 F.2d at 1376-77 (the *discretionary*  
25 *function exception* barred a claim based on an agency’s interpretation that an implant  
26 was excluded as a “prosthetic device” under a statute). And, Defendant’s contention  
27 that Plaintiffs’ case “turns on” the government’s interpretation of “unaccompanied  
28 minor children” is contrary to Plaintiffs’ allegations that the separations stemmed  
from a policy to intentionally inflict harm on families so as to deter future asylum  
seekers. *See* Compl. ¶¶ 21-31. Nor do *Dalehite v. United States*, 346 U.S. 15 (1953),  
or *Dupree v. United States*, 247 F.2d 819 (3d Cir. 1957), support Defendant’s  
argument. Dkt. 18 at 10. Plaintiffs are not challenging “the legality of statutes or  
regulations” here; indeed, there is no statute or regulation mandating family  
separation.

1                   **2. No Statute or Regulation Mandated Separation When the**  
2                   **Government Detained Plaintiffs Pending Removal**  
3                   **Proceedings**

4                   Next, Defendant argues that the separations were independently mandatory  
5                   under the Settlement Agreement in *Flores v. Sessions*, No. 85-cv-4544 (C.D. Cal.  
6                   Feb. 2, 2015) (Dkt. No. 101) (the “*Flores* Agreement”), because Plaintiff mothers  
7                   “were detained during the pendency of their removal proceedings.” Dkt. 18 at 14.  
8                   Specifically, Defendant asserts that the *Flores* Agreement “precluded the detention of  
9                   alien minors in adult detention facilities” and “thus necessitated” these separations. *Id.*  
10                  at 14-15. This argument fails for several reasons.

11                  First, the *Flores* Agreement is designed to protect the best interests of children,  
12                  *see Flores v. Sessions*, 2018 WL 4945000, at \*5 (C.D. Cal. July 9, 2018), and it  
13                  promotes family *unification*. *See Bunikyte*, 2007 WL 1074070, at \*16. Defendant’s  
14                  use of *Flores* to justify intentionally harming children turns *Flores* on its head.

15                  Second, the *Flores* Agreement is not a statute or a regulation, *see* Dkt. 18 at 4  
16                  n.2, and, even if it were, Defendant is wrong to suggest that the Agreement  
17                  “necessitated” family separation. Dkt. 18 at 14-15. Parents may “affirmatively waive  
18                  their children’s rights to prompt release and placement in state-licensed facilities” as  
19                  Defendant has conceded in other litigation. *Flores*, 2018 WL 4945000, at \*4; *Ms. L.*,  
20                  3:18-cv-000428, Joint Motion Regarding Scope of the Court’s Preliminary Injunction  
21                  (S.D. Cal. July 13, 2018) (Dkt. 105) (agreeing parents can waive children’s *Flores*  
22                  rights to be placed in the “least restrictive setting” in order to remain in custody with  
23                  their parents). And, as Defendant acknowledges, the *Flores* Agreement—far from  
24                  mandating separation—permits family detention if it complies with the Agreement’s  
25                  requirements. *See* Dkt. 18 at 15 n.7; *Bunikyte*, 2007 WL 1074070, at \*3.

26                  Defendant incorrectly relies on *Bunikyte* for its position that “separation of  
27                  parent and child occurs” because, under the *Flores* Agreement, Immigration and  
28                  Customs Enforcement (“ICE”) “must” release the child from detention. Dkt. 18 at 15.  
29                  *Bunikyte* does not say that. There, plaintiff children were detained with their parents

1 in a family detention center and were seeking release, with their parents, because the  
2 conditions in the detention center did not comply with *Flores*. *Bunikyte*, 2007 WL  
3 1074070 at \*16. In analyzing ICE’s options for complying with *Flores*, the court  
4 made clear that the children’s release from the family detention center—which would  
5 have resulted in separation from their parents because the parents would continue to  
6 be detained—was “not mandated by the *Flores* Settlement language.” *Id.* Indeed, the  
7 court observed that separating children from their parents and placing them in shelters  
8 would *not* be in the “best interests” of the children. *Id.* (emphasis added). *Bunikyte*  
9 also found that although “[t]he Settlement expresses a policy preference for the  
10 release of minors where possible,” such preference “makes no sense when the minor’s  
11 parents are detained with the child,” as “separating the minor Plaintiffs from their  
12 parents . . . would be traumatizing and detrimental to them.” *Id.* at \*3.

13 Third, immigration officers did not separate Plaintiffs because of the *Flores*  
14 Agreement. Rather, officers separated Plaintiffs pursuant to the family separation  
15 policy within a few days of their arrival in the United States, Compl. ¶¶ 70-83, 119-  
16 31, 171-90, 235-49, 304-27, well before any of the release or detention provisions of  
17 the *Flores* Agreement were implicated. *Flores v. Lynch*, 212 F. Supp. 3d 907, 912-14  
18 (C.D. Cal. 2015), *aff’d in relevant part*, 828 F.3d 898 (9th Cir. 2016) (interpreting the  
19 *Flores* Agreement to permit accompanied minors to be held in a family detention  
20 center for at least 20 days).

21 Lastly, Defendant erroneously contends that “[f]or the due care exception to  
22 apply, the government need only be authorized by statute or regulation to take the  
23 course of action that caused that harm.” Dkt. 18 at 15. No court has ever interpreted  
24 the DCE to bar FTCA claims whenever officials’ conduct was merely “authorized” by  
25 stature or regulation. To the contrary, district courts in this Circuit and other courts of  
26 appeals have held that the DCE applies only where a statute or regulation  
27 “mandated”—*i.e.*, “specifically pr[e]scribed”—the conduct at issue. *See Welch*, 409  
28 F.3d at 652; *Buchanan*, 915 F.2d at 970-71; *Gonzalez*, 2013 WL 942363, at \*3-4.

1 Defendant's reliance on *Borquez v. United States*, 773 F.2d 1050 (9th Cir. 1985), is  
2 misplaced. There, the government transferred the maintenance and operation of a dam  
3 to a corporation, which was explicitly authorized by statute. *Id.* at 1051-52 (citing 43  
4 U.S.C. § 499). Plaintiffs later brought FTCA claims alleging negligent maintenance  
5 and operation of the dam. Because the government's transfer was explicitly  
6 authorized by statute (and there was no evidence the transfer was made without due  
7 care), a claim challenging the government's failure to maintain the dam "represent[ed]  
8 a challenge to the statutory authority of the government to transfer full care, operation  
9 and maintenance." *Id.* at 1052. The Ninth Circuit found in favor of the government  
10 because the due care exception "bars 'tests by tort action of the legality of statutes and  
11 regulations.'" *Id.* (citing *Dalehite*, 346 U.S. at 33). Here, there is no statute expressly  
12 authorizing family separation, nor are Plaintiffs challenging the legality of any statute  
13 or regulation. *See supra* at n.3.<sup>4</sup>

14 **3. Defendant's Arguments Are Contrary to Its Actions and**  
15 **Would Virtually Eliminate FTCA Claims in the Immigration**  
16 **Context**

17 Defendant's assertion that family separation was mandatory also is belied by  
18 President Trump's Executive Order purporting to end the family separation policy.  
19 *See* Compl. ¶¶ 59-60. If family separation were mandated by statute or regulation then  
20 the government presently would be violating the law it claims it must follow.  
21 Similarly, the fact that Plaintiffs were eventually transferred to family detention  
22 centers, reunited, and released from detention while their immigration proceedings  
23 remained pending confirms that no law mandates family separation. *See, e.g.,*  
24 *id.* ¶¶ 103-08.<sup>5</sup>

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25 <sup>4</sup> To the extent Defendant's DCE argument is based on purported mandates in an  
26 Executive Order, Presidential memo, or DOJ memo, *see* Dkt. 18 at 8-9, the DCE does  
27 not apply where such documents, and not a statute or regulation, direct the  
28 government's course of conduct. *See Garcia-Feliciano*, 2014 WL 1653143, at \*4 n.8.

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

1 If Defendant were correct that the DCE applies whenever the tortious conduct  
2 “stemmed from the government’s execution of its Federal statutory authorities”  
3 concerning criminal and immigration law, Dkt. 18 at 2, 13, virtually any immigration-  
4 related FTCA claim would fail, as all of the government’s immigration-related  
5 activities at least arguably “stem[] from” the government’s execution of its statutory  
6 authority. Yet, courts have found the DCE inapplicable to FTCA claims arising from  
7 the conduct of immigration officers. *See Gonzalez*, 2013 WL 942363, at \*4; *Watson*,  
8 179 F. Supp. 3d at 270-71; *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1299-1300  
9 (M.D. Ga. 2012).<sup>6</sup>

10 **C. Even if a Statute or Regulation Had Mandated the Separations,**  
11 **Defendant Does Not Establish that the Government Exercised “Due**  
12 **Care”**

13 Even if a statute or regulation mandated the separations (and none did), the  
14 DCE would not bar Plaintiffs’ claims because the government failed to exercise “due  
15 care” in “following the dictates of” such mandate. *Welch*, 409 F.3d at 652. When  
16 considering whether federal officers acted with due care, “[t]he relevant question is  
17 one of reasonableness.” *Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1161  
18 (1st Cir. 1987); *see also Hatahley v. United States*, 351 U.S. 173, 181 (1956) (“‘Due  
19 care’ implies at least some minimal concern for the rights of others.”). Despite having  
20 the burden of proving the DCE applies, *Prescott*, 973 F.2d at 702, Defendant does not  
21 even address whether the government exercised due care. In light of Plaintiffs’  
22 allegations, any effort to do so would be futile.

23 The family separation policy reflects an inherent lack of due care. Deliberately  
24 traumatizing children and their parents to achieve a policy goal of deterrence is

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25 <sup>6</sup> Plaintiffs are not challenging the government’s *authority* to execute federal criminal  
26 and immigration statutes. Instead, Plaintiffs are challenging the *manner* in which the  
27 government executed that authority. *See Stewart v. United States*, 486 F. Supp. 178,  
28 182 (C.D. Ill. 1980) (DCE did not apply where plaintiff was “not attacking the  
[statute] which authorized the Government to dispose of excess stockpiled asbestos”  
but rather plaintiff was “attacking the manner in which the sale was made”).

1 unavoidably careless. It is not something a “reasonable law enforcement agency  
2 [would] have done under [any] circumstances[.]” *Hydrogen Tech. Corp.*, 831 F.2d at  
3 1161.

4 What’s more, the Complaint is replete with allegations that the government  
5 failed to act reasonably or with “minimal concern for the rights of others” in  
6 implementing its family separation policy as to Plaintiffs. CBP officers physically  
7 ripped two Plaintiff children from their mothers’ arms, they mocked and laughed at  
8 Plaintiff mothers when the mothers begged the officers not to take their children, and  
9 they refused to give Plaintiff mothers information about where their children were  
10 being taken at the time of separation. *See, e.g.*, Compl. ¶¶ 72, 83-84, 133, 190, 249-  
11 50, 316, 328. For weeks or months, the government failed to give Plaintiff mothers  
12 and children any information about each other’s whereabouts or well-being, or about  
13 when, or if, they would see each other again. *See, e.g., id.* ¶¶ 109, 162, 224, 293, 366.  
14 When Plaintiffs finally communicated with each other, officers limited the frequency  
15 and length of their communications. *See id.* ¶¶ 87, 148, 151, 154, 197, 200. The  
16 government failed to record basic information about Plaintiffs, which prolonged their  
17 separation and hampered their ability to communicate. *See id.* ¶¶ 53-59, 153.

18 Because the government did not act reasonably or show a minimal degree of  
19 concern for Plaintiffs, the DCE does not apply. At the very least, there is a question of  
20 fact as to whether the government failed to exercise due care. *See, e.g., Moher v.*  
21 *United States*, 875 F. Supp. 2d 739, 764 (W.D. Mich. 2012) (denying motion to  
22 dismiss FTCA claims because factual issue existed as to whether use of force against  
23 plaintiff was reasonable).

## 24 **II. The Discretionary Function Exception Does Not Apply Here**

25 Plaintiffs allege that Defendant inflicted emotional distress and acted  
26 negligently by failing “to record which children belonged with which parents” and  
27 providing only limited communication between and information about family  
28 members. Compl. ¶¶ 5, 53. Defendant responds that this conduct is protected by the

1 discretionary function exception (“DFE”), which bars claims based on governmental  
2 actions that (1) involve an element of judgment or choice, and (2) involve public  
3 policy considerations. Dkt. 18 at 11, 18-19; *United States v. Gaubert*, 499 U.S. 315,  
4 322-23 (1991) (citations omitted).<sup>7</sup> The DFE, however, is inapplicable here because  
5 the government does not have the “discretion” to violate the Constitution. *See Nurse*  
6 *v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (“In general, governmental  
7 conduct cannot be discretionary if it violates a legal mandate.”); *Fazaga v. Fed.*  
8 *Bureau of Investigation*, 916 F.3d 1202, 1250-51 (9th Cir. 2019) (“[T]he Constitution  
9 can limit the discretion of federal officials such that the FTCA’s [DFE] will not  
10 apply.”) (quoting *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004)); *Loumiet v.*  
11 *United States*, 828 F.3d 935, 943 (D.C. Cir. 2016) (“We hold that the FTCA’s  
12 discretionary-function exception does not provide a blanket immunity against tortious  
13 conduct that a plaintiff plausibly alleges also flouts a constitutional prescription.”).<sup>8</sup>

14 Plaintiffs allege that the government’s “failure to track the children and  
15 promptly reunite the families once they were separated violated the constitutional  
16 right to family integrity of the persons subject to the policy, including Plaintiffs.”  
17 Compl. ¶ 68. Indeed, the *Ms. L.* court concluded that the government’s tracking  
18 failures violated class members’ due process rights<sup>9</sup>:

19 [T]he government has no system in place to keep track of, provide effective  
20 communications with, and promptly produce alien children. The unfortunate  
21 reality is that under the present system migrant children are not accounted for  
22 with the same efficiency and accuracy as *property*. Certainly, that cannot  
satisfy the requirements of due process.

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23 <sup>7</sup> Defendant also argues that these tortious acts are “inextricably tied” to Plaintiffs’  
24 claims based on the initial separations, and therefore are protected by the DCE. Dkt.  
25 18 at 17-18. These acts are not protected by the DCE for the same reasons the  
26 separations do not fall within the DCE—they were not mandated by statute or  
regulation. And, none of the cases Defendant cites for this point address the DCE.

27 <sup>8</sup> Plaintiffs also allege that the government was negligent in carrying out the  
separations, *see* Compl. ¶¶ 390-93, but Defendant does not challenge that claim on  
DFE grounds.

28 <sup>9</sup> Plaintiffs were members of the *Ms. L.* class. Compl. ¶ 62.

1 Compl. ¶ 57 (quoting *Ms. L.*, 310 F. Supp. 3d at 1144).<sup>10</sup>

2 The government's misconduct in failing to facilitate communication between  
3 families or provide information about each other's whereabouts also violates  
4 Plaintiffs' constitutional right to family integrity. *See Jacinto-Castanon de Nolasco*,  
5 319 F. Supp. 3d at 501; *Ms. L.*, 310 F. Supp. 3d at 1145-46; *see generally Troxel v.*  
6 *Granville*, 530 U.S. 57, 65-66 (2000). Thus, because Plaintiffs have plausibly alleged  
7 that the communication and tracking failures violated their constitutional rights, the  
8 DFE does not apply. *See Nurse*, 226 F.3d at 1002.<sup>11</sup>

9 Moreover, the government's decisions to limit information, communications,  
10 and tracking do not involve the type of policy-based decision-making shielded by the  
11 DFE. In *Ruiz v. United States*, 2014 WL 4662241 (E.D.N.Y. Sept. 18, 2014), a father  
12 brought intentional infliction of emotional distress ("IIED") and negligence claims  
13 arising from CBP's detention of his four-year-old daughter, a U.S. citizen. The court  
14 rejected the government's DFE defense, reasoning that CBP officers' "treatment of"  
15 the child during her detention "cannot be said to be susceptible to policy analysis." *Id.*  
16 at \*8. The court could not "discern how deciding to wait fourteen hours before  
17 contacting [the child's] parents and to only provide the child with a cookie and a soda  
18 over twenty hours could constitute a considered judgment grounded in social,  
19 economic, or political policies." *Id.* Rather, CBP's "actions appear more plausibly to

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21 <sup>10</sup> Defendant claims the tracking deficiencies did not "hinder[] [Plaintiffs']  
22 reunifications," noting that four Plaintiff families were reunified within the 30-day  
23 period ordered in *Ms. L.* Dkt. 18 at 18-19 & n.10. But the harm from the tracking  
24 failures manifested well before the reunification date ordered in *Ms. L.*, which was  
25 more than two months after the separations here, including by hampering  
26 communication between Plaintiff mothers and their children. *See* Compl. ¶¶ 67, 69,  
27 84, 136, 195, 255, 257, 348.

28 <sup>11</sup> For the same reason, the DFE does not bar Plaintiffs' claims based on the initial  
separations. In cases considering the constitutionality of the family separation policy,  
courts have found that plaintiffs were likely to succeed on their claims that separation  
violated the plaintiffs' due process rights. *See, e.g., Ms. L.*, 310 F. Supp. 3d at 1142-  
46); *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1124-26 (N.D. Ill. 2018); *Jacinto-*  
*Castanon de Nolasco*, 319 F. Supp. 3d at 499-500.



1 be the result of negligence or laziness,” and did not “warrant the application of the  
2 [DFE].” *Id.* Likewise, the government’s failures here “do not involve considerations  
3 of public policy.” *Id.*

### 4 **III. Plaintiffs’ Tort Claims Satisfy the Broad Private Analog Inquiry**

5 Defendant erroneously contends that it cannot be liable under the FTCA for  
6 IIED or negligence because there is no state tort analog. According to Defendant,  
7 “only the Federal government has the authority to enforce the Nation’s immigration  
8 laws and applicable state law does not impose liability on private persons for failing  
9 to enforce Federal law.” Dkt. 18 at 19-20. But the Supreme Court has made clear that  
10 the private analog doctrine, which provides that the United States is liable “in the  
11 same manner and to the same extent as a private individual under like circumstances,”  
12 28 U.S.C. § 2674, must be interpreted broadly. *See Indian Towing Co. v. United*  
13 *States*, 350 U.S. 61 (1955). The FTCA’s requirement that a claim address “*like*  
14 *circumstances*” does not mean “under the *same* circumstances,” *id.* at 64 (emphasis  
15 added); rather, courts must look “further afield” to find analogous torts relating to the  
16 government activity at issue. *United States v. Olson*, 546 U.S. 43, 46 (2005); *see also*  
17 *Firebaugh Canal Water Dist. v. United States*, 712 F.3d 1296, 1303 (9th Cir. 2013)  
18 (private analog need not be “exactly on point;” it need only be “appropriate”). Here,  
19 Plaintiffs have pled facts to support Arizona tort claims that apply in circumstances  
20 sufficiently similar to the claims at issue.

21 It is settled law that the United States can be liable for activities over which the  
22 federal government has exclusive authority. *See Indian Towing*, 350 U.S. at 69-70  
23 (United States could be liable for Coast Guard’s failure to maintain a lighthouse  
24 despite the government’s exclusive authority over such operations); *see also United*  
25 *States v. Muniz*, 374 U.S. 150, 159-62, 165-66 (1963) (even though confinement of  
26 inmates was uniquely governmental function, negligence actions allowed to proceed);  
27 *Tekle v. United States*, 511 F.3d 839, 852 (9th Cir. 2007) (“Even if the conduct entails  
28

1 uniquely governmental functions, the court is to examine the liability of private  
2 persons in analogous situations.”).

3 In the immigration context, courts allow FTCA claims to proceed even though  
4 actions of immigration officers are uniquely governmental. In *Xue Lu v. Powell*, 621  
5 F.3d 944, 947-50 (9th Cir. 2010), the Ninth Circuit rejected the government’s private  
6 analog defense and allowed the plaintiffs’ IIED claim where an asylum officer  
7 conditioned outcomes in the plaintiffs’ immigration proceedings on satisfaction of  
8 demands for money and sexual favors. *Xue Lu* thus forecloses Defendant’s theory that  
9 immigration enforcement lacks a private analog. *See also Liranzo v. United States*,  
10 690 F.3d 78, 80-81, 94-95 (2d Cir. 2012) (false arrest and imprisonment claims viable  
11 where government erroneously detained plaintiff in immigration custody, finding  
12 private analog in state tort law allowing claims against private individuals for  
13 detention without “legal privilege to do so”); *Avalos-Palma v. United States*, 2014  
14 WL 3524758, at \*12 (D.N.J. July 16, 2014) (private analog doctrine did not bar  
15 claims arising from wrongful deportation).

16 Here, Plaintiffs allege that their injuries arise from the government’s forcible  
17 removal of their children from their care, as well as its subsequent communication and  
18 tracking failures. *See, e.g.*, Compl. ¶¶ 1, 58, 387-88, 391-92. Arizona courts have held  
19 private persons liable in tort under analogous circumstances. In *Pankratz v. Willis*, the  
20 court upheld a verdict in favor of plaintiff father who asserted an IIED claim against  
21 his former in-laws for removing his child from his care. 744 P.2d 1182, 1189 (Ariz.  
22 Ct. App. 1987). Arizona courts have also recognized Section 700 of the Restatement  
23 of Torts as providing a cause of action to a parent entitled to the custody of a minor  
24 child against private parties who remove the child from the parent’s care without  
25 consent. Restatement (Second) of Torts § 700 (1977); *see Pankratz*, 744 P.2d at 1189,  
26 n.6; *see also Rodriguez v. City of Phoenix*, 2007 WL 411832 (D. Ariz. Feb. 5,  
27 2007), *aff’d*, 300 F. App’x 514 (9th Cir. 2008). Courts have also allowed IIED claims  
28 under the FTCA to proceed in circumstances involving non-consensual family

1 separation. *See, e.g., Martinez v. United States*, 2018 WL 3359562, at \*11-12 (D.  
2 Ariz. July 10, 2018) (recognizing viability of plaintiffs’ IIED claim where CBP’s  
3 interrogation of the father included “threaten[ing] to separate his family” and  
4 “ensur[ing] that [he] watched the agents transport his family to another location”).<sup>12</sup>

5 Arizona law also recognizes that private persons owe a duty of care when  
6 acting in a supervisory capacity analogous to the government’s supervision of  
7 Plaintiffs here. *See, e.g., Sanders v. Alger*, 394 P.3d 1083, 1086 (Ariz. 2017) (a  
8 caregiver owes a duty of reasonable care to their patients); *Broadbent by Broadbent v.*  
9 *Broadbent*, 907 P.2d 43, 50 (Ariz. 1995) (parents owe a duty of care to their children);  
10 *Hill v. Safford Unified Sch. Dist.*, 952 P.2d 754, 756 (Ariz. Ct. App. 1997) (schools  
11 have a duty not to subject students to risk of harm). Given these recognized  
12 responsibilities under Arizona law, the government had a duty to avoid negligently  
13 harming Plaintiffs while in government custody. Its failure to do so gives rise to a  
14 negligence claim under the FTCA.

15 The authorities Defendant cites, *see* Dkt. 18 at 20-21, stand for the  
16 uncontroversial proposition that the FTCA’s immunity waiver does not extend to  
17 causes of action based solely on the government’s violation of federal regulations. *See*  
18 *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 537-38 (1st Cir. 1997) (conduct  
19 at issue “wholly concern[ed] the [Federal Aviation Administration’s] alleged failure  
20 to perform its regulatory functions” under federal statutes); *Chen v. United States*, 854  
21 F.2d 622, 626-27 (2d Cir. 1988) (dismissing FTCA claim predicated on government’s  
22 failure to abide by its own procurement regulations).<sup>13</sup> Plaintiffs’ claims are not based  
23 on an alleged failure to follow federal regulations.

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24  
25 <sup>12</sup> While there is no explicit discussion of the private analog issue in *Martinez*, a court  
26 lacks subject matter jurisdiction over an FTCA claim unless the claim satisfies the  
27 private analog test. *See Liranzo*, 690 F.3d at 84-85, 93. Because courts must consider  
subject matter jurisdiction even when the issue is not raised, the *Martinez* court’s  
ruling suggests it found the IIED claim to be an appropriate private analog.

28 <sup>13</sup> Nor does *McGowan v. United States*, 825 F.3d 118 (2d Cir. 2016), support the  
contention that there is no private analog here because only governments can establish

1 Defendant's cases holding that there is no private analog for "quasi-  
2 adjudicative actions," Dkt. 18 at 21-22, are also inapplicable. Defendant relies  
3 primarily on *Akutowicz v. United States*, 859 F.2d 1122 (2d Cir. 1988). *Id.* In *Liranzo*,  
4 the Second Circuit rejected the application of *Akutowicz* to an immigration-related  
5 false arrest claim: "But in *Akutowicz*, there was no detention. The only action  
6 complained of was the removal of plaintiff's citizenship. Citizenship is a legal status,  
7 which only the federal government is capable of altering. A private individual  
8 cannot . . . cause injury to another's citizenship. But a private person is of course  
9 capable of falsely arresting another." *Liranzo*, 690 F.3d at 96. Likewise, Arizona tort  
10 law provides that a private person may be liable for the harms Plaintiffs allege. *See*  
11 *supra* at 18-19.<sup>14</sup>

#### 12 **IV. Plaintiffs State Claims for Intentional Infliction of Emotional Distress and** 13 **Negligence Under Arizona Law**

14 Defendant does not challenge the sufficiency of Plaintiffs' allegations with  
15 respect to any element of their IIED and negligence claims under Arizona law.  
16 Defendant nevertheless contends that Plaintiffs have not stated a claim because  
17 Plaintiffs' harms arise solely from the consequences of their detention. *See* Dkt. 18 at  
18 23-24. Defendant relies on a case in which the plaintiff sued the group home where

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19 detention facilities. Dkt. 18 at 23. That case involved "wrongful confinement"—a  
20 claim for prisoners subjected to punitive segregation—and the court merely held that  
21 there is no private analog to such a claim. *Id.* at 126.

22 <sup>14</sup> Defendant's remaining cases are inapposite because they also involve quasi-  
23 adjudicative actions, which—unlike the government's actions here—private persons  
24 cannot engage in. *See Bhuiyan v. United States*, 2017 WL 2837023, at \*4 (D.N. Mar.  
25 I. June 30, 2017) (negligent approval of I-360 application), *aff'd*, 772 F. App'x 564  
26 (9th Cir. 2019); *Elgamal v. United States*, 2015 WL 13648070, at \*2 (D. Ariz. July 8,  
27 2015) (negligent denial of plaintiff's I-485 adjustment motion), *aff'd sub*  
28 *nom. Elgamal v. Bernacke*, 714 F. App'x 741 (9th Cir. 2018); *Figueroa v. United*  
*States*, 739 F. Supp. 2d 138, 142 (E.D.N.Y. 2010) (negligent processing of passport);  
*Appleton v. United States*, 180 F. Supp. 2d 177, 185 (D.D.C. 2002) (negligent  
processing of ammunition import applications). The court in *Mazur v. United States*  
declined to address the private analog argument because it found the plaintiff's action  
to be time-barred. 957 F. Supp. 1041, 1043 (N.D. Ill. 1997).

1 he resided for leaving him unsupervised, which allegedly led to him committing  
2 crimes that resulted in incarceration. *Muscat by Berman v. Creative Innervations*  
3 *LLC*, 418 P.3d 967, 969 (Ariz. Ct. App. 2014). The plaintiff claimed the home’s  
4 failure to prevent him from committing his crimes caused him to suffer “loss of  
5 freedom” and “loss of participation in life’s activities.” *Id.* at 971.

6 *Muscat* is inapposite, even setting aside that Plaintiffs were not criminally  
7 charged and incarcerated. *See* Compl. ¶ 34. The *Muscat* court found that the plaintiff’s  
8 alleged injuries were not “distinct from the consequences of his prison sentence,” and  
9 “no properly-convicted criminal has a legally protected interest in being free from the  
10 inherent consequences of the resulting sentence.” *Muscat*, 418 P.3d at 971. Here, the  
11 government’s forcible separation of Plaintiffs and its communication and tracking  
12 failures are not “inherent consequences” of Plaintiffs’ detention.

13 **CONCLUSION**

14 For the foregoing reasons, the Court should deny Defendant’s motion.

15  
16 RESPECTFULLY SUBMITTED this 6th day of February, 2020.

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