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2
3 **NOT FOR PUBLICATION**
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5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 C.M., et al.,

10 Plaintiffs,

11 v.

12 United States of America,

13 Defendant.
14

No. CV-19-05217-PHX-SRB

ORDER

15 The Court now considers Defendant United States’ Motion and Memorandum in
16 Support of the United States’ Motion to Dismiss (“Motion”) (Doc. 18, (“Mot.”)). The
17 Court heard oral argument on March 24, 2020.

18 **I. BACKGROUND**

19 Plaintiffs C.M., B.M., L.G., B.G, M.R., J.R., O.A., L.A., V.C., and G.A.
20 (collectively, “Plaintiffs”) are five mothers and their respective children who were forcibly
21 separated by federal officers while detained at various immigration holding centers in
22 Arizona. (Doc. 1, Compl. ¶¶ 5, 11–15.) Each family remained separated for more than
23 two months. (*Id.* ¶ 5.) During that time, the federal government provided only limited
24 information to each mother about her child’s whereabouts and well-being and afforded
25 only minimal opportunities for each mother and child to communicate. (*Id.* ¶ 5.) Four of
26 the children were transferred to shelters in New York. (*Id.* ¶¶ 99, 193, 281, 324.) As a
27 result of the separation, Plaintiffs allege that they suffered, and continue to suffer,
28 substantial trauma. (*Id.* ¶ 5.)

1 Plaintiffs filed suit on September 19, 2019, alleging two causes of action under the
2 Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b)(1), 2671–2680: (1) intentional
3 infliction of emotional distress (“IIED”); and (2) negligence. (*Id.* ¶¶ 387–93.) Plaintiffs
4 seek compensatory damages. (*Id.* ¶ 394(A).)

5 On December 23, 2019, the United States filed its Motion requesting dismissal for
6 lack of jurisdiction. (Mot.) Plaintiffs filed their Opposition to Defendant’s Motion to
7 Dismiss (“Response”) on February 6, 2020. (Doc. 19, Opp’n to Def.’s Mot. (“Resp.”).)

8 **II. LEGAL STANDARD AND ANALYSIS**

9 **A. Rule 12(b)(1) Motion to Dismiss**

10 The United States’ Motion attacks the Complaint on its face. *See Safe Air for*
11 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (“In a facial attack, the challenger
12 asserts that the allegations contained in a complaint are insufficient on their face to invoke
13 federal jurisdiction.”). In ruling on such a motion, the Court accepts the allegations of the
14 complaint as true and affords plaintiffs the benefit of all favorable inferences that can be
15 drawn from the alleged facts. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004);
16 *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164
17 (1993). Plaintiffs bear the burden of establishing a court’s subject-matter jurisdiction. *See*
18 *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Chandler v. State Farm*
19 *Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

20 **B. Jurisdiction under the FTCA**

21 The United States is immune from liability absent its consent, and the terms of that
22 consent define a court’s jurisdiction to entertain a suit against the United States. *United*
23 *States v. Mitchell*, 445 U.S. 535, 538 (1980). The FTCA provides such consent “under
24 circumstances where the United States, if a private person, would be liable to the claimant
25 in accordance with the law of the place where the act or omission occurred.” *Fazaga v.*
26 *Fed. Bureau of Investigation*, 916 F.3d 1202, 1249 (9th Cir. 2019) (quoting 28 U.S.C. §
27 1346(b)(1)). The FTCA’s general waiver of immunity, however, is subject to several
28 exceptions. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 485 (2006). Section 2680(a), 28

1 U.S.C., provides that this waiver shall not apply to:

2 Any claim [1] based upon an act or omission of an employee
3 of the Government, exercising due care, in the execution of a
4 statute or regulation, whether or not such statute or regulation
5 be valid, or [2] based upon the exercise or performance or the
6 failure to exercise or perform a discretionary function or duty
7 on the part of a federal agency or an employee of the
8 Government, whether or not the discretion involved be abused.

9 28 U.S.C. § 2680(a) (bracketed numerals added). The Court refers to [1] as the “due care
10 exception” and [2] as the “discretionary function exception.” The United States argues that
11 both exceptions apply. (Mot. at 9.)

12 The “plaintiff bears the burden of persuading the court that it has subject[-]matter
13 jurisdiction under the FTCA’s general waiver of immunity,” and the United States bears
14 the burden of proving that an exception applies. *Prescott v. United States*, 973 F.2d 696,
15 701–02 (9th Cir. 1992) (citing 28 U.S.C. § 1346(b)).

16 **1. Private Analogue Requirement**

17 To carry their burden of establishing subject-matter jurisdiction under the FTCA,
18 Plaintiffs must show that “a private individual under like circumstances would be liable
19 under state law.” *United States v. Muniz*, 374 U.S. 150, 153 (1963); 28 U.S.C. § 1346(b).
20 To do this, Plaintiffs’ allegations must demonstrate “a persuasive analogy with private
21 conduct.” *See Westbay Steel, Inc. v. United States*, 970 F.2d 648, 650 (9th Cir. 1992)
22 (quoting *Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538, 543 (9th Cir. 1987)).
23 Recognizing that “the federal government ‘could never be exactly like a private actor,’”
24 the Ninth Circuit requires a court only “to find the most reasonable analogy.” *Dugard v.*
25 *United States*, 835 F.3d 915, 919 (9th Cir. 2016) (quoting *LaBarge v. Mariposa Cty.*, 798
26 F.2d 364, 367 (9th Cir. 1986)).

27 Plaintiffs bring claims of IIED and negligence. (Compl. ¶¶ 387–93.) This Court
28 recently recognized the viability of an IIED claim brought under the FTCA simply where
“[federal] agents’ actions were motivated by malice.” *Martinez v. United States*, 2018 WL
3359562, at *10–12 (D. Ariz. July 10, 2018) (citing *Gasho v. United States*, 39 F.3d 1420,
1434 (9th Cir. 1994)). The Complaint contains ample factual allegations suggesting that

1 the government's separation of families was motivated by malice. (*See* Compl. ¶¶ 27–29,
2 31–33, 38, 39, 40–41, 43, 45, 50, 53, 71–72, 76–83, 127–32, 182–90, 244–49, 314–17.)
3 This Court also recently recognized the viability of a negligence claim brought under the
4 FTCA where plaintiffs alleged that federal employees' placement of a prisoner in a certain
5 cell was negligent. *Estate of Smith v. Shartle*, No. CV-18-00323-TUC-RCC, 2020 WL
6 1158552, at *1 (D. Ariz. Mar. 10, 2020). *Estate of Smith* reasoned:

7 [l]ike a nursing facility employee, a BOP employee is tasked
8 with the care of persons who are dependent upon them to make
9 daily housing and safety determinations. And, like nursing care
10 employees, BOP has a duty to ensure the safety of the persons
11 who reside at the facility.

12 2020 WL 1158552, at *1–2 (citing 28 U.S.C. § 4042(2)). Federal immigration officials,
13 too, are tasked with the care and custody of those they detain, and owe detainees at least a
14 minimal level of care. *See, e.g., Flores v. Sessions*, No. 85-CV-4544 (C.D. Cal. Feb. 2,
15 2015) (ECF No. 101) (“Flores Settlement Agreement”).

16 The United States argues that “[b]ecause only the [f]ederal government has the
17 authority to enforce the Nation's immigration laws and applicable state law does not
18 impose liability on private persons for failing to enforce [f]ederal law,” no private analogue
19 exists. (Mot. at 19–20.) A private analogue, however, need only exist under “like
20 circumstances,” not “under the *same* circumstances.” *Indian Towing Co. v. United States*,
21 350 U.S. 61, 64 (1955) (emphasis added). Plaintiffs have demonstrated a private analogue
22 under like circumstances. The Court therefore has subject-matter jurisdiction under the
23 FTCA unless the United States proves that an exception applies.

24 **2. Due Care Exception**

25 The United States argues that “[f]or the due care exception to apply, the government
26 need only be authorized by statute or regulation to take the course of action that caused the
27 harm,” citing *Borquez v. United States*.¹ In *Borquez*, plaintiffs brought an FTCA claim
28 against the government for the negligent maintenance and operation of a dam. *Id.* at 1051.
The government had previously transferred responsibility for maintaining and operating

¹ 773 F.2d 1050 (9th Cir. 1985).

1 the dam to a corporation pursuant to a statute that explicitly and specifically authorized it
2 to do so.² *Id.* at 1052 (citing 43 U.S.C. § 499). Because the plaintiffs’ claim “represent[ed]
3 a challenge to the statutory authority of the government” to transfer responsibility for the
4 dam to a corporation—a type of challenge the exception was designed to prohibit—the
5 exception applied. *Id.*

6 Plaintiffs’ claims present no such challenge. The United States has cited to no
7 statute explicitly authorizing the government to detain parents and children in separate
8 facilities before it has charged either with a crime. Indeed, no such statute exists. *Borquez*,
9 therefore, is inapposite.

10 Following other courts in this circuit, the Court applies the two-prong test
11 established by *Welch v. United States*³ to determine whether the due care exception applies.
12 See *Ferguson v. United States*, No. 15CV1253 JM (DHB), 2016 WL 4793180, at *7 (S.D.
13 Cal. Sept. 14, 2016) (applying *Welch*’s two-part test); *Kwai Fun Wong v. Beebe*, No. CIV.
14 01-718-ST, 2006 WL 977746, at *7–8 (D. Or. Apr. 10, 2006) (same). Under *Welch*, the
15 due care exception applies if (1) the statute or regulation in question “specifically
16 pr[e]scribes a course of action for an officer to follow,” and (2) “the officer exercised due
17 care in following the dictates of that statute or regulation.” *Welch*, 409 F.3d at 652 (citing
18 *Crumpton v. Stone*, 59 F.3d 1400, 1403 (D.C. Cir. 1995)). Otherwise stated, the due care
19 exception applies only when an official was “reasonably executing the mandates of” a
20 statute or regulation. *Id.* at 651.

21 The United States cites no statute or regulation mandating the separation of
22 Plaintiffs upon their entry into the country. It cites no statute or regulation requiring the

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24 ² The statute read:

25 Whenever any legally organized water-user’s association or
26 irrigation district shall so request, the Secretary of the Interior
27 is authorized, in his discretion, to transfer to such water-users’
28 association or irrigation district the care, operation, and
maintenance of all or any part of the project works, subject to
such rules and regulations as he may prescribe.

43 U.S.C. § 499.

³ 409 F.3d 646 (4th Cir. 2005).

1 detention of individuals who are “amenable to prosecution”⁴ in facilities different from
2 those who are not “amenable to prosecution.” Further, family separation was established
3 by executive policy—not by a statute or regulation—which is not covered by the due care
4 exception. (See Compl. ¶¶ 23, 31, 34; *Garcia-Feliciano v. United States*, No. CIV. 12-
5 1959 SCC, 2014 WL 1653143, at *4 n.8 (D.P.R. Apr. 23, 2014) (due care exception “would
6 not apply here, however, because a policy—not a statute or regulation—pr[e]scribed the
7 deputy’s conduct”).) The United States has failed to prove that the due care exception
8 applies.

9 3. Discretionary Function Exception

10 The discretionary function exception bars claims arising from governmental actions
11 that (1) “involv[e] an element of judgment or choice” and (2) are “based on considerations
12 of public policy.” *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991) (quotations
13 omitted).

14 In an underdeveloped argument, the United States asserts that “prioritizing
15 enforcement of [f]ederal law” and “subsequent prosecutorial decisions” are “classic
16 discretionary functions shielded by the FTCA’s discretionary function exception and
17 prosecutorial immunity.” (Mot. at 12.) This argument, however, rests on the false premise
18 that by taking custody of children whose parents are “amenable to prosecution,” the United
19 States is simply enforcing federal law. As previously explained, the United States was not
20 enforcing federal law when it separated Plaintiffs. See *supra* Section II(B)(2). It therefore
21 was not *prioritizing* the enforcement of federal law. Any argument that the government
22 was simply exercising prosecutorial discretion ignores the crucial fact that the government
23 never charged any Plaintiff with a crime. (See Compl. ¶ 34.)

24 ⁴ The United States suggests that its family-separation policy was authorized by 8 U.S.C.
25 § 1232(b)(3), which requires the government to transfer alien children into the custody of
26 the U.S. Department of Health and Human Services (“HHS”) after determining that an
27 alien child is “unaccompanied.” (Doc. 25, Def.’s Reply to Resp. (“Reply”) at 3.) The
28 United States postulates that parents who are “amenable to prosecution” under immigration
statutes are “unavailable to provide care or custody” to their children, which in turn renders
their children “unaccompanied” and subject to § 1232(b)(3)’s custodial-transfer
requirement. (Mot. at 2, 13, 17; Reply at 3.) The United States fails to explain how a
parent who is merely “amenable” to prosecution—but has not been charged with a crime—is,
for that reason, unavailable to care for her child.

1 Plaintiffs argue the discretionary function exception does not apply because the
 2 government lacks discretion to violate the Constitution, and their Complaint alleges a
 3 deprivation of due process. (Resp. at 15; Compl. ¶ 68.) “[T]he Constitution can limit the
 4 discretion of federal officials such that the FTCA’s discretionary function exception will
 5 not apply.” *Nurse v. United States*, 226 F.3d 996, 1002 n.3 (9th Cir. 2000). In a related
 6 suit brought by a class of migrant parents that included Plaintiffs, a district court found that
 7 the government’s practice of separating families, and the procedures used to implement
 8 this practice, likely violated the parents’ due process rights. *Ms. L. v. U.S. Immigration*
 9 *and Customs Enf’t*, 310 F. Supp. 3d 1133, 1144–46 (S.D. Cal. 2018), *modified by* 330
 10 F.R.D. 284 (S.D. Cal. 2019); Compl. ¶ 62 (citing *Ms. L.*). The court stated:

11 A practice of this sort implemented in this way is likely to be
 12 ‘so egregious, so outrageous, that it may fairly be said to shock
 13 the contemporary conscience,’ interferes with rights “‘implicit
 14 in the concept of ordered liberty[,]” and is so “‘brutal” and
 “‘offensive” that it [does] not comport with traditional ideas of
 fair play and decency.’

15 *Id.* at 1145–46 (citations omitted). The United States responds that “Plaintiffs cannot . . .
 16 circumvent the discretionary function exception simply by labeling governmental conduct
 17 as unconstitutional.” (Reply at 11.) Plaintiffs, however, did more than “simply label[]”
 18 the government’s conduct as unconstitutional—they cited a court order declaring this
 19 conduct so “egregious,” “outrageous,” “brutal,” and “offensive” that it warranted
 20 immediate enjoinder. (*See* Compl. ¶¶ 62, 68.) Plaintiffs have plausibly alleged that the
 21 government’s separation of their families violated their constitutional rights, which is not
 22 shielded by the discretionary function exception.

23 To the extent the United States asks the Court to parse the Complaint to assess
 24 whether claims with respect to individual factual allegations are barred,⁵ the Court declines
 25 to do so. Such an approach is inconsistent with the Complaint, which incorporates all facts

26 ⁵ *See, e.g.*, Mot. at 18 (“[C]laims relating to the conditions of one’s detention in a secure
 27 facility are . . . shielded by the discretionary function exception.”); *id.* (“[A]ny challenge
 28 to the frequency of communications between and about separated family members is barred
 by the discretionary function exception.”); *id.* at 19 (“[A]n agency’s decisions regarding
 the design and maintenance of its computer systems and databases is a policy-based
 discretionary function . . .”).


1 into each count. (*See* Compl. ¶¶ 387–93.) Moreover, discussion of the extent to which
2 certain facts could or could not prove a claim is outside the scope of this Order; such a
3 resolution would be premature. The United States has failed to prove that the discretionary
4 function exception applies.

5 **III. CONCLUSION**

6 Plaintiffs have demonstrated that “a private individual under like circumstances
7 would be liable under state law” for the allegedly tortious conduct committed by the United
8 States. The United States has failed to demonstrate that an exception to the FTCA’s general
9 waiver of immunity applies. The Court therefore has subject-matter jurisdiction over this
10 action.

11 **IT IS ORDERED** denying the United States’ Motion and Memorandum in Support
12 of the United States of America’s Motion to Dismiss (Doc. 18).

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14 Dated this 30th day of March, 2020.

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19 _____
20 Susan R. Bolton
21 United States District Judge
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