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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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E.S.M.,

Plaintiff,

v.

United States of America,

Defendant.

No. CV-21-00029-TUC-JAS

ORDER

21 Pending before the Court is Defendant's Motion to Dismiss for Lack of Subject
22 Matter Jurisdiction (Doc. 35), Plaintiffs' response (Doc. 36), and Defendant's reply (Doc.
23 44). Plaintiffs bring claims under the Federal Tort Claims Act (FTCA) for Intentional
Infliction of Emotional Distress, Negligence, and Loss of Child's Consortium. Defendant
moves this Court to dismiss Plaintiffs' claims for want of subject matter jurisdiction. For
the reasons set forth in this Order, Defendant's motion is denied. Because the briefing is
adequate and oral argument will not help in resolving this matter, oral argument is
denied. See *Mahon v. Credit Bureau of Placer County, Inc.*, 171 F.3d 1197, 1200-1201
(9th Cir. 1999).

24 **I. Background**

25 Plaintiffs E.S.M. and his son H.S.S. were apprehended at the U.S./Mexico border
26 in May of 2018, seeking asylum after fleeing their home in Guatemala. Customs and
27 Border Protection (CBP) officers incarcerated Plaintiffs in crowded, unhygienic
28 conditions, in a cold cell without adequate warm clothing. Acting under an executive

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1 private employees.

2 Defendant correctly argues that the FTCA does not waive immunity for claims
3 based on “actions of the type private persons could not engage in and hence could not be
4 liable for under local law.” *Chen v. U.S.*, 854 F.2d 622, 626 (2d Cir. 1988). But it would
5 be inappropriate to apply *Chen* in this case. In *Chen*, the Government was sued for
6 breaching a duty specifically created *for the Government*. 854 F.2d at 626. Thus, none of
7 the Government’s conduct in *Chen* would be actionable under state tort law. *Id.* This is
8 also what happened in *Westbay*, where the Ninth Circuit found no FTCA liability. Unlike
9 in *Chen* and *Westbay*, however, in the present case,

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1 **B. Statutory Exceptions to the FTCA**

2 A plaintiff may establish each of the six elements of an FTCA claim but still fail to
3 establish subject matter jurisdiction should the defendant successfully argue that one of
4 the FTCA’s exceptions applies. Pertinent to this case are the discretionary-function and
5 due-care exceptions found in 28 U.S.C. § 2680(a).¹

6 Discretionary-Function Exception

7 The discretionary function exception (DFE) shields the Government from liability
8 for claims based upon acts of its employees which “involve an element of judgment or
9 choice.” *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz v. United*
10 *States*, 486 U.S. 531, 536 (1988)). The exception is in place because Congress did not
11 intend the FTCA to be a tool for challenging “the propriety of [] discretionary
12 administrative act[s]” such as “the expenditure of federal funds, the execution of a
13 Federal project,” and regulatory activities. *Dalehite v. United States*, 346 U.S. 15, 33
14 (1953); *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984) (“Congress wished to
15 prevent judicial “second-guessing” of legislative and administrative decisions grounded
16 in social, economic, and political policy through the medium of an action in tort.”).

17 The *Gaubert* Court established a two-pronged analysis for the DFE. First, courts
18 must determine whether the act or omission is discretionary in nature, and that
19 they involve an element of judgment or choice. Second, courts must determine “whether
20 that judgment is of the kind that the [DFE] was designed to shield.” *Gaubert*, 499 U.S. at
21 322-23 (quoting *Varig Airlines*, 467 U.S. at 813).

22 Discretion, for purposes of the DFE, exists only where a government employee’s
23 acts cannot be considered mandatory. *See Berkovitz*, 486 U.S. at 544 (“When a suit
24 charges an agency with failing to act in accord with a specific mandatory directive, the
25 discretionary function exception does not apply.

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and thus nondiscretionary, if adequately restricted by the United States Constitution. *See Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (“In general, governmental conduct cannot be discretionary if it violates a legal mandate.”); *Id.* at n.2 (“We hold only

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