UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D.J.C.V., a minor child, and G.C., his father, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	20 Civ. 5747 (PAE)

GOVERNMENT'S MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFFS' MEMORANDUM OF LAW IN FURTHER OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

After conducting nearly six months of jurisdictional discovery, receiving more than 65,000 documents produced by the Government, and taking five depositions of Government witnesses, including two Rule 30(b)(6) depositions, Plaintiffs cannot identify any evidence demonstrating that their separation was the result of the Department of Justice's Zero Tolerance Policy, DHS's Referral Policy, or any other allegedly unconstitutional family separation policy.[1] To the contrary, the evidence overwhelmingly shows that the DHS Referral Policy was not implemented in RGV Sector until May 7, 2018—five days after Plaintiffs were separated and after they had already left USBP custody. Plaintiffs therefore could not have been separated pursuant to that policy. Rather, Plaintiffs were separated because G.C. had a violent criminal history and satisfied the prosecution criteria in place at the time. Accordingly, he was referred to the U.S. Attorney's Office for prosecution of an immigration offense, and D.J.C.V. was referred to ORR custody because minor children cannot accompany their parents through the criminal justice system.

In the face of this uncontroverted evidence, Plaintiffs nevertheless attempt to argue that the DHS Referral Policy was implemented in RGV Sector before May 7, 2018, by pointing to earlier prosecution initiatives in other USBP Sectors, intra-agency communications regarding potential policy options, and hearsay media reports. But there is no evidence showing any nexus between these practices or communications and Plaintiffs' separation. Plaintiffs also speculate that G.C.'s violent criminal history is merely a pretextual justification for his separation from D.J.C.V., and that their separation was actually motivated by the Zero Tolerance Policy. But again, Plaintiffs offer no evidence to support that theory, which is refuted by the record.

[1] The Government has adopted the abbreviations from its opening memorandum of law herein.

Plaintiffs further maintain that G.C.'s violent criminal history and prosecution referral could not have been the basis for their separation because the U.S. Attorney's Office declined the referral the evening before D.J.C.V. was transferred to ORR custody. But the decision to refer G.C. for prosecution and the decision to designate D.J.C.V. as a UAC were inextricably linked. Once G.C. was referred for prosecution, USBP reasonably took steps to ensure compliance with legal requirements regarding detention of minors, including by making a timely ORR referral for D.J.C.V. There is no evidence indicating that USBP referred G.C. for prosecution in bad faith or without expectation that the prosecution would go forward. When G.C.'s prosecution was declined, USBP lawfully exercised its discretion, in light of G.C.'s criminal history, to refer him to ICE custody in an adult detention facility, where D.J.C.V. could not live with him. Thus, ORR placement remained necessary for D.J.C.V., even though G.C. was not ultimately prosecuted.

Because Plaintiffs were not separated pursuant to the DHS Referral Policy or any other allegedly unconstitutional policy, the discretionary function exception ("DFE") bars Plaintiffs' claims relating to the first period of their separation from May 2, 2018, through October 10, 2018. The evidence amply demonstrates that the Government's decisions to refer G.C. for prosecution and/or immigration detention were discretionary and susceptible to policy analysis, satisfying both prongs of the DFE test. Decisions regarding prosecution and immigration detention referrals are not mandated by statute or regulation, involve the exercise of judgment based on individual circumstances, and implicate considerations of immigration policy, border security, public safety, and child welfare. There is no Government policy prohibiting family separation or mandating family reunification in all circumstances, nor was the separation in this case clearly unconstitutional or outside the bounds of protected discretion. Plaintiffs have therefore failed to rebut the Government's substantial showing that the DFE bars their claims.

Accordingly, the DFE precludes Plaintiffs' claims relating to the first period of separation and the Government's motion should be granted.

LEGAL STANDARD

It is well-settled that on a Rule 12(b)(1) motion to dismiss, a plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. (See Mem. of Law in Further Support of Def.'s Mot. to Dismiss the Cplt. (ECF No. 192) ("Government's Brief" or "Gov. Br.") at 29 (citing cases).) Plaintiffs have acknowledged that they bear this burden. (See Pl.'s Mem. of Law in Opp. to MTD, dated Dec. 8, 2020 (ECF No. 32) at 9.)

Where, as here, subject matter jurisdiction turns on the applicability of the DFE, "a plaintiff bears the burden of showing that the DFE does not apply to his claim." Molchatsky v. United States, 778 F. Supp. 2d 421, 431 (S.D.N.Y. 2011), aff'd, 713 F.3d 159 (2d Cir. 2013). "Any waiver of the government's sovereign immunity is to be strictly construed in favor of the government." Long Island Radio Co. v. NLRB, 841 F.2d 474, 477 (2d Cir. 1988).

Courts in this Circuit have applied a three-part burden shifting paradigm in evaluating whether a plaintiff has met its burden to show that the DFE does not apply. First, a plaintiff bears the initial burden of adequately alleging a claim that is not barred by the DFE. Molchatsky, 778 F. Supp. at 431. Second, the Government must respond by demonstrating that the action falls within a discretionary framework. Id. Finally, the plaintiff must "rebut" the Government's showing sufficiently "to demonstrate that there is a plausible case for non-discretionary or non-policy action in order to defeat dismissal." Id.; accord, e.g., Ruiz v. United States, No. 17 CIV. 6727 (JFK), 2019 WL 952712, at *2 (S.D.N.Y. Feb. 27, 2019); Farley v. United States, No. 11-CV-198S, 2017 WL 3503727, at *4 (W.D.N.Y. Aug. 16, 2017); Clarke v. United States, 107 F. Supp. 3d 238, 246 (E.D.N.Y. 2015). Whereas some courts have described this three-part

framework as placing the "ultimate" burden on the plaintiff, and other courts have described it as placing the burden on the defendant, the same three-part regime applies regardless.

Despite this precedent, Plaintiffs argue that the Government bears the burden of establishing the applicability of the DFE under a summary judgment standard. (Pl.'s Mem. of Law in Further Opp. to Def.'s Mot. to Dismiss the Cplt. (ECF No. 184) ("Pl. Br.") at 5-6.)[2] Plaintiffs urge the Court to adopt the standard set forth in Anson v. United States, 294 F. Supp. 3d 144, 158 (W.D.N.Y. 2018), (see Pl. Br. at 6), and argue that "the Government will generally be in the best position to prove facts relevant to the applicability of the discretionary function exception," (id. (quoting S.R.P. ex rel. Abunabba v. United States, 676 F.3d 329, 343 n.2 (3d Cir. 2012))). However, Anson applies the three-part burden-shifting analysis set forth above, and there is no concern here about unequal access to information where Plaintiffs had the opportunity to conduct jurisdictional discovery over a period of nearly six months, including the opportunity to take two Rule 30(b)(6) depositions on multiple topics and access thousands of documents.

Further, a summary judgment standard should not be applied because "a Rule 12(b)(1) motion cannot be converted into a Rule 56 motion." Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986). Plaintiffs have not cited a single case in which a Rule 12(b)(1) motion to dismiss was decided under a summary judgment standard. (See Pl. Br. at 6 (citing Zeranti v. United States, 358 F. Supp. 3d 244 (W.D.N.Y. 2019) (Government moved to dismiss and also for summary judgment); Hamm v. United States, 439 F. Supp. 2d 262, 264 (W.D.N.Y. 2006), aff'd, 483 F.3d 135 (2d Cir. 2007) ("The consideration of materials outside the pleadings does not convert the motion into one for summary judgment."); Keller v. United States, 771 F.3d

[2] Docket No. 184 is the unredacted version of Plaintiffs' opposition brief, which was filed under seal. All citations to Docket No. 184 should be deemed to also cite to the identical pages in the publicly-filed version at Docket No. 199.

1021 (7th Cir. 2014) (summary judgment motion)).)

Plaintiffs also argue that a summary judgment standard applies because "the jurisdictional question is closely intertwined with the merits." (Pl. Br. at 6 (citing Zeranti, 358 F. Supp. 3d at 254).) That is not correct. Any decision on the merits in this case, should the merits be reached, will involve, *inter alia*, an evaluation of whether the Government's conduct met the standard for intentional infliction of emotional distress or breached a duty of care owed to Plaintiffs, whether any such conduct caused Plaintiffs harm, and the nature and scope of the harm. See MTD Op. at 39-42. By contrast, for purposes of the jurisdictional motion, the relevant issue is whether Plaintiffs were separated as a result of G.C.'s criminal history. Id. at 21. Moreover, even if a summary judgment standard applied—which it does not—the standard for FTCA claims is preponderance of the evidence, see Yesina v. United States, 911 F. Supp. 2d 217, 220 (E.D.N.Y. 2012), not "beyond reasonable dispute" as Plaintiffs suggest, (see Pl. Br. at 6-7); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) ("[A] ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.").

Accordingly, for Plaintiffs' claims relating to the First Period to survive this Motion to Dismiss, Plaintiffs must meet their initial burden of adequately alleging that the DFE does not bar their claims, and, if they are able to do so, must also plausibly rebut the Government's substantial showing that the challenged conduct falls within a discretionary, policy-oriented framework. (See Gov. Br. at 25-40.) For the reasons below, Plaintiffs have failed to meet this burden and their claims relating to the First Period should be dismissed.

ARGUMENT

I. USBP HAD DISCRETIONARY AUTHORITY TO DETAIN G.C. AND PLACE D.J.C.V. IN ORR CUSTODY

In its opening memorandum of law on the jurisdictional issue, the Government demonstrated that its detention decisions with respect to Plaintiffs involved an "element of judgment or choice," were not compelled by statute or regulation, and were not driven by the Zero Tolerance Policy or DHS Referral Policy. (See id. at 28-39); United States v. Gaubert, 499 U.S. 315, 322-23 (1991) (first prong of DFE test is satisfied if alleged acts are discretionary); see also United States v. Texas, No. 22-58, 2023 WL 4139000, at *5 (U.S. June 23, 2023) ("Th[e] principle of enforcement discretion over arrests and prosecutions extends to the immigration context . . . ."). While Plaintiffs do not contend that the Government lacked the discretion and authority to refer G.C. for prosecution, they argue that Plaintiffs' subsequent separation does not satisfy the first prong of the DFE test because (1) the Zero Tolerance Policy drove Plaintiffs' separation; (2) Plaintiffs' separation violated mandatory USBP policy requiring agents to reunite families after a prosecution referral was declined; and (3) D.J.C.V. did not meet the statutory definition of a UAC at the time of separation. (Pl. Br. at 24-36.) These arguments are not supported by the record and do not rebut the applicability of the first prong of the DFE test.[3]

A. Neither the Zero Tolerance Policy Nor the DHS Referral Policy Played Any Role in Plaintiffs' Separation by USBP

As an initial matter, the Department of Justice's Zero Tolerance Policy did not motivate Plaintiffs' separation because the Zero Tolerance Memorandum "was directed to the Department

[3] In their opening brief, Plaintiffs conflate several different Government decisions that occurred at different times and should be analyzed separately: (1) the Government's May 1, 2018, decision to refer G.C. for criminal prosecution; (2) the Government's May 1, 2018, decision to refer D.J.C.V. to ORR custody; (3) the Government's May 2, 2018, decision to transfer D.J.C.V. out of USBP custody into ORR custody; (4) the Government's May 2 or 3, 2018, decision to refer G.C. to secure immigration detention; and (5) subsequent decisions to detain G.C. through October 10, 2018. These distinct decision points are discussed in this section as appropriate.

of Justice and not DHS," (SUF ¶ 57), and had "no bearing on U.S. Border Patrol," (Grame Decl., Exh. A ("Grame Dep. Tr.") 131:10-14 (USBP "did not change our processes as a result or based on the DOJ memoranda.")). The DHS Referral Policy, which did impact USBP prosecution referrals, did not become effective until May 5, 2018—three days *after* Plaintiffs were separated. (SUF ¶ 64.) In RGV Sector, the DHS Referral Policy was implemented even later, on May 7, 2018. (See id. ¶¶ 64, 70.) Indeed, Plaintiffs do not (and cannot) dispute that the DHS Referral Policy was implemented in the RGV Sector only after D.J.C.V. was in ORR custody.[4]

Faced with these undisputed facts, Plaintiffs argue that USBP covertly and unofficially implemented a family separation policy in RGV Sector prior to the DHS Referral Policy effective date, and that this covert policy factored into USBP's decision to separate Plaintiffs. There is no evidence to support these allegations.

1. *There is no evidence that the DHS Referral Policy or any similar policy was implemented in RGV Sector prior to May 7, 2018*

To support this claim, Plaintiffs first point to an El Paso prosecution initiative as evidence that "DHS began using prosecution as a pretext [in 2017] to justify increasing family separations." (Pl. Br. at 13.) However, the El Paso initiative was of limited duration and was implemented only in the El Paso Sector. (See id. at 14-16.) There is no evidence demonstrating a nexus between the El Paso initiative and RGV Sector. In addition, on November 18, 2017, USBP headquarters ordered El Paso to "stand down" on the initiative pending review by USBP leadership. (Id. at 16 (citing York Decl., Exh. 20).) Thus, the evidence shows that the El Paso

[4] On page three of their brief, Plaintiffs state: "[S]hifting away from its original position to this Court that the separation was driven by G.C.'s prior 'criminal history,' the government has suggested it will argue that because USBP separated G.C. and D.J.C.V. on May 2, 2018 . . . Plaintiff's [*sic*] separation could not have been part of the Zero Tolerance policy." (Pl. Br. at 3.) It has been, and continues to be, the Government's position that Plaintiffs were separated due to G.C.'s criminal history. It is also the Government's position, however, that the DHS Referral Policy was not in effect at the time Plaintiffs were separated and played no role in that decision.

initiative was a local practice that was shut down in November 2017 and played no part in Plaintiffs' separation over six months later in a different Sector. Plaintiffs also note a prosecution initiative in Yuma Sector during the summer of 2017, (id. at 15), but again offer no evidence showing any nexus with RGV Sector.

Plaintiffs point to internal DHS policy discussions during 2017 and 2018 in an attempt to show that some version of the DHS Referral Policy was developed and implemented before May 2, 2018. (See id. at 11-13.) There is no evidence, however, that any of the policy options discussed were implemented earlier than May 5, 2018. Nor is there evidence that these internal discussions otherwise led to the decision to refer G.C. for prosecution and separate Plaintiffs.

In addition, Plaintiffs seek to rely on isolated media reports and advocacy letters from legal service providers to support their assertion that increased family separations were occurring prior to the implementation of the DHS Referral Policy. (See id. at 16-17; York Decl., Exh. 34.) This is hearsay (and double hearsay) which cannot be offered for the truth of the matters reported. See, e.g., Jacobson v. Deutsche Bank, A.G., 206 F. Supp. 2d 590, 594 (S.D.N.Y. 2002), aff'd, 59 F. App'x 430 (2d Cir. 2003) (statements contained in news article reporting out-of-court interview were hearsay); Disability Advocs., Inc. v. Paterson, No. 03-CV-3209 (NGG) (MDG), 2009 WL 1312112, at *3 (E.D.N.Y. May 8, 2009) (excluding advocacy report as hearsay because it is "not a public record" and not admissible under any hearsay exception); see also Fed. R. Evid. 801(c). These assertions, which are not supported by competent evidence, are refuted by the declaration and deposition testimony of Chief Monique Grame (Grame Decl. ¶¶ 38, 44; Grame Dep. Tr. 131:10-14), and documents reflecting changes to the prosecution referral process in RGV Sector after May 7, 2018, (id., Exhs. G, H).

2. Separation on the basis of criminal history was not pretextual

There is substantial evidence demonstrating that G.C.'s prosecution referral was due to his criminal history, including the contemporaneous email which specifically requested supervisory approval to refer G.C. for prosecution and separate Plaintiffs based on G.C.'s prior "criminal history." (Cavazos Decl., Exh. C; see also Gov. Br. at 25-27.) USBP's request for D.J.C.V. to be placed with ORR was a direct consequence of its decision to initiate G.C.'s prosecution referral. (Grame Decl. ¶ 27 ("referral of a single parent for prosecution results in the separation of the [family unit]").) This treatment was consistent with RGV Sector practices: "Before during and after the time that the DHS Referral Policy was in effect (*i.e.*, May 5 to June 20, 2018), FMUA parents/adults with criminal history, or those who posed a safety risk to their children or others, were consistently prioritized for prosecution referrals in the RGV Sector, with resulting family separations." (Id. ¶ 44.) Indeed, the Government's Brief points to several additional examples of Border Patrol Agents, during 2017 and 2018, requesting to separate families due to the parent's criminal history. (Gov. Br. at 39-40 (citing Grame Custodian Decl., Exhs. 4-6; Macal Decl., Exh. B; Cavazos Decl., Exhs. D, E, F).)

After G.C.'s prosecution was declined, he was referred to ICE for secure adult detention due to his criminal and immigration history. This referral would very likely have occurred even if G.C. had not been referred for prosecution, and it resulted in Plaintiffs' continued separation. At the time, if a family unit could not be placed in an ICE residential center "and the adult had a violent criminal history, RGV Sector would likely separate the adult parent from the child" and transfer the adult parent "to ICE ERO custody as a single adult." (Grame Decl. ¶ 25.) USBP did not typically release a noncitizen with violent criminal history into the community due to safety concerns, whether or not that noncitizen was part of a family unit, and such release required

headquarters approval. (Id.) Here, G.C. and D.J.C.V. could not be referred to ICE custody as a family following G.C.'s prosecution declination because no family residential center would accept a family with a male head of household with prior violent criminal history. (Guadian Decl. ¶ 17.) Accordingly, G.C.'s criminal history resulted in his placement in secure adult detention and Plaintiffs' separation, notwithstanding the prosecution declination.[5]

Plaintiffs nevertheless argue that criminal history was only the "public-facing justification" for family separations before May 5, 2018, and that "[i]nternal processes demonstrate that a policy of Zero Tolerance was driving family separations." (Pl. Br. at 21-22.) But the only evidentiary support provided for this statement is a 2019 DHS OIG report which confirms that the DHS Referral Policy began on "May 5, 2018." (See id. at 22; DHS Office of Inspector General, "DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families," Nov. 25, 2019, *available at* https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf ("OIG Report"), at 2, 7, 23.) The OIG Report discusses the fact that April 2018 updates to USBP's database added 11 "separation codes" to track the reason(s) for family separations, none of which were "specifically tied to the Zero Tolerance Policy." (Pl. Br. at 22 (citing OIG Report at 10).) Plaintiffs attempt to argue that this demonstrates an effort by USBP to hide the true motivation for family separations, (see id.), but the record contains ample evidence of longstanding reasons, unrelated to the DHS Referral Policy, why families would be separated, (Grame Decl. ¶ 25; Gov. Br. at 25-27). Further, the spreadsheet used to track

[5] While Plaintiffs assert that "there was no policy in place authorizing family separations based on 'criminal history' alone" in the absence of prosecution, (see Pl. Br. at 26), it was the decision to refer G.C. for prosecution based on his criminal history that resulted in D.J.C.V.'s designation as a UAC and separation of the family, (see Cavazos Decl. ¶¶ 11, 13, 17). In any event, as explained above, the same result likely would have occurred even without a prosecution referral. The purported absence of a Government policy specifically authorizing family separations based on criminal history alone is not probative; the Government does not need to identify a formal policy specifically authorizing a decision protected by the DFE. See Berkovitz v. United States, 486 U.S. 531, 536 (1988).

family separations in the RGV Sector did include "zero tolerance" as a reason for a family separation in some cases, but not until May 10, 2018—after Plaintiffs had left USBP custody and the DHS Referral Policy had been implemented. (Pl. Br. at 22 (citing York Decl., Exh. 18); Macal Decl., Exh. A.)

Plaintiffs also contend that the Government used prosecution initiatives as a way to sanitize and obscure its true motive to effect "widespread" family separations as a deterrent to illegal immigration. (Pl. Br. at 11, 27.) But again, the DHS Referral Policy was not implemented in RGV Sector at the time of Plaintiffs' separation and the exhibits to which Plaintiffs cite do not support that they were separated due to any pretextual prosecution initiative. (See id. at 27); see also, e.g., Hua Ji Lin v. Holder, 467 F. App'x 66, 68 (2d Cir. 2012) (noting that plaintiff's speculation about the motives of government officials "did not establish the actual motives behind the officials' actions"). Accordingly, Plaintiffs' unsupported assertion that "[t]he factual record conclusively reveals that Plaintiffs were not actually separated due to G.C.'s 'criminal history' and that Plaintiffs [*sic*] separation can only be explained by the Zero Tolerance policy then in effect," (Pl. Br. at 4 n.2), is thus contradicted by the record and not sufficient to meet their burden of proof.

3. *Plaintiffs were not separated due to any policy in RGV Sector to separate families based solely on "amenability" to prosecution*

Plaintiffs also maintain, without support in the record, that "USBP developed an unofficial policy of designating as many parents as possible as 'amenable to prosecution' and separating family units based on 'amenability' alone." (Id. at 27.) Plaintiffs explain that "[t]his more expansive and unprecedented concept was unique to the Zero Tolerance Policy . . . ." (Id.) Plaintiffs, however, were not separated pursuant to the Zero Tolerance Policy or DHS Referral Policy, (see supra at 6-7; Gov. Br. 27-28), nor were they separated merely because G.C. was

amenable to prosecution, (see Gov. Br. 14-15). Rather, D.J.C.V. was designated a UAC because G.C. was referred for prosecution due to his criminal history, and that designation was not subsequently revised, (see Grame Decl. ¶¶ 25-27; SUF ¶¶ 18, 24). These were discretionary, policy-based decisions unrelated to any alleged policy of "separating family units based on 'amenability.'"

Plaintiffs further argue, mistakenly, that "[t]his move from separating family units as a result of an actual prosecution to separating family units where the parent was merely 'amenable to prosecution'" was "in direct contravention of USBP's own mandatory policy to reunite families if prosecution was declined or the parent was sentenced to time served . . . ." (Pl. Br. at 28.) As explained below, USBP did not have a "mandatory" reunification policy. (See infra at Section I.B.) While USBP attempted to maintain family unity where possible, operational feasibility, legal constraints, or safety concerns sometimes required continued separation. (Grame Decl, Exh. C (TEDS Policy), ¶ 29 (following a prosecution declination, "if RGV Sector was aware that the adult was a part of an FMUA and had the child still in custody, and if there were no other reasons warranting continued separation such as safety concerns, RGV Sector would make reasonable efforts to reunify that family and cancel the ORR referral to the extent operationally feasible").)

In sum, Plaintiffs fail to point to any evidence in the record showing that their separation was pursuant to the Zero Tolerance Policy or any allegedly unconstitutional family separation policy. This ends the jurisdictional inquiry, which was designed to determine whether "G.C.'s criminal history of domestic violence . . . drove the decision" to separate Plaintiffs. (MTD Op. at 47.) The Government has established that it did, and Plaintiffs have failed to rebut that showing. Accordingly, the Government's Motion should be granted. See Pena Arita v. United States, 470

F. Supp. 3d 663 (S.D. Tex. 2020) (granting motion to dismiss under Rule 12(b)(1) because DFE barred Plaintiffs' FTCA claims arising from a family separation at the Southwest border).

B. Plaintiffs' Separation Did Not Violate Any Mandatory USBP Policies

Plaintiffs additionally argue that RGV agents lacked discretion to separate Plaintiffs because "USBP's own mandatory policy" required it to "reunite families if prosecution was declined or the parent was sentenced to time served while the child was still in USBP custody . . . ." (Pl. Br. at 28.) While Plaintiffs are correct that Government acts that violate a "specific mandatory directive—*i.e.*, a federal statute, regulation, or policy [that] specifically prescribes a course of action for [the federal government] to follow"—may not be shielded by the DFE, Cangemi v. United States, 13 F.4th 115, 130 (2d Cir. 2021) (internal quotations omitted), that is not the situation here.

Contrary to Plaintiffs' assertion, there was no "mandatory" USBP policy requiring family reunification following the declination of a prosecution referral. Rather, USBP's policy was to "maintain family unity to the greatest extent operationally feasible, absent a legal requirement or an articulable safety or security concern that requires separation." (See SUF ¶¶ 37, 38; Grame Decl., Exh. C (TEDS Policy).) Far from mandatory, by its terms, this policy applies only to the extent that it is "operationally feasible" and only if there are no contravening "legal requirement[s]" or "safety or security concern[s]." (Id.); see also K.O. by & through E.O. v. United States, No. CV 4:20-12015-TSH, 2023 WL 131411, at *8 (D. Mass. Jan. 9, 2023) (holding that the TEDS Policy's instruction to maintain family unity "to the greatest extent possible" does not specify any particular course of action and is therefore "discretionary"). "Also, in general, references to manuals and other informal sources of policy as authority are disfavored" as sources of "mandatory" authority for purposes of evaluating the first prong of the

DFE. K.O. by & through E.O., 2023 WL 131411, at *8.

While USBP strived to maintain family unity, circumstances sometimes made it infeasible. In addition to resource limitations, public safety considerations, and immigration enforcement priorities—including, for example, the determination that noncitizens with violent criminal history should generally be referred for prosecution, (see Gov. Br. at 30-32, 39-40; Grame Decl. ¶¶ 12-14)—there are also various legal requirements that can prevent family unity, such as the TVPRA's requirement to transfer UACs to ORR within 72 hours, (SUF ¶ 40 (citing 8 U.S.C. §1232(b)(3))), the prohibition on detaining minors with non-familial adults of a different gender in the same cell or area, (see Grame Decl. ¶ 23), other aspects of the TEDS Policy, the Flores Agreement, and strict admission criteria for ICE's family residential centers, (see Guadian Decl. ¶¶ 16-17). Thus, while maintaining family unity was an important objective, it was not guaranteed, and the TEDS Policy did not mandate it. The practices that were in effect in RGV Sector around May 1 and 2, 2018, comported with the TEDS Policy. (See Grame Decl. ¶ 29.)

Plaintiffs' reliance on a handful of emails dating from after implementation of the DHS Referral Policy which state that, at least in certain instances, parents who were sentenced to time served were being returned to USBP and reunified with their children, (Pl. Br. at 19-21), is unavailing. None of these communications suggest that reunification was required in every case, or that there was any specified timeline for the reunification. None of the other evidence or testimony relied on by Plaintiffs establish any mandatory reunification policy, either. (See Pl. Br. at 9.)

Here, there were operational considerations, legal requirements, and safety concerns that resulted in D.J.C.V.'s ORR placement not being rescinded after his father's prosecution referral was declined. At the time, USBP was apprehending hundreds of unlawful entrants per day, and

had to allocate its resources to respond to these challenges. (See Grame Decl. ¶¶ 10, 32.) There was only an approximately 13-hour window—between May 1, 2018, at 9:30 p.m., and May 2, 2018, at 10:53 a.m.—during which USBP could have potentially canceled D.J.C.V.'s ORR referral. (SUF ¶¶ 22-23.) USBP had discretion to determine how processing was conducted and how resources were allocated under these circumstances, and neither the TEDS Policy nor any other mandate required reassessment of D.J.C.V.'s ORR placement during that window.

Additionally, USBP was authorized to refer G.C. to ICE custody as a single adult for the 90-day detention period triggered by his reinstated order of removal, see 8 U.S.C. § 1231(a)(2), and that referral did not violate any mandatory policy. Because G.C. and D.J.C.V. were not eligible for admission to a family residential center, their separation was a necessary consequence of G.C.'s continued detention, and there was no reason for USBP to cancel D.J.C.V.'s ORR referral after G.C.'s prosecution was declined. 8 U.S.C. § 1232(a)(2), (5); (Guadian Decl. ¶¶ 15-17; Grame Decl. ¶ 25). Accordingly, Plaintiffs' separation did not violate any mandatory USBP policies and Plaintiffs have not met their burden to rebut the applicability of the DFE.

C. USBP Did Not Violate the TVPRA by Designating D.J.C.V. as a UAC

Finally, Plaintiffs argue that USBP lacked discretion to refer D.J.C.V. to ORR because he was not a UAC under the statutory definition. (See Pl. Br. at 33-36.) According to Plaintiffs, in the context of a criminal prosecution referral, a child of a single parent household becomes a UAC only once the parent is actually taken into custody by the U.S. Marshals. (Id. at 34-35.) Again, Plaintiffs have not identified any "specific mandatory directive" regarding the timing of making an ORR placement request or a UAC designation that would remove USBP's discretion to interpret the statute as permitting designation upon initiation of a prosecution referral. See

Cangemi, 13 F.4th at 130; Nwozuzu v. United States, 712 Fed. App'x 31, 33 (2d Cir. 2017) (summary order) (due care applies to government's interpretation of a statute where there is legal uncertainty on the issue and no controlling legal authority clearly precludes that particular interpretation); Baie v. Sec'y of Def., 784 F.2d 1375, 1376-77 (9th Cir. 1986) (the agency's "interpretation of the statute is a plainly discretionary administrative act the 'nature and quality' of which Congress intended to shield from liability under the FTCA").

While Plaintiffs have cited several cases holding that the criminal incarceration of a single parent renders his or her child a UAC, (see Pl. Br. at 34-35), that does not prohibit earlier UAC designations where prosecution is sought, as it was here. See D.B. v. Poston, 119 F. Supp. 3d 472, 482-83 (E.D. Va. 2015), aff'd in part, vacated in part, remanded sub nom. D.B. v. Cardall, 826 F.3d 721 (4th Cir. 2016) (recognizing that "federal agencies are afforded discretion under the statutory scheme when classifying juveniles as unaccompanied alien children"); Fisher Bros. Sales v. United States, 46 F.3d 279, 287 (3d Cir. 1995) (decision protected by DFE when it "necessarily reflects the decisionmaker's judgment that it is more desirable to make a decision based on the currently available information than to wait for more complete data or more confirmation of the existing data").

Plaintiffs assert, without citation, that "USBP's *de facto* policy" was to separate families regardless of whether cases were actually referred for prosecution and "even when agents had no expectation that the parent would ever be prosecuted." (Pl. Br. at 18.) There is no support in the record for this claim and it finds no support in the facts of this case. G.C. was referred for prosecution because he satisfied the priority criteria (prior order of removal and criminal history of a violent nature). (Grame Decl. ¶¶ 45-46.) There is no indication in the record that this referral was in bad faith, or that there was no expectation that G.C. would be prosecuted.

Indeed, Chief Hastings confirmed in deposition testimony in another family separation case that before the DHS Referral Policy went into effect, [redacted] This is exactly what happened here.

Moreover, the RGV Central Processing Center was handling a surge of unlawful entrants in April and May 2018 with limited resources and needed to ensure compliance with the TVPRA's strict 72-hour referral window. 8 U.S.C. § 1232(b)(3); (Grame Decl. ¶ 32). Referring minors to ORR at the time a parent's prosecution referral was initiated permitted USBP to comply with its statutory and other legal obligations. (Grame Decl. ¶¶ 21, 28.) As Chief Grame testified at her deposition, USBP prioritized these detainee populations and took care to ensure statutory compliance despite operational challenges. (Id. ¶ 35; Grame Dep. Tr. 63:2-6.) USBP appropriately exercised its discretion to interpret the UAC statutory definition to ensure compliance with its legal obligations.

In addition, as discussed above, because USBP generally does not release into the community noncitizens with prior violent criminal history, these individuals are typically referred to ICE for secure detention if they are not prosecuted. (Grame Decl. ¶ 25.) By law,

minors cannot stay with their parents indefinitely in secure immigration detention. (MTD Op. at 46-47 (citing authorities).) As a result, FMUAs such as Plaintiffs are typically separated as a consequence of the parent's referral to ICE, if not to the U.S. Marshals.[6]

Several court decisions recognize that immigration civil detention renders a parent "unavailable" within the meaning of the HSA. In S.E.B.M. v. United States, a noncitizen child filed an FTCA action against the Government alleging that her separation from her father following his arrest for unlawful entry constituted intentional infliction of emotional distress and negligence. No. 1:21-CV-00095-JHR-LF, 2023 WL 2383784, at *2 (D.N.M. Mar. 6, 2023). Plaintiffs had spent one night together at a CBP station after which the father was prosecuted under 8 U.S.C. § 1325(a) and the child was transferred to ORR. Id. The father pled guilty, was sentenced to time served, and was then transferred to an ICE detention center and eventually deported. Id. S.E.B.M. remained in ORR custody until January 2018. Id. The Court granted the Government's motion to dismiss for lack of subject matter jurisdiction, finding that "[t]he government's alleged actions in this case were protected by its privilege to prosecute." Id. at *8. Even though the father was sentenced to time served and detained in a civil immigration facility for the majority of the separation period, the child "became an unaccompanied alien child because her father could not provide her care and physical custody while in detention." Id. (citing 6 U.S.C. § 279(g)(2)).

Similarly, in K.O. by & through E.O. v. United States, the Court held that plaintiffs did not overcome the first prong of the DFE because the father's criminal detention, and subsequent

[6] There is no documentation of the precise time that USBP made the decision to refer G.C. to ICE, but G.C. was taken into ICE custody on May 3, 2018. ICE was authorized to detain G.C. in secure detention pending removal, especially considering that Plaintiffs were not eligible for admission to a family residential center. 8 U.S.C. § 1323(a)(2), (5); (Guadian Decl. ¶¶ 15-17.) As such, the ORR placement would have been required no later than the next day, when G.C. was taken into secure custody for single adults.

immigration detention, rendered the child a UAC. 2023 WL 131411, at *3, 7. The Court did not hold that plaintiffs should have been reunited upon the father's transfer into civil immigration detention. See id. at *7 (stating that the TVPRA "does not *forbid* family separation" after the government has taken some separate action against a parent) (emphasis in original); see also D.B. v. Cardall, 826 F.3d 721, 734 (4th Cir. 2016) (observing that "a parent who is not 'capable of providing for the child's physical and mental well-being'—as mandated by the suitable custodian requirement of 8 U.S.C. § 1232(c)(3)(A)—is not available to provide what is necessary for the child's health, welfare, maintenance, and protection").[7]

Here, USBP reasonably interpreted the Homeland Security Act and TVPRA to permit ORR referrals simultaneously with a decision to initiate a parent's prosecution referral in the absence of mandatory directives to the contrary and in an effort to meet its statutory obligations and provide for the best interests of the children in its custody. The DHS Referral Policy played no role in these decisions and had not yet been implemented in RGV Sector. Accordingly, USBP's separation of Plaintiffs was discretionary, authorized, and protected under the first prong of the DFE.

II. PLAINTIFFS' SEPARATION WAS GROUNDED IN POLICY CONSIDERATIONS

For the DFE to apply, "the judgment or choice in question must be grounded in considerations of public policy or susceptible to policy analysis." MTD Op. at 19 (quoting Coulthurst v. United States, 214 F.3d 106, 109 (2d Cir. 2000) (internal quotation marks omitted);

[7] Plaintiffs cite Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf't as a case holding that a parent held in civil immigration detention is not "unavailable" under the UAC statutory definition. 319 F. Supp. 3d 491, 495 (D.D.C. 2018). (See Pl. Br. at 35.) However, that case involved a separation pursuant to the DHS Referral Policy where the parent's detention was not based on any criminal history other than her immigration violation, and where the Court reasoned that the family could be detained together in a family residential center. Under those circumstances, the court found that the separation was "likely unconstitutional" and ordered that the family be reunified. Jacinto-Castanon de Nolasco. 319 F. Supp. 3d at 495 n.2.

(see also Gov. Br. at 23). Plaintiffs claim that their May 2, 2018, separation failed to meet this standard. (Pl. Br. at 37.) However, the decisions that led to their separation were both grounded in considerations of public policy and susceptible to policy analysis. As described in the Government's opening brief, decisions regarding noncitizen detention implicate immigration policy, foreign policy, border security, and public safety. (See Gov. Br. at 31-32, 35.)

Plaintiffs contend that their separation occurred without "any policy analysis" after prosecution was declined. (Pl. Br. at 37-39.)[8] However, the relevant question is not whether such policy analysis actually occurred in this particular case, but whether the challenged acts "are susceptible to policy analysis." See MTD Op. at 19 (citing United States v. Gaubert, 499 U.S. 315, 325 (1991); In re Joint E. & S. Dists. Asbestos Litig., 891 F.2d 31, 37 (2d Cir. 1989). Here, there is no indication that USBP did not follow agency procedures. See DeMartino v. New York State Dep't of Tax'n & Fin., No. 22-720, 2023 WL 2563967, at *2 (2d Cir. Mar. 20, 2023) (quoting U.S. Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001)) (a "presumption of regularity attaches to the actions of Government agencies"). Those procedures, along with the specific decisions made regarding Plaintiffs, reflected policy considerations around how best to run the RGV Central Processing Center and process individuals with a declined prosecution referral. (See Grame Decl. ¶¶ 29-30.)

This case thus differs from the cases cited by Plaintiffs for the "principle that careless and negligent execution of discretionary duties is not covered by the DFE." (See Pl. Br. at 38 (citing, e.g., Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 475 (2d Cir. 2006) (finding that pro se complaint had adequately alleged that the prison guard on duty when plaintiff was allegedly

[8] As discussed supra, Plaintiffs' contention that "agency policy . . . mandated reunification" once G.C.'s prosecution was denied, (Pl. Br. at 37), is incorrect.

attacked "failed to patrol or respond diligently to an emergency situation out of laziness or inattentiveness"); Coulthurst, 214 F.3d at 110 (holding that "if [an] inspector failed to perform a diligent inspection out of laziness or was carelessly inattentive, the DFE does not shield the United States from liability"); Andrulonis v. United States, 952 F.2d 652, 655 (2d Cir. 1991) (affirming FTCA liability where CDC scientist failed to warn plaintiff of a dangerous laboratory condition)).) Contrary to Plaintiffs' suggestion, (see Pl. Br. at 38), the record does not indicate that D.J.C.V. was referred to ORR custody due to laziness or carelessness.

Indeed, in Coulthurst, the Second Circuit highlighted the distinction between a claim that an inspection was negligently conducted, which would not be barred by the DFE, and a claim that inspection procedures were deficient, which would "be grounded in considerations of public policy since they would involve choices motivated by considerations of economy, efficiency, and safety." Coulthurst, 214 F.3d at 109. Plaintiffs here are asserting that the standard procedure followed in RGV Sector once G.C.'s prosecution was declined was insufficient, not that any particularly USBP employees negligently performed their duty. This is precisely the type of challenge to agency decision making that is shielded by the DFE because it implicates policy considerations regarding how to allocate agency resources and conduct noncitizen processing.

Moreover, regardless of whether G.C. was ultimately prosecuted for an immigration offense, the reason for his prosecution referral—namely, his aggravated assault conviction for threatening his wife with a machete—meant that he could not be kept with D.J.C.V. in ICE custody, Guadian Decl. ¶ 17, and that he was unlikely to be released by USBP into the community, Grame Decl. ¶ 25. The day after the separation, May 3, 2018, G.C. was placed in ICE detention as a single adult, and Plaintiffs do not argue that he was capable of caring for D.J.C.V. while in secure detention. The determination to refer G.C. to ICE for secure detention,

which resulted in Plaintiffs' continued separation, was plainly subject to policy analysis and therefore met the second prong of the DFE test.

III. PLAINTIFFS' SEPARATION BETWEEN MAY 3, 2018, AND OCTOBER 10, 2018, WAS THE RESULT OF A DISCRETIONARY, POLICY-ORIENTED DECISION TO KEEP G.C. IN SECURE DETENTION

Plaintiffs do not address whether G.C.'s detention in a secure facility between May 3, 2018, and October 10, 2018, and the resulting separation of Plaintiffs during that period, was due to G.C.'s criminal history rather than the Zero Tolerance Policy of the DHS Referral policy. But even if Plaintiffs had addressed that separation period, they would not be able to rebut the evidence demonstrating that G.C.'s detention during this period was discretionary and susceptible to policy analysis, and therefore protected by the DFE.

There is no evidence that Plaintiffs' treatment during this period was the result of the Zero Tolerance Policy or DHS Referral Policy. Following the June 26, 2018, Ms. L. decision, see Ms. L. v. U.S Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018), ICE released parents in its custody who had children in ORR custody unless the parent was considered unfit or presented a danger to the child, (SUF ¶ 85; Guadian Decl. ¶ 18). ICE determined that G.C. was unsuitable for reunification under this standard (id. ¶ 19)—a decision the Ms. L. court found was a reasonable exercise of the agency's discretion (SUF ¶¶ 86, 88; see also Hogan Decl. Ex. 2 at 3.) After the 90-day removal period had run for G.C., ICE made a discretionary decision that G.C. should remain in secure detention, based on his immigration records and criminal history. (Guadian Decl. ¶ 12.) In other words, G.C.'s criminal history and attendant public safety and law enforcement policy considerations justified his detention, and remained the basis for his detention, even after those detained as a result of the DHS Referral Policy were released.

IV. THE GOVERNMENT HAD DISCRETION TO SEPARATE PLAINTIFFS WITHOUT CONDUCTING AN INTEREST OF THE CHILD ANALYSIS

Plaintiffs argue that they have a "fundamental right to family integrity, which cannot be breached by the government without some individualized assessment based on the interests of the child." (Pl. Br. at 24.) This Court has already held, however, in its Motion to Dismiss Opinion that if "the decision to separate the plaintiffs [was] unrelated to the Zero Tolerance policy and [was] driven by policies triggered by G.C.'s misdemeanor conviction in 2010 for attacking his wife with a machete . . . one or more exceptions to the FTCA's waiver of sovereign immunity would apply to the sequential but interwoven decisions (1) to detain G.C., (2) to house him in a secure facility, and (3) to separate him from D.J.C.V." MTD Op. at 43. As the Court explained, with respect to Plaintiffs' separation, "[t]he statute and regulations authorizing the placement of a convicted criminal in a secure facility did not oblige authorities to undertake an individualized assessment of G.C.'s fitness as a parent. Assuming that G.C.'s conviction drove the decision to put him [in] a secure facility, that decision was discretionary and within the DFE." Id. at 47.

Plaintiffs do not cite any new caselaw or changed facts that would justify a departure from the Court's prior holding. The decisions to refer G.C. for prosecution and subsequently place him in secure detention were based on his violent criminal history, and as the Court previously held, no assessment of D.J.C.V.'s interest was required for the agency to make those determinations. See id.; 8 U.S.C. 1231(g)(1) (government has authority to "arrange for appropriate places of detention for aliens detained pending removal"); c.f. Martinez-Velasquez v. Holder, 311 F. App'x 476, 478-79 (2d Cir. 2009) (quoting Payne-Barahona v. Gonzales, 474 F.3d 1, 2 & n.1 (1st Cir. 2007)) ("[A] parent's otherwise valid deportation does not violate a child's constitutional right[s].")).

Plaintiffs assert that "strict scrutiny applies to government actions interfering with the fundamental right to family integrity." (Pl. Br. at 24-25.)[9] However, as the Court recognized in the Motion to Dismiss Opinion, Plaintiffs' substantive due process claim must "allege governmental conduct that is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." MTD Op. at 27 (internal quotation marks omitted); see also Oles v. City of New York, No. 22-1620-cv, 2023 WL 3263620, at *1 (2d Cir. May 5, 2023) (applying a "shocks the conscience" standard to substantive due process claim); Goe v. Zucker, 43 F.4th 19, 30 (2d Cir. 2022) (explaining that in an as applied rather than facial challenge, "[w]e use the shocks the conscience test to assess substantive due process challenges to government conduct"). Plaintiffs have failed to meet that high bar here in light of the Government's "legitimate interest in continuing detention of individuals who posed a . . . danger to the community or others in a family detention facility because of that person's criminal history." Ms. L. v. U.S. Immigr. & Customs Enf't, 331 F.R.D. 529, 537 (S.D. Cal. 2018). Because there was no way for D.J.C.V. to be detained with G.C.—whether in U.S. Marshals or ICE custody—Plaintiffs' separation was necessary to serve that interest and does not shock the conscience. (See Mem. in Further Supp. of

[9] The cases Plaintiffs cite on this point do not establish that the separation in this case was a constitutional violation. (See Pl. Br. at 25.) The sole Second Circuit case Plaintiffs point to, United States v. Myers, 426 F.3d 117, 126 (2d Cir. 2005), addressed conditions of supervised release for a convicted sex offender, and in that context, where the specific condition of supervised release must "involve[] no greater deprivation of liberty than is reasonably necessary," found that a deprivation of a fundamental liberty is "reasonably necessary" only where it is "narrowly tailored to serve a compelling government interest." Id. The Second Circuit did not decide whether the particular defendant in that case had established a protected liberty interest. The other cases cited by Plaintiffs are inapposite because they do not involve strong governmental interests justifying any deprivation of liberty. See Alvarez v. Bause, No. 922 Civ 00186(LEK)(ATB), 2023 WL 1765415, at *7 (N.D.N.Y. Feb. 3, 2023) (government did not offer any interest "that would justify [the defendant's] decision to author a false misbehavior report with the intent to prolong Plaintiff's incarceration to prevent Plaintiff from caring for his young daughter battling cancer"); Nicholson v. Williams, 203 F. Supp. 2d 153, 250 (E.D.N.Y. 2002) (finding that "[n]o legislatively appropriate policy, no compelling state interest, justifies" a policy "to remove children of abused mothers . . . solely because the mother has been abused"); J.S.R. by & through J.S.G. v. Sessions, 330 F. Supp. 3d 731, 741-42 (D. Conn. 2018) (granting preliminary injunction in part, where the child plaintiffs were separated from their parents, who were members of the Ms. L. class; there was no dispute that the plaintiffs' constitutional rights had been violated and the Government did not "establish[] a compelling reason for depriving the children of their family integrity . . . or that its policy was narrowly tailored to achieve that compelling reason").

Def.'s Mot. to Dismiss, dated Feb. 12, 2021 (ECF No. 77) at 4-5).[10]

CONCLUSION

For the foregoing reasons, Plaintiffs' claims relating to the first period of separation should be dismissed for lack of subject matter jurisdiction.

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New York, New York

Respectfully submitted,

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[10] Official conduct may also be protected by the DFE even where it is later held unconstitutional, if the constitutional right was not defined with sufficient specificity at the time. Denson v. United States, 574 F.3d 1318, 1337-38 (11th Cir. 2009) (allegations of constitutional violations do not defeat discretionary function exception unless evidence is sufficient to establish a Bivens claim based on that same conduct, which requires a showing the constitutional right was clearly established); see also Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). Here, to the extent there is a right to family integrity in the immigration processing and detention context, it was not clearly established at the time of G.C.'s prosecution referral and ICE detention. See Reyna as next friend of J.F.G. v. Hott, 921 F.3d 204, 210-11 (4th Cir. 2019) (noting in 2019 that the court was "unable to find a substantive due process right to family unity in the context of immigration detention pending removal"); Dominguez-Portillo, No. 17-4409, 2018 WL 315759, at *6 (W.D. Tex. Jan. 5, 2018) ("[T]he case law provides little guidance on how such parental rights are actually manifested when a parent charged with a petty misdemeanor illegal entry offense is separated from their child who allegedly accompanied them across the border.").