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(*continued on next page*)

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Martin VARGAS, as Successor in Interest of the Estate of Martin Vargas Arellano,

Plaintiff,

v.

UNITED STATES OF AMERICA; THE GEO GROUP; and WELLPATH, LLC.

Defendants.

Case No. 5:23-cv-00380-JWH-SP

Plaintiff's Opposition to Motion to Dismiss; and Memorandum of Points and Authorities in Support Thereof

Hearing Date: August 25, 2023
Hearing Time: 9:00 a.m.
Ctrm: 9D

Hon. John W. Holcomb
United States District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

FEDERAL RULES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's father, Martin Vargas Arellano, tragically died after contracting COVID-19 in U.S. Immigration and Customs Enforcement ("ICE") custody at the Adelanto ICE Processing Center ("Adelanto") due to repeated failings by Defendant USA ("Defendant"). ICE failed its duty to adequately protect him from COVID-19. Then, over the course of several months, ICE violated its own policies governing the standard of care at detention facilities, repeatedly refused to release Arellano despite a court order mandating the release of medically vulnerable detained people not subject to mandatory custody (absent rare cases), and actively concealed Arellano's grave medical condition and subsequent death from his legal representative and family.

Plaintiff's claims against Defendant under the Federal Tort Claims Act ("FTCA") are not jurisdictionally barred and are adequately pled. Plaintiff has alleged that Defendant *itself* engaged in specific and discrete acts and omissions that violated its legal obligations under California tort law, including failing to implement, and ensure Adelanto implemented, steps to mitigate the spread of COVID-19 in the facility and basic infection control measures required by the Center for Disease Control and Prevention ("CDC") guidance and the agency's own Performance-Based National Detention Standards ("PBNDS"); failing to release Arellano despite his medical vulnerability to COVID-19; and actively concealing Arellano's hospitalization and medical condition. *See* First Amended Complaint ("FAC") ¶¶35, 37, 67–79, 89–96.

Defendant's arguments fail.

First, actions by ICE—not an independent contractor—violated binding directives and constituted torts for which there are several private analogs under California law. The FTCA's independent contractor bar is inapplicable to Plaintiff's negligence, negligent infliction of emotional distress ("NIED"), or intentional infliction of emotional distress ("IIED") claims, which directly concern ICE's own failures to exercise duties

not delegated to Co-Defendant the GEO Group ("GEO"), such as its oversight responsibilities and duties arising out of unilateral actions undertaken by the agency.

Second, the discretionary function exception under the FTCA does not apply to Plaintiff's negligence, NIED, and IIED claims because they concern ICE actions that violate constitutional and regulatory mandates ICE had no discretion to disregard. This exception also does not apply to Plaintiff's claims regarding ICE's decision to continue to detain Arellano, which caused the harms alleged here.

Third, Defendant's assumption that Arellano was subject to mandatory custody is legally erroneous given binding law establishing that he did not fall under 8 U.S.C. §1226(c). Further, ICE did not have discretion to disobey the court's mandate in *Fraihat v. ICE*, No. 5:19-cv-01546-JGB (SHK), 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020) (order enforcing preliminary injunction), when it denied release in October 2020.

Finally, Plaintiff has adequately pled negligence, NIED, and IIED against Defendant regarding its failure to communicate about Arellano's transfer to the hospital and grave medical condition. ICE violated a mandatory duty to inform Arellano's legal representative and next-of-kin of his transfer and medical condition. In doing so, it intentionally or recklessly caused severe emotional distress to Arellano.

As such, Defendant's Motion to Dismiss must be denied.

II. RELEVANT FACTS

Plaintiff Martin Vargas is the son of Martin Vargas Arellano, a noncitizen who died on March 8, 2021 after contracting COVID-19 while detained at Adelanto. FAC at ¶¶14, 60, 94.

A. Arellano's Immigration History

Arellano came to the U.S. when he was two. *Id*. at ¶60. On May 15, 2013, ICE placed him in removal proceedings to determine whether he should be removed from the U.S. *Id*. at ¶61. He was assigned a Qualified Representative to represent him in removal proceedings because he was a class member in *Franco-Gonzalez v. Holder*, No. 10-

2211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014), a case mandating legal representation for mentally incompetent individuals. *Id*. Arellano suffered from chronic health conditions including high blood pressure, diabetes, cellulitis, liver disease, and severe psychiatric illness. FAC at ¶67.

In 2014, ICE released Arellano while his Petition for Review was pending before the Ninth Circuit because he was not a danger to others or a flight risk, and not subject to mandatory custody under 8 U.S.C. § 1226(c). Alrabe Dec. Exh. D. In 2018, the Ninth Circuit remanded his case. FAC at ¶62. In 2019, ICE re-detained Arellano following a conviction for failure to register as a sex offender. *Id*. at ¶¶63, 78. His case was again ordered removed before the immigration judge and he appealed that decision.

B. ICE's Response to COVID-19

Following the spread of COVID-19 to the U.S., the Secretary of Health and Human Services declared a nationwide public health emergency on January 31, 2020. *Id*. at ¶20. On March 27, 2020, ICE issued a Memorandum on Coronavirus Disease 2019 (COVID-19), Action Plan, Revision 1. *Id*. at ¶21. In April 2020, ICE established the Pandemic Response Requirements ("PRR"), which mandated polices on the management of COVID-19 at immigration detention facilities, and the "Detained Docket Review" guidance ("DDR"), which required ICE to reassess custody for chronically ill immunocompromised detained persons not subject to mandatory detention. *Id*. at ¶49; *Fraihat v. ICE*, 445 F. Supp. 3d 709, 724 (C.D. Cal. 2020), *order clarified*, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020), *and rev'd and remanded*, 16 F.4th 613 (9th Cir. 2021).[1] DDR guidance also mandated individualized custody reviews setting forth the basis for the custody determination and that a chronic medical illness was a "significant discretionary factor weighing in favor of release." Alrabe Dec., Exh. I at 2-3.

ICE also had additional obligations in response to COVID-19 at detention

[1] A legal addendum is attached for the convenience of the Court.

facilities due to multiple lawsuits filed for their failure to protect detained persons from the disease. Arellano was a class member in two COVID-19-related suits.

This Court found in *Fraihat* that ICE's directives and management of detention facilities related to COVID-19 were severely lacking. The *Fraihat* court issued a preliminary injunction compelling ICE to make timely custody re-determinations for class members to reduce detained populations. 445 F. Supp. 3d at 724. FAC at ¶25. On October 7, 2020, the *Fraihat* court issued an order after significant concern that despite ICE's DDR, more than 70 percent of detained people not subject to mandatory detention, and subject to serious illness or death if they contracted COVID, remained in custody. *Fraihat,* 2020 WL 6541994, at *6. The *Fraihat* Court ordered immediate custody determination assessments and deemed "blanket or cursory" denials of release without an individualized assessment insufficient. *Id.* at 12. The Court mandated that "[o]nly in rare cases should a Subclass member not subject to mandatory detention remain detained, and pursuant to the [DDR], a justification is required." *Id*. In response to the October 7, 2020 *Fraihat* order, ICE amended the PRR on October 27, 2020, to mirror the custody determination language of the *Fraihat* order. Alrabe Dec. at Exh. I at 19.

In *Roman v. Wolf*, the Court issued a preliminary injunction compelling ICE*, inter alia*, to reduce the population at Adelanto in response to the COVID-19 pandemic. No. 5:20-cv-00768-TJH-PVC, 2020 WL 1952656 (C.D. Cal. Apr. 23, 2020), *aff'd in part, vacated in part sub nom. Roman v. Wolf*, 829 F. App'x 165 (9th Cir. 2020), and *supplemented,* No. 5:20-cv-00768-TJH-PVC, 2020 WL 5797918 (C.D. Cal. Sept. 29, 2020). The Court found, and the Ninth Circuit affirmed, that the government had violated the due process rights of individuals detained in Adelanto in April 2020 given the COVID-19 related conditions at the facility. *Roman*, 829 F. App'x at 171; FAC at ¶¶34–35.

C. Arellano's Continued Detention in Contravention of Court Orders

In response to his habeas petition, the Court ordered Arellano's release on April 2,

2020, but it stayed that order on April 3, 2020, because there was no placement for him; he was otherwise homeless. *Vargas Arellano v. Wolf*, No. 5:20-cv-00813-TJH-JEM, ECF #41 (CD. Cal.); FAC at ¶70. His case was then subsumed into the procedures for release set forth in the *Roman* and *Fraihat* class actions.[2]

On October 29, 2020, ICE denied Arellano's request for release under *Fraihat*, stating that he was a "threat to public safety," without further explanation. FAC at ¶71. Alrabe Dec., Exh. A.

D. Arellano's Illness, and Death, and ICE's Failure to Notify His Representative

On December 10, 2020, Arellano tested positive for COVID-19, which he contracted from a medical provider employed by Defendant Wellpath, LLC ("Wellpath") during an examination on November 29, 2020, as determined by a special master in the *Roman* litigation. *Id*. at ¶80; *Roman,* No. 5:20-cv-00768 TH (PVCx), ECF #1220 (C.D. Cal. July 16, 2021). Defendant GEO provides health care for detained people at Adelanto through Wellpath. *See* ECF #50–2, ¶12. ICE Health Services Corps ("IHSC") is responsible for overseeing the compliance of contracted providers like Wellpath and GEO, including by ensuring they comply with applicable standards. *Fraihat v. ICE*, 16 F.4th 613, 620 (9th Cir. 2021).

On December 11, 2020, the day after he tested positive for COVID-19, Arellano reported to ICE that he suffered from shortness of breath, fever, dry cough, and eventually what became diagnosed as COVID-19 pneumonia, for which he had to be hospitalized. FAC at ¶82. Between December 11 and February 27, 2020, Arellano endured persistent COVID-19 symptoms and was transferred back and forth between Adelanto and various hospitals. *Id.* at ¶83–87.

On February 17, 2021, after experiencing further shortness of breath, Arellano

[2] *Roman* certified the Adelanto class on September 22, 2020, rendering Arellano's habeas moot. *See In Re: Adelanto COVID Habeas Petitions,* No, 5:20-cv-00813-TJH-JEM, ECF #74 (C.D. Cal. Jul. 31, 2021).

was hospitalized for the third and final time for COVID-19. *Id*. at ¶88. On February 19, 2021, a Wellpath Medical Director emailed ICE's medical coordinator explaining that Arellano's medical condition had become grave, and that he was "'at great risk of pulmonary embolism and [that there was a] possibility of sudden death' due to multiple ailments, including ongoing weakness and chest pain in the wake of COVID-19 infection." *Roman*, ECF #1220 at 5 (Special Master's Report and Recommendation Following the Investigation Into The Death of Martin Vargas Arellano). The Wellpath Medical Director urged ICE to evaluate whether Arellano should be released from detention. *Id*.; FAC at ¶89.

After ICE learned that Arellano was at risk of sudden death, it initiated a plan to release him. FAC at ¶90. On February 22, 2021, Arellano's Deportation Officer, Sergio Guzman, contacted Arellano's legal representative, Margaret Hellerstein, informing her that ICE was considering releasing Arellano and asking for information about his housing and transportation. *Id*. Guzman did not inform Hellerstein of Arellano's grave condition nor that it was the reason for ICE's consideration of release. *Id*.

On or about February 26, 2021, Arellano suffered a stroke that caused brain death. *Id*. at ¶92. On March 5, 2021, ICE "released" Arellano purportedly on his own recognizance while in the hospital, even though he was comatose and brain dead. *Id*. at ¶93. ICE did not inform Hellerstein nor Arellano's family of this release. *Id*. On March 8, 2021, Arellano passed away due to complications brought by COVID-19. *Id.*at ¶94. ICE did not inform Hellerstein nor Plaintiff of Arellano's death. *Id*.

III. ARGUMENT

Plaintiff has the burden of proving that the Court has subject matter jurisdiction. *Ashoff v. City of Ukiah*, 130 F.3d 409, 410 (9th Cir. 1997). A motion to dismiss under Rule 12(b)(1) may be a facial or factual attack. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Defendant has primarily asserted a factual attack, introducing evidence that "disputes the truth of [Plaintiff's] allegations that, by

themselves, would otherwise invoke federal jurisdiction." *Id*. Plaintiff is then obliged to "present affidavits or any other evidence necessary to satisfy [his] burden of establishing that the court, in fact, possesses subject matter jurisdiction." *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016) (internal citations and quotations omitted).

In evaluating evidence in a Rule 12(b)(1) factual attack, "the court need not presume the truthfulness of the [plaintiff's] allegations, [but] [a]ny factual disputes []must be resolved in favor of [the plaintiff]." *Edison*, 822 F.3d at 517 (9th Cir. 2016) (internal citations and quotations omitted). The standard for evaluating the evidence is the same standard applicable to summary judgment motions under Rule 56(c). *Autery v. United States,* 424 F.3d 944, 956 (9th Cir. 2005). "'The court must not weigh the evidence or determine the truth of the matters asserted but must only determine whether there is a genuine issue for trial.'" *Id*. (internal citation omitted).

A motion to dismiss for failure to state a claim under Rule 12(b)(6) should be granted only if the plaintiff has failed to allege sufficient facts to "state a claim that is plausible on its face," construing the complaint in the light most favorable to the plaintiff. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

A. The Contractor Exception Does Not Apply to the Government's Failure to Adequately Shield Arellano from COVID-19 and to Provide Adequate Facilities and Care Because the Government Did Not Entirely Delegate its Duties Over These Matters

Defendant misconstrues Plaintiff's negligence, NIED, and IIED claims as asserting vicarious liability for acts and omissions of its contractors. *See* ECF #50 at 7–11.[3] Plaintiff's allegations, however, point to ICE's failure to exercise its non-delegated duties, including its oversight responsibilities over GEO and duties arising from ICE's unilateral actions. *See*, *e.g*., FAC ¶37 (referencing ICE's blocking of universal COVID-

[3] Defendant only challenges portions of Plaintiff's negligence, NIED, and IIED claims here. *See* ECF #50 at 8 (challenging FAC ¶¶106(a), (c), 116(a), (c), 112-113). Defendant only asserts jurisdictional challenges to these claims based on the government's failure to adequately protect Arellano from COVID-19 and to provide sufficient facilities and care.

19 testing at Adelanto and its unilateral determination that detained people could maintain sufficient social distancing). "The independent contractor exception…has no bearing on the United States' FTCA liability for its *own* acts or omissions." *Edison*, 822 F.3d at 518 (emphasis in original).

The Ninth Circuit requires a three-step inquiry for assessing FTCA liability regarding privately operated detention facilities where the government asserts the independent contractor bar. *See id* at 519. First, a court must look to whether state law imposes a duty of care. *Id*. Second, where such a duty exists, the court must conduct a fact-specific inquiry to determine if the government retained any portion of this duty through either contract or party action. *Id*. "[O]nly upon a finding that the government delegated its *entire* duty of care may the court dismiss the claim for lack of jurisdiction. *Id*. at 518 (emphasis in original). Third, "even if it appears that the government delegated all of its duties to the independent contractor, [the court must] ask whether California law imposed any nondelegable duties on the government." *Id*. The Court need not reach this third prong because Defendant maintained an active decision-making role on Adelanto health issues and was required to oversee its contractors' compliance with relevant ICE health directives.

Defendant has a clearly established duty of care towards Plaintiff under state law. California law imposes a special duty of care for individuals held in custody by law enforcement agencies like ICE:[4]

> Prisoners are vulnerable. And dependent. Moreover, the relationship between them is protective by nature, such that the jailer has control over the prisoner, who is deprived of the normal opportunity to protect himself from harm inflicted by others. This, we conclude, is the epitome of a special relationship, imposing a duty of care on a jailer owed to a prisoner, and we today add California to the list of jurisdictions recognizing a special relationship between jailer and prisoner.

[4] ICE is considered a law enforcement agency. *Arizona v. United States*, 567 U.S. 387, 445 (2012); 8 C.F.R. § 287.5.

Giraldo v. California Dep't of Corr. & Rehab., 168 Cal. App. 4th 231, 250–51 (2008). *See also Lum v. Cty. of San Joaquin*, 756 F. Supp. 2d 1243, 1254 (E.D. Cal. 2010). This special duty extends not just to protection against acts by others, but to detention conditions, such as environmental hazards. *See Edison*, 822 F.3d at 521–22.

Once a duty of care is established, a court must then "look to the contract and the parties' actions to determine whether the United States retained some portion of that duty for which it could be held directly liable." *Edison*, 822 F.3d at 519. In *Edison*, which involved FTCA claims based on the Federal Bureau of Prisons' ("BOP") failure to protect against an outbreak of a bacterial disease, the court found that the U.S. retained its duty of care for actions related to detention if the BOP exercised unilateral control over such actions or where the contract with the private detention operator mandated prior BOP approval. *Edison*, 822 F.3d at 523. Here, as in *Edison*, the government retained several duties relevant to Plaintiff's claims in at least three ways.

First, ICE's actions during the COVID-19 outbreak at Adelanto demonstrate that the agency retained duties related to shielding Arellano from COVID-19 and ensuring the adequacy of the facility for individuals at high-risk of death from the virus. In May 2020, after GEO informed ICE's Assistant Field Office Director, Gabriel Valdez, that Adelanto was ready to conduct universal COVID-19 testing, "Valdez *ordered the GEO Group* to not conduct the universal testing of detainees." *Roman*, 2020 WL 5797918, at *2 (C.D. Cal. Sept. 29, 2020)(emphasis added); FAC ¶35. Additionally, in the *Roman* litigation, ICE Officer Valdez attested "that he was *the only person* involved in determining" the number of detained people who could be safely held at Adelanto. *Id.*, at *4 (emphasis added). In both situations, as in *Edison*, "although the United States delegated the general duty to oversee healthcare at [the facility] to GEO/MTC, its actions make clear that it chose to retain the specific duty" to ensure adequate COVID-19 precautions at Adelanto. *Edison*, 822 F.3d at 523.

Second, ICE and IHSC have a direct and undelegated duty under the detention contract to ensure GEO's compliance with the detention standards applicable to Plaintiff's FTCA claims and are empowered to compel such compliance. *See* ECF #50–2, , Exh. C, Section C-Performance Work Statement Detention Services ("PWS")[5], Arts.V.A. (subjecting Adelanto to PBNDS, requiring it allow ICE inspection "to insure compliance with ICE Standards," and explaining that "[d]eficiencies shall be immediately rectified or a plan for correction submitted by the Contractor to the [government official] for approval."), II.C. (providing that ICE officer "will be responsible for monitoring, assessing, recording, and reporting on the technical performance of the Contractor on a day-to-day basis").

Third, beyond its oversight duty, ICE's contract with GEO also demonstrates that it has not delegated the entirety of the relevant duties to GEO. The contract includes numerous provisions that require prior approval by ICE before GEO can act. Contractually requiring prior approval demonstrates retention of a duty. *See Edison*, 822 F.3d at 522. Here, GEO requires authorization from IHSC "before proceeding with non-emergency, off-site medical care." ECF #50–2, Exh. A, Statement of Work, Art. V.J. Between April 2019 and his death, ICE transferred Arellano for off-site medical care at least 14 times. *See* FAC ¶67–88. The contract also requires written ICE approval before GEO hires or replaces key personnel including the facility administrator, assistant facility administrator, and quality assurance manager. *See* ECF #50–2, , Exh. C, PWS, Art. IV.J.3. The contractor is also required to obtain ICE approval for all training formats and subjects for detention officers at the facility. *Id*. at Art.IV.W.1.

While GEO and Wellpath staff also harmed Plaintiff, Plaintiff's FTCA claims directly concern only ICE and DHS's *own* failures to properly oversee GEO and exercise their undelegated duties. *See Harvey v. United States*, No. 14 Civ. 1787 (PAC),

[5] The PWS is incorporated into the relevant detention service contract between ICE and GEO, Group, Inc. contract #70CDCR20D00000009. ECF #50–2, Exh. C, at 149.

2017 WL 2954399, at *6 (S.D.N.Y. July 10, 2017) ("[T]he independent contractor exception . . . does not permit federal employees to abdicate their responsibility for undelegated duties. Federal ICE agents owed Harvey a duty of care separate from any duty OCCF owed Harvey. Thus, any negligence in their conduct is covered by the FTCA.") (citing *Logue v. United States*, 412 U.S. 521, 533 (1973)).[6] To the extent Defendant factually disputes ICE's failure to adhere to the requisite duty of care, that is no basis for dismissal at this stage. Defendant has not met, let alone engaged with, the *Edison* standard. The independent contractor exception thus does not bar Plaintiff's claims.

B. The Discretionary Function Exception Does Not Apply to Plaintiff's Negligence, NIED, and IIED claims Because the Government Has No Discretion to Violate Legal Mandates

The discretionary function exception does not bar Plaintiff's negligence, NIED, and IIED claims for three reasons. The specific government conduct being challenged, including Defendant's egregious failure to adequately shield Arellano from COVID-19, provide adequate facilities and care, and properly oversee GEO (1) violated the Constitution, (2) did not involve "an element of judgment or choice," and (3) were not "based on considerations of public policy." *See Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988). "The burden of proving the applicability of the discretionary function exception is on the United States." *Marlys Bear Med. v. U.S. ex rel. Sec'y of Dep't of Interior*, 241 F.3d 1208, 1213 (9th Cir. 2001) (citing *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992)).[7]

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[6] The cases Defendant cites for the proposition that the U.S. is not liable under the FTCA for how its employees conduct oversight are not to the contrary. ECF # 50, Mot. at 9–11. None of these cases denied FTCA liability for *direct* tortious conduct of U.S. employees, which is the situation here. Instead, they address situations where plaintiffs attempted to hold other, non-U.S. employee actors liable under the FTCA.

[7] Defendant is only challenging portions of Plaintiff's negligence, NIED, and IIED claims under this FTCA exception. *See* ECF #50 at 13 (challenging FAC ¶¶ 106(c), (d), 116(c), (d), and 129).

First, the *Roman* court already found, and the Ninth Circuit affirmed, that ICE violated detained individuals' constitutional rights at Adelanto with respect to protection from COVID-19 in April 2020. *Roman*, 829 F. App'x at 171. For this reason alone, the discretionary function exception does not apply. *See Nurse v. U.S.*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) ("the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply.").

Second, Defendant's challenged actions violated its own policies, which takes them out of the realm of judgment or choice as a matter of law. *Miller v. United States*, 992 F.3d 878, 885–86 (9th Cir. 2021). Where "an applicable federal statute, regulation, or policy specifically prescribes a course of action,' then the 'requirement of judgment or choice is not satisfied,' because 'the employee has no rightful option but to adhere to the directive.'" *Id*. (quoting *United States v. Gaubert*, 499 U.S. 315, 332 (1991)). In other words, "governmental conduct cannot be discretionary if it violates a legal mandate." *Nurse,* 226 F.3d at 1002.

Here, ICE's own detention standards – including the PBNDS and PRR – are internal policies that ICE is required to follow. *See* ECF #50–2, ¶8 (noting that PBNDS 2011 and 2016 revisions apply to Adelanto); Alrabe Dec., Exh. G (ICE Enforcement and Removal Operations, COVID-19 Pandemic Response Requirements, Version 1.0) (Apr. 10, 2020). Courts have, therefore, found that ICE's failure to follow its detention standards bars dismissal of FTCA claims for lack of subject matter jurisdiction. *See Baires v. United States*, 2011 WL 6140998, at *8 (N.D. Cal. Dec. 9, 2011); *Prado v. Perez*, 451 F. Supp. 3d 306, 313 (S.D.N.Y. 2020). CDC guidance, incorporated by the PBNDS and PRR, also imposes mandatory directives on ICE. *See Gayle v. Meade*, No. 20-21553-Civ., 2020 WL 2086482, at *5–6 (S.D. Fla. Apr. 30, 2020) *order clarified*, 2020 WL 2203576 (S.D. Fla. May 2, 2020), at *6.

These policy guidelines include several mandates, such as the provision of adequate prevention strategies for communicable diseases including screening and

isolation, *see* FAC ¶¶44–46 (citing PBNDS), and implementing management strategies where there has been a suspected COVID-19 case, including temperature screening, medical isolation and quarantine, the use of environmental disinfectants, and staff use of adequate personal protective equipment, *see* FAC ¶¶49–53 (citing PRR and CDC guidelines).

Plaintiff alleges that Defendant violated these policies through ICE's egregious disregard for ensuring adequate public health conditions at Adelanto during Arellano's detention. *See* FAC ¶35. Specifically, as affirmed by the Ninth Circuit, "the Government had failed to impose social distancing because there were 'too many detainees at Adelanto for its size'; newly arrived detainees were either mixed with the general population or housed with other new detainees who had arrived at different times, both of which undermined the ostensible 14-day quarantine period for new arrivals; staff were not required to wear gloves and masks; there was a lack of necessary cleaning supplies, resulting in cleaning of communal spaces that was 'haphazard, at best.'" *Roman v. Wolf*, 829 F. App'x at 171. When ICE violated these guidelines, it failed to adequately shield Arellano from contracting COVID-19 and failed to provide facilities and care sufficient to meet his medical needs.

Third, none of Defendants' actions or omissions involved public policy considerations; Defendant's attempt to evade liability should be rejected. "Government actions involving the exercise of judgment or choice are exempted from suit under the FTCA only if they are 'susceptible to policy analysis,' and involve a 'decision[ ] grounded in social, economic, and political policy." *O'Toole v. United States*, 295 F.3d 1029, 1033–34 (9th Cir. 2002) (quoting *Gaubert,* 499 U.S. at 323, 325). When evaluating this prong, courts examine "whether the judgment was the kind of discretionary function that the exception was designed to sheild." *See Berkovitz*, 486 U.S at 536.

Here, Plaintiff is not challenging the creation or adequacy of the PBNDS, PRR, or

any policies adopted by ICE to mitigate the spread of COVID-19.[8] Rather, Plaintiff is challenging their implementation by ICE. The Ninth Circuit has "generally held that the *design* of a course of governmental action is shielded by the discretionary function exception, whereas the *implementation* of that course of action is not." *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (emphasis in original). "The Government cannot claim that both the decision to take safety measures and the negligent implementation of those measures are protected policy decisions." *Marlys Bear Med.*, 241 F.3d at 1215.

C. Plaintiff's False Imprisonment Claim Should Not Be Dismissed Because Defendant Failed to Follow the Law When Refusing His Release

Defendant moved to dismiss Plaintiff's False Imprisonment claim under Rule 12(b)(6) based on the erroneous conclusion that Defendant could not release Arellano because he was subject to mandatory detention under 8 U.S.C. § 1226(c). The record and legal precedent entirely refute that assertion. At the time of his October 29, 2020 *Fraihat* release denial, Arellano was not subject to mandatory detention under § 1226(c) under multiple overlapping legal precedents, such that Defendant's argument fails as a matter of law.[9]

Defendant also moved to dismiss this claim under Rule 12(b)(1), but those arguments should be rejected too because, while release in general may be discretionary in certain circumstances, under *Fraihat*, the procedures Defendant was required to follow in making such a determination were not discretionary, and Plaintiff has sufficiently alleged that Defendant violated those mandatory procedures.

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[8] Plaintiff does not challenge the selection of Adelanto as a detention facility or GEO as the contractor, *see* Mot. 11-15, but, rather, ICE's failure to ensure proper implementation of its own policies at Adelanto,

[9] To the extent that Defendant is arguing that ICE *believed* Arellano was subject to mandatory detention and therefore did not *intentionally* falsely imprison him, that is a factual dispute precluding dismissal under Rule 12(b)(6). *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003).

1. Arellano Was Not Subject to Mandatory Custody and Therefore Defendant's 12(b)(6) Claim Fails

Defendant's claim that Arellano could not be released due to the mandatory custody provision in §1226(c) is wrong on multiple levels. ECF #50 at 15. Two different, overlapping injunctions governing the detention of people held longer than six months—the *Franco* injunction for people with serious mental disorders and the *Rodriguez* injunction for people held in the Central District—classified him as held under §1226(a), rather than §1226(c). *Rodriguez v. Holder,* 2:07-cv-03239-TJH-RNB (C.D. Cal. Aug. 6, 2013); *Franco-Gonzalez v. Holder,* No. 10-cv-02211 DMG (DTBX), 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013).[10] So did a separate Ninth Circuit decision— *Casas-Castrillon v. Dep't of Homeland Sec.,* 535 F.3d 942 (9th Cir. 2008) — that governed people whose immigration cases were subject to review at the Ninth Circuit or on remand after such review (as was Arellano's case during this time period).FAC ¶62.[11] All three were in effect at the time of the October 2020 *Fraihait* custody decision. FAC ¶71 As such, its Rule 12(b)(6) claim fails as a matter of law because Arellano was not subject to §1226(c).

It is of no moment that the Supreme Court subsequently rejected the statutory basis underlying these decisions in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), which held that the mandatory detention provision of §1226(c) applies beyond any six-month limitation throughout the duration of removal proceedings. *Id.* at 847. The government has never argued that that decision undermines the permanent injunction in *Franco-Gonzalez*, which remains in effect. Nor has it succeeded in vacating the *Rodriguez* injunction, despite the Supreme Court's decision. The Ninth Circuit did not order it vacated until October 19, 2021, in *Rodriguez v. Barr*, No. 20-55770, 2021 WL 4871067 (9th Cir. Oct. 19, 2021), and that order remains pending on rehearing (with no mandate

[10] Arellano was a *Franco-Gonzalez* class member because he was not competent to represent himself in removal proceedings. FAC¶61.

having issued). No. 20-55770 (9th Cir.); ECF #45. And while *Casas-Castrillon* is no longer good law, the Ninth Circuit reached that conclusion only on June 6, 2023, well after the 2020/2021 time period relevant here. *See Avilez v. Garland*, 69 F.4th 525, 535 (9th Cir. 2023). Even under the *current* state of the law, both the *Franco* and *Rodriguez* injunctions remain in place. Were Arellano still alive and jailed by ICE, he would be held under §1226(a), not §1226(c).

Were there any further doubt, that Arellano was not subject to mandatory detention is supported by Defendant's own admission of this fact. On April 24, 2019, ICE moved for a *Franco* bond redetermination hearing before the immigration judge, noting that Arellano was eligible for release. Alrabe Dec., Exh. B. And, ICE's March 5, 2021 release of Arellano *after* his stroke, FAC, ¶93, makes clear he was eligible. Even if ICE erroneously believed that he was subject to §1226(c) and that was the basis for refusing release, then this is another reason Plaintiff's false imprisonment claim should survive. *See Rhoden v. United States*, 55 F.3d 428, 431 (9th Cir. 1995).

Next, Judge Hatter's April 3, 2020 order staying Arellano's release in his individual habeas petition (absent court approval), did not prevent ICE from releasing him in October 2020 under *Fraihat*, because Judge Hatter vacated that order once he certified a class of all people held in Adelanto in *Roman v. Wolf. See Arellano v. Wolf,* No. 20-cv-00813, ECF #41TH (JEM) (C.D. Cal. 2020); Mot. at 16. Once the *Roman* class was certified on September 22, 2020, the individual habeas became moot. *Roman*, 2020 WL 6261318, No. 20-cv-00768 TH (PVCx) (C.D. Cal. Sept. 22, 2020); *Adelanto Covid Cases,* No. 5:20-cv-00813-TJH-JEM, ECF #74 (C.D. Cal. Jul. 13, 2021). Arellano then fell under the legal mandates of both *Roman* and *Fraihat*, and nothing precluded ICE from releasing him in October 2020.

Last, *Fraihat* itself provided for release *even if* a class member was subject to §1226(c). *Fraihat* required Defendants to consider every medically-vulnerable class member for release. 2020 WL 6541994, at *12. The October 29, 2020 *Fraihat* release

denial is clear that Arellano was a *Fraihat* class member. Alrabe Dec., Exh. A. Due to the exigency of the pandemic, and the particular threat coronavirus posed to those with medical vulnerabilities, the *Fraihat* court specifically ordered ICE to consider all subclass members for release regardless of what detention statute governed their case. *Fraihat*, 2020 WL 6541994, at *12 (providing procedures for §1226(c) release).[12] Indeed, Defendants acknowledged his eligibility for release under *Fraihat* insofar as their October 29, 2020 denial was based on their three-word description of him as a public safety threat, rather than based on the statute governing his detention. Alrabe Dec.,Exh. A.

2. The Discretionary Function Exception Does Not Apply

Plaintiff's false imprisonment claim is not barred under the discretionary function exception because Arellano was *not* subject to mandatory custody, and Defendant's failure to provide adequate justification for refusing to release him under *Fraihat* falls outside the discretionary function exception. ICE had the authority to release Arellano as a *Fraihat* class member, and was required to follow strict procedures in considering release, which it failed to do. Contrary to Defendant's assertions, Mot. at 15-17, it *lacked the discretion* to *refuse* to comply with *Fraihat's* mandate that only in *rare cases* should a class member continue to be detained if they are not subject to mandatory detention, and that if ICE continued to detain them, it was required to provide an individualized determination justifying its decision. *Fraihat*, 2020 WL 6541994, at *12. The *Fraihat* order required redetermination hearings within one week. *Id.*[13] Arellano's *Fraihat*

Fraihat also controlled notwithstanding *Roman. Fraihat* was a nationwide injunction and *Roman* was limited to Adelanto, and afforded bail applications before the district court when *Fraihat* did not. The September 29, 2020 modified preliminary injunction in *Roman* is clear that the *Fraihat* continues to govern, and that *Fraihat* class members who remained detained could seek bail before the *Roman* court. *Roman*, 2020 WL 5797918 at *6 (C.D. Cal. 2020).

[13] On October 27, the PRR was also amended to reflect this mandate: "[o]nly in rare cases should a *Fraihat* subclass member not subject to mandatory detention remain detained, and … a justification for continued detention is required." Alrabe Dec., Exh. G at 19.

review took more than three weeks. Alrabe Dec., Exh. A. Defendant's failure to abide by these judicial mandates prolonged Arellano's detention through to his death bed, when it released him when he was brain dead, giving rise to Plaintiff's false imprisonment claim.

Under the discretionary function exception, conduct is only discretionary where the action is a "matter of choice for the acting employee." *Young v. United States*, 769 F.3d 1047, 1053 (9th Cir. 2014). However, "governmental conduct cannot be discretionary if it violates a legal mandate." *Nurse*, 226 F.3d at 1002. Further, even if the action is a discretionary one, then the government must show that the decision was based on social, economic, or public policy; it "must be, by its nature, susceptible to policy analysis." *Miller v. United States,* 163 F.3d 591, 593 (9th Cir. 1998).

ICE violated the binding *Fraihat* order in at least three ways. First, Arellano received his *Fraihat* review on October 29, 2020, in violation of the October 7, 2020 *Fraihat* order which required consideration in less than one week, absent "rare cases." 2020 WL 6541994, at *12.

Second, in that untimely review, ICE acknowledged that Arellano was a *Fraihat* class member. Alrabe Dec., Exh. A. However, ICE issued a "blanket" and "cursory" release denial stating only that he was a "threat to public safety." *Id.* ICE did not identify why Arellano was a threat and did not justify why he should be among the "rare cases" who should remain detained. *Fraihat*'s legal mandate required a presumption of Arellano's release or a non-cursory justification for refusing release, and ICE's failure to follow the Order cannot be insulated by the discretionary function exception.

Third, to the extent ICE conducted his custody redetermination based on the legally erroneous conclusion that he was subject to mandatory detention, ICE's decision to refuse to release him on that basis takes Plaintiff's claim out of the realm of "social, economic, or public policy" considerations required by the discretionary function exception. *Miller,* 163 F.3d at 593; *Prescott*, 973 F.2d at 703 (9th Cir. 1992). Although the *Fraihat* denial itself did not contain his custody classification, ICE's determination

that Arellano was a "threat to public safety" supports a plausible inference that ICE classified him as detained under §1226(c) and held him to a higher standard than he should have been subject to as a *Franco* and *Rodriguez* class member. Defendant argues as much in its Motion. Mot. at 23–24. Defendant has not provided any evidence to support its contention that this decision was "susceptible to such balancing" required by the discretionary function exception. *Miller,* 163 F.3d at 593; *Prescott*, 973 F.2d at 703. Moreover, at the very least it creates a "factual dispute[] [that] must be resolved in favor of [Arellano]." *Edison*, 822 F.3d at 517.

D. Plaintiff Has Adequately Pled His Failure to Communicate Claims

Defendant cursorily argues that the portion of Plaintiff's negligence, NIED, and IIED claims related to Defendant's failure to communicate regarding Arellano's grave medical condition are barred under Rule 12(b)(6). Both arguments fail.

Defendant first argues that there is no private analog under California law to Plaintiff's negligence and NIED claims regarding failure to communicate. Mot. at 25 (referencing FAC ¶¶104(f), 116(f)). However, the private analog doctrine, which provides that the United States is liable "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, must be interpreted broadly. *See Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955); *United States v. Muniz*, 374 U.S. 150, 152-58 (1963). Courts must look "further afield" to find analogous torts. *United States v. Olson*, 546 U.S. 43, 46 (2005). The proper inquiry is whether individuals "may create a relationship with third parties that is similar to the relationship [between the plaintiffs and the government]." *Id*. at 47; *see LaBarge v. Mariposa Cty.*, 798 F.2d 364, 367 (9th Cir. 1986)("a court's job in applying the [private analog] standard is to find the most reasonable analogy."). Courts have recognized private analogs to negligence and NIED claims brought under the FTCA involving misconduct by immigration officials. *See Nunez Euceda v. United States*, No. 2:20-cv-10793-VAP-GJSx, 2021 WL 4895748, at *4 (C.D. Cal. Apr. 27, 2021); *Avalos-Palma v.*

United States, No. Civ. A. 13-5481 (FLW), 2014 WL 3524758, at *12 (D.N.J. July 16, 2014). The same reasoning must be applied here. Plaintiff's allegations meet the elements of negligence and NIED under California law, especially in light of Defendant's special duty to protect those held in its custody. *See Giraldo*, 168 Cal. App. 4th, at 250–51.

Here, ICE undertook a mandatory duty to inform Arellano's legal representative and next-of-kin of his transfer to the hospital and his medical condition. FAC ¶¶47–48 (citing PBNDS). There are numerous examples of private persons who can be sued under California tort law under like circumstances: a bank's duty to provide information to a homeowner, *see Warren v. PNC Bank Nat'l Ass'n*, No. 22-cv-07875-WHO, 2023 WL 3182952, at *10 (N.D. Cal. Apr. 30, 2023); a jail warden's duty to communicate policies to staff, *see Stewart v. California*, No. 18-cv-01778-PJH, 2019 WL 1332722, at *2 (N.D. Cal. Mar. 25, 2019); a physician's duty to communicate risks to patient, s*ee Cobbs v. Grant*, 8 Cal. 3d 229, 243, 502 P.2d 1, 10 (1972); and a prison's duty to communicate death to next-of-kin, *see Est. of Duran v. Chavez*, No. 2:14-02048-TLN-CKD, 2015 WL 8011685, at *11 (E.D. Cal. Dec. 7, 2015). Thus, Plaintiff's negligence and NIED claims related to Defendant's failure to communicate should not be dismissed.

Second, Defendant makes a last-ditch effort to dismiss Plaintiff's IIED claim, arguing Plaintiff did not adequately plead that Defendant acted intentionally or with reckless disregard or that Arellano suffered severe emotional distress. ECF #50 at 17–18.[14] Plaintiff has more than sufficiently pled both elements.

The FAC details how ICE did not inform Arellano's legal representative of his hospitalization or about the seriousness of his medical condition, despite being informed by Wellpath that he may die. FAC ¶¶88–91. Even after Arellano was brain dead, ICE

[14] Defendant does not argue that Plaintiff has not properly alleged that Defendant's conduct was outrageous or that Defendant's conduct was the actual or proximate cause of the emotional distress. Mot. at 17–18.

continued to actively conceal his medical condition and subsequent death. *Id*. ¶¶93–95. As Arellano lay on his deathbed, neither his family nor his attorney could be by his side because ICE concealed his location, his medical condition, and the fact of his death from them. His last few days, and breaths, were spent with no one who was close to him or cared for him. Arellano suffered severe emotional distress as a result. *Id*. ¶131.

These actions were directed towards Arellano – and even if not, Defendant acted with reckless disregard in his presence by failing to communicate about his condition. *See Christensen v. Superior Ct.*, 54 Cal. 3d 868, 905–06 (1991). At this stage, these facts are sufficient for the Court to infer that Arellano suffered emotional distress and that Defendant acted intentionally or with reckless disregard of the probability of causing emotional distress. *Marsh v. San Diego Cnty.*, 432 F. Supp. 2d 1035, 1055 (S.D. Cal. 2006). Therefore, this Court should allow Plaintiff's claims regarding failure to communicate to proceed, and at the very least grant leave to amend to address any purported pleading deficiencies.

E. Plaintiff's Wrongful Death Claim Should Not Be Dismissed

Defendant does not raise any independent reason why Plaintiff's wrongful death claim must be dismissed, solely stating that it fails because "it is premised on his other claims". Mot. at 26. Because Plaintiff's other claims should survive, Plaintiff's wrongful death claim should also proceed.

IV. CONCLUSION

For the above reasons, the Court should deny Defendant's Motion to Dismiss.

Dated: July 21, 2023

Respectfully submitted,

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The undersigned, counsel of record for Plaintiff, certifies that this brief contains **6,981** words, which complies with the word limit of L.R. 11-6.1 and the

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