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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**

No. CV-19-00481-TUC-JAS

14 A.I.I.L., et al.,

15 Plaintiffs,

16 v.

17 Jefferson Beauregard Sessions, III, et al.,

18 Defendants.

**MOTION TO DISMISS FOR LACK
OF PERSONAL JURISDICTION AND
FAILURE TO STATE A CLAIM**

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INTRODUCTION

To challenge federal immigration policy, Plaintiffs ask this Court to recognize novel claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against fifteen current and former high-ranking government officials in their personal capacities: former White House Chief of Staff John F. Kelly; Senior Advisor to the President Stephen Miller; former Attorney General (“AG”) Jefferson B. Sessions, III; Counselor to the AG Gene Hamilton; former Secretary of Homeland Security Kirstjen Nielsen; former Acting Secretary of Homeland Security and former Commissioner of United States Customs and Border Protection (“CBP”) Kevin K. McAleenan; Acting Commissioner of CBP Mark Morgan; former Chief of CBP United States Border Patrol Carla Provost; Acting Director of Immigration and Customs Enforcement (“ICE”) Matthew Albence; former Director of ICE Thomas Homan; former Acting Director of ICE Ronald D. Vitiello; former Director of United States Citizenship and Immigration Services (“USCIS”) L. Francis Cissna; Secretary of Health and Human Services (“HHS”) Alex Azar; former HHS Counselor for Human Services Policy Margaret Wynne; and former Director of the Office of Refugee Resettlement (“ORR”) Scott Lloyd (“Defendants”). Plaintiffs purport to bring this individual-capacity suit as a class action, and they seek both money damages and the establishment of a fund for mental health treatment for the alleged constitutional and statutory civil rights violations. Compl. ¶¶ 24, 268–78.

To begin with, Plaintiffs have not alleged facts establishing that this Court has personal jurisdiction over Defendants. Plaintiffs’ failure to plead facts establishing any colorable basis for the threshold issue of personal jurisdiction coincides with the Complaint’s other substantive deficiencies and requires dismissal.

Among these deficiencies, the Supreme Court has held that core separation-of-powers principles preclude suits for money damages based on the sort of constitutional challenges to high-level U.S. immigration policy that Plaintiffs make here. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (rejecting *Bivens* cause of action); *see also Mejia-Mejia v. U.S. Immigration & Customs Enf’t*, No. CV 18-1445 (PLF), 2019 WL 4707150,

1 at *4 (D.D.C. Sept. 26, 2019) (declining to extend *Bivens* to a family separation challenge
2 and noting that “this action is obviously a collateral challenge to a government-wide policy
3 affecting thousands of individuals”). Congress has never authorized the remedy Plaintiffs
4 demand, and a number of alternative processes exist to more effectively and efficiently
5 address any and all alleged constitutional infirmities in U.S. policy. Moreover, numerous
6 other factors counsel against creating a money damages remedy against individual federal
7 officials in the novel and sensitive context presented here: a challenge to the Executive
8 Branch’s enforcement of immigration laws at the border. Immigration is an arena not only
9 heavily regulated by Congress, but one deeply connected to our national security for which
10 primacy rests with the political branches.

11 Not only does authoritative precedent compel the conclusion that no novel damages
12 cause of action should be created here, all Defendants are entitled to qualified immunity
13 because Plaintiffs have not alleged the violation of any clearly established constitutional or
14 statutory right by any Defendant. Of note, Plaintiffs only allege a “conspiracy” by a single
15 entity, the Executive Branch, which itself warrants a finding of no clearly established law.
16 *See Abbasi*, 137 S. Ct. at 1867 (“When two agents of the same legal entity make an
17 agreement in the course of their official duties, however, as a practical and legal matter
18 their acts are attributed to their principal.”). Finally, absolute immunity bars Plaintiffs’
19 claims against former AG Sessions, and all of the other individuals to whom the challenged
20 policy of zero tolerance for improper entry is attributed, for the government’s decision to
21 prosecute all (or any) persons who violate a particular federal law.

22 Therefore, as explained more fully below, the Complaint should be dismissed with
23 prejudice pursuant to Federal Rules of Civil Procedure 12(b)(2) and (6).

24 **I. FACTUAL AND PROCEDURAL BACKGROUND.**

25 **A. The Individual Allegations and Claims**

26 Plaintiffs are five Central American families who allege that the federal government
27 separated them from each other after they came into the United States. Defendants, as they
28

1 must, assume the truth of only well-pled factual allegations and only for the limited purpose
2 of this motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

3 Ana and her two sons, Jaime and Mateo, crossed into the United States on May 25,
4 2018. Compl. ¶ 60.¹ After crossing into the United States, CBP officers took them into
5 custody. *Id.* ¶ 61. While in custody, CBP officers/agents separated Ana from Jaime and
6 Mateo. *Id.* ¶ 62. Jamie and Mateo were later transferred to ORR custody. *Id.* ¶ 65. On June
7 26, 2018, a federal district court granted a preliminary injunction for a class of parents,
8 which included Ana, ordering the United States to reunify all class members with their
9 minor children. *Id.* ¶ 219; *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d
10 1133, 1149 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019). Ana was released
11 on bond on July 6, 2018. Compl. ¶ 71. Jamie and Mateo were released to Ana's custody on
12 July 13, 2018. *Id.* ¶ 72.

13 Lorena and her daughter, Karina, presented to CBP officers at the DeConcini Port
14 of Entry on December 22, 2017. *Id.* ¶ 77. They were taken into custody by CBP. *Id.* Over
15 the course of three days, Lorena and Karina were transferred to a number of other facilities
16 in New Mexico and Arizona. *Id.* ¶ 78. On the third day, ICE officers separated them. *Id.*
17 ¶ 80. Lorena remained detained until she signed a form agreeing to her removal from the
18 United States. *Id.* ¶ 86. After allegedly being told by an unidentified individual that the
19 only way to see her daughter again was to consent to removal, Lorena told an immigration
20 judge that she consented to removal. *Id.* Lorena was deported to El Salvador on March 21,
21 2018. *Id.* Karina remained in the United States. *Id.* ¶¶ 86–87. After sixteen months of
22 separation, Lorena returned to the United States and was reunited with Karina. *Id.* ¶ 89.
23 Lorena and Karina are currently seeking asylum or withholding of removal. *Id.* ¶ 91.

24 Jorge and his daughter, Diana, crossed into the United States on June 4, 2018. *Id.*
25 ¶ 92. The following day a CBP officer separated them. *Id.* ¶ 94. Jorge was subsequently
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27
28 ¹ On December 18, 2019, the Court granted Plaintiffs' motion to proceed under
pseudonyms. Dkt. 22.

1 held in a series of detention facilities and Diana was transferred to the care of ORR. *Id.*
2 ¶¶ 94–95. They were reunified after about eight weeks. *Id.* ¶¶ 97–98.

3 Jairo and his daughter, Beatriz, crossed into the United States on December 24,
4 2017. *Id.* ¶ 101. They were separated after being held in government custody for two days.
5 *Id.* ¶¶ 104–05. In mid-January 2018, Jairo was deported to Guatemala. *Id.* ¶ 107. Beatriz
6 was transferred to the custody of ORR. *Id.* ¶ 108. Beatriz returned to Guatemala and
7 reunited with Jairo and her mother in June of 2018. *Id.* ¶ 107.

8 Jacinto and his son, Andres, crossed into the United States on May 16, 2018. *Id.*
9 ¶ 111. They were taken into custody and separated from each other the next day. *Id.* ¶ 112.
10 Andres was transferred to ORR custody. *Id.* ¶ 115. Jacinto signed a document consenting
11 to be removed from the United States after an ICE officer allegedly convinced him that
12 signing it was necessary for his asylum case. *Id.* ¶ 118. Jacinto maintains he could not read
13 or understand the document, which was in English. *Id.* Jacinto was deported in May of
14 2018. *Id.* ¶ 119. Ten months after their initial separation, Jacinto returned to the United
15 States and Jacinto and Andres were reunited. *Id.* ¶¶ 115, 120.

16 **B. The Alleged Creation of “Family Separation” Policies**

17 Plaintiffs allege that Defendants, high-level Executive Branch officials, conspired
18 together to formulate and implement a series of policies to separate Central American
19 families along the southern border. *See id.* ¶¶ 123–256. According to Plaintiffs, certain
20 Defendants began discussing the possibility of separating families as a border enforcement
21 measure in early 2017. *Id.* ¶¶ 123, 125. In July 2017, “a number of Defendants” began
22 implementing the idea of family separations through a “covert ‘pilot program’” at certain
23 “CBP facilities along the southern border.” *Id.* ¶ 133. Hundreds of children were separated
24 from their parents under the pilot program and transferred from CBP to ORR custody. *Id.*
25 ¶¶ 137–38. The pilot program concluded in October 2017. *Id.* ¶ 141. Around that time,
26 Nielsen (then White House principal deputy Chief of Staff) purportedly discussed the
27 possibility of creating a general policy of family separation on the southern border with
28 Chief of Staff Kelly, AG Sessions, and Senior Advisor Miller. *Id.* In December 2017,

1 certain Defendants drafted or oversaw the drafting of a memorandum which described
2 options for enhancing border security, including the option to separate immigrant families.
3 *Id.* ¶¶ 142–43. Plaintiffs do not allege whether this option, if any, was chosen or acted upon.

4 According to Plaintiffs’ allegations, in April of 2018, Director Homan, Director
5 Cissna, and Commissioner McAleenan (then the heads of ICE, USCIS, and CBP), in
6 consultation with Chief Provost, authored a memorandum to Secretary Nielsen “seeking
7 further approval for expanded family separations along the southern border.” *Id.* ¶¶ 149–
8 50. Plaintiffs allege that shortly after receiving the memorandum, Nielsen met with
9 McAleenan, Homan, and Cissna “to discuss expanding family separations.” *Id.* ¶ 151.
10 Nielsen agreed to expand the policy of separating families entering the United States to
11 “all points across the southern border.” *Id.* “[S]enior officials from the White House, DOJ,
12 DHS, and HHS, including Defendants Sessions, Nielsen, Kelly, Miller, Hamilton, Homan,
13 Vitiello, Cissna, McAleenan, Lloyd, and Provost,” and others also discussed family
14 separations in multiple meetings. *Id.* ¶ 152. They purportedly conducted these discussions
15 without consulting with lower-level government employees. *Id.* ¶ 154. “They also drafted,
16 reviewed, and edited memoranda that spelled out how to deter immigrants by separating
17 families at the southern border.” *Id.* ¶ 152. Plaintiffs identify this group as the “Conspiracy
18 Defendants.” *Id.* AG Sessions, Chief of Staff Kelly, Nielsen, Counselor Hamilton, Senior
19 Advisor Miller, Homan, Cissna, and McAleenan directed CBP and ICE officers “to
20 separate families at the southern border.” *Id.* ¶ 153. Those officers followed the policies
21 formulated by Defendants and separated the families. *Id.*

22 According to Plaintiffs, the government’s “family separation” policies took multiple
23 forms. *Id.* ¶¶ 155–59. Some separations, they allege, were performed without stated
24 justification. *Id.* ¶ 156. However, Plaintiffs concede the United States justified other
25 separations on the suspicion that the adult was not the actual parent of the child, and
26 Plaintiffs do not actually dispute that federal officers acted on credible suspicions. *Id.*
27 ¶ 157. Others occurred because the parent was criminally prosecuted for unlawful entry
28 into the United States under 8 U.S.C. § 1325(a). *Id.* ¶ 158. Plaintiffs assert referrals for

1 prosecutions had increased following AG Sessions’ announcement on April 6, 2018, of a
2 “Zero Tolerance” policy of accepting for prosecution all cases DHS referred involving
3 violations of Section 1325(a) along the southern border. *Id.* Plaintiffs allege that AG
4 Sessions, Secretary Nielsen, Senior Advisor Miller, and Counselor Hamilton created the
5 Zero Tolerance policy as a pretext to cause separations. *Id.* ¶ 160. Plaintiffs say that when
6 a parent who had violated Section 1325(a) was referred by DHS to DOJ for criminal
7 prosecution, their child would be “moved to another CBP facility or transferred to ORR
8 custody,” as per standard practice while criminal charges are pending. *Id.* ¶ 161. According
9 to a Staff Report by House of Representatives, at least 2,231 children were separated from
10 their parents along the southern border from May 7, 2018, through June 20, 2018. *Id.* ¶ 165.

11 While in government custody, Plaintiffs contend that parents and children were
12 deprived the opportunity to communicate, subjected to harassment by officers, and forced
13 to travel long distances apart. *Id.* ¶¶ 168–73. Some parents, Plaintiffs maintain, were
14 tricked by unidentified immigration officers into waiving their asylum rights or consenting
15 to their own deportation, and others did not understand the forms that they were signing or
16 only signed in order to be reunited with their children. *Id.* ¶¶ 178–82. These actions
17 sometimes extended the separations, although the court in the *Ms. L* litigation stopped such
18 deportations and ordered that eleven parents deported without their children be returned to
19 the United States. *Id.* ¶¶ 183–84.

20 As pled, Defendants at DHS and HHS failed to take proper steps to prepare for the
21 influx of children into ORR care or take adequate measures once the children were placed
22 with ORR. *Id.* ¶¶ 185–210. Children separated from their parents were classified as
23 unaccompanied alien children, without processes in place to track family relationships. *Id.*
24 ¶ 227. A staff report by the House of Representatives concluded that the “stripping of data
25 connecting parents to their children” caused delays to reunification. *Id.* ¶ 231.

26 Plaintiffs allege that the United States continues to separate families up to the
27 present day, despite the *Ms. L* decision limiting the circumstances when separations may
28 occur. *Id.* ¶¶ 225, 234. The ongoing separations are occurring as a result of a parent’s

1 criminal offenses, doubts about familial relationships, and parent’s health issues. *Id.*
2 ¶¶ 235–37. Congress is aware that separations are ongoing. *Id.* ¶ 238.

3 Defendants, who were among “the President’s most senior advisors,” purportedly
4 implemented these policies in order to further an alleged “animus” on the part of President
5 Trump “toward Central Americans.” *Id.* ¶¶ 240–49. Defendants “serve or served at the
6 pleasure of the President, and in their roles, they have implemented the Administration’s
7 discriminatory agenda, including through initiatives and/or practices that disfavor non-
8 white, non-European individuals generally and target Central Americans specifically.” *Id.*
9 ¶ 248. Plaintiffs allege that they suffered harm to their mental health as a result of the
10 separations. *Id.* ¶¶ 257–67.

11 Based on these allegations, Plaintiffs assert eight causes of action in this lawsuit: (1)
12 Count I – Substantive Due Process (Forcible Separation of Family Units) against all
13 Defendants, *id.* ¶¶ 280–90; (2) Count II – Substantive Due Process (Failure to Provide
14 Adequate Health Care) against Defendants Nielsen, Kelly, Homan, Vitiello, Albence,
15 Cissna, McAleenan, Morgan, Azar, Lloyd, Provost, John/Jane Doe DHS Defendants, and
16 John/Jane Doe HHS/ORR Defendants, *id.* ¶¶ 291–300; (3) Count III – Substantive Due
17 Process (Punitive Treatment) against all Defendants, *id.* ¶¶ 301–09; (4) Count IV –
18 Procedural Due Process, against Defendants Sessions, Nielsen, Kelly, Homan, Vitiello,
19 Albence, Cissna, McAleenan, Morgan, Hamilton, Provost, and John/Jane Doe DHS
20 Defendants, *id.* ¶¶ 310–17; (5) Count V – Equal Protection against all Defendants, *id.*
21 ¶¶ 318–26; (6) Count VI – Fourth Amendment (Protection from Unlawful and
22 Unreasonable Seizures) against Defendants Sessions, Nielsen, Kelly, Homan, Vitiello,
23 Albence, Cissna, McAleenan, Morgan, Hamilton, Provost, and John/Jane Doe DHS
24 Defendants, *id.* ¶¶ 327–36; (7) Count VII - Conspiracy to Interfere with Civil Rights in
25 Violation of 42 U.S.C. § 1985(3) against the “Conspiracy Defendants,”² *id.* ¶¶ 337–42; (8)

26
27 ² The Complaint defines the “Conspiracy Defendants” as Defendants Sessions, Nielsen,
28 Kelly, Miller, Hamilton, Homan, Vitiello, Cissna, McAleenan, Lloyd, and Provost, as well

1 Count VIII - Refusal or Neglect to Prevent or Aid in Preventing Conspiracy to Interfere
2 with Civil Rights in Violation of 42 U.S.C. § 1986 against all Defendants, *id.* ¶¶ 343–47.

3 C. Class Allegations

4 At the motion to dismiss stage, the Court considers only allegations pertaining to
5 named plaintiffs because a putative class action cannot proceed unless the named plaintiff
6 can state a claim for relief. *See Boyle v. Madigan*, 492 F.2d 1180, 1182 (9th Cir. 1974)
7 (“Until [the named plaintiffs] can show themselves aggrieved in the sense that they are
8 entitled to the relief sought, there is no occasion for the court to wrestle with the problems
9 presented in considering whether the action may be maintained on behalf of the class.”);
10 *Kamath v. Robert Bosch LLC*, No. 2:13-CV-08540-CAS, 2014 WL 2916570, at *5 n.4
11 (C.D. Cal. June 26, 2014) (“[A]t the motion to dismiss stage, the Court only considers
12 allegations pertaining to the named plaintiff because a putative class action cannot proceed
13 unless the named plaintiff can state a claim for relief as to himself.”).

14 Plaintiffs seek to frame this case as a class action under Federal Rules of Civil
15 Procedure 23(a), 23(b)(1), and 23(b)(3). Compl. ¶ 268. Plaintiffs purport to represent two
16 classes. First, “a nationwide class consisting of all *minor children* who since 2017 have
17 arrived at or between ports of entry along the United States’ southern border, and who have
18 been separated from their parents by DHS or its sub-agencies (including CBP, ICE, or
19 USCIS) without a demonstration in a hearing that the parent was unfit or presented a danger
20 to that child” (the “Child Class”) (emphasis added). *Id.* ¶ 269. And second, “a nationwide
21 class consisting of all *parents* who since 2017 have arrived at or between ports of entry
22 along the United States’ southern border, and who have a minor child who was separated
23 from them by DHS or its sub-agencies (including CBP, ICE, or USCIS) without a

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27 as John/Jane Doe DHS Defendants at CBP and ICE and John/Jane Doe HHS/ORR
28 Defendants. Compl. ¶ 152.

1 demonstration in a hearing that the parent is unfit or presents a danger to the child” (the
2 “Parent Class”). *Id.* (emphasis added).³

3 **D. Related Litigation**

4 The events underlying this case have spawned numerous lawsuits against both the
5 federal government and many of these individual defendants. For example:

6 Some Plaintiffs and members of the potential Parent Class are class members in the
7 *Ms. L* litigation, discussed above. On June 26, 2018, the *Ms. L* court certified a nationwide
8 class of parents separated from their children and granted a class-wide preliminary
9 injunction based on the plaintiffs’ claim that the federal government’s separation of
10 children from their parents violated the Fifth Amendment. *Ms. L.*, No. 18-cv-428 (S.D.
11 Cal.), Dkt. 82–83; *see also M.M.M. ex rel. his minor child, J.M.A. v. Barr*, No. 18-cv-1832
12 (S.D. Cal.). The following claims were brought on behalf of the class in *Ms. L*: (1)
13 separation of the class members from their children violates procedural and substantive
14 due process under the Fifth Amendment; (2) practices regarding separation of class
15 members from their children are arbitrary and capricious, thus violating the Administrative
16

17 ³ Although class certification is not presently before the Court and would be premature at
18 this time, *see Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (noting that “in some
19 cases, it may be appropriate in the interest of judicial economy to resolve a motion for
20 summary judgment or motion to dismiss prior to ruling on class certification”), Defendants
21 note that they would have additional defenses than those addressed in this motion against
22 claims brought by certain class members. For example, claims that accrued prior to October
23 3, 2017, *see, e.g.,* Compl. ¶¶ 133–41 (alleging the existence of a pilot program that ran
24 from July 2017 through October 2017), are barred by the two year statute of limitations
25 applicable to *Bivens* suits in Arizona. *See Rhodes v. Chavez*, 644 F. App’x 714, 715 (9th
26 Cir. 2016). Also, any Class Members who have previously sued Defendants for the alleged
27 creation of family separation policies where that “prior litigation was terminated by a final
28 judgment on the merits” are precluded from pursuing those claims again. *See Cent. Delta
Water Agency v. United States*, 306 F.3d 938, 952 (9th Cir. 2002) (discussing the elements
of claim preclusion). The plaintiffs in *Mejia-Mejia*, No. 18-1445, (D.D.C.), and *Lopez-
Sales v. Sessions*, No. 18-1700 (D.D.C.), for example, are both precluded from pursuing
those claims again. Though these defenses do not control the named Plaintiffs’ claims, and
other defenses may be relevant to purported class members, Defendants specifically
preserve the right to assert any such defenses.

1 Procedure Act (“APA”); and (3) separation of families violates the federal laws that
2 provide for asylum and other protections from removal and class members have a private
3 right of action to challenge violations of their right to apply for asylum under 8 U.S.C.
4 § 1158(a). *See Ms. L.*, No. 18-cv-428 (S.D. Cal.), Dkt. 1, 32, 85. The *Ms. L.* court recently
5 held that the government’s application of the factors identified in the preliminary injunction
6 generally were consistent with the court’s orders, including the government’s use of
7 criminal history as a justification for separations. *Compare Ms. L.*, No. 18-cv-428 (S.D.
8 Cal.), Dkt. 509 at 9–10 (Order on Motion to Enforce Preliminary Injunction) *with* Compl.
9 ¶¶ 234–35 (discussing post-injunction separations and the use of old criminal offenses as
10 a justification for separations).

11 Members of the potential Parent Class are also class members in *Ms. J.P. v. William*
12 *P Barr*, No. 18-6081 (C.D. Cal.) (“*Ms. J.P.*”), where a court granted a preliminary
13 injunction requiring the federal government to screen, and, where appropriate, provide
14 mental health treatment to those members of the class in custody, as well as those released
15 from custody. *See Ms. J.P.*, No. 18-6081 (C.D. Cal.), Dkt. 251 at *45–46.

16 Some Plaintiffs and members of the potential Child Class are members of a putative
17 class action against eleven of these same individual Defendants in the District Court for
18 the District of Columbia. *K.O. v. Sessions*, No. 20-309 (D.D.C.) (“*K.O.*”). Plaintiffs in *K.O.*
19 assert claims for violations of the Fourth Amendment, Fifth Amendment, 42 U.S.C.
20 § 1985(3), and 42 U.S.C. § 1986. *See K.O.*, No. 20-309 (D.D.C.), Dkt. 45 (Amended
21 Complaint). *K.O.* was recently transferred to the District Court for the District of Columbia
22 after a court in Massachusetts granted defendants’ motion to dismiss and held that it lacked
23 personal jurisdiction over the defendants and that venue was improper. *K.O. v. Sessions*,
24 No. 18-40149-TSH, 2020 WL 533461, at *7–8 (D. Mass. Feb. 3, 2020).

25 Some members of the potential classes also brought individual claims against some
26 of these same Defendants, and have already had claims arising from an alleged family
27 separation policy decided on their merits. *See, e.g., Mejia-Mejia*, 2019 WL 4707150, at *6
28 (dismissing individual-capacity claims against AG Sessions and Director Lloyd with

1 prejudice); *see also Lopez-Sales v. Sessions*, No. 18-1700 (D.D.C.), Dkt. 30 (stipulating to
2 dismissal with prejudice of individual-capacity claims against AG Sessions and Director
3 Lloyd). Another case in Arizona involving the separation of families at the border, *C.M. v.*
4 *United States*, No. 19-05217 (D. Ariz.), seeks damages against the United States under the
5 Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b)(1), 2671–80.

6 **II. STATUTORY AND REGULATORY FRAMEWORK.**

7 The following specific statutory and regulatory schemes apply in the immigration
8 context pled in the Complaint and inform the analysis of the instant motion.

9 **A. Expedited Removal, Credible Fear, and Mandatory Detention under the** 10 **Immigration and Nationality Act (“INA”)**

11 Any individuals who attempt to enter the United States without inspection and are
12 apprehended within two weeks and one hundred miles of a port of entry, *e.g.*, Compl ¶¶ 60,
13 92, may be subject to a process commonly referred to as “expedited removal,” which
14 provides an accelerated removal process for certain aliens. *See* 8 U.S.C. § 1225(b).⁴ Under
15 expedited removal processes, aliens are ordered removed from the United States without
16 further hearing or review unless the alien expresses an intention to apply for asylum or a
17 fear of persecution. 8 U.S.C. § 1225(b)(1)(A). Aliens who express an intention to apply for
18 asylum or a fear of persecution are referred for a credible fear interview with an asylum
19 officer. *Id.* Congress has explicitly mandated the detention of individuals who are in the
20 expedited removal process and whose claim of credible fear of persecution is still being

21
22 ⁴ Generally, when aliens are apprehended by CBP they may be processed for expedited
23 removal, removal proceedings pursuant to 8 U.S.C. § 1229a, or reinstatement of removal
24 pursuant to 8 U.S.C. § 1231(a)(5). In Section 1229a removal proceedings, aliens will have
25 an opportunity to contest their removability from the United States and apply for various
26 forms of relief, including asylum, before an immigration judge. *Id.* These aliens are
27 provided a written notice, known as a notice to appear, specifying among other things the
28 nature of the proceedings against the alien, the legal authority under which the proceedings
are conducted, and the charges against the alien with the statutory provisions alleged to
have been violated. *Id.* § 1229(a). Unaccompanied alien children generally are subject to
Section 1229a removal proceedings. *See* 8 U.S.C. § 1232(a)(5)(D)(i).

1 considered or has been rejected. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (“Any alien subject
 2 to the procedures under this clause *shall be detained* pending a final determination of
 3 credible fear of persecution and, if found not to have such a fear, until removed.”)
 4 (emphasis added). Individuals processed for expedited removal and subject to mandatory
 5 detention are eligible for release from immigration detention only if they are granted parole
 6 in limited circumstances. *See, e.g., id.* § 1182(d)(5)(A); 8 C.F.R. §§ 235.3(b)(2)(iii),
 7 235.3(b)(4)(ii). The INA also requires that any individuals who express an intent to apply
 8 for asylum at a port of entry, *e.g.,* Compl. ¶ 77, be detained during their removal
 9 proceedings, 8 U.S.C. § 1225(b)(2)(A), unless the Secretary of Homeland Security
 10 exercises his discretion to release them on parole, 8 U.S.C. § 1182(d)(5). *See* 8 C.F.R.
 11 § 235.3(c).

12 **B. Statutes Governing the Care and Custody of Unaccompanied Alien Children**

13 *a. The Homeland Security Act of 2002 (“HSA”)*

14 The HSA, enacted in 2002, created DHS and transferred most immigration functions
 15 formerly performed by the Immigration and Naturalization Service to the newly-formed
 16 DHS and its components, including USCIS, CBP, and ICE. *See* Homeland Security Act of
 17 2002, Pub. L. No. 107-296, 116 Stat. 2135; *see also* DHS Reorganization Plan
 18 Modification of January 30, 2003, H.R. Doc. No. 108-32 (also set forth as a note to 6 U.S.C.
 19 § 542). Congress separately transferred to ORR the responsibility for caring for
 20 unaccompanied alien children (“UAC”) “who are in Federal custody by reason of their
 21 immigration status.” HSA, § 462(a)(b)(1)(A), codified as amended at 6 U.S.C.
 22 § 279(b)(1)(A) (2002). That is, Congress transferred to ORR the responsibility of caring
 23 for any UAC who ORR receives from DHS.

24 The HSA transferred to ORR the responsibility, in consultation with DHS, for
 25 making UAC placement decisions. 6 U.S.C. § 279(b)(1)(C), (D). The HSA defines an
 26 “unaccompanied alien child” as a child who:

- 27 (A) has no lawful immigration status in the United States;
- 28 (B) has not attained 18 years of age; and
- (C) with respect to whom—

- (i) there is no parent or legal guardian in the United States; or
- (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

Id. § 279(g)(2). Congress prohibited ORR from releasing UACs on their own recognizance. *See id.* § 279(b)(2).

b. Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”)

In 2008, the TVPRA codified protections related to the custody of UACs. The TVPRA requires that “the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.” 8 U.S.C. § 1232(b)(1). Congress also required that “[e]xcept in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.” *Id.* § 1232(b)(3). Thus, the combination of the HSA and the TVPRA requires that all UACs in DHS custody be transferred to HHS, and that HHS provides for UACs in its care.

The TVPRA requires that UACs in HHS custody be “promptly placed in the least restrictive setting that is in the best interest of the child.” *Id.* § 1232(c)(2)(A). It delegates to the Secretary of HHS the authority to make such placement decisions, noting that the Secretary “may consider danger to self, danger to the community, and risk of flight.” *Id.* Staff from HHS, and particularly ORR, make an initial care provider placement decision for each UAC. *See* ORR Policy Guide: Children Entering the United States Unaccompanied § 1.3.2, <http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied> (last visited Feb. 13, 2020).⁵

⁵ Federal Rule of Evidence 201 provides that “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). At several points in this brief, Defendants cite material from government websites, including statistical information, whose accuracy cannot be reasonably questioned, and is

1 The TVPRA makes clear that HHS is responsible for all placement decisions for
2 UACs in its custody and provides guidelines for their placement with a custodian, including
3 the requirement for HHS to evaluate the suitability of any placement. 8 U.S.C.
4 § 1232(c)(3). The TVPRA provides that a child may be placed with a proposed custodian
5 (either a person or an entity) if HHS

6 . . . makes a determination that the proposed custodian is capable of
7 providing for the child’s physical and mental well-being. Such determination
8 shall, at a minimum, include verification of the custodian’s identity and
9 relationship to the child, if any, as well as an independent finding that the
individual has not engaged in any activity that would indicate a potential risk
to the child.

10 *Id.* § 1232(c)(3)(A). Neither the TVPRA nor the HSA provides HHS with authority to
11 apprehend or detain aliens, or to enforce the INA through prosecutions for improper entry
12 or otherwise. HHS is purely a custodian and provider of social services for UACs.

13 **C. Criminal Prosecution for Improper Entry**

14 Individuals in DHS custody may be subject to prosecution for criminal violations of
15 immigration or other laws. *See, e.g.*, 8 U.S.C. §§ 1324, 1325, 1326. For example, the United
16 States Code makes it a federal crime for aliens to: (1) enter the United States “at any time
17 or place other than as designated by immigration officers,” (2) elude “examination or
18 inspection by immigration officers,” or (3) obtain entry to the United States “by a willfully
19 false or misleading representation or the willful concealment of a material fact.” 8 U.S.C.
20 § 1325(a). DHS has discretion to refer people to the U.S. Department of Justice (“DOJ”)
21 for prosecution based on the particularized facts and circumstances.

22 **D. The “Zero-Tolerance Policy”**

23 On April 6, 2018, then-AG Sessions issued a “Memorandum for Federal Prosecutors
24 along the Southwest Border” that provided guidance on how to exercise prosecutorial
25 discretion with respect to illegal entry enforcement consistent with DOJ priorities and

26 _____
27 proper for judicial notice and consideration on a motion to dismiss. *See, e.g., Daniels-Hall*
28 *v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (taking judicial notice of relevant
facts provided on government website which “neither party disputes”).

1 Congress's legislative choices. *See* Apr. 6, 2018, Zero-Tolerance Memorandum, *available*
2 *at* <https://www.justice.gov/opa/press-release/file/1049751/download> (last visited Feb. 13,
3 2020); U.S. DOJ, News Release: Attorney General Announces Zero-Tolerance Policy for
4 Criminal Illegal Entry (Apr. 6, 2018), 2018 WL 1666622; Compl. ¶ 158. The memorandum
5 directed southwest border prosecutors immediately to adopt a policy of accepting, to the
6 extent practicable, all offenses referred for prosecution under 8 U.S.C. § 1325(a) by DHS.

7 On June 20, 2018, the President issued an executive order stating that it is the
8 “policy of this Administration to maintain family unity, including by detaining alien
9 families together where appropriate and consistent with law and available resources.”
10 Executive Order § 1, *available at* [https://www.whitehouse.gov/presidential-](https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/)
11 [actions/affording-congress-opportunity-address-family-separation/](https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/) (last visited Feb. 13,
12 2020); Compl. ¶¶ 217–18.

13 **III. THE COURT SHOULD DISMISS THE COMPLAINT FOR LACK OF** 14 **PERSONAL JURISDICTION OVER THE DEFENDANTS**

15 Plaintiffs' lawsuit must be dismissed under Federal Rule of Civil Procedure 12(b)(2)
16 because the Court does not have personal jurisdiction over any of the fifteen Defendants.
17 *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1783 (2017) (pre-
18 requisites for personal jurisdiction “must be met as to each defendant”). As the Supreme
19 Court has explained, “[f]ederal courts ordinarily follow state law in determining the bounds
20 of their jurisdiction over persons.” *Walden v. Fiore*, 571 U.S. 277, 283 (2014); *id.* (usual
21 rules apply to establish in personam jurisdiction over federal employees sued individually).
22 “This is because . . . in most cases,” a district court may exercise personal jurisdiction upon
23 proper service of a defendant “who is subject to the jurisdiction of a court of general
24 jurisdiction in the state where the district court is located.” *Id.* (quoting Fed. R. Civ. P.
25 4(k)(1)(A)); *see Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir.
26 2004) (“Where . . . there is no applicable federal statute governing personal jurisdiction,
27 the district court applies the law of the state in which the district court sits.”) (citing Fed.
28 R. Civ. P. 4(k)(1)(A)). Here, none of the fifteen Defendants – each sued in a personal, not

1 official capacity – “is subject to the jurisdiction” of courts in Arizona, and Plaintiffs cannot
2 meet their burden of showing otherwise. *See Schwarzenegger*, 374 F.3d at 800 (“Where a
3 defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears
4 the burden of demonstrating that jurisdiction is appropriate.”); *id.* (plaintiff’s “pleadings
5 and affidavits [must] make a prima facie showing of personal jurisdiction”).

6 **A. Plaintiffs Must Show That Each Defendant Has Constitutionally Sufficient**
7 **“Contacts” with Arizona.**

8 Arizona authorizes its courts to assert “personal jurisdiction over a person, whether
9 found within or outside Arizona, to the maximum extent permitted by . . . the United States
10 Constitution.” Ariz. R. Civ. P. 4.2(a). Arizona’s long-arm statute is thus “coextensive with
11 federal due process requirements,” and so “the jurisdictional analyses under state law and
12 federal due process are the same.” *Schwarzenegger*, 374 F.3d at 800–01. In other words,
13 Arizona courts may exercise personal jurisdiction over a nonresident defendant⁶ only if
14 “that defendant ha[s] at least ‘minimum contacts’ with the . . . forum such that the exercise
15 of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’”
16 *Schwarzenegger*, 374 F.3d at 801 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316
17 (1945)).

18 Depending on the nature of a defendant’s forum contacts (if any), personal
19 jurisdiction may take the form of general or specific jurisdiction. *Schwarzenegger*, 374
20 F.3d at 801–02. “For general jurisdiction to exist over a nonresident defendant . . . , the
21 defendant must engage in continuous and systematic general business contacts . . . that
22 approximate physical presence in the forum state.” *Id.* at 801 (internal quotation marks and
23 citation omitted); *see Munns v. Clinton*, 822 F. Supp. 2d 1048, 1077 (E.D. Cal. 2011) (same
24 for individual-capacity *Bivens* defendants). “This is an exacting standard, as it should be,
25 because a finding of general jurisdiction permits a defendant to be haled into court in the
26 forum state to answer for any of its activities anywhere in the world.” *Schwarzenegger*,

27 ⁶ Plaintiffs do not allege that any Defendant resides in Arizona. *See generally* Compl. Nor
28 could they, as all of the Defendants presently live elsewhere.

1 374 F.3d at 801; *see Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780 (“[O]nly a limited set of
2 affiliations with a forum will render a defendant amenable to general jurisdiction in that
3 State.”) (internal quotation marks and citation omitted). For specific jurisdiction, a plaintiff
4 bears the burden of showing first, that “[t]he non-resident defendant . . . purposefully
5 direct[ed] his activities or consummate[d] some transaction with the forum or resident
6 thereof; or perform[ed] some act by which he purposefully avail[ed] himself of the
7 privilege of conducting activities in the forum, thereby invoking the benefits and
8 protections of its laws.” *Schwarzenegger*, 374 F.3d at 802. Second, plaintiff must show that
9 his or her “claim . . . arises out of or relates to the defendant’s forum-related activities.” *Id.*
10 If – and only if – plaintiff demonstrates both purposeful availment/direction and
11 relatedness, “the burden then shifts to the defendant to present a compelling case that the
12 exercise of jurisdiction would not be reasonable.” *Id.* (internal quotation marks and
13 citations omitted).

14 **B. Plaintiffs Have Not Established Constitutionally Sufficient Contacts**
15 **Between Any Defendant and Arizona.**

16 Here, the Complaint includes no references at all to personal jurisdiction. *See*
17 *generally* Compl. While Plaintiffs do address and purport to establish subject matter
18 jurisdiction and venue, *see id.* ¶¶ 44–50, they make no allegations about the Court’s
19 personal jurisdiction over any Defendant. *See generally id.* The Complaint never alleges,
20 in other words, that general jurisdiction applies, or that any Defendant resides in or has
21 substantial “continuous and systematic” contacts with Arizona. *Id.*; *see Schwarzenegger*,
22 374 F.3d at 801.⁷

23 Likewise, the Complaint says nothing about specific jurisdiction, or about how any
24 Defendant – let alone each of them – interacted with Arizona such that specific jurisdiction

25
26 ⁷ Indeed, while Plaintiffs bear the burden on this issue, defense counsel has conducted
27 diligent research and is aware of no information that any Defendant lives in Arizona; owns
28 property there; or otherwise engages with the state in a manner allowing general
jurisdiction.

1 applies. *See generally* Compl. While the Complaint references Arizona numerous times,
2 *see id.* ¶¶ 1, 8, 19–22, 45–50, 60, 66, 68, 77–78, 82–83, 87, 95, 101, 106, 108, 140, 142,
3 153, 158, 165, 201, 254, most of these allegations make no mention of any Defendant and
4 instead discuss where the separations allegedly occurred, *see id.* ¶¶ 1, 19–20, 22, 48, 165
5 (in Arizona and elsewhere); where Plaintiffs and other purported class members allegedly
6 were detained, *see id.* ¶¶ 19–22, 45, 48–50, 61, 66, 68, 77–78, 82–83, 87, 95, 106, 108 (in
7 Arizona and elsewhere); and where Plaintiffs and other purported class members allegedly
8 crossed into the United States, *see id.* ¶¶ 46–47, 60, 101 (in Arizona).⁸ But Plaintiffs do not
9 claim that any *Defendant* separated anyone from a family member anywhere; detained
10 anyone anywhere; or had anything to do with Plaintiffs’ choice of which State to attempt
11 entry. *See generally id.*⁹ These Arizona allegations, in other words, describe *Plaintiffs’*
12 alleged experiences or those of putative class members, not the actions of Defendants. *Id.*
13 ¶¶ 1, 19–22, 45–50, 60, 66, 68, 77–78, 82–83, 87, 95, 101, 106, 108, 140, 165, 254.
14 Plaintiffs’ connections to Arizona, however, have no bearing on the jurisdictional analysis.
15 *Walden*, 571 U.S. at 283–91. As the Supreme Court said in *Walden*, “[w]e have consistently
16 rejected attempts to satisfy the defendant-focused ‘minimum contacts’ inquiry by
17 demonstrating contacts between the plaintiff (or third parties) and the forum State.” *Id.* at
18 284 (reversing court of appeals and finding no personal jurisdiction over federal defendant
19 in *Bivens* suit). Rather, due process requires that a defendant’s “connection with the forum

20
21 ⁸ Plaintiffs reference some alleged action by one or more Defendants in paragraphs 8, 142,
22 153, 158, and 201, but these allegations describe high-level policymaking activity and
23 efforts to implement national policy. *See* Compl. ¶¶ 8, 142, 153, 158, 201. As explained
24 below, such allegations cannot establish specific personal jurisdiction here. The
25 Complaint’s remaining two references to Arizona – in paragraphs 140 and 254 – have
26 nothing to do with personal jurisdiction and instead identify a particular organization’s
27 headquarters location and an unrelated litigation matter. *Id.* ¶¶ 140, 254.

28 ⁹ To the contrary, the Complaint repeatedly states that specific, unnamed “officers” and
“guards” separated the plaintiff parents and children and placed them in detention facilities.
See, e.g., Compl. ¶¶ 60–63, 66–67, 71, 78, 80–82, 94, 104–05, 112–13.

1 State . . . arise out of contacts that the ‘defendant *himself*’ creates with [that] State.” *Id.*
 2 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (emphasis added).

3 Turning to the Complaint’s allegations about the Defendants’ alleged activities,
 4 Plaintiffs again identify no conduct triggering specific jurisdiction. *See generally* Compl.
 5 Plaintiffs’ references to the Defendants instead focus on their high-level role in formulating
 6 and implementing national immigration policy and practices from other locations, such as
 7 Washington, D.C.¹⁰ But courts around the country have long held that “allegations limited
 8 to national policy implementation and oversight are insufficient to support a finding of
 9 personal jurisdiction” against individual-capacity defendants. *Munns*, 822 F. Supp. 2d at
 10 1078; *see Oksner v. Blakey*, No. C 07-2273 SBA, 2007 WL 3238659, at *9 (N.D. Cal. Oct.
 11 31, 2007), *aff’d*, 347 Fed. App’x 290 (9th Cir. 2009) (“the mere fact that federal officials
 12 enforce federal laws and policies on a nationwide basis is not sufficient in and of itself to
 13 confer personal jurisdiction” in a *Bivens* suit against such officials).¹¹ A contrary result

14
 15 ¹⁰ *See* Compl. ¶¶ 8–9, 11–12, 17, 25–37, 39–41, 43, 55, 123, 125–26, 128–30, 132–36,
 16 141–60, 162–65, 167–70, 172–73, 175–77, 185, 187, 192–93, 195–97, 199, 201–02, 204–
 17 06, 208, 210–11, 215–17, 225, 227, 231–33, 239–42, 248–52, 254–56, 267, 272–73, 280–
 347.

18 ¹¹ *See also Yellowbear v. Ashe*, 612 F. App’x 918, 921 (10th Cir. 2015) (“[N]umerous
 19 courts, including our own, have held that broad supervisory authority is insufficient” to
 20 establish personal jurisdiction over “a government official . . . in an individual capacity
 21 suit.”); *Perez v. United States*, No. 13CV1417-WQH-BGS, 2014 WL 4385473, at *7–9
 22 (S.D. Cal. Sept. 3, 2014) (allegation that high-ranking officials supervised/implemented
 23 federal border-security policy insufficient to establish personal jurisdiction in *Bivens* suit);
 24 *Moss v. U.S. Secret Service*, No. 06-3045, 2007 WL 2915608, at *18–19 (D. Or. Oct. 7,
 25 2007), *rev’d in part, dismissed in part on other grounds*, 572 F.3d 962 (9th Cir. 2009) (no
 26 specific jurisdiction over federal official in *Bivens* suit based on adoption/implementation
 27 of national policy); *Mahmud v. Oberman*, 508 F. Supp. 2d 1294, 1301–02 (N.D. Ga. 2007),
 28 *aff’d sub nom. Mahmud v. U.S. Dep’t of Homeland Sec.*, 262 F. App’x 935 (11th Cir. 2008)
 (no specific jurisdiction in *Bivens* suit based on “‘mere fact that’” supervisory TSA official
 “‘enforce[s] federal laws and policies . . . on a nationwide basis’”) (quoting *Wag-Aero, Inc.*
v. United States, 837 F. Supp. 1479, 1485 (E.D. Wis. 1993)); *Rank v. Hamm*, No. 204-
 0997, 2007 WL 894565, at *11–13 (S.D.W. Va. Mar. 21, 2007) (“[A]doption of a

1 “would essentially subject the individual Defendants to personal liability in every state in
2 the Union regardless of how tenuous their actual contacts with a particular forum might
3 be.” *Munns*, 822 F. Supp. 2d at 1078. Such an approach would ignore the “purposeful
4 availment”/“purposeful direction” requirement noted above and its focus on a defendant’s
5 intentionality in interacting with the forum state. *See Perez*, 2014 WL 4385473, at *8
6 (purposeful direction requires “an intentional act, . . . expressly aimed at the forum state,
7 . . . causing harm that the defendant knows is likely to be suffered in the forum state”). As
8 the *Perez* court put it, “general allegations of the[] [defendant] federal officers’ supervisory
9 responsibilities and alleged implementation” of border-security policy do not meet
10 “[p]laintiffs’ prima facie burden to satisfy the purposeful direction test” and thus cannot
11 establish specific personal jurisdiction. 2014 WL 4385473, at *8.¹² Because the Complaint

12 _____
13 nationwide policy does not of itself result in [individual-capacity federal official]
14 purposefully directing personal activities toward West Virginia.”); *McCabe v. Basham*,
15 450 F. Supp. 2d 916, 924–27 (N.D. Iowa 2006) (no specific jurisdiction over former
16 Secretary of Homeland Security or Director of Secret Service; “[a]t bottom, Plaintiffs are
17 premising jurisdiction over . . . senior-level federal government officials[] upon . . . [their]
18 supervisory status . . . [and] the acts of low-level federal, state and/or local government
19 employees”); *Nwanze v. Philip Morris Inc.*, 100 F. Supp. 2d 215, 220 (S.D.N.Y. 2000),
20 *aff’d sub nom. Nwanze v. Morris*, 6 F. App’x 98 (2d Cir. 2001) (“[m]ere supervision over
21 the Bureau of Prisons, the reach of which extends into every state,” does not support
22 personal jurisdiction over individual-capacity defendant); *Claasen v. Brown*, No. Civ. A.
23 94-1018-GK, 1996 WL 79490, at *2 (D.D.C. Feb. 16, 1996) (“In order to exercise personal
24 jurisdiction over a federal official in an individual capacity, a court must find minimum
25 contacts other than those arising from federal employment or supervisory roles.”); *Wag-*
26 *Aero, Inc.*, 837 F. Supp. at 1486 (no personal jurisdiction unless “a federal court . . . find[s]
27 that a federal defendant sued in his or her personal capacity has minimum contacts with
28 the forum”; if an agency head “could be sued personally in any district within his or her
official authority merely for supervising acts of subordinates . . . the minimum contacts
requirement would be rendered meaningless”); *Vu v. Meese*, 755 F. Supp. 1375, 1378 (E.D.
La. 1991) (no personal jurisdiction over federal officials “who enforce the federal laws and
policies on a nationwide basis,” including “Zero Tolerance” federal drug enforcement
policy, because “governmental officials must have the requisite minimum contacts with
the forum state”).

¹² *Accord Moss*, 2007 WL 2915608, at *18–19 (no purposeful interaction with Oregon

1 does not show that any Defendant has constitutionally sufficient “minimum contacts” with
2 Arizona, the Court lacks personal jurisdiction over all of the Defendants.¹³ Fed. R. Civ. P.
3 12(b)(2); *see also K.O.*, 2020 WL 533461, at *3–6 (dismissing for lack of personal
4 jurisdiction and improper venue purported class action on behalf of minor children
5 allegedly separated at the southwestern border, finding “Plaintiffs’ showing on the first two
6 prongs [of the specific jurisdiction test] is not merely weak, it is non-existent”).

7 **IV. THIS COURT SHOULD REJECT PLAINTIFFS’ INVITATION TO**
8 **EXTEND *BIVENS* TO CHALLENGE THE CONSTITUTIONALITY OF**
9 **THE GOVERNMENT’S FEDERAL PROSECUTION OR IMMIGRATION**
10 **ENFORCEMENT POLICY**

11 Plaintiffs attempt to bring a *Bivens* action against Defendants, seeking damages for
12 allegedly unconstitutional policy decisions of the United States in the immigration arena.
13 But Supreme Court precedent squarely establishes that Plaintiffs have no such claim.
14 *Abbasi*, 137 S. Ct. at 1861. Plaintiffs’ claims “bear little resemblance to the three *Bivens*
15 claims the [Supreme] Court has approved in the past: a claim against [federal] agents for
16 handcuffing a man in his own home without a warrant [*see Bivens*, 403 U.S. at 388]; a
17 claim against a Congressman for firing his female secretary [*Davis v. Passman*, 442 U.S.
18 228 (1979)]; and a claim against prison officials for failure to treat an inmate’s asthma [*see*
19 *Carlson v. Green*, 446 U.S. 14 (1980)].” *Abbasi*, 137 S. Ct. at 1860. And the Supreme
20 Court has been exceedingly skeptical of any invitation to invent new *Bivens* claims, as
21 Plaintiffs invite this Court to do. Compl. ¶¶ 25, 44; *Abbasi*, 137 S. Ct. at 1860. Simply put,

22 _____
23 where plaintiffs allege that agency head had “nation-wide policy of engaging in viewpoint
24 discrimination”); *Rank*, 2007 WL 894565, at *11–13 (no purposeful direction of “personal
25 activities toward West Virginia” based on federal official’s adoption of nationwide policy);
26 *McCabe*, 450 F. Supp. 2d at 924 (allegations that high-level federal officials created or
27 followed an allegedly impermissible policy or practice “do[] not indicate any act by which
28 [the officials], in their individual capacities, purposefully availed themselves of the
privilege of conducting activities within [the forum state]” or the benefits of its laws).

13 Because Plaintiffs have not met their burden of satisfying either the purposeful
avowment/direction or relatedness prongs of specific jurisdiction analysis, the Court need
not reach the “reasonableness” inquiry. *Schwarzenegger*, 374 F.3d at 801–02.

1 “a *Bivens* action is not ‘a proper vehicle for altering an entity’s policy,’” particularly in the
2 immigration context with its clear separation of powers implications, and this Court should
3 leave to Congress the decision whether to authorize a damages action, or some other form
4 of relief, to do just that. *Abbasi*, 137 S. Ct. at 1860 (quoting *Corr. Servs. Corp. v. Malesko*,
5 534 U.S. 61, 74 (2001)).

6 **A. Plaintiffs’ Claims Involve a New Context**

7 Under the Supreme Court’s analysis for determining whether to recognize a *Bivens*
8 remedy, this Court must first assess whether Plaintiffs’ allegations present “a new *Bivens*
9 context.” *Id.* at 1859. As the Court made clear in *Ziglar v. Abbasi*: “[i]f the case is different
10 in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court, then the
11 context is new” and a special factors analysis must be performed. *Id.* (emphasis added).¹⁴
12 *Abbasi* listed non-exclusive examples of such differences:

13 the rank of the officers involved; the constitutional right at issue; the
14 generality or specificity of the official action; the extent of judicial guidance
15 as to how an officer should respond to the problem or emergency to be
16 confronted; the statutory or other legal mandate under which the officer was
17 operating; the risk of disruptive intrusion by the Judiciary into the
functioning of other branches; or the presence of potential special factors that
previous *Bivens* cases did not consider.

18 *Id.* at 1860. Such “meaningful” differences may be “small, at least in practical terms.” *Id.*
19 at 1865. But “even a modest extension is still an extension.” *Id.* at 1864.

20 Here, the differences are in no way small or modest, and all of the potential factors
21 identified in *Abbasi* materially distinguish this case from *Bivens*, *Davis*, and *Carlson*. The
22 “new-context inquiry is easily satisfied.” *Id.* at 1865. First, unlike the “line-level” officers
23 at issue in *Bivens*, Defendants are (or were) some of the nation’s highest officials,
24 responsible for enforcing and implementing federal legislation through high-level
25

26 ¹⁴ *Abbasi* strictly limits the “new context” inquiry to a comparison with the three cases in
27 which the Supreme Court itself affirmatively approved of a *Bivens*-type remedy – *Bivens*,
28 *Davis*, and *Carlson*. *Id.* at 1859. The analysis does not consider decisions of courts of
appeals or district courts recognizing a *Bivens* remedy.

1 Executive Branch policy. *See* Compl. ¶¶ 26–37, 39–41. Second, Plaintiffs’ constitutional
2 claims arise in the context of immigration and related criminal enforcement activities, areas
3 in which the Supreme Court has never affirmatively recognized an implied remedy and
4 which are fraught with separation of powers concerns. Third, these claims challenge the
5 United States’ broad authority to enforce the nation’s borders through the implementation
6 of policies that apply to all potential entrants to the United States, not the type of specific
7 officer action at issue in *Bivens*. *See, e.g.*, Compl. ¶¶ 26–37, 39–41, 288, 298, 307, 315,
8 324, 333. Fourth, the judicial guidance on the constitutional standards governing the high-
9 level official actions at issue here is far less particular than the specific, binding guidance
10 available to the officers involved in *Bivens*, *Davis*, and *Carlson*. *Cf. Abbasi*, 137 S. Ct. at
11 1864 (“[T]he judicial guidance available to this warden, with respect to his supervisory
12 duties, was less developed.”). Fifth, and relatedly, the statutory and legal mandates
13 pursuant to which Defendants – who worked for a variety of agencies within the Executive
14 Branch – acted are meaningfully different from those at issue in *Bivens*, *Davis*, or *Carlson*.
15 *See, e.g., Wilkie v. Robbins*, 551 U.S. 537 (2007) (declining to recognize proposed Fourth
16 and Fifth Amendment claims); *accord De La Paz v. Coy*, 786 F.3d 367, 375 (5th Cir. 2015).
17 Sixth, the recognition of a *Bivens* claim in this context would risk significant and disruptive
18 intrusion by the Judiciary into the functioning of both Congress, which has been active in
19 establishing both statutory mandates regarding UACs and criminal prosecution for
20 unlawful entry, and the Executive Branch. Finally, as discussed below, this case involves
21 multiple “special factors” that the Supreme Court has not previously addressed in *Bivens*,
22 *Davis*, or *Carlson* that alone warrant a finding of new context. *Abbasi*, 137 S. Ct. at 1860.

23 In short, the contextual attributes of this case are not only significant, they span *all*
24 of the differences described as meaningful in *Abbasi*; certainly they are “meaningful
25 enough” to preclude extension of *Bivens* to this context. *Abbasi*, 137 S. Ct. at 1859. Thus,
26 in considering Plaintiffs’ claim, this Court *must* address the “antecedent” issue of whether
27 to imply a remedy at all. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017). That, in turn,
28 involves asking: (1) whether “alternative, existing process[es]” protect the right at issue,

1 and (2) whether any other “special factors counsel[ing] hesitation” in implying a damages
2 remedy. *Abbasi*, 137 S. Ct. at 1858 (quoting *Wilkie*, 551 U.S. at 550). As shown below, the
3 answer to both questions is yes – Plaintiffs have alternative avenues to obtain relief *and*
4 there are numerous “special factors” counseling against recognizing the *Bivens* remedy
5 Plaintiffs request.

6 **B. Multiple Alternative, Existing Processes Preclude the Creation of a *Bivens*** 7 **Remedy**

8 Plaintiffs have (or had) “available to them ‘other alternative forms of judicial
9 relief,’” and “when alternative methods of relief are available, a *Bivens* remedy usually is
10 not.” *Abbasi*. 137 S. Ct. at 1863 (quoting *Minneci v. Pollard*, 565 U.S. 118, 124 (2012)).
11 “Under this rationale, the Supreme Court has declined to extend *Bivens* where Congress
12 has provided at least a partial remedy via statute . . . as well as where other causes of action
13 provide redress.” *Liff v. Office of Inspector Gen. for U.S. Dep’t of Labor*, 881 F.3d 912,
14 918 (D.C. Cir. 2018) (internal citations omitted). The fact that existing avenues of redress
15 do not provide for “monetary compensation” does not mean that the Court should create a
16 *Bivens*-type remedy. *Mirmehdi v. United States*, 689 F.3d 975, 982 (9th Cir. 2012); *see id.*
17 (“Congress’s failure to include monetary relief can hardly be said to be inadvertent, given
18 that despite multiple changes to the structure of appellate review in the Immigration and
19 Nationality Act, Congress never created such a remedy.”). Indeed, where a plaintiff has an
20 alternative process, the Court has “*consistently* rejected invitations to extend *Bivens*.”
21 *Malesko*, 534 U.S. at 70 (emphasis added). As the Ninth Circuit has confirmed,
22 “[a]lternative remedial structures’ can take many forms, including administrative,
23 statutory, equitable, and state law remedies.” *Vega v. United States*, 881 F.3d 1146, 1154
24 (9th Cir. 2018).

25 The availability of an avenue to pursue injunctive relief is “of central importance”
26 to deciding whether to imply a *Bivens* remedy. *Abbasi*, 137 S. Ct. at 1862. The APA, for
27 example, provides explicit authority to consider constitutional issues in official capacity
28 actions, and is an alternative process counselling against a damages remedy. *See, e.g., W.*

1 *Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1123 (9th Cir. 2009) (“[T]he APA
2 leaves no room for *Bivens* claims based on agency action or inaction.”). The availability of
3 habeas is another potential process that counsels against a *Bivens* remedy, *see Abbasi*, 137
4 S. Ct. at 1849, and indeed “might” provide a “more direct route to relief than a suit for
5 money damages.” *Id.* at 1862–63; *see Mirmehdi*, 689 F.3d at 982 (“The availability of
6 habeas is another remedy.”). The Ninth Circuit has also held that the INA provides a
7 “remedial system” to challenge immigration detention. *Id.*

8 Plaintiffs have alternative avenues of review here, the availability of which
9 (regardless of its outcome) counsel against any implied remedy. Indeed, members of the
10 proposed Parent Class have already sought injunctive and habeas relief, and have filed
11 statutory claims under the APA arising out of the same policies and related actions that
12 Plaintiffs challenge here. *See, e.g., Jacinto-Castanon de Nolasco v. U.S. Immigration &*
13 *Customs Enf’t*, 319 F. Supp. 3d 491, 505 (D.D.C. 2018) (ordering the government to
14 reunify plaintiff with her sons). Plaintiffs also are (or could have been) members of the
15 class in *Ms. L.*, which pursued APA relief. The court in *Ms. L.* granted a class-wide
16 preliminary injunction to parents based on claimed separations without a determination
17 that the parent was unfit or a danger to their child, holding that such separations likely
18 violated the Fifth Amendment. *Ms. L.*, No. 18-cv-428 (S.D. Cal.), Dkt. 82–83; Compl. ¶ 75
19 (noting that a plaintiff received judicial relief from *Ms. L.* court). Plaintiffs also could have
20 sought injunctive relief similar to the class in *Ms. J.P.*, where the district court has already
21 ordered the federal government to provide mental health treatment to a class of separated
22 families. *See Ms. J.P.*, No. 18-6081 (C.D. Cal.), Dkt. 251 at *45–46. But even if plaintiffs
23 in the individual cases or *Ms. L.* or *Ms. J.P.* had not been successful, the actions themselves,
24 and the ability to have their constitutional challenges addressed in federal court,
25 demonstrate that alternative processes exist to address Plaintiffs’ concerns. *Malesko*, 534
26 U.S. at 69 (“So long as the plaintiff had an avenue for some redress, bedrock principles of
27 separation of powers foreclosed judicial imposition of a new substantive liability.”). The
28 only court yet to address the issue of the inappropriateness of an individual damages

1 remedy in the context of alleged “family separations” confirms this analysis. *See Mejia-*
2 *Mejia*, 2019 WL 4707150, at *5 (“As the numerous cases before this Court and the two
3 class actions before Judge Sabraw in the Southern District of California demonstrate . . .
4 there are alternative mechanisms available to challenge the constitutionality of the kind of
5 government action at issue here.”). In short, there has been no shortage of litigation in this
6 area. Plaintiffs’ constitutional challenges thus plainly can be, and have been, pursued
7 through other avenues.

8 Even without those cases, a new *Bivens* claim should not be recognized because
9 Plaintiffs also have at least a potential avenue for suit in state tort law (for anyone acting
10 outside the scope of federal employment), and/or a suit against the United States under the
11 Federal Tort Claims Act (“FTCA”). 28 U.S.C. §§ 1346(b), 2671–80; *see C.M.*, No. 19-
12 05217 (D. Ariz.) (asserting FTCA claims for damages from family separations). In fact,
13 Plaintiffs state their intention to bring an FTCA claim. Compl. ¶ 17 n.2. While the FTCA
14 standing alone may not constitute a sufficient alternative process in all contexts, *see*
15 *Carlson*, 446 U.S. at 20–23, the availability of the FTCA (and/or state law remedies) when
16 considered with other factors is probative of whether Congress “might doubt” or a court
17 should hesitate to recognize a *Bivens* remedy.¹⁵ *Abbasi*, 137 S. Ct. at 1861.

18 It is not even necessary to divine all potential avenues for alternative forms of
19 judicial relief in this context because it is clear that many are available. *See generally Liff*,
20 881 F.3d at 921 (“We do not parse the specific applicability of this web of” alternatives
21 “but instead note the spectrum of remedies they provide”). This Court should decline to
22 supplement the avenues of review provided by Congress with a non-statutory individual
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24 ¹⁵ *See, e.g., Malesko*, 534 U.S. at 73–74 (refusing to imply a remedy for plaintiff whose
25 “lack of alternative tort remedies was due solely to [the] strategic choice” not to sue for
26 common-law negligence); *Andrews v. Miner*, 301 F. Supp. 3d 1128, 1134–35 (N.D. Ala.
27 2017) (acknowledging that, under *Carlson*, “[t]he FTCA remedy is not a substitute for a
28 *Bivens* action,” but still considering “an effective and available [FTCA] remedy” – whose
“administrative prerequisites” the plaintiff “failed to follow” – in the mix with other
“special factors”).

1 capacity claim for damages. Review and the potential for relief through these avenues
2 *alone* is sufficient to preclude creating a new *Bivens* remedy. *Abbasi*, 137 S. Ct. at 1863.

3 **C. Other Factors Counsel Strongly Against Implying a *Bivens* Remedy Here**

4 In addition to the processes discussed above, a wide range of “special factors” may
5 or “might” make it inappropriate to create a *Bivens* remedy in a particular context, even
6 where no alternative remedy exists. *Abbasi*, 137 S. Ct. at 1861. Although a single factor
7 can suffice, special factors in the aggregate may also preclude a *Bivens* remedy. *See*
8 *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (concluding that factors “[t]aken together”
9 “constitute[d] ‘special factors’” and precluded creation of a *Bivens* remedy); *Abbasi*, 137
10 S. Ct. at 1862–63 (taking into account multiple factors, including congressional silence in
11 a heavily legislated arena, the potential for injunctive relief, and national security
12 considerations). Plaintiffs’ claims implicate at least five distinct and additional factors that
13 compel hesitation and warrant not implying a damages remedy in this novel and sensitive
14 context.

15 *a. Congressional Action in the Context of Immigration Has Been “Frequent* 16 *and Intense” and Implying a Damages Remedy Would Raise Serious* 17 *Separation-of-Powers Concerns*

18 In *Abbasi*, the Court recognized that Congress’s failure to provide a damages
19 remedy “is relevant . . . and . . . telling” when Congress has otherwise considered and
20 regulated in a given arena. 137 S. Ct. at 1862. This is particularly true where Congress’s
21 interest has been “frequent and intense.” *Id.* In the exercise of its Constitutional power to
22 “establish an uniform Rule of Naturalization,” U.S. Const. art. I, § 8, cl. 4, Congress has
23 acted repeatedly on the issues of immigration prosecution and the custody of alien children,
24 among them enacting and modifying the Immigration and Nationality Act (“INA”), the
25 HSA, and the TVPRA. And the Supreme Court “has repeatedly emphasized that ‘over no
26 conceivable subject is the legislative power of Congress more complete than it is over’ the
27 admission of aliens.” *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation*
28 *Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); accord *E. Bay Sanctuary Covenant v. Trump*,

1 932 F.3d 742, 755 (9th Cir. 2018) (citing U.S. Const. art. I, § 8, cl. 4, *id.* art. I, § 8, cl. 3;
2 *id.* art. I, § 8, cl. 11) (“Congress is vested with the principal power to control the nation’s
3 borders.”).

4 The INA provides for the expedited removal and mandatory detention of certain
5 aliens who enter the United States without documentation allowing for their admission. *See*
6 8 U.S.C. § 1225(b)(1). Individuals processed for expedited removal who are determined
7 by an asylum officer to have a credible fear of persecution must be detained for further
8 consideration of the application for asylum. 8 U.S.C. § 1225(b)(1)(B)(ii). Individuals who
9 present themselves at a port of entry and are processed for immigration proceedings under
10 Section 1229a are to be detained if the individual is not clearly and beyond a doubt entitled
11 to be admitted. 8 U.S.C. § 1225(b)(2)(A); *see* 8 C.F.R. § 235.3(c). The INA provides the
12 circumstances under which an individual may be paroled, the procedures and requirements
13 for asylum, and the procedures for challenging removal and detention. *See, e.g.*, 8 U.S.C.
14 §§ 1158, 1182, 1225–30; *see also* 8 U.S.C. § 1231(g)(1) (stating the “Attorney General
15 shall arrange for appropriate places of detention for aliens detained pending removal or a
16 decision on removal”); *Comm. Of Cent. Am Refugees v. Immigration & Naturalization*
17 *Serv.*, 795 F.2d 1434, 1440 (9th Cir. 1986) (stating Attorney General has “broad discretion”
18 in deciding where to house deportable aliens). The HSA created DHS and transferred to
19 HHS the responsibility for the care and custody of UACs. *See* 6 U.S.C. §§ 542, 279(a). The
20 TVPRA further codified HHS’s responsibility for all placement decisions for UACs in its
21 custody and provides the requirements for HHS to evaluate the suitability of any
22 placement. 8 U.S.C. § 1232(b)(1), (c)(3).

23 The passage of these statutes represents just a sampling of Congress’s actions in this
24 area. Since enacting the INA in 1952, Congress has amended it wholesale at least six times.
25 *De La Paz*, 786 F.3d at 377 (listing statutes). Likewise, Congress has amended the TVPRA
26
27
28

1 and passed other legislation to care for UACs and combat human trafficking.¹⁶ At no time
2 has Congress provided the sort of damages remedy contemplated here.

3 Additionally, Congress is plainly aware of the particular issues at the core of this
4 lawsuit – allegations regarding the widespread separation of families, and harms
5 consequent thereto – and has responded with legislation and other oversight. *See, e.g.*,
6 Emergency Supplemental Appropriations for Humanitarian Assistance and Security at the
7 Southern Border Act, 2019, Pub. L. No. 116-26, 133 Stat. 1018 (requiring the Executive
8 Branch to submit monthly reports to Congress and the public of the number of any
9 separated children and the cause of those separations); Compl. ¶ 238 (discussing
10 Congressional report on family separations). Indeed, for each of the past two years
11 Congress has appropriated \$4 million to HHS’s Substance Abuse and Mental Health
12 Services Administration in order to address mental health needs of UACs through the
13 National Child Trauma Stress Initiative, with a special focus in 2018 on children who were
14 separated from their family. *See* Department of Defense and Labor, Health and Human
15 Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act,
16 2019, Pub. L. No. 115-245, 132 Stat. 2981; Joint Explanatory Statement of the Committee
17 of Conference, H.R. Rep. No. 115-952, at *533 (2018); *see also* Consolidated
18 Appropriations Act, 2019, H.R. Rep. No. 116-31, § 224 (prohibiting DHS from using

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20 ¹⁶ *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386,
21 114 Stat. 1464; Prosecutorial Remedies and Tools against the Exploitation of Children
22 Today Act of 2003 (Protect Act), Pub. L. No. 108-21, 117 Stat. 650; Trafficking Victims
23 Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; Intelligence
24 Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638;
25 Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119
26 Stat. 3558 (2006); William Wilberforce Trafficking Victims Protection Reauthorization
27 Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; Violence against Women
28 Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; National Defense
Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632; Justice for
Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227; National Human
Trafficking Hotline, Pub. L. No. 114-271, 130 Stat. 1398 (2016); Combating Human
Trafficking in Commercial Vehicles Act, Pub. L. No. 115-99, 131 Stat. 2242 (2018); No
Human Trafficking on Our Roads Act, Pub. L. No. 115-106, 131 Stat. 2265 (2018).

1 appropriation funds to take actions against sponsors and potential sponsors of UACs). Both
2 the House and the Senate have held multiple hearings on family separations. *See, e.g.,*
3 *Oversight of Immigration Enforcement and Family Reunification Efforts Before the S.*
4 *Comm. on the Judiciary*, 115th Cong. (July 31, 2018). Among those persons subject to
5 Congressional oversight and inquiry who have testified in these hearings are some of the
6 individual Defendants in this case. *See, e.g., Oversight of the Department of Homeland*
7 *Security Before the H. Comm. on the Judiciary*, 115th Cong. (Dec. 20, 2018) (Nielsen
8 testifying); *Hearing on Prescription Drug Affordability and Innovation Before the S.*
9 *Comm. on Finance*, 115th Cong. (June 26, 2018) (Azar); *Oversight of the Trump*
10 *Administration’s Family Separation Policy Before the H. Comm. on the Judiciary*, 116th
11 Cong. (Feb. 26, 2019) (Lloyd); Compl. ¶ 227 (McAleenan and Provost). Congress has also
12 considered multiple legislative proposals regarding family separation in the immigration
13 context that have not been passed into law. *See, e.g.,* Keep Families Together Act, S. 3036,
14 115th Cong. (2018); Protect Kids and Parents Act, S. 3091, 115th Cong. (2018).

15 Despite statutes, repeated amendments, and recent congressional oversight,
16 Congress has never provided a damages remedy against government officials who create
17 or implement policy to enforce the nation’s immigration laws – the damages remedy
18 Plaintiffs seek in this suit.¹⁷ This “institutional silence speaks volumes,” and “counsels
19 strongly against judicial usurpation of the legislative function.” *De La Paz*, 786 F.3d at
20 377; *see also Abbasi*, 137 S. Ct. at 1862 (noting that where policies “attract the attention
21 of Congress,” yet “Congress fails to provide a damages remedy,” then “it is much more
22 difficult to believe that ‘congressional inaction’ was ‘inadvertent’” (citing *Schweiker v.*
23 *Chilicky*, 487 U.S. 412, 423 (1988))). As the Ninth Circuit has stated in the immigration
24 enforcement context, “Congress’s failure to include monetary relief can hardly be said to
25 be inadvertent, given that despite multiple changes to the structure of appellate review in
26 the [INA], Congress never created such a remedy.” *Mirmehdi*, 689 F.3d at 982 (citation

27 ¹⁷ In contrast, for example, Congress *has* created a private right of action for victims of
28 trafficking to sue their traffickers for damages, 18 U.S.C. § 1595.

1 omitted). Given Congress’s “repeated and careful attention to immigration matters,” *De La*
2 *Paz*, 786 F.3d at 377, this Court should not supplant the legislative function by creating a
3 *Bivens* claim here. *Id.* at 378 (“[T]he comprehensive regulations and remedies provided in
4 civil immigration law and regulations preclude crafting an implied damage remedy here.”);
5 *Mirmehdi*, 689 F.3d at 982 (declining to allow *Bivens* action by aliens in part because “[t]he
6 complexity and comprehensiveness of the existing remedial system is another factor among
7 a broad range of concerns counseling hesitation”).

8 *b. National and Border Security Concerns, which are Constitutionally*
9 *Committed to the Political Branches, Counsel Against Creation of an*
10 *Individual Capacity Cause of Action in this Context*

11 Because Plaintiffs’ claims arise out of immigration enforcement activities at an
12 international border, they necessarily implicate national security and foreign affairs. Like
13 immigration, these areas are constitutionally committed to the political branches. *See, e.g.,*
14 *Abbasi*, 137 S. Ct. at 1861; *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016)
15 (recognizing “controlling role of the political branches” in foreign affairs); *Harisiades v.*
16 *Shaughnessy*, 342 U.S. 580, 588–89 (1952) (“[A]ny policy toward aliens is vitally and
17 intricately interwoven with contemporaneous policies in regard to the conduct of foreign
18 relations [and] the war power . . . Such matters are so exclusively entrusted to the political
19 branches of government. . . .”). Indeed, “[m]atters intimately related to foreign policy and
20 national security are rarely proper subjects for judicial intervention.” *Haig v. Agee*, 453
21 U.S. 280, 292 (1981); *Hernandez v. Mesa*, 885 F.3d 811, 819 (5th Cir. 2018) (en banc)
22 (risk to national security counseled against recognizing *Bivens* claim in border shooting
23 case) (certiorari granted). This most certainly includes judicial interference by extending
24 *Bivens*. *See Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012) (“The Supreme Court has
25 never implied a *Bivens* remedy in a case involving the military, national security, or
26 intelligence.”); *see also Mejia-Mejia*, 2019 WL 4707150, at *5 n.6 (“These concerns are
27 heightened with respect to immigration matters that also implicate national security.”).
28

1 The national security and border concerns at issue here counsel against recognizing
2 a new *Bivens* claim. Congress has charged DHS and its components with securing the
3 border, 6 U.S.C. §§ 111, 202, and courts have long recognized that “this country’s border-
4 control policies are of crucial importance to the national security and foreign policy of the
5 United States.” *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004).
6 Related “immigration issues ‘have the natural tendency to affect diplomacy, foreign policy,
7 and the security of the nation,’ which further ‘counsels hesitation’ in extending *Bivens*.”
8 *Mirmehdi*, 689 F.3d at 982 (quoting *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009)).
9 Indeed, the Supreme Court has recognized that concerns about “subjecting the prosecutor’s
10 motives and decisionmaking to outside inquiry” are magnified in the immigration context.
11 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) (citation and
12 quotation omitted). Thus, any supplemental damages remedy provided here should come
13 from Congress.

14 c. *Bivens Actions May Not Be Used to Challenge High-Level Executive Branch*
15 *Immigration Enforcement Policy on the Border*

16 Plaintiffs do not challenge the acts of lone, line-level or rogue officers, but instead
17 the decision-making of Congress and alleged policies of the Executive Branch. Although
18 styled as a suit against Defendants, Plaintiffs’ real grievance is with national immigration
19 policies of the Executive Branch regarding enforcement of the immigration laws. The
20 Complaint is replete with references to the “Trump Administration,” and even specific
21 statements made by the President of the United States. *See, e.g.*, Compl. ¶¶ 215, 217, 239,
22 242, 244–49. But the Supreme Court has held that special factors preclude damages suits
23 against federal agencies and entities. *F.D.I.C. v. Meyer*, 510 U.S. 471, 485–86 (1994)
24 (declining to imply a damages action directly against a federal agency). As the Court has
25 explained, “injunctive relief [not an individual-capacity damages action] has long been
26 recognized as the proper means for preventing *entities* from acting unconstitutionally.”
27 *Malesko*, 534 U.S. at 74 (emphasis added).

28

1 *Abbasi* confirms that individual-capacity constitutional lawsuits challenging high-
2 level Executive Branch policy raise serious separation-of-powers issues and other practical
3 concerns. *Abbasi*, 137 S. Ct. at 1860. Interfering in government policymaking through the
4 vehicle of an individual-capacity damages action accrues “substantial social costs” far
5 beyond those imposed by a traditional *Bivens* action. *Anderson v. Creighton*, 483 U.S. 635,
6 638 (1987). The entire thrust of *Bivens* and its progeny is that it is directed to the actions
7 of lone, typically line-level officers, towards lone plaintiffs, not government-wide
8 decision-making. *Cf. Rodriguez v. Swartz*, 899 F.3d 719, 745, 748 (9th Cir. 2018) (allowing
9 a *Bivens* claim against “a rank-and-file officer, not the head of the Border Patrol or any
10 other policy-making official,” where the line-level officer had been prosecuted by the
11 United States for murder). Plaintiffs should not be permitted to evade clear Supreme Court
12 holdings on this point simply by naming individual high-level Executive Branch
13 employees as defendants.

14 Furthermore, Plaintiffs’ proposed *Bivens* claims would implicate the precise
15 separation-of-powers concerns in the policy-making arena that *Abbasi* identified. Far from
16 claiming Defendants were on some personal lark, Plaintiffs maintain that Defendants
17 violated their constitutional rights through implementing and/or condoning policies of *the*
18 *United States*.¹⁸ And here these policies were informed by Congressional directives. *See*,

19
20 ¹⁸ *See, e.g.*, Compl. ¶ 28 (“[A]s Chief of Staff, Kelly advised President Trump on all aspects
21 of immigration policy and practice, including the detention of asylum seekers and forcible
22 separation of children and parents”); *id.* ¶¶ 133–38 (alleging the creation of a “pilot
23 program” that resulted in the separation of hundreds of children from their parents); *id.*
24 ¶¶ 145–54 (alleging an agreement “to pursue separation of families entering the United
25 States at all points across the southern border”); *id.* ¶¶ 158–60 (alleging that the Zero-
26 Tolerance policy of prosecuting anyone who violated 8 U.S.C. § 1325(a) along the southern
27 border was a pretext for “widespread separations”); *id.* ¶ 165 (alleging that “*the*
28 *government* began to separate parents and children at substantially increased rates and in
substantially increased numbers”) (emphasis added); *id.* ¶¶ 166–67 (alleging that the
separations were effected by “John/Jane Doe DHS Defendants”); *id.* ¶ 288 (“Defendants
have developed, adopted, implemented, enforced, sanctioned, encouraged, condoned, and
acquiesced to a pattern, practice, or custom of violating the clearly established Fifth
Amendment due process rights of Plaintiffs and Class Members . . .”).

1 e.g., 8 U.S.C. §§ 1225(b)(1)(B)(iii)(IV), 1325(a). As the only court to squarely address this
2 issue in the context of “family separation” allegations has recognized, a suit against high-
3 level Executive Branch policymakers alleging the creation of such policies “is obviously a
4 collateral challenge to a government-wide policy affecting thousands of individuals.”
5 *Mejia-Mejia*, 2019 WL 4707150, at *4, *6.

6 The creation of an individual capacity damages action in these circumstances would
7 burden Defendants and future officials alike “from devoting the time and effort required
8 for the proper discharge of their duties.” *Abbasi*, 137 S. Ct. at 1860. Moreover, “the
9 discovery and litigation process would either border upon or directly implicate the
10 discussion and deliberations that led to the formation” of any policy or practice related to
11 the separation of Plaintiffs and their children at the border, requiring “courts to interfere in
12 an intrusive way with sensitive functions of the Executive Branch.” *Id.* The Complaint is
13 replete with allegations of such discussions between high-ranking officials of the Executive
14 Branch. *See, e.g.*, Compl. ¶¶ 123, 134–35, 141, 150–52. Even the President himself is
15 alleged to have had some involvement in U.S. policy on this front. *Id.* ¶¶ 242–49. The threat
16 of discovery could inhibit the free flow of advice and fulsome analysis within the Executive
17 Branch, *see Fed. Open Mkt. Comm. Of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360
18 (1979), and reduce the Executive’s autonomy and confidentiality, *see Cheney v. U.S. Dist.*
19 *Ct. for D.C.*, 542 U.S. 367, 385 (2004); *accord Mejia-Mejia*, 2019 WL 4707150, at *5
20 (noting that if courts extended *Bivens* to challenges of “Executive Branch policies . . . the
21 discovery required to gain details on individual defendants’ motivations could dampen the
22 candor of conversations and advice rendered by officials within the executive branch”); *cf.*
23 *Lanuzza v. Love*, 899 F.3d 1019, 1029 (9th Cir. 2018) (quoting *Abbasi*, 137 S. Ct. at 1849)
24 (“*Bivens* actions against high-ranking executive officers, such as the Director of the Federal
25 Bureau of Investigation and the U.S. Attorney General in *Abbasi*, are disfavored because
26 such suits ‘would call into question the formulation and implementation of a high-level
27 executive policy, and the burdens of that litigation could prevent officials from properly
28

1 discharging their duties.’’). Indeed, Plaintiffs are almost certain to seek such intrusive
2 discovery to prove the details of the alleged ‘‘conspiracy’’.

3 While a *Bivens* action would not be appropriate to challenge *any* government policy,
4 that concern is particularly heightened, where, as here, the policy was allegedly created at
5 the highest levels of government in an arena with respect to which power has been
6 constitutionally-committed to the Executive Branch. See *Lebron v. Rumsfeld*, 670 F.3d
7 540, 548 (4th Cir. 2012) (explaining that ‘‘[p]reserving the constitutionally prescribed
8 balance of powers is . . . [a] special factor counseling hesitation’’ in implying a *Bivens*
9 remedy). Of relevance in this context, the Constitution ‘‘vests power in the President to
10 regulate the entry of aliens into the United States.’’ *E. Bay Sanctuary Covenant*, 932 F.3d
11 at 755; see *id.* (citing U.S. Const. art. II, § 2, cl. 1 (President’s role as ‘‘Commander in
12 Chief’’); U.S. Const. art. II, § 3 (President’s right to ‘‘receive Ambassadors and other public
13 Ministers’’); U.S. Const. art. II, § 3 (Take Care Clause)). While Congress, as discussed
14 above, ‘‘has the power to regulate naturalization, it shares its related power to admit or
15 exclude aliens with the Executive.’’ *E. Bay Sanctuary Covenant*, 932 F.3d at 756. In
16 contrast, the Judicial Branch’s authority in ‘‘the area of immigration and naturalization’’ is
17 relatively circumscribed. *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976). There is simply no
18 question that the judicial creation of a *Bivens* remedy to challenge Executive Branch
19 immigration policies would disturb the balance of powers delineated in the Constitution.

20 *d. Additional Separation-of-Powers Principles Would Be Violated by Creating*
21 *an Individual Capacity Claim for Prosecutorial Policy Decisions*

22 In a similar vein, Plaintiffs’ claims raise additional separation-of-powers concerns
23 related to the Executive’s enforcement of the laws. ‘‘The Supreme Court has long
24 recognized that ‘the Executive Branch has exclusive authority and absolute discretion to
25 decide whether to prosecute a case.’’’ *In re Sealed Case*, 829 F.2d 50, 63 (D.C. Cir. 1987)
26 (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)); see also *United States v.*
27 *Edmonson*, 792 F.2d 1492, 1497 (9th Cir. 1986) (‘‘It cannot be disputed that under our
28 system of separation of powers, the decision whether to prosecute, and the decision as to

1 the charge to be filed, rests in the discretion of the Attorney General or his delegates, the
2 United States Attorneys.”). “The Presidential power of prosecutorial discretion is rooted in
3 Article II, including the Executive Power Clause, the Take Care Clause, the Oath of Office
4 Clause, and the Pardon Clause.” *In re Aiken City*, 725 F.3d 255, 262–63 (D.C. Cir. 2013)
5 (citing U.S. Const. art. II, § 1, cl. 1 (Executive Power Clause); U.S. Const. art. II, § 1, cl. 8
6 (Oath of Office Clause); U.S. Const. art. II, § 2, cl. 1 (Pardon Clause); U.S. Const. art. II,
7 § 3 (Take Care Clause); *see also* U.S. Const. art. I, § 9, cl. 3 (Bill of Attainder Clause)). To
8 aid the President in the task of taking care that the laws are faithfully executed, Congress
9 specifically delegated to the Attorney General and his or her subordinates in the DOJ the
10 power to “conduct any kind of legal proceeding, civil or criminal,” 28 U.S.C. § 515(a). To
11 the extent Defendants implemented a policy of criminally prosecuting all DHS referrals of
12 Section 1325(a) violations, Compl. ¶ 158, they did so as contemplated by Congress, 8
13 U.S.C. § 1325(a), and pursuant to power granted specifically by the Constitution to the
14 Executive. Separation-of-powers concerns counsel squarely against creating a *Bivens*
15 remedy aimed at the exercise of that power. *Abbasi*, 137 S. Ct. at 1857 (“separation-of-
16 powers principles are or should be central to the analysis” of whether to recognize a
17 damages remedy).

18 *e. The Scope and Number of Governmental Actions and Actors Plaintiffs*
19 *Challenge Across Agencies Would Make Devising a Workable Individual-*
20 *Capacity Cause of Action Impracticable*

21 The Supreme Court has recognized that a “serious difficulty of devising a workable
22 cause of action” for a particular *Bivens* claim counsels against such a free-standing non-
23 statutory remedy. *See Wilkie*, 551 U.S. at 562. Relatedly, where recognizing a plaintiff’s
24 proposed remedy would open the floodgates, the unusual risk of “burden and demand” on
25 federal officials that “might well prevent” them “from devoting the time and effort required
26 for the proper discharge of their duties” (and related “practical concerns”) will also counsel
27 hesitation. *Abbasi*, 137 S. Ct. at 1860; *see also id.* at 1858 (discussing the “costs and
28 consequences to the Government itself” of recognizing a new claim). These factors all

1 inhere in this specific context. *Mejia-Mejia*, 2019 WL 4707150, at *5 (“[G]iven the
2 thousands of asylum seekers and many others involved in the immigration system, allowing
3 individual capacity damages claims risks a torrent of new litigation that could burden both
4 the Executive Branch and the judiciary . . .”).

5 Creating the *Bivens* action Plaintiffs seek would also have sweeping implications
6 “on governmental operations systemwide.” *Abbasi*, 137 S. Ct. at 1858. Those system-wide
7 costs include “the burdens on Government employees who are sued personally, as well as
8 the projected costs and consequences to the Government itself . . .” *Id.* In the context of
9 immigration enforcement operations, claims similar to Plaintiffs’ could readily be asserted
10 by numerous other aliens facing criminal prosecution, detention, and removal. Given the
11 fact that every single one of the approximately 61,000 individuals removed from the United
12 States in 2017 were from a foreign country, *see* Fiscal Year 2017 ICE Enforcement and
13 Removal Operations Report, *available at* <https://www.ice.gov/removal-statistics/2017>
14 (last visited Feb. 13, 2020), this alone could open the floodgates of litigation over equal
15 protection claims against government officials enforcing immigration laws. And, should
16 the Court allow claims to proceed that are based on allegations about officials’ personal
17 motives, such claims may be relatively easy to plead and difficult to disprove. *See, e.g.,*
18 *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) (“[C]harges of
19 racial discrimination . . . may be easy to make and difficult to disprove.”) (citation omitted);
20 *cf. Crawford-El v. Britton*, 523 U.S. 574, 584–85 (1998) (“Because an official’s state of
21 mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent
22 may be less amenable to summary disposition . . .”) (internal quotations omitted). The
23 Court has consistently resisted efforts to embroil the judiciary in lawsuits over the
24 subjective motive behind facially lawful official conduct. *See, e.g., Ashcroft v. al-Kidd*,
25 563 U.S. 731, 737 (2011); *Wood v. Moss*, 572 U.S. 744, 761–62 (2014).

26 The potentially tremendous financial impact at issue also weighs heavily against
27 supplanting Congress’s role in deciding whether to create a damages remedy, particularly
28 with the sort of class-wide fund Plaintiffs seek here. *See, e.g., Meyer*, 510 U.S. at 486

1 (discussing the “potentially enormous financial burden” of creating a *Bivens* remedy to
2 challenge agency policies); Compl. at 75. In circumstances where Congress has chosen to
3 allow broad-based challenges to policies and practices in the official capacity arena, the
4 number of potential plaintiffs and potential damages can be enormous. *See, e.g., Cobell v.*
5 *Salazar*, 679 F.3d 909, 912 (D.C. Cir. 2012) (discussing the creation of \$3.4 billion
6 settlement fund). Plaintiffs allege here that the universe of “family separation” plaintiffs
7 number in the thousands. Compl. ¶¶ 267, 271. From a practical perspective, even assuming
8 there were viable claims, it is unlikely that any government official would have sufficient
9 assets to pay the potential costs associated with remedying an unconstitutional policy of
10 the United States. *See Carlson*, 446 U.S. at 21 (noting *Bivens* actions subject officials to
11 “personal financial liability”). Ultimately, Congress is best-equipped to decide whether and
12 how to provide a financial remedy for past harms caused by government policies.

13 Plaintiffs’ choices about how to structure their suit underscore the unworkability of
14 implying a *Bivens* remedy here. For example, Plaintiffs bring this suit as a class action, but
15 class actions to challenge general government policies are uniquely ill-suited to litigate
16 constitutional tort claims, which must be brought against federal officials for their “own
17 individual actions.” *Iqbal*, 556 U.S. at 676. Plaintiffs also seek injunctive relief against the
18 Defendants requiring “the establishment of a recovery fund to provide for health services
19 to Class Members,” Compl. at 75, but *Bivens* suits allow only for money damages. *See,*
20 *e.g., Higazy v. Templeton*, 505 F.3d 161, 169 (2d Cir. 2007) (“The only remedy available
21 in a *Bivens* action is an award for monetary damages from defendants in their individual
22 capacities.”). Individual-capacity suits of this nature against federal employees are simply
23 not conducive to the sort of remedy Plaintiffs seek. *Cf. Meyer*, 510 U.S. at 486 (“We leave
24 it to Congress to weigh the implications of such a significant expansion of Government
25 liability.”).

26 ***

1 Plaintiffs’ proposed constitutional tort claims implicate a remarkable number and
2 variety of separation-of-powers concerns counseling hesitation. This Court should
3 certainly decline to create the novel *Bivens* cause of action Plaintiffs seek here.

4 **V. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY FOR ALL**
5 **CONSTITUTIONAL AND FEDERAL STATUTORY CLAIMS**

6 Plaintiffs’ lawsuit should also be dismissed because all fifteen Defendants are
7 entitled to qualified immunity for all claims raised in the Complaint. Qualified immunity
8 protects public officials “from liability for civil damages insofar as their conduct does not
9 violate clearly established statutory or constitutional rights of which a reasonable person
10 would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is “an immunity
11 from suit rather than a mere defense to liability.” *Saucier v. Katz*, 533 U.S. 194, 200–01
12 (2001). Accordingly, courts should resolve “immunity questions at the earliest possible
13 stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). To overcome
14 qualified immunity, a plaintiff must “plead[] facts showing” two prongs “(1) that the
15 official violated a statutory or constitutional right, and (2) that the right was ‘clearly
16 established’ at the time of the challenged conduct.” *al-Kidd*, 563 U.S. at 735 (quoting
17 *Harlow*, 457 U.S. at 818).

18 For purposes of qualified immunity, a right is clearly established if, “at the time of
19 the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every
20 ‘reasonable official would [have understood] that what he is doing violates that right.’” *al-*
21 *Kidd*, 563 U.S. at 741 (alterations in original) (quoting *Anderson*, 483 U.S. at 640). “This
22 inquiry . . . must be undertaken in light of the specific context of the case, not as a broad
23 general proposition.” *Saucier*, 533 U.S. at 201; see *West v. City of Caldwell*, 931 F.3d 978,
24 983 (9th Cir. 2019) (Courts may not “define clearly established law at a high level of
25 generality). “We do not require a case directly on point, but existing precedent must have
26 placed the statutory or constitutional question beyond debate.” *al-Kidd*, 563 U.S. at 741.
27 Once a government “official pleads qualified immunity, the burden is on the plaintiff to
28

1 prove” a particular Defendant engaged in the violation of a clearly established right.
2 *Isayeva v. Sacramento Sheriff’s Dep’t*, 872 F.3d 938, 946 (9th Cir. 2017).

3 Courts may “exercise their sound discretion in deciding which of the two prongs of
4 [the qualified immunity] analysis should be addressed first in light of the circumstances in
5 the particular case at hand.” *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Where a case
6 can “be disposed of more readily” at the second step, *id.* at 237 (citation omitted) – because
7 the court can “quickly and easily decide that there was no violation of clearly established
8 law before turning to the more difficult question whether the relevant facts make out a
9 constitutional question at all,” *id.* at 239 – the court may find that qualified immunity
10 applies without reaching the initial “constitutional” question. This rationale applies equally
11 to Plaintiffs’ federal statutory claims under 42 U.S.C. §§ 1985(3) and 1986, which
12 incorporate constitutional standards by definition. *See, e.g.*, 42 U.S.C. § 1985 (“If two or
13 more persons . . . conspire . . . for the purpose of depriving . . . any person or class of
14 persons of the *equal protection of the laws* . . .”) (emphasis added); *Griffin v.*
15 *Breckenridge*, 403 U.S. 88, 102 (1971) (“The language requiring intent to deprive of equal
16 protection, or equal privileges and immunities, means that there must be some racial, or
17 perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’
18 action.”); *Bisbee v. Bey*, 39 F.3d 1096, 1102 (10th Cir. 1994) (explaining why the
19 requirements of qualified immunity apply in § 1985 cases).

20 Here, Defendants’ immunity can easily be resolved at step two – Plaintiffs’ failure
21 to identify the violation of a clearly established constitutional or related federal statutory
22 right. Principles of constitutional avoidance favor this approach, particularly where, as
23 here, the answer to the clearly established question is plain. *Camreta v. Greene*, 563 U.S.
24 692, 705 (2011) (“[O]ur usual adjudicatory rules suggest that a court should forbear
25 resolving [the merits of a constitutional question].”). The absence of case law at the time
26 of Plaintiffs’ separation that would have put Defendants on notice of any clearly established
27 right requires dismissing Plaintiffs’ claims. *See D.C. v. Wesby*, 138 S. Ct. 577, 591 (2018)
28 (“Tellingly, neither the panel majority nor the partygoers have identified a single precedent

1 – much less a controlling case or robust consensus of cases – finding a [constitutional]
2 violation ‘under similar circumstances.’”) (citations omitted).

3 **A. Plaintiffs Fail to Allege the Violation of a Clearly Established Due Process**
4 **Right**

5 Plaintiffs ask this Court to recognize an across-the-board clearly established due
6 process right of immigration detainees to be housed with their minor children, but
7 precedent does not clearly support any such right. As an initial matter, the Supreme Court
8 has warned against analyzing claimed substantive due process rights at too general a level.
9 *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). It has also “been reluctant to
10 expand the concept of substantive due process because guideposts for responsible
11 decisionmaking in this unchartered area are scarce and open-ended.” *Collins v. City of*
12 *Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). When analyzed appropriately, it is clear
13 that the right Plaintiffs claim is both too context-dependent to qualify as clearly established
14 and is, in any event, not supported by Supreme Court or Ninth Circuit precedent.

15 Although framed in a variety of different ways, at their core, Plaintiffs’ substantive
16 due process claims, Counts I (“Forcible Separation of Family Units”), II (“Failure to
17 Provide Adequate Health Care”), and III (“Punitive Treatment”), are all rooted in the
18 premise that Plaintiffs have a categorical constitutional right to remain “together as a
19 family.” Compl. ¶ 283; *see id.* ¶¶ 296, 305. But any right which children may have
20 regarding their relationship with their parents necessarily varies by context. *See, e.g.,*
21 *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (recognizing that rights of familial
22 association apply differently when an individual is imprisoned); *accord Dunn v. Castro*,
23 621 F.3d 1196, 1205 (9th Cir. 2010). The fact-specific nature of the inquiry required in this
24 case, the necessity of balancing competing interests, and the complexity of managing adult
25 and family detention at the United States border all compel the conclusion that the law
26 applicable to Plaintiffs’ constitutional and related federal statutory claims was not clearly
27 established for qualified immunity purposes. *See Ms. L.*, No. 18-cv-428 (S.D. Cal.), Dkt.
28 509 at 9–10 (Order on Motion to Enforce Preliminary Injunction) (noting that substantive

1 due process is context-dependent and in the context of family separations on the border,
2 “the government interests extend to securing the Nation’s borders and enforcing the
3 Nation’s criminal and immigration laws, and all that those interests entail, including
4 detention and parole determinations for migrants taken into custody.”).

5 But even setting aside that problem, Plaintiffs’ claims cannot be squared with the
6 statutory scheme governing immigration enforcement. It is well established that Congress
7 has broad power to regulate immigration, even when such decisions touch on sensitive
8 familial relationships. *See, e.g., Fiallo*, 430 U.S. at 797–98 (rejecting constitutional
9 challenge to sections of INA which excluded the relationship between an illegitimate child
10 and his natural father from the special preference status otherwise accorded a “child” or
11 “parent” of a United States citizen or lawful permanent resident). Courts have thus
12 repeatedly rejected attempts to establish that aliens have any substantive due process right
13 to family visitation, or to be detained in proximity to – much less to be detained with or
14 released from detention with – family members. *See, e.g., Aguilar v. U.S. Immigration &*
15 *Customs Enf’t.*, 510 F.3d 1, 22 (1st Cir. 2007) (immigration arrest which prevented parent
16 from making arrangements for the care of their children did not violate the right to family
17 integrity); *Gallanosa by Gallanosa v. United States*, 785 F.2d 116, 120 (4th Cir. 1986)
18 (“The courts of appeals that have addressed this issue have uniformly held that deportation
19 of the alien parents does not violate any constitutional rights of the citizen children.”).

20 Related case law confirms the point. From a legal perspective, courts consider
21 immigration detainees analogous to pretrial detainees under certain circumstances. *See*
22 *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) (“We consider a person detained
23 for deportation to be the equivalent of a pretrial detainee.”). But pretrial detainees, even
24 those who are U.S. citizens, do not have a constitutional right to be housed with or even
25 near family members while in criminal custody. *See Olim v. Wakinekona*, 461 U.S. 238,
26 247–48 & n.8 (1983) (interstate transfer of criminal detainee does not violate any due
27 process right, even if the transfer leaves detainee separated hundreds of miles from his
28 family) (citing *Montanye v. Haymes*, 427 U.S. 236, 241 n.4 (1976)); *Ms. L.*, 310 F. Supp.

1 3d at 1143 (noting that “parents and children may lawfully be separated when the parent is
2 placed in criminal custody”). Whatever the parameters of their rights, aliens attempting to
3 enter the United States certainly do not have greater constitutional rights than U.S. citizens.
4 *See Mathews*, 426 U.S. at 79–80 (“In the exercise of its broad power over naturalization
5 and immigration, Congress regularly makes rules that would be unacceptable if applied to
6 citizens.”).

7 There is also no historical precedent to support the novel substantive right that
8 Plaintiffs claim. *See, e.g., City of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)
9 (asserting that the “shock-the-conscience” inquiry “may be informed by a history of liberty
10 protection”); *United States v. Dominguez-Portillo*, No. 17-MJ-4409, 2018 WL 315759, at
11 *5–6 (W.D. Tex. Jan. 5, 2018), *aff’d sub nom. United States v. Vasquez-Hernandez*, 314
12 F. Supp. 3d 744 (W.D. Tex. 2018), *aff’d*, 924 F.3d 164 (5th Cir. 2019) (alien-parent’s
13 referral for prosecution under 8 U.S.C. § 1325(a) was not enough to show “outrageous
14 government conduct” for purposes of the Fifth Amendment because “the case law provides
15 little guidance on how . . . parental rights are actually manifested when a parent charged
16 with . . . illegal entry . . . is separated from their child who allegedly accompanied them
17 across the border” and noting “the lack of clearly established parental rights in these
18 circumstances and under case law”). To the contrary, it has always been acknowledged that
19 “the evenhanded enforcement of the immigration laws, in and of itself, cannot conceivably
20 be held to violate substantive due process.” *Aguilar*, 510 F.3d at 22 (citing *de Robles v.*
21 *Immigration & Naturalization Serv.*, 485 F.2d 100, 102 (10th Cir. 1973)). Any associated
22 interference with the right to family integrity alleged here was incidental to such
23 enforcement and sprang from the federal government’s legitimate interest in prosecuting
24 illegal entrants and/or detaining them during the expedited removal and credible fear
25 screening process. *See Demore v. Kim*, 538 U.S. 510, 523 (2003) (“[D]etention during
26 deportation proceedings [is] a constitutionally valid aspect of the deportation process.”);
27 *Payne-Barahona v. Gonzales*, 474 F.3d 1, 3 (1st Cir. 2007) (rejecting the argument that
28 “family separation” based on a valid deportation “shocks-the-conscience”). This is a

1 critically important point because *every* governmental detention of a parent runs the risk of
2 interfering in some way with the parent’s ability to care for his or her children. *See id.* at 3
3 (“If there were such a right [to challenge a parent’s valid deportation], it is difficult to see
4 why children would not also have a constitutional right to object to a parent being sent to
5 prison or, during periods when the draft laws are in effect, to the conscription of a parent
6 for prolonged and dangerous military service.”).

7 It is for this reason that the overwhelming majority of cases run contrary to
8 Plaintiffs’ theories of substantive due process. “After all, the right to family integrity has
9 been recognized in only a narrow subset of circumstances,” *Aguilar*, 510 F.3d at 23, but
10 not in deportations, which “are routine and do not of themselves dictate family separation,”
11 *Payne-Barahona*, 474 F.3d at 3. As described by numerous courts of appeals, “[i]f an alien
12 could avoid the consequences of unlawful entry into the United States by having a child, it
13 would create perverse incentives and undermine Congress’s authority over immigration
14 matters.” *Marin-Garcia v. Holder*, 647 F.3d 666, 674 (7th Cir. 2011).¹⁹

15 Defendants are mindful that some district courts have recently held that certain
16 policies allegedly resulting in family separations at the border may be unconstitutional and
17 plaintiffs were *likely* to succeed on “their substantive due process claim that their continued
18 separation, absent a determination that [the parent] is either an unfit parent or presents a
19 danger to her sons, violates their right to family integrity under the Fifth Amendment.”

20
21 ¹⁹ *See also* *Newton v. Immigration & Naturalization Serv.*, 736 F.2d 336, 343 (6th Cir.
22 1984) (finding “no constitutional rights of citizenship implicated in the decision to deport”
23 parents of citizen children); *Delgado v. Immigration & Naturalization Serv.*, 637 F.2d 762,
24 764 (10th Cir. 1980) (“This Court has repeatedly held that the incidental impact visited
25 upon the children of deportable, illegal aliens does not raise constitutional problems.”);
26 *Cortez-Flores v. Immigration & Naturalization Serv.*, 500 F.2d 178, 180 (5th Cir. 1974)
27 (“[D]eportation of a parent does not deprive the child of any constitutional rights.”); *de*
28 *Robles*, 485 F.2d at 102 (rejecting argument that it is unconstitutional to break up a family
and deprive children of “constitutional right to a continuation of the family unit”);
Cervantes v. Immigration & Naturalization Serv., 510 F.2d 89, 92 (10th Cir. 1975) (“The
incidental impact on aliens’ minor children caused by the enforcement of duly-enacted
conditions on aliens’ entrance and residence does not create constitutional problems.”).

1 *Jacinto-Castanon*, 319 F. Supp. 3d at 499; *see also Ms. L.*, 310 F. Supp. 3d at 1145–46
2 (finding likelihood of success on plaintiffs’ due process claim). However, this does not
3 demonstrate that any particular Defendants’ alleged action in this case violated clearly
4 established law. Those decisions were not decisions on the merits, but came in a different
5 procedural posture (preliminary injunction), issued against a different defendant (the
6 United States), facing different plaintiffs, seeking different relief (injunctive), in a different
7 factual context (before reunification). More importantly, for qualified immunity purposes,
8 even if there were a decision on the merits, district court decisions cannot clearly establish
9 a legal proposition of the nature raised here. *See Camreta*, 563 U.S. at 709 n.7 (quoting 18
10 J. Moore et al., *Moore’s Federal Practice* § 134.02[1][d] (3d ed. 2011)) (“‘A decision of a
11 federal district court judge is not binding precedent in either a different judicial district, the
12 same judicial district, or even upon the same judge in a different case.’”). They certainly
13 cannot do so where they, as here, post-date most of the challenged conduct. *Pearson*, 555
14 U.S. at 232 (“[T]he court must decide whether the right at issue was ‘clearly established’
15 *at the time of defendant’s alleged misconduct.*”) (emphasis added).

16 Plaintiffs’ attempt to particularize their substantive due process claims fares no
17 better. For instance, Count III alleges that Defendants violated Plaintiffs’ due process rights
18 by subjecting them to “punitive treatment” by separating their families. Compl. ¶¶ 304–
19 305. But as discussed above, Plaintiffs cannot point to any clearly-established law requiring
20 that they be held together as a family. And any claims regarding the particular conditions
21 of their detention, to the extent they existed, (*see, e.g.*, Compl. ¶ 65 (freezing cold rooms),
22 *id.* ¶¶ 65, 78, 93 (inadequate bedding), *id.* ¶¶ 67, 78, 103 (inadequate food), *id.* ¶ 103
23 (overcrowding)), or the failure to provide them with adequate health services (Count II)
24 would have to be brought against the line-level officers and/or custodians who allegedly
25 committed the particular infractions. *Iqbal*, 556 U.S. at 676, (“[A] plaintiff must plead that
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1 each Government-official defendant, through the official’s own individual actions, has
2 violated the Constitution.”²⁰ Such claims do not undercut dismissal of Defendants herein.

3 Similarly, the minor Plaintiffs cannot show that they had some clearly established
4 substantive due process right *not* to be treated as “unaccompanied alien children” even
5 though they entered the United States with their parents. By federal statute (not the
6 Constitution), a UAC is a child under 18 years of age with no lawful immigration status in
7 the United States who either (1) does not have a parent or legal guardian in the United
8 States or (2) does not have a parent or legal guardian in the United States “available to
9 provide care and physical custody.” 6 U.S.C. § 279(g)(2). Courts have struggled to apply
10 this definition, with federal judges disagreeing on when the label is appropriate. *Compare*
11 *D.B. v. Cardall*, 826 F.3d 721, 734 (4th Cir. 2016) (“Consequently, to be ‘available to
12 provide care’ for a child, a parent must be available to provide what is necessary for the
13 child’s health, welfare, maintenance, and protection.”) *with id.* at 744 (Floyd, J., dissenting)
14 (“Congress has not empowered the federal Office of Refugee Resettlement to seize
15 children from bad parents. The Office is only authorized to detain alien children whose
16 parents are not available in the United States.”). Judges also disagree about precisely when
17 and under what circumstances aliens (whether adults or children) entering the United States
18 gain constitutional protections.²¹ When judges disagree on such questions, all of which are

19
20 ²⁰ Depending on the facts and circumstances, a plaintiff may also be able to seek injunctive
21 relief to remedy ongoing constitutionally deficient conditions of confinement. *See, e.g.,*
22 *Doe v. Kelly*, 878 F.3d 710, 725 (9th Cir. 2017) (affirming grant of preliminary injunction
23 requiring the government to provide detainees with mats and blankets after 12 hours); *Ms.*
24 *J.P.*, No. 18-6081 (C.D. Cal.), Dkt. 251 (discussed *supra* at 10).

25 ²¹ *Compare Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the
26 country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’
27 within the United States, including aliens, whether their presence here is lawful, unlawful,
28 temporary, or permanent.”) *with United States v. Verdugo-Urquidez*, 494 U.S. 259, 271
(1990) (“[A]liens receive constitutional protections when they have come within the
territory of the United States and developed substantial connections with this country.”);
Garza v. Hargan, 874 F.3d 735, 747 (D.C. Cir. 2017), *cert. granted, judgment vacated sub*
nom. Azar v. Garza, 138 S. Ct. 1790 (2018) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161

1 implicated by Plaintiffs’ claims, it is unfair to subject officials to “money damages for
2 picking the losing side of the controversy.” *Wilson v. Layne*, 526 U.S. 603, 618 (1999).
3 Given the lack of clarity even on these general principles, Plaintiffs cannot show that
4 clearly established substantive due process law prohibited Defendants’ conduct in the
5 “particular circumstances” alleged here. *Wesby*, 138 S. Ct. at 590. Accordingly, Counts I,
6 II, and III should be dismissed.

7 Plaintiffs also make a procedural due process claim (Count IV, Compl. ¶¶ 310–17),
8 but to the extent any due process claim lies here, it sounds in substantive, not procedural
9 due process. Even if Plaintiffs were to press such a claim, it would fail. As with substantive
10 due process, a procedural due process claim requires courts to “ask whether there exists a
11 liberty or property interest of which a person has been deprived,” *Swarthout v. Cooke*, 562
12 U.S. 216, 219 (2011), and as noted, *supra*, no such interest was clearly established with
13 respect to immigration detainees. But even if such an interest did exist, ORR’s care and
14 custody of UACs does not violate any clearly established procedural due process rights
15 because there are sufficient mechanisms to challenge the initial decision to maintain
16 custody of such children, including Plaintiffs here. Due process only requires “the
17 opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v.*
18 *Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted); *id.* at 333–35 (prescribing a

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20 _____
21 (1945) (Murphy, J., concurring)) (Henderson, J., dissenting) (“[B]efore developing the
22 ‘substantial connections’ that constitute ‘entry’ for an illegally present alien—‘[t]he Bill of
23 Rights is a futile authority for the alien seeking admission for the first time to these
24 shores.’”); *Castro v. United States Dep’t of Homeland Sec.*, 835 F.3d 422, 445 (3d Cir.
25 2016) (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)) (holding that petitioners,
26 aliens who were apprehended after illegally entering the United States, could not state a
27 proper Suspension Clause claim because “the Supreme Court has unequivocally concluded
28 that ‘an alien seeking initial admission to the United States requests a privilege and has no
constitutional rights regarding his application.”); *United States v. Carpio-Leon*, 701 F.3d
974, 975 (4th Cir. 2012) (“[I]llegal aliens are not law-abiding members of the political
community and aliens who have entered the United States unlawfully have no more rights
under the Second Amendment than do aliens outside of the United States seeking
admittance.”).

1 balancing test for procedural due process claims). Agencies are not required to provide
2 trial-like procedures unless mandated to do so by Congress. 5 U.S.C. § 554(a); *see Pension*
3 *Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655–56 (1990). Children are in ORR care
4 and custody pursuant to the HSA and TVPRA, and there are mechanisms for challenging
5 ORR’s determination that their parents or other custodians are unable to provide for each
6 child’s care and custody. *See, e.g.*, Children Entering the United States Unaccompanied:
7 Section 2, Safe and Timely Release from ORR, *available at*
8 [https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-](https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.2)
9 [section-2#2.2](https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.2). Indeed, all families identified in this Complaint were reunited before it was
10 filed. Compl. ¶¶ 71, 89, 98, 110, 120. Additional procedural safeguards are not required
11 under a *Mathews* balancing test. 424 U.S. at 333–35. Therefore, there was no clearly
12 established procedural due process violation inherent in the government’s custody of
13 Plaintiffs, and Count IV should be dismissed.

14 **B. Plaintiffs Fail to Allege a Violation of a Clearly Established Equal**
15 **Protection Right**

16 Plaintiffs cannot show that the alleged general policies violated any clearly
17 established equal protection right (Count V). The Supreme Court has long held that a policy
18 that does not identify a suspect classification or fundamental right “cannot run afoul of the
19 Equal Protection Clause if there is a rational relationship between the disparity of treatment
20 and some legitimate governmental purpose.” *Armour v. City of Indianapolis, Ind.*, 566 U.S.
21 673, 680 (2012) (internal quotation and citations omitted); *see Aleman v. Glickman*, 217
22 F.3d 1191, 1200 (9th Cir. 2000) (explaining that rational basis review applies if a
23 classification does not involve a fundamental right or protected class). Even as alleged, the
24 policies described by Plaintiffs targeted all groups entering along the southern border. *See*
25 Compl. ¶¶ 133–38, 145–54, 158–60. This is not a suspect classification. Moreover, the vast
26 majority of illegal entries to the United States occur at its Southern Border,²² and this,

27 _____
28 ²² *See* Nationwide Apprehensions by Citizenship and Sector in Fiscal Year 2017, *available*

1 rather than any “discriminatory animus toward immigrants from Central America,” Compl.
2 ¶ 241, is an “obvious alternative explanation” explaining the impetus for those alleged
3 policies. *Iqbal*, 556 U.S. at 682–83 (rejecting animus allegations because “obvious
4 alternative explanation” explained disparate treatment of Arab Muslims).

5 But even if there were a fundamental right or national origin classification somehow
6 at issue here, it is not clearly established in the immigration and related UAC context that
7 a court must apply a heightened standard of review. Courts have repeatedly affirmed that
8 “[d]istinctions on the basis of nationality may be drawn in the immigration field by the
9 Congress or the Executive.” *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979);
10 accord *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–19 (2018) (“Because decisions in these
11 matters may implicate relations with foreign powers, or involve classifications defined in
12 the light of changing political and economic circumstances, such judgments are frequently
13 of a character more appropriate to either the Legislature or the Executive.”) (quotations and
14 citation omitted); see also e.g., *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008); *Jean*
15 *v. Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1984). Where an equal protection challenge
16 to a federal immigration law (as opposed to a state law based on alienage) is brought, only
17 rational basis review applies. See *Mathews*, 426 U.S. at 83. “[I]t is clear that classifications
18 made under the immigration laws need only be supported by some rational basis to fulfill
19 equal protection guarantees.” *Alvarez v. Dist. Dir. of U.S. Immigration & Naturalization*
20 *Serv.*, 539 F.2d 1220, 1224 (9th Cir. 1976) (upholding preferential treatment for commuter
21 aliens from Mexico and Canada against equal protection challenge).

22 “[I]t should come as no surprise that the Court hardly ever strikes down a policy as
23 illegitimate under rational basis scrutiny.” *Hawaii*, 138 S. Ct. at 2420. Rational basis
24 review is highly deferential, especially because “[a]ny rule of constitutional law that would

25 _____
26 at [https://www.cbp.gov/sites/default/files/assets/documents/2018-May/usbp-](https://www.cbp.gov/sites/default/files/assets/documents/2018-May/usbp-apprehensions-citizenship-sector-fy2017.pdf)
27 [apprehensions-citizenship-sector-fy2017.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2018-May/usbp-apprehensions-citizenship-sector-fy2017.pdf) (last visited Feb. 13, 2020); CBP Border
28 Security Report for Fiscal Year 2017, available at
[https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/cbp-border-security-](https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/cbp-border-security-report-fy2017.pdf)
[report-fy2017.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/cbp-border-security-report-fy2017.pdf) (last visited Feb. 13, 2020).

1 inhibit the flexibility of the President to respond to changing world conditions should be
2 adopted only with the greatest caution.” *Id.* at 2419–20 (quotation and citation omitted);
3 *id.* at 2420 (“[T]he Court hardly ever strikes down a policy as illegitimate under rational
4 basis scrutiny.”). “A law will survive rational basis review ‘so long as it bears a rational
5 relation to some legitimate end.’” *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 543 (9th
6 Cir. 2004) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)). “[I]t is difficult to show
7 that a law violates the equal protection clause under rational basis review,” because such
8 review invalidates only laws “so irrational or absurd on their face [that] it is clear they can
9 be motivated by nothing other than animus or prejudice against a group.” *Id.* at 543; *see*
10 *also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

11 Features of geography support a focus of enforcement efforts on the southern
12 border. As a practical matter, it is relatively difficult for non-Canadian asylum seekers to
13 approach the United States from the northern border because they must first travel by air
14 or sea to Canada. *See, e.g., Iqbal*, 556 U.S. at 679–81 (in deciding a motion under 12(b)(6),
15 a court may draw on its judicial experience and common sense). In contrast, the nation of
16 Mexico lies on the southern border of the United States; to the south of Mexico are the
17 countries which make up Central America. Thus, asylum seekers from non-contiguous
18 countries south of the border face fewer logistical barriers to approaching the United States
19 through its southern border. The border between the United States and Canada is also
20 thousands of miles longer than the border with Mexico, making enforcement efforts more
21 diffuse. Plaintiffs ask this Court to ignore these realities and the obvious alternative and
22 common sense explanation for any alleged policies along the southern border, *i.e.*, to the
23 extent limited immigration enforcement resources are going to be committed anywhere, it
24 is reasonable to commit more of those resources to the geographic areas where the
25 violations occur most often. Viewed in this light, the zero-tolerance policy was not a
26 “pretext,” Compl. ¶ 160, but a logical attempt to allocate scarce resources to stop illegal
27 entry of aliens along the border. Plaintiffs may dispute the “effectiveness and wisdom” of
28 enforcing this policy through criminal prosecution, with the attendant separation when the

1 alien charged is a parent who comes to the border with his or her child. *Hawaii*, 138 S. Ct.
2 at 2421. But the Court may not substitute its judgment, or Plaintiffs', for the Executive's
3 judgment with regard to enforcing laws passed by Congress; nor may the Court reject the
4 rational basis underlying the policy. *See id.*

5 **C. Plaintiffs Fail to Allege the Violation of a Clearly Established Fourth**
6 **Amendment Right**

7 Plaintiffs also cannot show that the government's separation or continued custody
8 of the Plaintiff children violated Plaintiffs' clearly established Fourth Amendment rights.
9 The Fourth Amendment provides that:

10 The right of the people to be secure in their persons, houses, papers, and
11 effects, against unreasonable searches and seizures, shall not be violated, and
12 no Warrants shall issue, but upon probable cause

13 A "seizure" occurs only when a government official, "by means of physical force or show
14 of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S.
15 1, 19 n.16 (1968).

16 Plaintiffs do not complain of any seizure in a constitutionally-recognized sense. The
17 Plaintiffs were apprehended once: at the time they were initially detained after crossing the
18 border. Compl. ¶¶ 60, 77, 93, 102, 112. Nowhere does the Complaint contest the validity
19 of these initial apprehensions. After that initial apprehension and the time Plaintiffs spent
20 in the custody of the immigration officers, *see Robins v. Harum*, 773 F.2d 1004, 1010 (9th
21 Cir. 1985) (holding that a seizure continues "throughout the time the arrestee is in the
22 custody of the arresting officers"), any constitutional challenge to government custody
23 might arguably implicate the Fifth Amendment (or other constitutional provisions which
24 were not clearly established here), but not the Fourth Amendment. *See, e.g., Baker v.*
25 *McCullan*, 443 U.S. 137, 144 (1979) (stating that the speedy trial right or Eighth
26 Amendment, and not the Fourth Amendment, provide redress for indefinite detention
27 where probable cause otherwise exists); *Zadvydas*, 533 U.S. at 690 (analyzing allegations
28 of "indefinite civil detention" under the Fifth Amendment). Plaintiffs do not allege the type

1 of “continuing seizure” that might flow from the use of excessive force by officers after
2 they were taken into CBP custody. *Robins*, 773 F.2d at 1010. To the extent Plaintiffs allege
3 a violation based on separation and the continued detention of the children “without their
4 parents’ consent,” Compl. ¶ 331, that violation would speak to their family integrity claim
5 (Count I, Compl. ¶¶ 280–90), discussed above, not a stand-alone Fourth Amendment
6 claim. *See supra* at 40–46. Plaintiffs’ attempt to shoehorn the Fourth Amendment – which
7 was “tailored explicitly for the criminal justice system” – into the context of government
8 care and custody of alien children, falls far short. *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27
9 (1975). At the very least, Plaintiffs have not alleged any challenged actions that would
10 amount to a clearly established “seizure” for the purposes of the Fourth Amendment.²³
11 *West*, 931 F.3d at 983 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per
12 curiam)) (“The Supreme Court has emphasized, especially in the Fourth Amendment
13 context, that [courts] may not ‘define clearly established law at a high level of
14 generality.’”).

15 It is also not clearly established that if there were a “seizure” it was unreasonable in
16 these circumstances. *Terry*, 392 U.S. at 9 (noting that the Constitution prohibits
17 “unreasonable” seizures). For those families where the parents were referred for criminal
18 prosecution, Plaintiffs cannot show that it was clearly established that the children were
19 not “unaccompanied alien children” after their parents were transferred into criminal
20 custody. *See supra* at 45–46; *see also* 8 U.S.C. § 1232(b)(3) (requiring that CBP transfer a
21 UAC to HHS custody within 72 hours of determining that the child is a UAC, absent
22 exceptional circumstances). Indeed, there can be no doubt that Plaintiffs would not have
23 been “available to provide care and physical custody” during the time they were referred

24
25 ²³ Nor has it been clearly established that each (or any) Plaintiff had the requisite substantial
26 connections with the United States such that the Fourth Amendment applied to them at all.
27 *See Verdugo-Urquidez*, 494 U.S. at 265 (“[T]he people’ protected by the Fourth
28 Amendment . . . refers to a class of persons who are part of a national community or who
have otherwise developed sufficient connection with this country to be considered part of
that community.”).

1 for prosecution or in criminal custody. 6 U.S.C. § 279(g)(2)(C)(ii). And once Plaintiffs
2 were determined to be UACs, the terms of their release would be an agency decision
3 governed by the TVPRA – not a decision by any individual defendant herein. 8 U.S.C.
4 § 1232(c)(3)(A). No clearly established law required HHS to bypass TVPRA requirements
5 because Plaintiffs entered the United States with an adult.

6 The government’s ability to hold family units in ICE family residential centers is
7 limited even for those families where the parent is not referred for criminal prosecution.
8 The *Flores* Settlement Agreement, as interpreted in a series of court decisions, places
9 restrictions on DHS’s ability to detain children in the family residential centers. *See Flores*
10 *v. Lynch*, 828 F.3d 898, 905–908 (9th Cir. 2016) (holding that the Settlement Agreement
11 applies to minors accompanied by their parents); *Flores v. Lynch*, 212 F. Supp. 3d 907,
12 913–14 (C.D. Cal. 2015); *Flores v. Sessions*, No. 2:85-cv-04544, Dkt. 363 at 29–31 (C.D.
13 Cal. June 27, 2017). The *Flores* Settlement Agreement does not require the release of alien
14 parents, *Flores*, 828 F.3d at 909, including those who are subject to continued detention.
15 *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (“Any alien subject to the procedures under this
16 clause shall be detained pending a final determination of credible fear of persecution and,
17 if found not to have such a fear, until removed.”) (emphasis added).²⁴ This discrepancy –
18 that parents are presumed detained while children must be quickly released – combined
19 with the government’s interest in enforcing immigration laws at international borders, *see*
20 *United States v. Flores-Montano*, 541 U.S. 149, 149 (2004) (“The Government’s interest
21 in preventing the entry of unwanted persons and effects is at its zenith at the international
22

23 ²⁴ Settlement agreements do not establish the baseline for constitutional conduct. *See, e.g.,*
24 *Palmer v. Sheahan*, No. 93 C 181, 1994 WL 801474, at *1 n.4 (N.D. Ill. Feb. 15, 1994)
25 (“If the defendants violated the terms of the consent decree, the appropriate remedy is an
26 order . . . from the judge who entered the decree, not damages pursuant to § 1983.”) (citing
27 cases); *Green v. McKaskle*, 788 F.2d 1116, 1123 (5th Cir. 1986) (“[R]emedial court orders
28 per se, apart from independent constitutional grounds affirmed there, cannot serve as a
substantive basis for a § 1983 claim for damages because such orders do not create ‘rights,
privileges, or immunities secured by the Constitution and laws.’”) (quoting 42 U.S.C.
§ 1983).

1 border.”), demonstrates that it was not clearly established that any “seizure” here was
2 unreasonable. *See Emmons v. City of Escondido*, 921 F.3d 1172, 1174 (9th Cir. 2019)
3 (quoting *White v. Pauly*, 137 S.Ct. 548, 552 (2017) (per curiam)) (“[L]iability will not
4 attach unless there exists ‘a case where an officer acting under similar circumstances . . .
5 was held to have violated the Fourth Amendment.”). Accordingly, Count VI should be
6 dismissed.

7 **D. Defendants Did Not Personally Violate Plaintiffs’ Constitutional or Federal** 8 **Statutory Rights**

9 As the Supreme Court has made clear, “[b]ecause vicarious liability is inapplicable
10 to *Bivens* . . . suits,” to survive a motion to dismiss “a plaintiff must plead that each
11 Government-official defendant, *through the official’s own individual actions*, has violated
12 the Constitution.” *Iqbal*, 556 U.S. at 676 (emphasis added). In *Iqbal*, for example, the
13 Supreme Court rejected as insufficient allegations that (1) the former Attorney General and
14 former Director of the FBI “knew of, condoned, and willfully and maliciously agreed” to
15 subject plaintiff to constitutional violations because of race, religions or national origin, (2)
16 the AG was the “principal architect” of the policy, and (3) the FBI Director was
17 “instrumental in [its] adoption, promulgation, and implementation” as a conclusory,
18 formulaic recitation of the elements of a claim, and not entitled to an assumption of truth.
19 *Id.* at 669, 680–81. Adequate allegations of fact establishing personal participation are
20 required both in *Bivens* and federal statutory civil rights claims. *See Iqbal*, 556 U.S. at 676
21 (“Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must
22 plead that each Government-official defendant, through the official’s own individual
23 actions, has violated the Constitution.”); *Bisbee*, 39 F.3d at 1102 (“The justifications for
24 the doctrine of qualified immunity enunciated in *Harlow* are equally present in section
25 1985 claims.”).

26 As an initial matter, the Complaint contains allegations of conduct by persons other
27 than Defendants. For example, Plaintiffs allege other, unnamed, government employees
28 performed the actual separations. *See id.* ¶¶ 62, 80, 94, 105, 112–113, 166. Plaintiffs do

1 not allege that Defendants personally participated in Plaintiffs’ separations. Compl. ¶¶ 59–
2 122. John/Jane Doe Defendants are also alleged to have engaged in malfeasance by lying
3 to or coercing asylum seekers, or participating in other misconduct. *Id.* ¶¶ 169, 178–182.
4 Plaintiffs further allege that government employees physically mistreated Plaintiffs or
5 others. *See, e.g., id.* ¶ 82 (driving recklessly while Plaintiff was shackled in back of
6 vehicle); *id.* ¶ 104 (repeatedly striking a mother). But because it is black letter law that
7 there is no “respondeat superior” liability in *Bivens* actions, *Iqbal*, 556 U.S. at 676, the
8 named Defendants cannot be liable for any of those actions.

9 For that same reason, allegations that Defendants failed to provide Plaintiffs with
10 adequate health care, Compl. ¶¶ 291–300, are insufficient and fail for lack of personal
11 participation. Even presuming constitutionally inadequate care was alleged,²⁵ Defendants
12 were many steps removed from custodians or medical professionals who might have been
13 personally responsible for Plaintiffs’ medical care or aware of their medical conditions.
14 Defendants all are or were in high-level policymaking positions, and were not even direct
15 supervisors of federal employees within DHS or ORR with custodial responsibility for
16 Plaintiffs. Therefore, Count II should be dismissed.

17 Furthermore, some Defendants are not alleged to have done anything, or could not
18 have participated in the government’s alleged unconstitutional conduct because their tenure
19 did not overlap with the timing of the alleged conduct. For example:

- 20 • Defendants Morgan and Albence are not alleged to have taken any actions, let alone
21 any unconstitutional actions. Similarly, the Complaint contains only a single
22 conclusory allegation of any conduct by Secretary Azar, and it is without probative
23 value. Compl. ¶ 233.
- 24 • Some Defendants have left their positions or government service altogether before
25 portions of the alleged misconduct occurred, *e.g.*, Defendants Kelly (left January 2,
26

27 ²⁵ *See Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (explaining the high standard
28 for alleging a deliberate indifference claim).

1 2019), Homan (June 29, 2018), Vitiello (April 12, 2019), Cissna (June 1, 2019), and
2 Lloyd (November 2018), and cannot be liable for any of the alleged conduct after
3 their departure, *e.g.*, Compl. ¶ 234.

- 4 • Some Defendants only entered into government service or assumed their positions
5 after portions of the alleged misconduct occurred, *e.g.* Defendants Azar (began
6 January 29, 2018), Morgan (May 28, 2019), Cissna (October 8, 2017), and cannot
7 be liable for any of the alleged conduct before they started, *e.g.*, Compl. ¶ 125
8 (discussing alleged February 14, 2017 meeting); *id.* ¶ 142 (discussing alleged
9 “December 2017 Family Separation Memo”).

10 Accordingly, at the very least, the Court should dismiss the second cause of action and all
11 claims against Morgan and Albence and narrow any remaining claims to actions taken
12 while Defendants were in their official positions.

13 **E. The Court Should Dismiss Plaintiffs’ Federal Statutory Claims For** 14 **Additional Reasons**

15 Defendants are also entitled to qualified immunity with respect to Plaintiffs’ claims
16 under Sections 1985 (Count VII) and 1986 (Count VIII). *See Abbasi*, 137 S. Ct. at 1866
17 (applying qualified immunity to Section 1985 claim). To state a claim under Section
18 1985(3), a plaintiff must allege “(1) a conspiracy; (2) for the purpose of depriving, either
19 directly or indirectly, any person or class of persons of the equal protection of the laws, or
20 of equal privileges and immunities under the laws; and (3) an act in furtherance of the
21 conspiracy; (4) whereby a person is either injured in his person or property or deprived of
22 any right or privilege of a citizen of the United States.” *United Bhd. of Carpenters &*
23 *Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 828–29 (1983). Section
24 1985(3), however, “provides no substantive rights itself.” *Id.* at 833. Instead, “[t]he rights,
25 privileges, and immunities that § 1985(3) vindicates must be found elsewhere.” *Id.*
26 Allegations that the “conduct was motivated by a racial or perhaps otherwise class-based,
27 invidiously discriminatory animus . . . constitutes an essential element of a cause of action
28

1 under section 1985(3).” *Trerice v. Pedersen*, 769 F.2d 1398, 1402 (9th Cir. 1985). Here,
2 Plaintiffs invoke their equal protection rights. Compl. ¶ 339.

3 In addition to the reasons already given by Defendants about why they are entitled
4 to qualified immunity for Plaintiffs’ equal protection claim, *supra*, Section V.B,
5 Defendants are also entitled to qualified immunity on Plaintiffs’ statutory claims. *See*
6 *Griffin*, 403 U.S. at 102–03 (noting that cause of action under § 1985(3) requires proof of
7 an injury to, or deprivation of, a federally assured right or privilege). Indeed, the extent to
8 which Section 1985(3) even applies to federal actors at all has not been not clearly
9 established, *see DeBolt v. Rose*, No. 4:15-CV-00215, 2017 WL 3701002, at *2 (D. Ariz.
10 Mar. 31, 2017) (Soto, J.) (holding that the court lacked subject matter jurisdiction over
11 Section 1985(3) claim against individual federal defendants), let alone against federal
12 actors who formulate general policy. *Cf. Canlis v. San Joaquin Sheriff’s Posse Comitatus*,
13 641 F.2d 711, 719–20 (9th Cir. 1981) (“§ 1985(3) was originally designed to protect
14 oppressed southern blacks from the violence of the vindictive Ku Klux Klan . . .”).

15 Fundamentally, Plaintiffs statutory claims fail because they do not allege any
16 conspiracy between distinct persons or entities. Rather, Plaintiffs allege that Executive
17 Branch officials “consult[ed] among themselves and then adopt[ed] a policy for the entity,”
18 the Executive Branch. *Abbasi*, 137 S. Ct. at 1867. As *Abbasi* explained, “[u]nder this
19 principle—sometimes called the intracorporate-conspiracy doctrine—an agreement
20 between or among agents of the same legal entity, when the agents act in their official
21 capacities, is not an unlawful conspiracy.” *Id.* This doctrine is “derived from the nature of
22 the conspiracy prohibition,” which requires an agreement between “two or more separate
23 persons.” *Id.* But “[w]hen two agents of the same legal entity make an agreement in the
24 course of their official duties . . . as a practical and legal matter their acts are attributed to
25 their principal. And it then follows that there has not been an agreement between two or
26 more separate people.” *Id.*; *see Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771
27 (1984) (“They are not unlike a multiple team of horses drawing a vehicle under the control
28 of a single driver.”).

1 Drawing on these principles, *Abbasi* discussed the viability of a Section 1985(3)
2 claim against multiple “Executive Branch” officials for discussions that “were the preface
3 to, and the outline of, a general and far-reaching policy.” 137 S. Ct. at 1867. Although the
4 Court declined to decide on the applicability of intracorporate-conspiracy doctrine with
5 reference to Section 1985(3) conspiracies, the Court found the law was “sufficiently open”
6 that the government employees were entitled to qualified immunity. *Id.* at 1868–69; *accord*
7 *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1245 (9th Cir. 2019) (holding that
8 FBI agents were entitled to qualified immunity against liability against a Section 1985(3)
9 claim); *id.* at 1245–46 (explaining that agents could not “reasonably have known that
10 agreements entered into or agreed-upon policies devised with other employees of the FBI
11 could subject them to conspiracy liability under § 1985(3)”). Just as in *Abbasi*, many of the
12 Defendants here work or worked in the same agencies, and all Defendants worked for the
13 same branch of government, raising similar intracorporate-conspiracy issues. As with the
14 “team of horses” analogy mentioned in *Abbasi*, executive agencies and departments all
15 work together under the leadership of the White House and, ultimately, the President. *See*
16 *Nat’l Min. Ass’n v. McCarthy*, 758 F.3d 243, 249 (D.C. Cir. 2014) (“[E]xecutive agencies
17 . . . operate under the direction and supervision of the single President.”). Because the law
18 is no clearer now than it was at the time *Abbasi* was decided, Defendants are entitled to
19 qualified immunity.

20 Plaintiffs’ claim under 42 U.S.C. § 1986 must derivatively fail because a violation
21 of Section 1986 depends on an underlying violation of Section 1985. Section 1986 provides
22 that “[e]very person who, having knowledge that any of the wrongs conspired to be done,
23 and mentioned in section 1985 . . . are about to be committed, and having power to prevent
24 or aid . . . neglects or refuses so to do . . . shall be liable to the party injured . . .” 42 U.S.C.
25 § 1986. If a plaintiff fails to demonstrate a claim under Section 1985, however, courts
26 consistently conclude that a plaintiff cannot sustain a cause of action under Section 1986.
27 *See, e.g., Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 626 (9th Cir. 1988)
28 (“A claim can be stated under section 1986 only if the complaint contains a valid claim

1 under section 1985.”). In short, Plaintiffs’ Section 1986 claim is doomed by their failure to
2 allege facts sufficient to state a claim under Section 1985, and both claims should be
3 dismissed on the basis of qualified immunity. *See Saucier*, 533 U.S. at 201.

4 **VI. PLAINTIFFS’ CHALLENGE TO PROSECUTORIAL POLICYMAKING IS** 5 **BARRED BY ABSOLUTE IMMUNITY**

6 In *Imbler v. Pachtman*, the Supreme Court held that “in initiating a prosecution and
7 in presenting the [government’s] case, the prosecutor is immune from a civil suit for
8 damages” 424 U.S. 409, 431 (1976); *see also Schloss v. Bouse*, 876 F.2d 287, 290 (2d
9 Cir. 1989) (absolute immunity also protects the decision not to prosecute). This immunity
10 extends to any activities of the prosecutor “intimately associated with the judicial phase of
11 the criminal process” *Imbler*, 424 U.S. at 430. The Court has continued to employ
12 *Imbler*’s functional approach in determining whether absolute prosecutorial immunity
13 applies in a given case. *See Burns v. Reed*, 500 U.S. 478, 492 (1991) (listing cases). The
14 Supreme Court has confirmed that, like line prosecutors, policymakers are absolutely
15 immune from claims that arise out of the formulation of prosecutorial policies. *See Van de*
16 *Kamp v. Goldstein*, 555 U.S. 335, 349 (2009) (supervising prosecutors had absolute
17 immunity for general claims that their “supervision, training, or information-system
18 management was constitutionally inadequate”); *accord Dellums v. Powell*, 660 F.2d 802,
19 803 (D.C. Cir. 1981) (extending *Imbler*’s prosecutorial immunity to the Attorney General
20 for acts of prosecutorial policymaking).

21 Plaintiffs allege that in April 2018 former AG Sessions announced a “Zero
22 Tolerance” policy to criminally prosecute all DHS referrals of Section 1325(a) violations.
23 Compl. ¶ 158. This decision to initiate prosecutions against a class of offenders (whether,
24 as Plaintiffs claim, it was a “pretext” for discrimination, *id.* ¶ 160, or not) was the kind of
25 core activity protected by *Imbler*. 424 U.S. at 431. To the extent former AG Sessions, or
26 any other Defendant, is alleged to have created or implemented the policy of criminal
27 prosecution at issue, such acts are protected by absolute immunity, and all related claims
28 must be dismissed. *Dellums*, 660 F.2d at 806; *see* Compl. ¶ 160 (suggesting that the

1 government’s zero-tolerance policy “was conceived of” by Defendants Sessions, Nielsen,
2 Miller, and Hamilton). As discussed above, the immunity derives from the function of the
3 prosecutorial act, not the particular title of the government official. *See Romano v. Bible*,
4 169 F.3d 1182, 1186 (9th Cir. 1999) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269
5 (1993)) (“The Supreme Court has adopted a ‘functional approach’ to determine whether
6 an official is entitled to absolute immunity. This approach looks to the nature of the
7 function performed, not the identity of the actor who performed it.”).

8 **CONCLUSION**

9 For the reasons set forth above, Defendants respectfully request that the Court
10 dismiss the Complaint with prejudice.

11 Dated this 14th day of February, 2020.

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LRCiv 12.1 CERTIFICATION

Pursuant to Local Rule 12.1(c), Defendants’ counsel certifies that before filing this motion, I notified Plaintiffs’ counsel of the issues to be asserted in this motion and the parties were unable to agree that the pleading was curable in any part by a permissible amendment offered by Plaintiffs.

/s/ Paul Quast
Paul Quast

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by means of the District Clerk’s CM/ECF electronic filing system on February 14, 2020.

/s/ Paul Quast
Paul Quast