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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

MARTIN VARGAS, as successor in
interest of the estate of Martin
Vargas Arellano,

Plaintiff,

v.

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

Defendants.

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

**ORDER REGARDING
DEFENDANT’S MOTION TO
DISMISS PLAINTIFF’S SECOND
AMENDED COMPLAINT [ECF
No. 80]**

1 Before the Court is the motion of Defendant United States of America to
 2 dismiss the operative Second Amended Complaint of Plaintiff Martin Vargas.¹
 3 After considering the papers filed in support and in opposition,² as well as the
 4 argument of counsel at the hearing,³ the Court orders that the United States's
 5 instant Motion is **GRANTED in part** and **DENIED in part**, for the reasons set
 6 forth herein.

7 I. BACKGROUND

8 This case arises from the death of Martin Vargas Arellano, an immigration
 9 detainee who was in custody at the ICE Adelanto Processing Center. Plaintiff
 10 Vargas is Arellano's son. The parties are familiar with the facts and procedural
 11 posture of the case.

12 In his operative Second Amended Complaint, Vargas seeks damages
 13 against the United States—the appropriate defendant under the Federal Tort
 14 Claims Act (the “FTCA”). *See* 28 U.S.C. § 1346(b).⁴ Specifically, Vargas
 15 asserts the following claims for relief against the United States:

- 16 • negligence pursuant to the FTCA (the first claim);
- 17 • negligent infliction of emotional distress (“NIED”) pursuant to the
- 18 FTCA (the second claim);
- 19 • intentional infliction of emotional distress (“IIED”) pursuant to the
- 20 FTCA (the third claim);

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 22 ¹ Def.'s Mot. to Dismiss (the “Motion”) [ECF No. 80].

23 ² The Court considered the documents of record in this action, including
 24 the following papers: (1) Second Am. Complaint (the “Amended Complaint”)
 25 [ECF No. 71]; (2) Motion; (3) Pl.'s Opp'n to the Motion (the “Opposition”)
 26 [ECF Nos. 82 (redacted) & 83 (sealed, unredacted)]; and (4) Def.'s Reply in
 27 Supp. of the Motion (the “Reply”) [ECF No. 92].

28 ³ *See* Min. Order for Hearing re: Def.'s Mot. to Dismiss Pl.'s Second Am.
 Compl. [ECF No. 96].

⁴ Amended Complaint ¶ 19.

- 1 • false arrest/imprisonment pursuant to the FTCA (the fourth claim); and
2 • wrongful death (the eighth claim, which Vargas also asserts against
3 Defendants The Geo Group and Wellpath, LLC).⁵

4 The Court previously ruled upon the United States’s First Motion to
5 Dismiss Vargas’s First Amended Complaint.⁶ In that Order, the Court ruled—
6 in relevant part—as follows:

- 7 • the Court dismissed Vargas’s first, second, and third claims (for
8 negligence, NIED, and IIED) to the extent that those claims were based
9 upon ICE’s failure to shield Arellano adequately from contracting
10 COVID-19 and ICE’s failure to provide facilities and care sufficient to
11 meet Arellano’s medical needs;
- 12 • the Court dismissed Vargas’s first, second, and third claims to the extent
13 that those claims were based upon ICE’s failure to oversee facilities and
14 staff properly;
- 15 • the Court dismissed Vargas’s first, second, and third claims to the extent
16 that those claims were based upon ICE’s failure to release Arellano;
- 17 • the Court dismissed Vargas’s first and second claims (for negligence and
18 NIED) to the extent that those claims were based upon ICE’s failure to
19 disclose Arellano’s health condition and hospitalization to his counsel;
20 and
- 21 • the Court dismissed Vargas’s eighth claim (for wrongful death) as
22 derivative.⁷

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⁵ *See generally id.*

⁶ Order Granting in Part and Den. in Part Def.’s Mot. to Dismiss (the
“Order on First Motion to Dismiss”) [ECF No. 67]; *see also* Def.’s Mot. to
Dismiss Case (the “First Motion to Dismiss”) [ECF No. 50].

⁷ Order on First Motion to Dismiss 23.

1 All dismissals were without prejudice and with leave to amend.⁸

2 II. LEGAL STANDARD

3 The Court recited the appropriate legal standard in its Order on the First
4 Motion to Dismiss.⁹ The same standard applies to the instant Motion.

5 III. ANALYSIS

6 In its instant Motion, the United States argues that certain exceptions to
7 the FTCA’s waiver of sovereign immunity—specifically, the discretionary
8 function exception, the independent contractor exception, the private analog
9 requirement, and the misrepresentation exception—bar Vargas’s FTCA and
10 derivative claims. The Court explores each in turn.

11 A. Discretionary Function Exception

12 As it did in its First Motion to Dismiss, here the United States argues that
13 the discretionary function exception bars Vargas’s FTCA claims for relief to the
14 extent that those claims are based upon (1) ICE’s failure to release Arellano; and
15 (2) ICE’s failure to oversee its facilities and staff properly.

16 1. Failure to Release Arellano

17 In its Order on the First Motion to Dismiss, the Court dismissed Vargas’s
18 FTCA claims to the extent that those claims were based upon ICE’s failure to
19 release Arellano because the earlier pleading “challenge[d] the United States’s
20 failure to release Arellano,” but ICE was not required to release Arellano—
21 pursuant to *Frailhat v. U.S. Immigr. & Customs Enf’t*, 16 F.4th 613 (9th Cir.
22 2021), or any other authority—and Vargas “[did] not challenge the procedures
23 by which the United States complied (or failed to comply) with *Frailhat*.”¹⁰

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26 ⁸ See generally *id.*

27 ⁹ See *id.*

28 ¹⁰ *Id.* at 19.

1 In his current pleading, Vargas similarly does not assert that ICE was
2 required to release Arellano. Indeed, Vargas concedes that under *Fraihat*, ICE
3 had the discretion to release Arellano or not.¹¹ Vargas does not assert a claim for
4 relief for violation of procedural due process for ICE’s alleged failure to follow
5 the procedures prescribed by *Fraihat*. Accordingly, the discretionary function
6 exception continues to apply. To the extent that Vargas’s FTCA claims are
7 based upon ICE’s failure to release Arellano, the United States’s instant Motion
8 is **GRANTED**. Because Vargas has twice amended his pleading, including once
9 in response to this Court’s previous order, those claims are **DISMISSED**
10 **without leave to amend**.

11 2. Oversight of Facilities and Staff

12 In its Order on the First Motion to Dismiss, the Court ruled that Vargas’s
13 FTCA claims survived with respect to ICE’s alleged failure to provide medically
14 sufficient facilities and care because Vargas had adequately alleged that ICE had
15 failed to comply with its own mandatory policies. In contrast, the Court
16 dismissed Vargas’s claims to the extent that they were based upon ICE’s failure
17 to oversee facilities and staff properly. With respect to those claims, though, the
18 Court’s reasoning did not focus on ICE’s failure to abide by its own policies.
19 Rather, the Court relied upon *Nurse v. United States*, 226 F.3d 996, 1001 (9th
20 Cir. 2000), to conclude “that it is well established that issues of employee
21 supervision ‘fall squarely within the discretionary function exception.’”¹²

22 Vargas has amended his pleading to aver—like he did with his failure-to-
23 provide-care claims—that ICE failed to comply with its own mandatory policies
24 with respect to its oversight of its facilities and staff, such that the discretionary
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26 ¹¹ See Opposition 19:8-9 (acknowledging that ICE had the authority to
27 release Arellano).

28 ¹² Order on First Motion to Dismiss 14 (quoting *Nurse*, 226 F.3d at 1001).

1 function exception does not apply. Specifically, Vargas alleges that “ICE did
2 not comply with its mandatory oversight obligations and took no corrective
3 action—under the PBNDS, PRR, or its contract with GEO—against GEO’s
4 failure to follow [ICE’s PBNDS] standards during the height of the COVID-19
5 pandemic.”¹³ The Court concludes that Vargas has adequately corrected the
6 deficiency in his earlier pleading with respect to that issue. As Vargas argues,
7 “[t]he Ninth Circuit has ‘generally held that the *design* of a course of
8 governmental action is shielded by the discretionary function exception, whereas
9 the *implementation* of that course of action is not.’”¹⁴ “‘The Government
10 cannot claim that both the decision to take safety measures and the negligent
11 implementation of those measures are protected policy decisions.’”¹⁵

12 The United States argues that Vargas’s claims related to ICE’s alleged
13 failure to oversee its contractors properly are barred by the FTCA because
14 Vargas “has failed to establish any mandatory and specific requirements on the
15 United States’s oversight of GEO or Wellpath.”¹⁶ For that proposition, the
16 United States cites two unpublished, non-binding cases: *Shinotsuka v. Fed. Corr.*
17 *Inst. Terminal Island*, 2023 WL 6812759 (C.D. Cal. Sept. 14, 2023), and *Murillo*
18 *v. United States Dep’t of Just.*, 2022 WL 16745333 (D. Ariz. Nov. 7, 2022).¹⁷
19 Each of those cases concluded that the plaintiff had failed to cite mandatory
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21 ¹³ Amended Complaint ¶ 65; *see also id.* ¶ 64.

22 ¹⁴ Opposition 18:2-6 (quoting *Whisnant v. United States*, 400 F.3d 1177, 1181
23 (9th Cir. 2005)) (emphasis in original).

24 ¹⁵ *Id.* at 18:8-10 (quoting *Marlys Bear Med. v. U.S. ex rel. Sec’y of Dep’t of*
25 *Interior*, 241 F.3d 1208, 1215 (9th Cir. 2001)).

26 ¹⁶ Motion 20:26-28; *see also* Reply 10:11-12 (“[Vargas] fails to identify any
27 mandatory oversight procedures, nor allege how they were violated in a manner
that plausibly caused Arellano’s death.”).

28 ¹⁷ *See* Motion 20:28-22:1.

1 authority requiring the government to undertake the specific COVID-19
2 protective conduct that the plaintiff alleged it had failed to do. And during the
3 hearing on its Motion, the United States invited the Court’s attention to another
4 unpublished, non-binding case—*Ahn v. GEO Grp., Inc.*, 2024 WL 1258428
5 (E.D. Cal. Mar. 25, 2024), which the United States cites in its Reply but not its
6 Motion—for a similar proposition, although that case dealt with the
7 government’s alleged failure to abide by its own mental health screening
8 requirements for an inmate who ultimately committed suicide.¹⁸ Each of the
9 cases the United States cites is distinguishable because none entails the court-
10 imposed COVID-19-specific policies that Vargas confronts here. Additionally,
11 as the Court discusses in more detail below,¹⁹ the district court in *Roman v.*
12 *Wolf*, Case No. 5:20-cv-00768-TJH (PVCx) (C.D. Cal.), imposed certain
13 requirements upon ICE, and Vargas plausibly alleges that ICE failed to comply
14 with them.

15 Therefore, the Court **DENIES** the United States’s Motion to the extent
16 that Vargas’s FTCA claims are based upon ICE’s failure to oversee its facilities
17 and staff properly.

18 **B. Independent Contractor Exception**

19 As it did in its First Motion to Dismiss, the United States now argues that
20 the independent contractor exception bars Vargas’s FTCA claims to the extent
21 that those claims are based upon the allegations that ICE (1) failed to shield
22 Arellano adequately from contracting COVID-19; and (2) failed to provide
23 facilities and care sufficient to meet Arellano’s medical needs.²⁰

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26 ¹⁸ See generally Reply.

27 ¹⁹ See *infra* Part III.B.

28 ²⁰ See Motion 23:13-26:13.

1 In its Order on the First Motion to Dismiss, the Court agreed with the
2 United States’s argument and dismissed those claims. The Court applied the
3 three-part test set forth in *Edison v. United States*, 822 F.3d 510, 513 (9th Cir.
4 2016), and concluded that the independent contractor exception barred those
5 claims. The *Edison* test requires the Court (1) to analyze whether the applicable
6 state law would impose a duty of care on a private individual in a similar
7 situation; (2) if it would, then to “look[] to the contract and the parties’ actions
8 to determine whether the United States retained some portion of that duty for
9 which it could be held directly liable”; and (3) even if it appears that the
10 government delegated all of its duties to the independent contractor, to ask
11 whether the applicable state law imposed any nondelegable duties on the
12 government. *See Edison*, 822 F.3d at 519.

13 Specifically, the Court determined that, in his First Amended Complaint,
14 Vargas “fail[ed] at the first step” because “[w]hile Vargas cite[d] cases that
15 recognize a special relationship between jailers and prisoners, he d[id] not
16 address whether California law would impose the duty of care alleged here on a
17 *private person* in a similar situation.”²¹ Vargas argues that he “amended the
18 complaint to directly address the Court’s concerns”; specifically, by adding
19 Paragraphs 147 through 151 in the current Amended Complaint.²²

20 With respect to the first *Edison* prong, Vargas analogizes to “California’s
21 standard duty of care under tort law,” which “recognizes that ‘[a]s a general
22 principle, a defendant owes a duty of care to all persons who are foreseeably
23 endangered by his conduct, with respect to all risks which make the conduct
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25 ²¹ Order on First Motion to Dismiss 13 (citing the analogy in *Edison* between
26 the government’s duty to warn prisoners about cocci and a private landowner’s
27 duty under California law to act reasonably in the management of his or her
28 property) (emphasis in original).

²² Opposition 10:10-11.

1 unreasonably dangerous.’”²³ That duty of care, which is imposed upon private
2 persons, combined with the authority that Vargas cites—which “recognizes a
3 ‘special relationship’ between jailer [including contractors] and prisoner that
4 gives rise to a duty of care that requires jailers to protect prisoners against
5 ‘unreasonable risk of physical harm’”²⁴—convinces the Court that Vargas has
6 satisfied the first prong.

7 With respect to the second *Edison* prong, Vargas argues that ICE
8 retained—and breached—its duty of care “related to shielding Arellano from
9 the virus and ensuring the facility’s adequacy for individuals at high-risk of
10 death.”²⁵ For that proposition, Vargas points to allegations regarding the direct
11 role that ICE’s Assistant Field Office Director, Gabriel Valdez, allegedly played
12 in implementing COVID-19 protocols at Adelanto.²⁶ In its instant Motion, the
13 United States does not engage with these allegations. Vargas also argues that
14 “ICE has a direct and undelegated duty under the detention contract to adhere
15 to its own monitoring and compliance policies and procedures,” including:

- 16 • monitoring, assessing, recording, and reporting on the technical
17 performance, including compliance with the PBNDS standards, of GEO
18 on a day-to-day basis;
 - 19 • ensuring that medical care at Adelanto meets detention standards; and
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24 ²³ *Id.* at 11:10-14 (quoting *Golick v. State of California*, 82 Cal. App. 5th 1127,
1138 (2022)) (internal quotations omitted).

25 ²⁴ Amended Complaint ¶ 147 (quoting *Giraldo v. Dep’t of Corr. & Rehab.*,
26 168 Cal. App. 4th 231, 248 (2008)).

27 ²⁵ Opposition 12:15-16.

28 ²⁶ *Id.* at 12:16-27.

- 1 • conducting bi-weekly spot checks and issuing Contract Discrepancy
2 Reports (CDRs) for noncompliance.²⁷

3 The United States argues that Vargas cannot prove his underlying tort
4 claim because “Adelanto’s testing and social distancing requirements were
5 already controlled by the *Roman* Court’s orders.”²⁸ But, as the United States
6 appears to concede, the *Roman* court ordered ICE to act—*i.e.*, it imposed certain
7 duties upon ICE—with respect to COVID measures.²⁹ And the Court
8 concludes that Vargas plausibly alleges that the United States breached those
9 duties with respect to Arellano. Determining the veracity of the *Roman* court’s
10 finding that ICE was in compliance and assessing the impact of that finding on
11 this case are not appropriate at this stage.

12 Therefore, the Court **DENIES** the Motion with respect to Vargas’s
13 FTCA claims to the extent that those claims are based upon the allegations that
14 ICE (1) failed to shield Arellano adequately from contracting COVID-19; and
15 (2) failed to provide facilities and care sufficient to meet Arellano’s medical
16 needs.

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²⁷ *Id.* at 12:28-13:10 (citing Amended Complaint ¶ 64 for the list of ICE’s
21 allegedly non-delegable duties).

22 ²⁸ Motion 25:22-23.

23 ²⁹ *See id.* at 25:23-24 (“In September 2020, the *Roman* district court ordered
24 ICE to begin weekly testing for COVID-19 for all detainees.”) (internal
25 quotations omitted). At the hearing, the United States also argued that its
26 assertion of *Ahn* applies to prove the independent contractor exception for the
27 same reason that it applies to the discretionary function exception. However, as
28 the Court concluded with respect to the discretionary function exception, *Ahn* is
 distinguishable, and it does not support the United States’s position. *See supra*
 Part III.A.2.

1 **C. Private Analog Requirement**

2 The United States argues that the private analog requirement bars
3 Vargas’s FTCA claims (and his derivative wrongful death claim) to the extent
4 that those claims are based upon the United States’s alleged failure to
5 communicate Arellano’s health status.³⁰

6 The United States had previously asserted the same private-analog-
7 requirement argument.³¹ In its Order on the First Motion to Dismiss, the Court
8 concluded that Vargas “c[ame] close” to meeting the private analog
9 requirement by citing to *Est. of Duran v. Chavez*, 2015 WL 8011685, at *12
10 (E.D. Cal. Dec. 7, 2015), but that Vargas did not sufficiently expand upon the
11 analogy.³² Vargas now provides an extensive explanation of the analogy,³³ and
12 the Court concludes that he meets the private analog requirement.

13 **D. Misrepresentation Exception**

14 The United States also argues that the misrepresentation exception bars
15 Vargas’s FTCA claims (and his derivative wrongful death claim) to the extent
16 that those claims are based upon the United States’s alleged failure to
17 communicate Arellano’s health status.³⁴ The United States asserts the
18 misrepresentation exception in this Motion for the first time. The FTCA
19 provides an exception for “[a]ny claim arising out of . . . misrepresentation [or]
20 deceit” 28 U.S.C. § 2680(h). “28 U.S.C. § 2680(h) prohibits claims
21 against the government arising out of negligent, as well as intentional,
22 misrepresentation,” but “[t]he prohibition applies only to the misrepresentation
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24 ³⁰ Motion 26:14-29:5.

25 ³¹ See First Motion to Dismiss.

26 ³² Order on First Motion to Dismiss 20.

27 ³³ Opposition 23:14-26:2.

28 ³⁴ Motion 26:14-29:5.

1 portion of the lawsuit.” *United States v. Fowler*, 913 F.2d 1382, 1387 (9th Cir.
2 1990) (citing *Block v. Neal*, 460 U.S. 289, 295 (1983)). It “bar[s] negligence
3 actions which focus . . . on the Government’s failure to use due care in
4 communicating information,” but not negligence actions that focus “on the
5 Government’s breach of a different duty.” *Block*, 460 U.S. at 297. The United
6 States appropriately asserts that the exception is no longer limited to claims for
7 economic loss from misrepresentations in commercial decisions. *See, e.g., Kim*
8 *v. United States*, 940 F.3d 484, 493 (9th Cir. 2019); *Doe v. Holy See*, 557 F.3d
9 1066, 1084 n.10 (9th Cir. 2009) (*per curiam*); *Lawrence v. United States*, 340 F.3d
10 952, 958 (9th Cir. 2003).

11 Vargas is correct that the bulk of his FTCA claims (and his derivative
12 wrongful death claim) addresses “the Government’s breach of a different
13 duty,” but to the extent that those claims focus on ICE’s “failure to use due
14 care in communicating information” with respect to Arellano’s health
15 information and status, the Motion is **GRANTED**. Because Vargas has twice
16 amended his pleading, including once in response to the Court’s previous order,
17 those claims are **DISMISSED without leave to amend**. To the extent that
18 Vargas’s claims do not focus on ICE’s failure to communicate and are not
19 otherwise barred by the other doctrines detailed in this Order, the Motion is
20 **DENIED**.

21 **E. Wrongful Death Claim**

22 Both parties agree that Vargas’s wrongful death claim is derivative of his
23 other claims.³⁵ Therefore, his wrongful death claim will follow his FTCA claims
24 in disposition: to the extent that it is based upon ICE’s alleged failure to release
25 Arellano or to communicate Arellano’s health status, Vargas’s eighth claim is
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28 ³⁵ *Id.* at 29:6-11 & 27:17-20.

1 **DISMISSED without leave to amend.** But, otherwise, with respect to the
2 eighth claim, the instant Motion is **DENIED.**

3 **F. Evidentiary Objections**

4 The United States also raises certain evidentiary objections to
5 attachments that Vargas included with his Opposition.³⁶ As Vargas states,
6 Defendants’ instant Motion is a factual challenge pursuant to Rule 12(b)(1) of
7 the Federal Rules of Civil Procedure, which allows the Court to review materials
8 outside the pleadings.³⁷ Therefore, the United States’s Objections are
9 **OVERRULED.**

10 **IV. DISPOSITION**

11 For the foregoing reasons, the Court hereby **ORDERS** as follows:

12 1. The United States’s evidentiary Objections are **OVERRULED.**

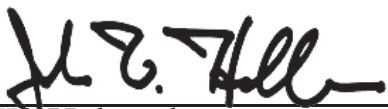
13 2. To the extent that Vargas’s first, second, third, fourth, and eighth
14 claims for relief are based upon ICE’s alleged failure to release Arellano or to
15 communicate Arellano’s health status, the Motion is **GRANTED** and those
16 claims are **DISMISSED without leave to amend.**

17 3. Otherwise, the Motion is **DENIED.**

18 4. The United States is **DIRECTED** to file its Answer to Vargas’s
19 Amended Complaint no later than August 30, 2024.

20 **IT IS SO ORDERED.**

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22 Dated: August 13, 2024



John W. Holcomb
UNITED STATES DISTRICT JUDGE

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26 ³⁶ Def.’s Objs. to Pl.’s Evid. Submitted in Opp’n to the Motion [ECF
No. 92-1].

27 ³⁷ Pl.’s Resp. to Def.’s Objections [ECF No. 95]; *see also* Order on First
28 Motion to Dismiss 9 (stating the rule for Rule 12(b)(1) factual challenges).