



**PRACTICE ADVISORY<sup>1</sup>**

**FEDERAL TORT CLAIMS ACT:  
FREQUENTLY ASKED QUESTIONS FOR ATTORNEYS REPRESENTING IMMIGRANT CLIENTS<sup>2</sup>**

December 10, 2025

***Introduction***..... 3

1. What is the Federal Tort Claims Act? ..... 3

2. What is the process for filing a claim under the FTCA? ..... 3

3. Why should attorneys file FTCA claims for their immigrant clients? ..... 4

4. How is an FTCA action different from a *Bivens* action? ..... 4

5. What kinds of immigration officers and agencies may be liable under the FTCA? ..... 5

6. Are attorneys’ fees and costs available? ..... 6

***Types of Claims and Applicable Law*** ..... 7

7. What types of immigration-enforcement related claims can be brought under the FTCA? . 7

8. What are some instances in which FTCA claims have been successfully brought on behalf of immigrants subjected to harmful immigration policies? ..... 9

9. What state law applies to FTCA claims? ..... 10

10. What type of compensation is available under the FTCA?..... 10

***Filing an FTCA Administrative Claim*** ..... 11

11. What is the deadline for filing an FTCA administrative claim? ..... 11

12. How is an FTCA administrative claim presented?..... 12

13. How does one decide the amount of damages to seek in an administrative claim?..... 12

---

<sup>1</sup> Copyright (c) 2025, National Immigration Project and Asylum Seeker Advocacy Project (ASAP). This advisory should not be used as a substitute for independent legal advice and decision-making by a lawyer familiar with a client’s case. Readers are cautioned to check for new legal developments.

<sup>2</sup> This resource was originally drafted in 2013 by Priya Patel, a law student at the time, under the supervision of Trina Realmuto, formerly the litigation director at the National Immigration Project. NILA and the National Immigration Project updated this resource in 2021. This 2025 update was authored by National Immigration Project attorneys Ann Garcia, Michelle Mendez, and Matthew Vogel, and ASAP attorneys Marcela Johnson and Jess Hanson.

14.	Where is an FTCA administrative claim filed?.....	13
15.	Can a claimant amend an administrative claim? .....	13
16.	What happens after the administrative claim is filed? .....	14
	<b><i>Litigating FTCA Claims in Federal Court</i></b> .....	<b>14</b>
17.	What is the deadline for filing an FTCA lawsuit in federal court? .....	14
18.	Who is the defendant in an FTCA lawsuit and on whom is the complaint served?.....	15
19.	Where is a federal FTCA lawsuit filed? .....	15
20.	What is the “private person analog” requirement?.....	17
21.	What is the judgment bar?.....	19
22.	Should FTCA and <i>Bivens</i> claims be brought together? .....	20
23.	What other legal claims can be brought alongside an FTCA claim in the same lawsuit? ..	21
	<b><i>Common Defenses to FTCA Claims</i></b> .....	<b>22</b>
24.	Are defenses available to the United States? .....	22
25.	What is the due care exception? .....	22
26.	What is the discretionary function exception? .....	23
27.	What is the foreign country exception? What if the tort occurred in the United States and DHS subsequently deports the person?.....	25
28.	What is the law enforcement proviso and how does it interact with the discretionary function exception? .....	26
29.	Does the Immigration and Nationality Act Section 1252(g) bar jurisdiction over FTCA claims?.....	27

## Introduction

### 1. What is the Federal Tort Claims Act?

The Federal Torts Claims Act (FTCA) is a federal statute enacted in 1946 that expressly allows private individuals to sue the U.S. government for the wrongful conduct of federal employees. *See* 28 U.S.C. § 1346(b)(1). The FTCA states that U.S. district courts

shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

By expressly allowing lawsuits against the U.S. government, FTCA waives the United States' sovereign immunity and authorizes lawsuits for money damages based on the negligent acts or omissions of federal employees, and, in some instances, intentional misconduct of such employees.<sup>3</sup>

### 2. What is the process for filing a claim under the FTCA?

There is a two-step process to filing an FTCA claim. **First**, the injured individual must file an administrative claim with the relevant federal agency or agencies by submitting a [Standard Form 95](#) (SF-95).<sup>4</sup> The SF-95 must be submitted within **two years** of the injury or alleged government conduct.<sup>5</sup>

**Second**, if the agency does not settle the claim, and, instead, makes a “final denial” of the claim (*i.e.*, denies it or fails to act on it within six months after the SF-95 was filed), the claimant then may file a complaint in federal district court.<sup>6</sup> If the agency issues a final denial of the claim, the claimant must file a lawsuit within **six months** of the date on which the written notice of denial is mailed. These steps are discussed in detail below.

---

<sup>3</sup> *See* 28 U.S.C. §§ 1346(b)(1), 2671 *et seq.*; 28 C.F.R. §§ 14.1–14.11.

<sup>4</sup> 28 U.S.C. §§ 2672, 2675; 28 C.F.R. §§ 14.2–14.4.

<sup>5</sup> 28 U.S.C. § 2401(b). Note, the FTCA's two-year statute of limitation to file the administrative claim may be equitably tolled when (1) wrongful conduct by the defendant prevents plaintiffs from bringing a claim, and (2) when “extraordinary circumstances beyond plaintiffs' control” prevent timely filing. *Alvarez-Machain v. United States*, 96 F.3d 1246, 1251 (9th Cir. 1996) (citation omitted); *see also J.E.B. et al. v. United States*, No. 24-cv-03069, 2025 WL 3294964, at \*3 (D. Ariz. Nov. 26, 2025) (allowing family separation FTCA case to proceed, even though plaintiffs filed their administrative claim more than two years after the separation).

<sup>6</sup> 28 U.S.C. §§ 2401(b), 2675; 28 C.F.R. § 14.9.

### **3. Why should attorneys file FTCA claims for their immigrant clients?**

The FTCA allows people, regardless of immigration status, to receive monetary compensation if they have been harmed by employees of any federal agency, including the U.S. Department of Homeland Security (DHS), Department of Justice (DOJ), and Department of Health and Human Services (HHS), which houses the Office of Refugee Resettlement (ORR). In the immigration context, for example, noncitizens who have experienced physical abuse or excessive force by U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE) agents; negligent medical care while in immigration detention, including ORR custody; or wrongful death in detention, among other harms, may have viable FTCA claims.

There are several reasons why attorneys should consider filing FTCA administrative claims (and potentially lawsuits) for their immigrant clients who have been injured by federal agents.

First, a noncitizen who has been harmed by federal officials may have no other avenue for recovery or compensation for their injuries. The FTCA provides a potential pathway to meaningful financial compensation for noncitizens who have been mistreated by United States officials.

Second, bringing an FTCA lawsuit can promote accountability for government misconduct. The litigation itself can generate valuable discovery that exposes how and why the misconduct occurred, creating a record that can bolster other advocacy efforts to improve agency-wide practices. FTCA cases can also be paired with a strategic communications effort to draw public attention to officer misconduct and abuse and build public pressure for reform.

Third, while difficult and rarely achieved, immigration relief may be bargained for as part of an FTCA claim settlement. For instance, the authors of this advisory are aware of noncitizens having received a grant of deferred action and eligibility for work authorization, or an executed Form I-918 Supplement B certification for submission with a U visa petition as part of an FTCA claim settlement.<sup>7</sup> With respect to the U visa petition, a federal agency can sign the certification as part of a settlement, or, if the FTCA claim succeeds in federal court, the noncitizen can ask the district judge to sign it instead.<sup>8</sup>

### **4. How is an FTCA action different from a *Bivens* action?**

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized the availability of damages and injunctive relief for constitutional violations committed by federal officers acting under color of federal law or authority. Unlike the FTCA, which provides an explicit statutory cause of action for tort claims, *Bivens* claims provide an implied cause of action for violations arising directly under the United States Constitution.

---

<sup>7</sup> U nonimmigrant status provides lawful status and a path to permanent residency for certain undocumented crime victims who cooperate with law enforcement. See 8 U.S.C. §§ 1101(a)(15)(U), 1184(p).

<sup>8</sup> See, e.g., *Villegas v. Metro. Gov't of Nashville*, 907 F. Supp. 2d 907, 914 (M.D. Tenn. 2012) (granting plaintiff's motion for a U visa certification in damages action under 42 U.S.C. § 1983). Please note, however, that we have not found any recent examples of a federal court granting a motion for a U visa law enforcement certification in either a Section 1983 or FTCA action.

District courts have jurisdiction over *Bivens* actions pursuant to 28 U.S.C. § 1331 (federal question statute). Notably, *Bivens* suits are filed against federal officers in their individual capacities, not against the United States.

While certain aspects of FTCA and *Bivens* litigation overlap, constitutional claims brought against individual defendants in a *Bivens* action are beyond the scope of this advisory, and, due to Supreme Court decisions narrowing the availability of such claims, present a host of legal and practical complexities that may counsel against pursuing such remedies.<sup>9</sup> Claims against state and local entities and officials under 42 U.S.C. § 1983 or state law also are not covered in this advisory.

## **5. What kinds of immigration officers and agencies may be liable under the FTCA?**

The FTCA allows people to seek monetary damages for negligence by officers or employees of federal agencies, and for certain intentional torts committed by “investigative or law enforcement officers,” when those officers are acting within the scope of their employment and would be liable under the law of the state where the conduct occurred if they were private individuals.<sup>10</sup> As such, most immigration officers employed by DHS, including its component agencies ICE, CBP, and U.S. Citizenship and Immigration Services (USCIS), are covered.<sup>11</sup>

Immigration-related FTCA claims can involve misconduct by employees of other federal agencies, such as HHS (including subagencies ORR, which houses unaccompanied migrant children, and the U.S. Public Health Service), and the DOJ (including subagencies U.S. Marshals Service and the Federal Bureau of Investigation). FTCA claims may implicate the misconduct of employees of more than one federal agency.<sup>12</sup>

The FTCA generally does not authorize actions against independent contractors with the United States.<sup>13</sup> However, the United States still may be liable under the FTCA if a federal employee fails to prevent tortious conduct by contract employees acting under federal supervision,<sup>14</sup> if the federal

---

<sup>9</sup> *But see infra* Question 22, discussing the intersection of FTCA and *Bivens* actions.

<sup>10</sup> 28 U.S.C. §§ 1346(b)(1), 2671 (defining “federal agency” and “employee of the government”), 2680(h) (defining “investigative or law enforcement officer”).

<sup>11</sup> 8 C.F.R. § 1.2 (defining immigration officers); *see also* 8 U.S.C. § 1357 (outlining powers of immigration officers and employees, including investigative and law enforcement functions); 8 C.F.R. § 287.5 (same).

<sup>12</sup> *See* 28 C.F.R. § 14.2(b)(2).

<sup>13</sup> The FTCA only waives sovereign immunity for tortious conduct committed by government “employee[s],” 28 U.S.C. § 1346(b)(1), and the definition of “employee” specifically excludes “any contractor with the United States.” *Id.* § 2674. For example, the Supreme Court has held that the United States is not liable under the FTCA for an independent contractor’s negligence in operating a jail. *Logue v. United States*, 412 U.S. 521, 532–33 (1973).

<sup>14</sup> *See United States v. Shearer*, 473 U.S. 52, 56 (1985) (plurality opinion) (“[T]he Government may be held liable for negligently failing to prevent the intentional torts of a non-employee under its supervision.”).

government “control[s] the physical conduct of the contractor in performance of the contract,”<sup>15</sup> or if a federal employee negligently places a detained individual in the care of a contract employee or contract facility.<sup>16</sup> These distinctions may be especially relevant in the immigration context when suing the United States for abuse and medical negligence or malpractice in a contracted detention center. Separately, individuals may also pursue claims directly against private contractors under other federal laws or under state tort law, which often mirrors the FTCA’s standards and provides a parallel avenue for relief independent of federal sovereign immunity.<sup>17</sup>

## 6. Are attorneys’ fees and costs available?

The FTCA allows recovery of attorneys’ fees on a contingent basis, *see* 28 U.S.C. § 2678:

- If the claim is resolved administratively, attorneys’ fees may not exceed 20% of the settlement.
- If the claim is resolved after district court litigation is initiated, whether by a judgment or settlement, attorneys’ fees may not exceed 25% of the settlement or judgment.

The statute further provides that failure to abide by these rules could result in a fine of not more than \$2,000 or up to a year of imprisonment. Retainer agreements with clients should reflect these contingencies. It is also advisable that retainer agreements include the client’s consent to assign payment of FTCA fees to counsel’s Interest on Lawyer’s Trust Account (IOLTA). Counsel then must directly provide the client’s portion of recovery to the client.

In the immigration context, many FTCA cases are handled pro bono so that any recovery can go entirely to the client and their family, a practice that aligns with the statute’s fee limitations and the humanitarian nature of these claims.

---

<sup>15</sup> *Logue*, 412 U.S. at 527; *see also United States v. Orleans*, 425 U.S. 807, 814 (1976) (explaining the government can be held liable for a contractor’s acts if the contractor’s “day-to-day operations are supervised by the Federal Government”).

<sup>16</sup> *Sandoval v. United States*, 980 F.2d 1057, 1059 (5th Cir. 1993) (noting that *Logue* “did not rule out liability based on the negligent acts of the Government’s employees in placing [an] inmate into the care of [a] contractor”); *see, e.g., Leticia v. United States*, 22-cv-7527, 2023 WL 7110953, at \*19 (E.D.N.Y. Oct. 27, 2023) (“The United States may be liable for tort violations committed by Government employees even when plaintiffs are detained at a private facility”); Amended Complaint, *Doe v. United States, et al.*, No. 3:25-cv-00266-MPK, ECF No. 22 (W.D. Penn., Sept. 30, 2025) (federal lawsuit brought against the United States and a private prison provider, GEO Secure Services, LLC; Plaintiff asserts FTCA claims against the United States).

<sup>17</sup> *See, e.g., Complaint, A.E.S.E. et al. v. United States et al.*, No. 21-cv-00569 (D.N.M. filed June 18, 2021) (on file with authors) (suit alleged FTCA claims against United States, as well as New Mexico state tort claims against private prison contractor Management & Training Corporation); Complaint, *D.A., et al. v. United States et al.*, No. 20-cv-3082 (N.D. Ill. filed May 22, 2020) (on file with authors) (suit alleged FTCA claims against United States, as well as Rehabilitation Act and Illinois state tort law claims against ORR contractor Heartland Alliance).

## *Types of Claims and Applicable Law*

### **7. What types of immigration-enforcement related claims can be brought under the FTCA?**

In general, FTCA claims based on immigration enforcement can challenge a wide range of harms—such as unlawful detention, wrongful deportation, physical or psychological abuse, medical neglect, or family separation—when those harms result from conduct that would be a tort under state law. The FTCA makes the United States liable for the negligent torts of its employees and for certain intentional torts committed by investigative and law enforcement officers.<sup>18</sup> All such acts must be within the scope of the employee’s or law enforcement officer’s employment or office.<sup>19</sup>

The statute defines investigative and law enforcement officers as “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.”<sup>20</sup> The Supreme Court has held that the intentional torts of investigative and law enforcement officers are covered by the FTCA if they arise within the scope of their employment, “regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest.”<sup>21</sup>

An intentional tort is one in which the defendant acted with substantial certainty that their action would injure the plaintiff, or with a subjective motive to cause harm.<sup>22</sup> Intentional torts that may be brought against investigative or law enforcement officers include assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process.<sup>23</sup> The FTCA expressly prohibits claims against investigative or law enforcement officers for libel, slander, misrepresentation, deceit, or interference with contract rights.<sup>24</sup>

Immigration-enforcement based FTCA claims include, but are not limited to, torts that arise from unlawful detention, wrongful deportation, unlawful arrest, physical abuse, wrongful death, denial of medical services, family separation, and denial of religious freedom.<sup>25</sup> These claims are

---

<sup>18</sup> 28 U.S.C. § 1346(b)(1) (negligent torts); 28 U.S.C. § 2680(h) (intentional torts).

<sup>19</sup> *Id.*; see also *infra* Questions 9 and 27.

<sup>20</sup> 28 U.S.C. § 2680(h).

<sup>21</sup> *Millbrook v. United States*, 569 U.S. 50, 57 (2013).

<sup>22</sup> *Jandro v. Ohio Edison Co.*, 167 F.3d 309, 313 (6th Cir. 1999); *Miller v. J.D. Abrams Inc.*, 156 F.3d 598, 604 (5th Cir. 1998).

<sup>23</sup> 28 U.S.C. § 2680(h).

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., *Arce v. United States*, 899 F.3d 796 (9th Cir. 2018) (wrongful deportation in violation of court order); *Liranzo v. United States*, 690 F.3d 78 (2d Cir. 2012) (false arrest and imprisonment of U.S. citizen); *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010) (deportation of U.S. citizen child); *Rhoden v. United States*, 55 F.3d 428 (9th Cir. 1995) (per curiam) (six-day detention of lawful permanent resident at port of entry); *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987) (shooting by border patrol agent); *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987) (detention and mistreatment of U.S. citizen by INS investigator);

grounded in state law (e.g., false imprisonment, assault and battery, negligence, intentional infliction of emotional distress, abuse of process, loss of consortium, wrongful death, etc.). See *infra* Questions 9 and 27. Wrongful conduct may implicate both intentional and negligence tort claims. For example, where ICE unlawfully detains a person, practitioners could consider a claim for false imprisonment (an intentional tort) and a claim for negligent infliction of emotional distress (a negligence tort). Similarly, if a federal officer physically injures a person, practitioners could consider bringing claims for assault and battery (intentional torts) as well as negligent infliction of emotional distress claims (a negligence tort).

The FTCA is the *only* available remedy for medical negligence by employees of the U.S. Public Health Service (PHS). *Bivens* suits cannot be brought against individual PHS employees for medical negligence in a detention facility.<sup>26</sup> As medical care in immigration detention facilities often is handled by private contractors, remedies regarding medical negligence generally may be limited by the private contractor exception. See *supra* Question 5.

The current immigration enforcement landscape provides new opportunities to raise FTCA claims. As the government prioritizes immigration enforcement at all costs and across every agency, ICE, CBP, USCIS, and their contractors risk being liable for a state tort as they carry out the government's priorities and policies. Indeed, a zealous enforcement approach that disregards people's individual rights is exactly the type of context that gives rise to FTCA claims.<sup>27</sup> Therefore, FTCA is an important tool to seek redress and hold the government accountable for its current unlawful tactics.

---

*Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982) (detention of U.S. citizen at port of entry); *C.M. v. United States*, 672 F. Supp. 3d 288 (W.D. Tex.) (intentional infliction of emotional distress (IIED), abuse of process, battery, negligence, and loss of consortium arising out of family separation); *D.J.C.V. v. United States*, 605 F. Supp. 3d 571 (S.D.N.Y. 2022) (IIED, negligent infliction of emotional distress, and negligence arising out of family separation); *A.P.F. v. United States*, 492 F. Supp. 3d 989 (D. Ariz. 2020) (IIED, negligence, and loss of child's consortium arising out of family separation); *Alvarado v. United States*, No. 16-5028, 2017 WL 2303758 (D.N.J. May 25, 2017) (detention conditions, including cold, crowded conditions, and constant lighting); *Avalos-Palma v. United States*, No. 13-5481, 2014 WL 3524758 (D.N.J. July 16, 2014) (wrongful deportation in violation of regulatory stay of removal); *Mayarov v. United States*, 84 F. Supp. 3d 678 (N.D. Ill. 2015) (failure to reasonably investigate citizenship claim); *Lyttle v. United States*, 867 F. Supp. 2d 1256 (M.D. Ga. 2012); (wrongful deportation of U.S. citizen); *Badrawi v. DHS*, 579 F. Supp. 2d 249 (D. Conn. 2008) (unlawful arrest and detention of immigrant who was also denied religious freedom and access to medical treatment); *Araujo v. United States*, 301 F. Supp. 2d 1095 (N.D. Cal. 2004) (unlawful arrest and removal); *Adedeji v. United States*, 782 F. Supp. 688 (D. Mass. 1992) (false imprisonment and strip search by customs officials); *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986) (arrest, detention and beating of immigrant by border patrol agent).

<sup>26</sup> See *Hui v. Castaneda*, 559 U.S. 799, 810–13 (2010). Although a *Bivens* remedy is not available for medical negligence committed by PHS employees, it may be available if the negligence was committed by another medical care provider.

<sup>27</sup> See, e.g., *Martin v. United States*, 605 U.S. 395 (2025) (holding FBI SWAT team liable under the FTCA for negligence and intentional torts like assault and battery after mistakenly raiding a home searching for a suspected gang member, breaking down the door, deploying a flash-bang grenade, and holding the family at gunpoint).

As further explained below, the United States may, and often does, raise defenses or exemptions to liability. Understanding these defenses and exemptions is critical to FTCA litigation.

## **8. What are some instances in which FTCA claims have been successfully brought on behalf of immigrants subjected to harmful immigration policies?**

Parents and children subjected to family separation carried out by the federal government can file FTCA claims for the physical, mental, and emotional injuries they suffered. For families separated between 2017–2018, immigration advocates organized a mass effort to find counsel for these families, explain the FTCA process, and file administrative claims.<sup>28</sup> By January 2025, over 40 FTCA family separation cases reached settlement agreements in district court.<sup>29</sup>

Relatedly, on December 11, 2023, a federal court approved a settlement agreement in the *Ms. L., et al. v. ICE, et al.* (S.D. Cal.) class action lawsuit brought on behalf of thousands of children and parents who were forcibly separated under the 2017–2018 zero-tolerance policy.<sup>30</sup> The *Ms. L.* lawsuit was not an FTCA action; instead, it challenged the legality of the family separation policies and sought to block these policies. The *Ms. L.* settlement prohibits the United States from separating immigrant families at the border for eight years, outside of limited circumstances, and

---

<sup>28</sup> For further information about the effort to file FTCA claims and lawsuits on behalf of separated families, please contact [ftca@lccrsf.org](mailto:ftca@lccrsf.org).

<sup>29</sup> See *A.F.P. v. United States*, No. 1:21-cv-00780 (E.D. Cal.); *C.D.A. et al. v. United States*, No. 21-cv-00469 (E.D. Penn.); *D.J.C.V., et al. v. United States*, 1:20-cv-05747 (S.D.N.Y.); *J.P. v. United States*, No. 22-cv-00683 (D. Ariz.); *M.M.C. et al. v. United States*, No. 23-cv-00158 (D.R.I.); *E.L.A. v. United States*, No. 20-cv-01524 (W.D. Wash.); *B.A.D.J. v. United States*, 21-cv-00215 (D. Ariz.); *Gonzalez de Zuniga et al. v. United States*, No. 2:23-cv-00162 (D.N.M.); *J.R.G. v. United States*, No. 4:22-cv-05183 (N.D. Cal.); *A.P.F. et al. v. United States*, No. 20-cv-00065-SRB (D. Ariz.); *A.E.S.E. et al. v. United States*, No. 21-cv-0569 (D.N.M.); *S.E.B.M. v. United States*, No. 21-cv-00095 (D.N.M.); *Arredondo Rodriguez v. United States*, No. 22-cv-2845 (C.D. Cal.); *I.T. et al. v. United States*, No. 4:22-cv-05333 (N.D. Cal.); *B.Y.C.C. v. United States*, No. 22-6586 (D.N.J.); *J.A.L.C. v. United States*, No. 22-6587 (D.N.J.); *R.J.P. v. United States*, No. 22-6588 (D.N.J.); *P.C.J. et al. v. United States*, No. 23-00780 (D. Ariz.); *M.S.E. v. United States*, No. 22-cv-01242 (D. Ariz.); *K.O. et al. v. United States*, No. 20-cv-12015 (D. Mass.); *C.M. et al. v. United States*, No. 19-cv-5217 (D. Ariz.); *Aguilar Morales et al. v. United States*, No. 3:23-CV-00247 (W.D. Tex.); *D.A. et al. v. United States*, No. 22-CV-00295 (W.D. Tex.); *Flores Benitez et al. v. United States*, No. 3:22-cv-00884 (D. Conn.); *J.P. v. United States*, 23-cv-01136 (C.D. Ill.); *Wilbur P.G. et al. v. United States*, No. 21-cv-04457 (N.D. Cal.); *Leticia v. United States*, No. 22-cv-7527 (E.D.N.Y.); *R.L.L. v. United States*, No. 4:23-cv-04792 (N.D. Cal.); *J.C.O.C. v. United States*, No. 3:23-cv-05268 (N.D. Cal.); *W.P.V. v. United States*, No. 23-cv-00074 (W.D. Tex.); *Argueta Caal v. United States*, No. 1:23-cv-00598 (N.D. Ill.); *Nunez Euceda v. United States*, No. 2:20-cv-10793 (C.D. Cal.); *F.C.C. v. United States*, No. 1:23-cv-03146 (D.D.C.); *M.A.N.H. v. United States*, No. 5:23-cv-00372 (C.D. Cal.); *E.S.M. v. United States*, 4:21-CV-00029 (D. Ariz.); *E.C.B. v. United States*, No. 2:22-CV-00915 (D. Ariz.); *C.M. v. United States*, No. 5:21-CV-00234 (W.D. Tex.); *A.I.I.L. v. United States*, No. CV-19-0481 (D. Ariz.); *N.R. v. United States*, No. 4:23-CV-00201 (D. Ariz.); *J.J.P.B. v. United States*, No. 7:23-cv-00133 (S.D. Tex.); *S.M.F. v. United States*, No. 2:22-cv-01193 (W.D. Wash.); *Fuentes-Ortega v. United States*, No. CV-22-00449 (D. Ariz.); *F.R. v. United States*, No. 21-00339 (D. Ariz.); *R.Y.M.R. v. United States*, No. 1:20-cv-23598 (S.D. Fla.).

<sup>30</sup> *Ms. L. et al. v. ICE et al.*, No. 18-cv-428 (S.D. Cal. Dec. 11, 2023), ECF No. 727.

requires the federal government to provide several social services to family class members.<sup>31</sup> If government officials separate a family during the eight years following the settlement agreement, not only may the family have a viable FTCA claim, but the separation may violate the *Ms. L.* settlement agreement.

## 9. What state law applies to FTCA claims?

Under the FTCA, the United States is liable for certain torts committed by federal officials if in the state where the act or omission occurred, a private individual would be liable for similar conduct.<sup>32</sup> When assessing the United States' liability, courts look to the state tort law in the place where the injury occurred. Where the tortious conduct or omission occurred in multiple states, plaintiffs should assert claims under all relevant states' laws. The court may assess the claims under all states' laws, though it ultimately will have to decide which state's choice-of-law test to apply.<sup>33</sup>

Note, in at least one case, a district court held that a state civil rights statute (not a tort statute) that would impose liability upon a private person for wrongful conduct could serve as the basis for an FTCA claim.<sup>34</sup>

## 10. What type of compensation is available under the FTCA?

Monetary damages are available under the FTCA,<sup>35</sup> and are assessed “in accordance with the law of the place where the act or omission occurred.”<sup>36</sup> In evaluating the claimant's damages, the agency or the court may consider relevant evidence, including, but not limited to, medical reports and expenses; expert reports; awards in comparable cases; and/or a statement of expected future expenses.<sup>37</sup>

The amount of damages recoverable in a federal lawsuit generally is limited to the amount stated in the FTCA administrative claim.<sup>38</sup> Exceptions to this cap exist where intervening facts or newly discovered evidence “not reasonably discoverable” at the time the claim was filed justify a larger

---

<sup>31</sup> See *Ms. L.*, No. 18-cv-428 (S.D. Cal. Oct. 16, 2023), ECF No. 711-1.

<sup>32</sup> 28 U.S.C. §§ 2674, 1346(b)(1); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 478 (1994) (“[W]e have consistently held that § 1346(b)'s reference to the ‘law of the place’ means law of the State—the source of substantive liability under the FTCA.”).

<sup>33</sup> See, e.g., *C.D.A. v. United States*, No. CV 21-469, 2023 WL 2666064, at \*21 & n.27 (E.D. Pa. Mar. 28, 2023).

<sup>34</sup> *Sosa Segura v. United States*, 418 F. Supp. 3d 605, 609–13 (E.D. Wash. 2019) (denying motion to dismiss FTCA claim predicated on a violation of a state anti-discrimination law).

<sup>35</sup> 28 U.S.C. § 2674.

<sup>36</sup> 28 U.S.C. §§ 1346(b), 2672.

<sup>37</sup> 28 C.F.R. § 14.4.

<sup>38</sup> 28 U.S.C. § 2675(b); see also *infra* Question 13.

recovery.<sup>39</sup> Further, a judgment on an FTCA claim is a complete bar to recovery against the employee for other claims based on the same conduct.<sup>40</sup> Judgment on an FTCA claim, therefore, bars recovery on *Bivens* claims.<sup>41</sup>

Punitive damages are not available under the FTCA.<sup>42</sup> In addition, the FTCA does not authorize a court to issue injunctive relief. However, nothing prevents the government from settling an FTCA claim for immigration relief, *e.g.*, providing a U visa certification, granting deferred action, foregoing initiation of removal proceedings, or staying deportation. *See also supra* Questions 3, 8.

### **Filing an FTCA Administrative Claim**

#### **11. What is the deadline for filing an FTCA administrative claim?**

To preserve an FTCA claim, the claimant must file an administrative claim ([Standard Form 95](#)) **within two years** of when the claim accrues.<sup>43</sup> Before filing a lawsuit, the claimant must exhaust their administrative remedies by filing the administrative claim and waiting either for a formal denial or for six months to pass without agency action, whichever happens first.<sup>44</sup> Only then can an FTCA lawsuit be filed.

If an FTCA administrative claim is filed after the two-year deadline has passed, it may be very difficult to reach a settlement or achieve a monetary award from the federal government. That said, the government has the authority to waive the deadline, or the individual could seek equitable tolling of the deadline in a federal lawsuit.<sup>45</sup> At least one federal court has denied the government's motion to dismiss where the claimant-plaintiff sought equitable tolling of the two-year deadline.<sup>46</sup>

Under the FTCA, a claim generally accrues when the injury happens. But if the injury or its cause is not immediately discoverable, the claim instead accrues when the claimant knew or reasonably should have known of the injury and its cause.<sup>47</sup>

---

<sup>39</sup> 28 U.S.C. § 2675(b); *see also Zurba v. United States*, 318 F.3d 736, 738–44 (7th Cir. 2003) (analyzing when plaintiff may recover damages in excess of the amount stated in administrative claim); *Lebron v. United States*, 279 F.3d 321, 325–31 (5th Cir. 2002) (same); *Michels v. United States*, 31 F.3d 686, 687–89 (8th Cir. 1994) (same).

<sup>40</sup> 28 U.S.C. § 2676; 28 C.F.R. § 14.10(b).

<sup>41</sup> *See, e.g., Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994); *Sanchez v. Rowe*, 870 F.2d 291, 295–96 (5th Cir. 1989); *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987).

<sup>42</sup> 28 U.S.C. § 2674.

<sup>43</sup> 28 U.S.C. § 2401(b).

<sup>44</sup> 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2.

<sup>45</sup> *United States v. Kwai Fun Wong*, 575 U.S. 402, 405, 412 (2015).

<sup>46</sup> *Se J.E.B.*, 2025 WL 3294964, at \*3 (allowing family separation FTCA case to proceed, even though plaintiffs filed their administrative claim more than two years after the separation).

<sup>47</sup> *See United States v. Kubrick*, 444 U.S. 111, 118–22 (1979); *Sanchez v. United States*, 740 F.3d 47, 52 (1st Cir. 2014); *Ortega v. United States*, 547 F. App'x 384, 387 (5th Cir. 2013); *Flores v. United States*,

## 12. How is an FTCA administrative claim presented?

A FTCA administrative claim must be filed in writing, either by using [Standard Form 95](#) (SF-95) or submitting a letter.<sup>48</sup> The form or letter *must* provide both a written notification of the incident and a specific amount of monetary damages claimed (also called a sum certain).<sup>49</sup> Practitioners should carefully consider the amount of monetary damages claimed in the administrative claim because, with few exceptions, a judgment in federal court cannot exceed the amount of money specified in the administrative claim.<sup>50</sup>

If an attorney prepares the claim, it must be presented in the claimant's name, be signed by the attorney, and show the attorney's title or legal capacity with a signed authorization form showing the attorney's authority to bring the claim on the claimant's behalf.<sup>51</sup> If filing administrative claims on behalf of a family, each family member must submit a separate claim. If the claim is being filed on behalf of a minor, the claim authorization form should be signed by a parent or legal guardian.<sup>52</sup>

Importantly, an administrative claim need not identify the alleged torts under state law.

Sample administrative claims can be found at: [asaptogether.org/ftca](https://asaptogether.org/ftca).

## 13. How does one decide the amount of damages to seek in an administrative claim?

Damages assessments can be challenging, particularly because the amount listed on the administrative claim generally acts as a cap on the amount of recovery, *see supra* Question 10, and, at the time of filing the administrative claim, counsel has not had the benefit of discovery. Indicating an amount that is too low may limit the amount of recovery if later developments or discovery reveal additional evidence of damages. However, indicating an amount that is too high may signal an unrealistic assessment of damages. Counsel should carefully research comparable damages awards, weigh the specifics of each case, and manage client expectations about ultimate recovery, particularly if listing a higher amount.

The U.S. Treasury Department's Judgment Fund allows users to search administrative claim awards and can be a useful source to help inform the calculation of damages. It is available at:

---

689 F.3d 894, 901 (8th Cir. 2012). In a wrongful death case, a claim generally accrues at the time of death. *Id.* at 901.

<sup>48</sup> 28 U.S.C. § 2401(b); 28 C.F.R. § 14.2(a). Form SF-95 is available at: <https://www.gsa.gov/reference/forms/claim-for-damage-injury-or-death>.

<sup>49</sup> *Id.*; *see also Adams v. United States*, 615 F.2d 284, 292–93 (5th Cir. 1980) (finding presentation of claim satisfied provided the agency has sufficient notice of the incident to investigate and the claim states a sum of certain damages).

<sup>50</sup> 28 U.S.C. § 2675(b). Exceptions to this cap exist where intervening facts or newly discovered evidence “not reasonably discoverable” at the time the claim was filed justify a larger recovery. *Id.*; *see also supra* Question 10.

<sup>51</sup> 28 C.F.R. § 14.2(a).

<sup>52</sup> *Id.*

<https://fiscal.treasury.gov/judgment-fund/>.

Westlaw and LEXIS have legal databases on jury verdicts and settlements that provide another useful source of information on damages amounts for the same or comparable torts awarded by the relevant state courts or in settlement agreements.

Prison Legal News also has a searchable database of articles on verdicts and settlements. It is available at: <https://www.prisonlegalnews.org/Search.aspx>.

#### **14. Where is an FTCA administrative claim filed?**

An FTCA administrative claim must be filed with the federal agency “whose activities gave rise to the claim.”<sup>53</sup> For the most current service addresses, please review the relevant agency’s webpage. To get started, to you can review *Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation* (April 15, 2024), a practice advisory by NILA, National Immigration Project, and the American Immigration Council.<sup>54</sup>

If the claim is related to medical care (or lack thereof), practitioners are also advised to send a copy of the claim to the Department of Health and Human Services if the medical care was or is believed to have been provided by the U.S. Public Health Service.

The receiving agency will designate a lead agency after receipt of an administrative claim.<sup>55</sup>

#### **15. Can a claimant amend an administrative claim?**

Yes, a claimant may amend an administrative claim at any time before the agency’s final disposition or before filing suit in federal court, provided that the amendment is in writing and signed by the claimant or counsel with the claimant’s authorization, as discussed *supra*, Questions 2 and 12.<sup>56</sup> Submitting an amendment resets the six-month administrative exhaustion period. This means the agency gets a new six months to make a final decision, and the amended claim is not ripe to litigate until those new sixth months pass or the agency denies the claim, whichever happens first.<sup>57</sup>

---

<sup>53</sup> 28 C.F.R. § 14.2(b)(1). Although there are currently no specific regulations or written guidance for public distribution regarding where to send immigration-related FTCA administrative claims, such claims arguably fall under the regulations governing service of summonses and complaints in litigation against DHS and its subdivision agencies. *See also* 6 C.F.R. §§ 5.41, 5.42 (providing for service of litigation documents, including documents related to administrative actions, on the DHS Office of General Counsel).

<sup>54</sup> Available at: <https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/whom-to-sue-and-whom-to-serve-in-immigration-related-district-court-litigation-2024.pdf>.

<sup>55</sup> *See generally* 28 C.F.R. § 14.2(b).

<sup>56</sup> 28 C.F.R. § 14.2(c).

<sup>57</sup> *Id.*

## 16. What happens after the administrative claim is filed?

After the administrative claim is filed with the appropriate agency or agencies, counsel may receive a letter acknowledging receipt of the claim and assigning a point of contact. Practitioners report that acknowledgement notices can be delayed for weeks or months, and some claimants never receive one.

In general, the receiving agency may take one of the following three approaches to the claim:

- It may send a notice denying the claim. This final denial starts the six-month clock to file an action in federal court (*see supra* Question 11).
- It may do nothing. Once six months have passed without a final denial, the claimant may file suit in federal court at any time.<sup>58</sup>
- It may engage in settlement negotiations, *e.g.*, making a settlement offer or asking for further information to assess settlement possibilities. Counsel for the agency may reach out months or years after the administrative claim is filed, so it is critical that attorneys who filed claims on behalf of their clients maintain up-to-date contact information. The back-and-forth settlement process can take the form of emails, letters, telephone calls, or some combination of the three. If settlement is reached, the parties sign a formal settlement agreement. If settlement is not reached, the agency issues a final denial notice (thus starting the six-month clock) or, in some circumstances, does nothing.

Counsel who wish to begin settlement negotiations have the option of affirmatively reaching out to agency counsel. If the agency denies a claim, a claimant may file a written request with the agency for reconsideration,<sup>59</sup> or proceed to file a lawsuit in federal court.

### **Litigating FTCA Claims in Federal Court**

## 17. What is the deadline for filing an FTCA lawsuit in federal court?

Federal lawsuits must be filed **within six months** after the date on which the agency mails, by certified or registered mail, written notice of the final denial of the claim.<sup>60</sup> This six-month deadline

---

<sup>58</sup> See 28 U.S.C. § 2675(a) (“The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant at any time thereafter, be deemed final denial of the claim . . .”); *see, e.g., Taumby v. United States*, 919 F.2d 69 (8th Cir. 1990) (recognizing that there is no time limit for filing FTCA action when administrative claim is deemed denied due to agency’s inaction); *Conn v. U.S.*, 867 F.2d 916 (6th Cir. 1981) (same); *Green v. Warden, MCC Chicago*, 2008 WL 4866329, at \*5 (N.D. Ill. 2008) (finding that “[w]hen the agency does not formally deny an administrative tort claim within six months, the claimant may file suit in federal court and may, in effect, wait indefinitely before filing suit”); *but see Miller v. United States*, 741 F.2d 148, 150 (7th Cir. 1984) (holding the plaintiff could exercise her option to deem agency’s inaction as a final decision “at any reasonable time” after the six-month period for sending the final decision expired).

<sup>59</sup> 28 U.S.C. § 14.9(b).

<sup>60</sup> 28 U.S.C. §§ 2401(b), 2675(a); 28 C.F.R. § 14.9(a).

to file a lawsuit applies regardless of when the agency issues its formal written denial.<sup>61</sup> The six-month statute of limitations is non-jurisdictional and may be equitably tolled.<sup>62</sup>

If the agency does not issue a final decision on a claim within six months after the claimant files the administrative claim, amended claim, or request of reconsideration of a final denial, the claimant may treat the agency's inaction as a final denial "at any time thereafter."<sup>63</sup> Most courts read this language in 28 U.S.C. § 2675(a) to mean that the claimant has no fixed deadline and may file suit in federal court at any point after the six-month period expires. The Seventh Circuit, however, takes a different view and requires the claimant to file suit within a "reasonable" time.<sup>64</sup>

## **18. Who is the defendant in an FTCA lawsuit and on whom is the complaint served?**

The United States is always the defendant in FTCA actions.<sup>65</sup> If an FTCA claim is brought against individuals or federal agencies, the court will dismiss them.

In lawsuits against the United States, counsel must serve the local U.S. Attorney's Office, the U.S. Attorney General, and the U.S. agency or officer whose actions are implicated by the complaint.<sup>66</sup>

For more information on serving a federal complaint, *see* the NILA, National Immigration Project, and AIC practice advisory on this topic.<sup>67</sup>

## **19. Where is a federal FTCA lawsuit filed?**

The FTCA contains its own venue provision, codified at 28 U.S.C. § 1402(b). FTCA lawsuits are filed in the U.S. district court where the plaintiff resides or where the relevant act or omission

---

<sup>61</sup> *See Ramirez v. United States*, 410 F. Supp. 3d 824, 833–35 (S.D. Tex. 2019).

<sup>62</sup> *United States v. Kwai Fun Wong*, 575 U.S. 402, 405, 412 (2015).

<sup>63</sup> 28 U.S.C. § 2675(a); 28 C.F.R. §§ 14.2(c), 14.9(b).

<sup>64</sup> 28 U.S.C. § 2675(a) (stating that the agency's failure to make a final disposition within six months of filing "shall, at the option of the claimant *any time thereafter*, be deemed a final denial of the claim") (emphasis added); *see, e.g., Taumby v. United States*, 919 F.2d 69 (8th Cir. 1990) (recognizing that there is no time limit for filing FTCA action when administrative claim is deemed denied due to agency's inaction); *Conn v. U.S.*, 867 F.2d 916 (6th Cir. 1981) (same); *Green v. Warden, MCC Chicago*, 2008 WL 4866329, at \*5 (N.D. Ill. 2008) (finding that "[w]hen the agency does not formally deny an administrative tort claim within six months, the claimant may file suit in federal court and may, in effect, wait indefinitely before filing suit"); *but see Miller v. United States*, 741 F.2d 148, 150 (7th Cir. 1984) (holding the plaintiff could exercise her option to deem agency's inaction as a final decision "at any reasonable time" after the six-month period for sending the final decision expired).

<sup>65</sup> *See* 28 U.S.C. § 1346(b)(1).

<sup>66</sup> Fed. R. Civ. P. 4(i)(1)(A)–(C).

<sup>67</sup> *Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation* (April 15, 2024), available at: <https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/whom-to-sue-and-whom-to-serve-in-immigration-related-district-court-litigation-2024.pdf>.

occurred.<sup>68</sup>

In some FTCA cases filed in the district in which the noncitizen plaintiff resides, the United States has moved to dismiss or transfer the case for improper venue, arguing that a noncitizen who is not a permanent resident cannot establish they “reside” in the United States.<sup>69</sup> Because the FTCA’s venue provision, 28 U.S.C. § 1402(b), does not define the term “reside,” some courts have looked instead to the general venue provision for actions in federal district courts.<sup>70</sup> This provision provides for “all” venue purposes that:

a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled.

28 U.S.C. § 1391(c)(1). Several district courts interpreting this provision have determined that “Congress intended to extend venue to **any** [noncitizen] who can establish he has an intent to remain in this country which is lawful under immigration law.”<sup>71</sup> Courts have also rejected the United States’ additional argument that noncitizens who were not lawful permanent residents were not “domiciled” in the district because they could not show a lawful intent to reside indefinitely in the United States. Instead, courts have found that noncitizen plaintiffs with various immigration statuses<sup>72</sup> could demonstrate the lawful intent to remain in the United States and thus reside in the judicial district in which they were domiciled for venue purposes.

However, at least one court has accepted the United States’ venue argument and transferred the portion of the plaintiff’s FTCA claims that arose in Texas to that district.<sup>73</sup>

In other cases, the United States has moved to transfer venue under 28 U.S.C. § 1404(a), which

---

<sup>68</sup> 28 U.S.C. § 1402(b) (setting forth venue requirements for FTCA claims); 28 U.S.C. § 1346(b)(1) (conferring district courts with exclusive jurisdiction over FTCA claims).

<sup>69</sup> See, e.g., *Tanyike v. United States*, 603 F. Supp. 3d 572, 576–79 (S.D. Ohio 2022).

<sup>70</sup> See, e.g., *E.L.A. v. United States*, No. 2:20-CV-1524-RAJ, 2022 WL 2046135, at \*2–4 (W.D. Wash. June 3, 2022); *Tanyike v. United States*, 603 F. Supp. 3d 572, 576–79 (S.D. Ohio 2022); *Fuanya v. United States*, No. 21-CV-02191-REB-NYW, 2022 WL 1027149, at \*3–5 (D. Colo. Apr. 6, 2022); *Coyoy v. United States*, 526 F. Supp. 3d 30, 35–42 (D.N.J. 2021); *Luna v. United States*, No. C20-1152RSL, 2021 WL 673534, at \*1–2 (W.D. Wash. Feb. 22, 2021); *Alvarado*, 2017 WL 2303758, at \*2–5; *Flores v. United States*, 108 F. Supp. 3d 126, 130–31 (E.D. N.Y. 2015).

<sup>71</sup> *Fuanya*, 2022 WL 1027149, at \*3 & n.4 (citing cases and explaining that “the overwhelming majority” of courts to consider the question have held that a noncitizen is domiciled in the United States if they can show a lawful intent to remain) (emphasis added).

<sup>72</sup> These immigration statuses include: withholding of removal in *Alvarado*, 2017 WL 2303758, at \*4–5; parole and a pending asylum application in *E.L.A.*, 2022 WL 2046135, at \*2–4, *Tanyike*, 603 F. Supp. 3d at 576–79, *Coyoy*, 526 F. Supp. 3d at 35–42, and *Flores*, 108 F. Supp. 3d at 131; parole and a denied asylum application with a pending petition for review in *Fuanya*, 2022 WL 1027149, at \*3–5; and a pending withholding and CAT application in *Luna*, 2021 WL 673534, at \*1–2.

<sup>73</sup> *Hernandez Najera v. United States*, No. 16-cv-459 (JCC/JFA), 2016 WL 6877069, at \*7 (E.D. Va. Nov. 22, 2016) (holding TPS holder was not a resident of Virginia because TPS holders are not “considered to be permanently residing in the United States under color of law” (quoting 8 U.S.C. § 1254a(f)(1))).

permits a court to transfer a case to any other district in which the case may have been brought if it serves the convenience of the parties and witnesses and is in the interest of justice. In reviewing such motions, courts consider several private and public interest factors; the majority of courts have denied the government’s motions to transfer FTCA cases on this basis.<sup>74</sup>

## 20. What is the “private person analog” requirement?

The FTCA waives sovereign immunity for tort suits against the United States only when the claimant can show that the United States would be liable “if a private person” engaged in the same conduct under the law of the state where the act or omission occurred.<sup>75</sup> The statute also provides that the government is liable “in the same manner and to the same extent as a private individual under like circumstances.”<sup>76</sup> Together, these requirements form the private person analog—a foundational concept in FTCA practice. Many courts consider it the claimant’s burden to identify and establish a private person analog as part of their FTCA claim.<sup>77</sup>

The government often argues there is no private person analog for the conduct at issue in FTCA lawsuits arising out of immigration enforcement actions.<sup>78</sup> The “like circumstances” requirement

---

<sup>74</sup> See, e.g., *R.E.S.V. v. United States*, No. 2:24-CV-12863, 2025 WL 889769 (E.D. Mich. Mar. 21, 2025) (denying transfer); *Tendo v. United States*, No. 2:23-CV-438, 2024 WL 3650462, at \*16–19 (D. Vt. Aug. 5, 2024) (denying transfer); *Leticia v. United States*, No. 22CV7527NGGRJL, 2023 WL 7110953, at \*6–8 (E.D.N.Y. Oct. 27, 2023) (denying transfer); *Hinestroza v. United States*, No. CV232026MWFMRWX, 2023 WL 6787769 (C.D. Cal. Sept. 6, 2023) (granting transfer); *C.D.A. v. United States*, No. CV 21-469, 2023 WL 2666064, at \*6–10 (E.D. Pa. Mar. 28, 2023) (denying transfer); *Eduardo I.T. v. United States*, No. 22-CV-05333-DMR, 2023 WL 10354060, at \*3–6 (N.D. Cal. Feb. 24, 2023) (denying transfer); *Rodriguez v. United States*, No. 222CV02845JLSAFM, 2022 WL 19237182, at \*3–4 (C.D. Cal. Dec. 22, 2022) (denying transfer); *A.E.S.E. v. United States*, No. 21-CV-0569 RB-GBW, 2022 WL 4289930, at \*6–7 (D.N.M. Sept. 16, 2022) (denying transfer); *Zhang v. United States*, No. 2:19-CV-01211-TL, 2022 WL 17077287, at \*3–6 (W.D. Wash. Aug. 1, 2022) (granting transfer); *A.F.P. v. United States*, No. 121CV00780DADEPG, 2022 WL 2704570, at \*4–9 (E.D. Cal. July 12, 2022) (denying transfer); *E.L.A.*, 2022 WL 2046135, at \*4–5 (denying transfer); *Fuanya*, 2022 WL 1027149, at \*5–8 (denying transfer); *Coyoy*, 526 F. Supp. 3d at 42–48 (denying transfer); *Alvarado*, 2017 WL 2303758, at \*2–8 (denying transfer); *Doe v. United States*, No. 3:16-cv-0856, 2017 WL 4864850, at \*3 (M.D. Tenn. Oct. 26, 2017) (denying transfer).

<sup>75</sup> 28 U.S.C. § 1346(b)(1).

<sup>76</sup> 28 U.S.C. § 2674.

<sup>77</sup> See, e.g., *Davallou v. Ancient & Honorable Artillery Co. of Massachusetts*, No. CV 18-10822-LTS, 2019 WL 3546665, at \*4 (D. Mass. May 23, 2019) (private analogue requirement precluded FTCA jurisdiction), *aff’d sub nom. Davallou v. United States*, 998 F.3d 502 (1st Cir. 2021); *McGonagle v. United States*, 155 F. Supp. 3d 130, 134–35 (D. Mass. 2016) (same); *Westbay Steel, Inc. v. United States*, 970 F.2d 648, 650 (9th Cir. 1992) (at the pleadings stage, plaintiff has the burden to demonstrate “a persuasive analogy with private conduct”) (internal quotations omitted).

<sup>78</sup> For instance, in the FTCA cases arising out of the 2017–2018 family separation policies, the government frequently argued that detention was a purely government function with no private person analog, citing cases like *McGowan v. United States*, 825 F.3d 118 (2d Cir. 2016). In *McGowan*, the Second Circuit ruled for the government in a case alleging that the Bureau of Prisons wrongfully placed a prisoner in segregated confinement. *Id.* at 126–27. The Court reasoned that unlike a decision whether to arrest an individual on

does not mean “the *same circumstances*,” however.<sup>79</sup> The claim simply must be “comparable” to a tort against a private citizen in the state where the tort occurred, and the allegations must satisfy the necessary elements of that comparable state cause of action, such as negligence, assault and battery, or intentional infliction of emotional distress.<sup>80</sup>

Courts are required to apply a broad level of generality in determining whether a state-law tort provides an appropriate analog.<sup>81</sup> Importantly, even where the conduct at issue involves a uniquely governmental function, the relevant inquiry is *not* whether local governments would be liable in similar circumstances, but whether private individuals could be liable under state law.<sup>82</sup> Applying this broad approach, many courts have found private person analogs in immigration enforcement-based FTCA claims, such as torts committed by immigration officials against people in detention,<sup>83</sup>

---

suspicion of illegal activity, which could be analogous to a citizen’s arrest, the decision whether to house a prisoner who is lawfully in custody in a segregated housing unit has no private analogue because “[p]rivate persons cannot establish facilities to detain other persons—only the government can.” *Id.* at 127. In the family-separation cases, however, plaintiffs distinguished cases like *McGowan* by emphasizing that their claims did not challenge the lawful classification or housing of people who are detained, but rather the government’s conduct that caused and perpetuated the separations and/or the poor conditions of confinement—conduct for which private-person analogs do exist.

<sup>79</sup> *United States v. Olson*, 546 U.S. 43, 46 (2005) (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955) (holding that plaintiff’s claims against the government for their negligent operation of a lighthouse were not barred solely because there were no private lighthouses in operation at the time)); see also *States v. Muniz*, 374 U.S. 150, 153 (1963) (even though federal confinement of inmates was “uniquely federal in character,” negligence actions were allowed to proceed). This analysis is similar to the U visa “other related crimes” analysis, which includes any similar activity where the elements of the crime are substantially similar.

<sup>80</sup> *D.J.C.V.*, 605 F. Supp. 3d at 598–88 (quoting *Chen v. United States*, 854 F.2d 622, 626 (2d Cir. 1988)).

<sup>81</sup> See, e.g., *United States v. Olson*, 546 U.S. 43, 46 (2005) (“[T]he words ‘like circumstances’ do not restrict a court’s inquiry to the *same circumstances*, but require it to look further afield.”) (quoting S. Rep. No. 1400, 79th Cong., 2d Sess., 32 (1946) (stating that the purpose of the FTCA was to make the tort liability of the United States “the same as that of a private person under like circumstance, in accordance with the local law”)); *Belluomini v. United States*, 64 F.3d 299, 303 (7th Cir. 1995) (“Not to be confused with ‘identical circumstances,’ the ‘like circumstances’ standard is not overly stringent, and should be applied broadly so as to achieve the statute’s intended purpose of putting the federal government on equal footing with private entities.”).

<sup>82</sup> See *Olson*, 546 U.S. at 45–46; *Indian Towing*, 350 U.S. at 64 (rejecting the government’s contention that it was not liable “for negligent performance of ‘uniquely governmental functions’”); *Rayonier, Inc.*, 352 U.S. at 318–19 (rejecting the claim that the scope of FTCA liability for uniquely governmental functions depends on whether state law imposes municipal or government liability for negligence of their agents); *United States*, 605 F. Supp. 3d 571, 601–02 (S.D.N.Y. 2022) (explaining that plaintiffs asserting FTCA claims based on family separation were not challenging their detention *qua* detention, but the focus of their claims was on the government’s forced separation and mistreatment of them with the intent of inflicting harm, actions which have private state law analogs).

<sup>83</sup> See, e.g., *Liranzo*, 690 F.3d at 90–97 (concluding that even though immigration is a “quintessentially federal function,” immigration detention has a private non-federal officer analog); *D.J.C.V.*, 605 F. Supp. 3d at 601–02 (explaining that plaintiffs were not challenging their detention *qua* detention, but the focus of the tort claims was on the Government’s forced separation and mistreatment of them with the intent of

while declining to find a private person analog in the context of processing paperwork, such as adjudicating an affirmative benefit request.<sup>84</sup>

Because FTCA claims implicate state law, attorneys should carefully research the elements of the state torts they think provide an analog. Attorneys may also wish to consult with an attorney specializing in these areas, including personal injury attorneys.

## 21. What is the judgment bar?

Designed to prevent duplicative lawsuits arising from a single event, the “judgment bar,” 28 U.S.C. § 2676, provides that “once a plaintiff receives a judgment (favorable or not) in an FTCA suit, [they] generally cannot proceed with a lawsuit against an individual employee based on the same underlying facts.”<sup>85</sup> Specifically, the judgment bar “forecloses a claim against a federal employee when: (1) there is a ‘judgment’; (2) that judgment came in ‘an action under section 1346(b)’; and (3) that action was based on ‘the same subject matter’ as the claims against the federal employee.”<sup>86</sup>

The bar applies to claims brought in separate actions and to claims brought in the same suit,<sup>87</sup> regardless of whether the FTCA judgment is for or against the plaintiff.<sup>88</sup>

Importantly, the judgment bar does not prevent bringing claims against both the government and an individual federal employee.<sup>89</sup> Instead, it “implicate[s] whether one may pursue those claims to

---

inflicting harm, actions which have private state law analogs); *A.P.F. v. United States*, 492 F. Supp. 3d 989, 994–95 (D. Ariz. 2020) (recognizing private analog under Arizona law for FTCA claims based on family separation); *Roe v. United States*, No. 18-CV-2644 (VSB), 2019 WL 1227940, at \*5–6 (S.D.N.Y. Mar. 15, 2019) (finding private analog under New York law for disregard or violation of a statutory duty); *Avalos-Palma*, 2014 WL 3524758, at \*9–13 (recognizing private analog under New Jersey law for negligence and infliction of emotional distress claims based on wrongful deportation).

<sup>84</sup> See *Watson v. United States*, 865 F.3d 123, 134–35 (2d Cir. 2017) (finding no private analog for claim that immigration officials failed to follow policy for investigating a claim to U.S. citizenship); *Andela v. Admin. Off. of U.S. Cts.*, 569 F. App’x 80, 84 (3d Cir. 2014) (finding no private analog to the EEOC’s work in processing and investigating discrimination charges); *Maliek-Ali v. U.S. Dep’t of State*, No. CV 18-102, 2019 WL 1436923, at \*2 (W.D. Pa. Apr. 1, 2019) (finding no private analog for negligent denial of a passport because “[i]ssuing and confiscating passports ... are not activities that private persons can engage in”) (quoting *Mesnaoui v. Berlowitz*, No. C 11-03165 LB, 2012 WL 464001, at \*4 (N.D. Cal. Feb. 13, 2012)); *Bhuiyan v. United States*, 772 F. App’x 564, 565 (9th Cir. 2019) (“[T]here is, as a general matter, no private analogue to governmental withdrawal of immigration benefits.”).

<sup>85</sup> *Simmons v. Himmelreich*, 578 U.S. 621, 625–26 (2016).

<sup>86</sup> *Elsharkawi v. United States*, 830 F. App’x 509, 511 (9th Cir. 2020) (citing 28 U.S.C. § 2676).

<sup>87</sup> *Manning v. United States*, 546 F.3d 430, 434–35 (7th Cir. 2008); see also *Ting v. United States*, 927 F.2d 1504, 1513 n.10 (9th Cir. 1991) (“The FTCA . . . imposes an election of remedies.”).

<sup>88</sup> *Hoosier Bancorp of Ind., Inc. v. Rasmussen*, 90 F.3d 180, 185 (7th Cir. 1996).

<sup>89</sup> See *Carlson v. Green*, 446 U.S. 14, 19–20 (1980) (stating that 1974 amendments to the FTCA made “it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action”).

judgment.”<sup>90</sup> Therefore, the judgment bar will block claims against individuals if the FTCA claims reach judgment first. Thus, if the claims are brought in separate lawsuits, it does not matter which suit is filed first.<sup>91</sup> Moreover, if the claims are brought in the same suit, at least six circuits have held that the judgment bar nevertheless applies to block the individual claims.<sup>92</sup> The Seventh Circuit even applied the bar retroactively to individual claims resolved before an FTCA claim.<sup>93</sup>

Whether the judgment bar applies is an active topic of litigation, so check the law of the applicable jurisdiction. In its last decision addressing the scope of the judgment bar, the Supreme Court held that the dismissal of FTCA claims for lack of a “private analog” under relevant state law operates as a “judgment” within the meaning of the judgment bar, therefore precluding *Bivens* claims against the individual federal employees involved.<sup>94</sup> However, a district court’s dismissal of an FTCA action on discretionary function grounds under 28 U.S.C. § 2680(a) *does not* fit within the judgment bar and, thus, does not preclude *Bivens* claims in the same case.<sup>95</sup>

## 22. Should FTCA and *Bivens* claims be brought together?

While the FTCA generally bars recovery in other civil actions for claims arising from the same conduct as that subject to an FTCA claim, *see supra* Question 21, it does not bar bringing a *Bivens* action against federal employees based on constitutional violations they committed.<sup>96</sup>

In the immigration context, FTCA and *Bivens* claims can be brought together but need not be. Because a judgment in an FTCA action will almost certainly bar recovery in a *Bivens* action, counsel should carefully consider whether it is necessary to bring both FTCA and *Bivens* claims

---

<sup>90</sup> *Manning*, 546 F.3d at 435.

<sup>91</sup> *See, e.g., Longworth v. Mansukhani*, 134 F.4th 755, 759 (4th Cir. 2025) (“Longworth’s *Bivens* claim (*whether or not it was filed first*) is still on appeal. It therefore remains an ‘action’ that is subject to the bar.”) (emphasis added) (citing *Brownback v. King*, 592 U.S. 209, 220–21 (2021) (Sotomayor, J., concurring)).

<sup>92</sup> *See Unus v. Kane*, 565 F.3d 103, 121–22 (4th Cir. 2009); *Harris v. United States*, 422 F.3d 322, 333–35 (6th Cir. 2005); *Manning v. United States*, 546 F.3d 430, 434–35 (7th Cir. 2008); *White v. United States*, 959 F.3d 328, 333 (8th Cir. 2020); *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858–59 (10th Cir. 2005); *cf. Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (barring state tort claims against federal officers following FTCA judgment). Whether the judgment bar applies to the dismissal of claims raised in the same suit was raised in *Brownback v. King*, 592 U.S. 209 (2021), but the Court did not decide the issue because it had not been addressed by the Sixth Circuit below. *See id.* at 215 n.4. On remand, the Sixth Circuit held that the judgment bar applied, under its *Harris* precedent. *King v. United States*, 49 F.4th 991 (6th Cir. 2022). The Supreme Court subsequently denied certiorari. *King v. Brownback*, 144 S. Ct. 10 (2023).

<sup>93</sup> *Manning*, 546 F.3d at 436–38.

<sup>94</sup> *Brownback v. King*, 592 U.S. 209 (2021); *see also supra* Question 20 (discussing private person analog requirement).

<sup>95</sup> *Simmons*, 578 U.S. at 625–27.

<sup>96</sup> 28 U.S.C. § 2679(b); 28 C.F.R. § 14.10(b).

and, if both claims are brought, which claim to pursue before trial. The following are factors counsel might consider when making these decisions:

- **Payment of damages:** FTCA damages are paid by the United States Treasury, not an individual employee as in *Bivens* suits, and thus are more likely to result in actual payment of damages.
- **Amount of damages:** State law limits on damages—such as caps on non-economic damages—apply to FTCA claims, whereas there are no such limits under *Bivens*.
- **Adjudicator:** FTCA claims are heard before a district court judge and may not be heard by a jury, while *Bivens* claims may be presented to a jury. If a jury is likely to be more favorable than the judge and/or if *Bivens* allows for greater damages recovery, then practitioners should take special care to avoid judgment bar implications (*see supra* Question 21).
- **Circuit case law/nature of the claim:** The availability of *Bivens* actions in the immigration context has narrowed significantly since the Supreme Court’s decisions in *Egbert v. Boule*, 596 U.S. 482 (2022) and *Ziglar v. Abbasi*, 582 U.S. 120 (2017). Counsel should research the state of *Bivens* law in the relevant circuit.
- **Pleading strategy:** When bringing both claims, consider filing the *Bivens* claims well in advance of the FTCA claims to allow time for resolution of the claim, as this *may* help avoid the judgment bar. If the *Bivens* claim is not resolved before the FTCA claims are ripe to include in an amended complaint, counsel should consider dismissing either the FTCA claims or *Bivens* claims without prejudice if there is a risk that the court might dismiss one of the claims on the merits.<sup>97</sup>

### 23. What other legal claims can be brought alongside an FTCA claim in the same lawsuit?

Many other legal claims may be brought in the same lawsuit as an FTCA claim, depending on the facts and the defendants involved. For instance, plaintiffs often pair FTCA claims with causes of action under other remedial statutes, such as the Torture Victims Protection Act, the Rehabilitation Act, or the Religious Land Use and Institutionalized Persons Act, or with claims under 42 U.S.C. § 1983 when state or municipal actors also involved. Additionally, individuals may also pursue claims directly against private contractors under other federal laws or under state tort law.<sup>98</sup>

It is important to remember, however, that an FTCA claim cannot be filed in federal court until

---

<sup>97</sup> See Fed. R. Civ. P. 41(a)(1).

<sup>98</sup> See, e.g., Complaint, *A.E.S.E. et al. v. United States et al.*, No. 21-cv-00569 (D.N.M. filed June 18, 2021) (on file with authors) (suit alleged FTCA claims against United States, as well as New Mexico state tort claims against private prison contractor Management & Training Corporation); Complaint, *D.A., et al. v. United States et al.*, No. 20-cv-3082 (N.D. Ill. filed May 22, 2020) (on file with authors) (suit alleged FTCA claims against United States, as well as Rehabilitation Act and Illinois state tort law claims against ORR contractor Heartland Alliance).

the claimant has first filed an administrative claim and it has been denied or six months have passed without the agency making a final decision. If the statute of limitations for accompanying non-FTCA claims is approaching, it may be necessary to file the complaint with those claims first and later move to amend the complaint to add the now-ripe FTCA claim, or to file a separate action asserting the FTCA claim and move to consolidate the two actions.

### **Common Defenses to FTCA Claims**

#### **24. Are defenses available to the United States?**

Yes. The FTCA provides a limited waiver of sovereign immunity, 28 U.S.C. § 1346(b)(1), with several exceptions set forth at 28 U.S.C. § 2680. If an exception applies, the district court lacks subject matter jurisdiction over the case. The most common defenses asserted by the United States in immigration FTCA cases are the due care exception, the discretionary function exception, the lack of a private person analog, the foreign country exception, and the law enforcement proviso. Additionally, the United States frequently asserts that there is no private analog for the alleged conduct. Each potential government argument is discussed below.

In addition, the United States may assert any defense that otherwise would have been available to the employee whose act gave rise to the claim.<sup>99</sup> This includes defenses under applicable state law and any defense based on legislative or judicial immunity. For example, in a negligence claim, the United States would be able to assert any defense of comparative or contributory negligence that would have been available if the employee had been sued in that jurisdiction.

#### **25. What is the due care exception?**

The “due care” exception provides that the waiver of sovereign immunity shall not apply to:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid.

28 U.S.C. § 2680(a).

The government bears the burden of proving that the due care exception applies.<sup>100</sup> In general, courts apply a two-part test to determine whether the due care exception applies.<sup>101</sup> The due care exception will apply if, and only if, (1) “the statute or regulation in question specifically

---

<sup>99</sup> 28 U.S.C. § 2674.

<sup>100</sup> *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992); *Carlyle v. U.S. Dep’t of Army*, 674 F.2d 554, 556 (6th Cir. 1982) (holding that United States has the burden with respect to the discretionary function exception, also found in § 2680(a)). *But see Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005) (“[I]t is the plaintiff’s burden to show that an unequivocal waiver of sovereign immunity exists and that none of the statute’s waiver exceptions apply to his particular claim.”).

<sup>101</sup> *See, e.g., Welch*, 409 F.3d at 652; *Crumpton v. Stone*, 59 F.3d 1400, 1403 (D.C. Cir. 1995); *Ferguson v. United States*, No. 15cv1253 JM (DHB), 2016 WL 4793180, at \*7 (S.D. Cal. Sept. 14, 2016).

pr[e]scribes a course of action for an officer to follow,” and (2) “the officer exercised due care in following the dictates of that statute or regulation.”<sup>102</sup>

As a practical matter, the test is subject to a narrow construction. Absent a specific statute or regulation mandating the action or omission underlying the claim, the first prong is not met. As to the second prong, when considering whether federal officers acted with due care, courts must assess whether the officer acted reasonably in carrying out the statutory or regulatory obligation.<sup>103</sup> The United States’ recent attempts to invoke the exception to seek dismissal of family separation FTCA claims were largely unsuccessful.<sup>104</sup>

## 26. What is the discretionary function exception?

A federal district court has no jurisdiction under the FTCA for claims based on an agency’s or employee’s exercise or failure to exercise a discretionary function or duty, even if the discretion was abused.<sup>105</sup>

Some courts have recognized that the United States bears the burden to prove the discretionary function exceptions (“DFE”) applies.<sup>106</sup> To successfully invoke the DFE, the alleged conduct must (1) involve an element of judgment or choice and (2) be based on public policy considerations.<sup>107</sup>

Under the first requirement, the DFE does not apply if the alleged conduct violates a statute,

---

<sup>102</sup> *Welch*, 409 F.3d at 652.

<sup>103</sup> *Hatahley v. United States*, 351 U.S. 173, 181 (1956) (“‘Due care’ implies at least some minimal concern for the rights of others.”); *Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1161 (1st Cir. 1987) (“The relevant question is one of reasonableness.”); *see also, e.g., Lyttle v. United States*, 867 F. Supp. 2d 1256, 1299–1300 (M.D. Ga. 2012) (finding that the due care exception did not apply where ICE officers were required to, but did not, take certain actions when the plaintiff made citizenship claims).

<sup>104</sup> *See, e.g., Leticia*, 2023 WL 7110953 at \*17 (holding DCE inapplicable because the government “did not exercise due care” in its treatment of a separated child plaintiff in treating him “without an apparent concern for his welfare”); *J.P. v. United States*, No. CV-22-00683, 2023 WL 4237331, at \*11 (D. Ariz. June 28, 2023) (finding DCE inapplicable even assuming a statute prescribed a course of action because plaintiffs plausibly alleged that the officers who detained and separated them did not act with due care); *A.P.F. v. United States*, 492 F. Supp. 3d 989, 996 (D. Ariz. 2020) (holding the government’s DCE argument failed at the first step, because “[a]ctions taken pursuant to executive policy are not shielded by the due care exception”); *C.M. v. United States*, No. CV-19-05217-PHX-SRB, 2020 WL 1698191, at \*3–4 (D. Ariz. Mar. 30, 2020) (same).

<sup>105</sup> 28 U.S.C. § 2680(a).

<sup>106</sup> *See, e.g., Merando v. United States*, 517 F.3d 160, 164 (3d Cir. 2008); *Terbush v. United States*, 516 F.3d 1125, 1128 (9th Cir. 2008). *But see, e.g., Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005) (holding that the plaintiff bears the burden of proof). *See also Walen v. United States*, 246 F. Supp. 3d 449, 456 n.6 (D.D.C. 2017) (discussing division of authority and listing cases).

<sup>107</sup> *United States v. Gaubert*, 499 U.S. 315, 322–27 (1991); *United States v. S.A. Empresa de Viacao Aera Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813–14 (1984). *See also Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987) (“[Law enforcement] decisions do not involve the sort of social, economic, and political policy choices that Congress intended to exempt from tort liability.”).

regulation, agency guidelines, or policy, as a federal employee does not have discretion to disobey a mandatory directive or legal duty.<sup>108</sup> Additionally, the majority of federal circuit courts have held that the DFE does not apply if the alleged conduct violates the U.S. Constitution, on the basis that a federal employee has no discretion to violate the Constitution.<sup>109</sup> The Seventh and Eleventh Circuits have ruled otherwise.<sup>110</sup>

Under the second requirement, the DFE does not apply if the alleged conduct was not “grounded in social, economic, [or] political policy.”<sup>111</sup> Even if a federal employee’s action was “nominally discretionary,” the conduct may be found objectively unreasonable such that it is not susceptible to policy analysis and thus does not satisfy this prong of the DFE test.<sup>112</sup>

Several courts have applied the DFE to bar claims challenging individual immigration-enforcement judgments—such as discrete arrest, detention, investigation, or removal decisions—for which no statute or regulation imposed a specific, mandatory course of action.<sup>113</sup> Other courts,

---

<sup>108</sup> *Id.*; see also *Munyua v. United States*, No. C-03-04538 EDL, 2005 WL 43960, at \*5–7 (N.D. Cal. Jan. 10, 2005) (finding that the discretionary function exception did not apply where federal statutes and regulations imposed mandatory duties for certain actions on immigration officers); *Sanders v. United States*, 937 F.3d 316, 329 (4th Cir. 2019) (holding that even internal agency operating procedures may “remov[e] any discretion from the task at hand and articulat[e] a mandatory directive that must be followed at the risk of incurring liability”).

<sup>109</sup> *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009); *Myers & Myers, Inc. v. U.S. Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975); *U.S. Fidelity & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988), *cert. denied*, 487 U.S. 1235 (1988); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (per curiam); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986). See also *M.Q. v. United States*, 22-cv-10680, 2025 WL 965810, at \*6–7 (S.D.N.Y. Mar. 31, 2025) (discussing the circuit split).

<sup>110</sup> *Shivers v. United States*, 1 F.4th 924 (11th Cir. 2021); *Kiiskila v. United States*, 466 F.2d 626, 627–28 (7th Cir. 1972) (per curiam).

<sup>111</sup> *Gaubert*, 499 U.S. at 335 (internal quotation marks omitted).

<sup>112</sup> *Hajdusek v. United States*, 895 F.3d 146, 152 (1st Cir. 2018). See, e.g., *Ruiz ex rel. E.R. v. United States*, No. 13-cv-1241, 2014 WL 4662241, at \*8 (E.D.N.Y. Sept. 18, 2014) (employee’s mistreatment of a minor was not “susceptible to policy analysis” because the court could not “discern how deciding to wait fourteen hours before contacting [the child’s] parents and to only provide the child with a cookie and a soda over twenty hours could constitute a considered judgment grounded in social, economic, or political policies.”); *Scott v. Quay*, No. 19-CV-1075, 2020 WL 8611292, at \*14 (E.D.N.Y. Nov. 16, 2020) (“An official’s lazy or careless failure to perform his or her discretionary duties are negligent acts that . . . are [not] grounded in considerations of governmental policy.”).

<sup>113</sup> See, e.g., *Ayala v. United States*, 982 F.3d 209, 215–18 (4th Cir. 2020) (finding that “[d]iscretion lies at the heart of DHS law enforcement” and barring tort claims arising from the arrest, detention and deportation of a U.S. citizen); *Tsolmon v. United States*, 841 F.3d 378, 383 (5th Cir. 2016) (finding that investigation into plaintiff’s immigration status fell within discretionary function exception because it involved numerous discretionary choices); *Castro v. United States*, 608 F.3d 266, 268 (5th Cir. 2010), *cert. denied*, 562 U.S. 1168 (2011) (barring claim for negligent deportation claim of U.S. citizen child where allowing citizen child to “accompany” father was a policy choice not governed by regulation or law); *Xue Lu v. Powell*, 621 F.3d 944, 950 (9th Cir. 2010) (applying discretionary function exception to supervisor’s failure to discipline

however, have refused to apply the DFE to immigration-related claims where the challenged conduct was alleged to violate the Constitution, exceed statutory or regulatory constraints, or disregard mandatory immigration procedures, and therefore did not constitute permissible discretionary judgment.<sup>114</sup> It is advisable to research the exception's applicability before filing an FTCA claim and assess whether the relevant conduct is the result of either a constitutional violation or the violation of a mandatory legal/regulatory duty.

## **27. What is the foreign country exception? What if the tort occurred in the United States and DHS subsequently deports the person?**

The FTCA's foreign country exception, 28 U.S.C. § 2680(k), precludes recovery for "[a]ny claim arising in a foreign country." The leading Supreme Court decision on the foreign country exception, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), held that the exception bars suits based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred. In other words, if the government's tortious act or omission occurs in the United States that causes harm to a person in a foreign country—e.g., U.S. officials plan and direct a policy from the United States—recovery under the FTCA is unlikely.

In FTCA litigation, the government often tries to argue that if a tort occurred in the United States and DHS subsequently deported the person, the claim is barred under this exception. However, a

---

where discipline not required); *Medina*, 259 F.3d at 226–29 (barring claims for assault, battery, malicious prosecution and false arrest based on finding that ICE agents' arrest and detention decisions were discretionary); *Adras v. Nelson*, 917 F.2d 1552, 1555–57 (11th Cir. 1990) (barring claim by Haitian refugees for unlawful detention based on INS's discretion to detain).

<sup>114</sup> See, e.g., *Vickers v. United States*, 228 F.3d 944, 951–53 (9th Cir. 2000) (finding that failure to institute an investigation into a shooting was not discretionary conduct); *C.M. v. United States*, 699 F. Supp. 3d 809, 831 (D. Ariz. 2023) ("Because CBP officers did not have discretion to pre-emptively designate children Plaintiffs as UACs before parent Plaintiffs were in fact unavailable to provide care and custody, the DFE does not apply."); *Flores Benitez v. Miller*, 687 F. Supp. 3d 304, 326–30 (D. Conn. 2023) (rejecting government's attempt to apply a qualified immunity-type standard to DFE analysis and holding DFE not applicable); *D.J.C.V. v. United States*, 605 F. Supp. 3d 571, 590–93 (S.D.N.Y. 2022) (because plaintiffs plausibly pled that their Fifth Amendment due process rights were violated, DFE does not apply); *A.P.F. v. United States*, 492 F. Supp. 3d 989, 996–97 (D. Ariz. 2020) ("Because government officials lack discretion to violate the Constitution, the discretionary function exception cannot shield conduct related to the government's likely unconstitutional separation of plaintiffs."); *S.M.F. v. United States*, No. 22-cv-01193, 2023 WL 6215319, at \*4 (W.D. Wash. Sept. 25, 2023) ("Because Plaintiffs have plausibly alleged a violation of their constitutional right to family integrity, and because each of Plaintiffs' causes of action stem from this separation, none are barred by the DFE." (cleaned up)); *Plascencia v. United States*, No. EDCV 17-02515 JGB(SPx), 2018 WL 6133713, at \*6–9 (C.D. Cal. May 25, 2018) (denying motion to dismiss based on plausible allegations that the arrest violated the Constitution); *Mayorov v. United States*, 84 F. Supp. 3d 678, 689–93 (N.D. Ill. 2015) (finding that the exemption did not bar negligence claim related to issuance of a detainer); *Makowski v. United States*, 27 F. Supp. 3d 901, 918–19 (N.D. Ill. 2014) (denying motion to dismiss based on plausible allegations that DHS and ICE violated policies relating to detainees); *Mancha v. ICE*, No. 1:06-CV-2650-TWT, 2009 WL 900800, at \*3 (N.D. Ga. Mar. 31, 2009) (finding that exemption did not apply because plaintiff alleged that agents violated the Constitution); *El Badrawi v. DHS*, 579 F. Supp. 2d 249, 274–75 (D. Conn. 2008) (denying motion to dismiss where allegation was that arrest violated the Constitution).

claim is only barred if the *injury* is suffered in a foreign country.<sup>115</sup> To determine where an injury is suffered, look to where the last event necessary to make an actor liable for the tort takes place.<sup>116</sup> The fact that a person was harmed in the United States and later removed, or that the plaintiff's damages continue to accrue outside the United States, is irrelevant. If the damages flow from an injury suffered inside the United States, the foreign country exception should not apply.<sup>117</sup>

## **28. What is the law enforcement proviso and how does it interact with the discretionary function exception?**

The law enforcement proviso is an exception to the exemption to the FTCA's waiver of sovereign immunity over certain intentional torts. In other words, even though the FTCA normally bars lawsuits for intentional torts, the law enforcement proviso allows a person to assert claims for six intentional torts (assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution) if they are committed by certain federal investigative and law enforcement officers.<sup>118</sup>

In *Martin v. United States*, 605 U.S. 395 (2025), the Supreme Court resolved a circuit split regarding the interplay between the law enforcement proviso and the discretionary function exception. The Supreme Court sided with the majority of circuit courts and held that though the law enforcement proviso allows plaintiffs to assert the six enumerated intentional torts against an investigative or law enforcement official, the discretionary function exception may still apply to shield the United States from liability.

---

<sup>115</sup> *Sosa*, 542 U.S. at 711 (stating that an FTCA claim “arises where the harm occurs”).

<sup>116</sup> *Id.* at 705 (“[A] cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred; i.e., the jurisdiction in which injury was received.”); see also *S.H. by Holt v. United States*, 853 F.3d 1056, 1058 (9th Cir. 2017) (holding that for the purposes of the FTCA's foreign country exception “an injury is suffered where the harm first impinges upon the body”).

<sup>117</sup> See *Arce v. United States*, 899 F.3d 796, 801 n.5 (9th Cir. 2018) (rejecting argument that FTCA claims were barred by the foreign country exception because the “injury clearly occurred in the United States when the government removed him from [the United States] and deported him to Mexico”); *Guerra-Castaneda v. United States*, 656 F. Supp. 3d 356, 364 (D. Mass. 2023) (holding the foreign country exception inapplicable to FTCA claim asserting negligence, negligent infliction of emotional distress, and wrongful deportation where plaintiff alleged “his primary injury occurred in the United States at the time the government forced him to board a plane in Louisiana and deported him without an order of removal authorizing it to do so”); *Roe v. United States*, No. 18-CV-2644 (VSB), 2019 WL 1227940, at \*4–5 (S.D.N.Y. Mar. 15, 2019) (holding that, for purposes of wrongful deportation claim, the “last act necessary to establish liability” occurred within the United States); see also *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1301 n.18 (M.D. Ga. 2012) (declining to apply the foreign country exception at the motion to dismiss stage, instead saving for trial “the issue of whether [the claimant's] damages for continuing harm that originated in the United States are recoverable”).

<sup>118</sup> 28 U.S.C. § 2680(h); see also *supra* Questions 5 (What kinds of immigration officers and agencies may be liable under the FTCA?) and 7 (What kinds of immigration officers and agencies may be liable under the FTCA?).

## 29. Does the Immigration and Nationality Act Section 1252(g) bar jurisdiction over FTCA claims?

The United States often moves to dismiss FTCA actions by arguing that 8 U.S.C. § 1252(g) strips the court of jurisdiction. Section 1252(g) bars jurisdiction over any case “arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any [noncitizen].”

As an initial matter, this argument conflicts with Congress’s express expectation that individuals must be able to bring civil actions for constitutional violations.<sup>119</sup> Additionally, several courts have recognized strong reasons why Section 1252(g) does not bar review of FTCA actions. In *Reno v. American-Arab Anti-Discrimination Committee (AADC)*, the Supreme Court held that Section 1252(g) applies only to the three specific agency actions listed in the statute—not to all claims related in some way to removal.<sup>120</sup> The Court also stressed that those three actions are inherently discretionary, which narrows the provision even further.

Following *AADC*, numerous courts have construed Section 1252(g) narrowly.<sup>121</sup> Some courts have held that the challenged action is too far removed from the commencement or adjudication of removal proceedings, or the execution of a removal order, to “arise” from those events.<sup>122</sup> Others have drawn a useful distinction: challenges to an agency’s legal authority act remain reviewable, whereas challenges to discretionary decisions the agency makes in exercising its authority may fall within Section 1252(g)’s bar.<sup>123</sup>

---

<sup>119</sup> See *Lanuza v. Love*, 899 F.3d 1019, 1030–31 (9th Cir. 2017) (citing 8 U.S.C. § 1357(g)(8)).

<sup>120</sup> 525 U.S. 471, 482 (1999) (rejecting the “unexamined assumption that § 1252(g) covers the universe of deportation claims”); *id.* at 485 (“Section 1252(g) seems clearly designed to give some measure of protection to ‘no deferred action’ decisions and similar *discretionary* determinations.”) (emphasis added); *id.* at 485 n.9 (“Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion.”); *id.* at 487 (“It is entirely understandable, however, why Congress would want only the discretion-protecting provision of § 1252(g) applied even to pending cases: because that provision is specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings.”).

<sup>121</sup> See, e.g., *Jama v. INS*, 329 F.3d 630, 632–33 (8th Cir. 2003) (finding that § 1252(g) does not preclude review of the Attorney General’s interpretation of the removal statute), *aff’d on other grounds*, 543 U.S. 335 (2005).

<sup>122</sup> See, e.g., *Alvarez v. ICE*, 818 F.3d 1194, 1205 (11th Cir. 2016) (“Quite simply, a claim that arises from the decision to indefinitely detain [a noncitizen]—and thus, by definition, never to remove him—cannot arise from the decision to execute removal.”); *Artiga Carrero v. Farrelly*, 270 F. Supp. 3d 851, 877–78 (D. Md. 2017) (finding § 1252(g) barred review of arrest of plaintiff with a final removal order but did not bar review of claim related to agent’s entry of the final order into national crime database); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1068–69 (N.D. Ill. 2007) (finding § 1252(g) barred review of arrest and detention which were a “direct outgrowth of the decision to commence proceedings” but did not bar review of the 12-hour pre-arrest interrogation which preceded the decision to commence proceedings).

<sup>123</sup> See, e.g., *Arce v. United States*, 899 F.3d 796, 800–01 (9th Cir. 2018) (interpreting § 1252(g) narrowly and finding review over government’s removal of plaintiff in violation of Ninth Circuit’s stay order, explaining that plaintiff’s claims arise not from the execution of the removal order, but from its violation); *Garcia v. Att’y Gen.*, 553 F.3d 724, 729 (3d Cir. 2009) (finding that § 1252(g) is “not implicated” where

Under this reasoning, some courts have held that Section 1252(g) does not protect the commencement of proceedings or the execution of a removal order that was unlawful to begin with, because officers have no authority to violate the law.<sup>124</sup>

While these cases arise in a variety of procedural postures—habeas petitions, petitions for review, and claims for both injunctive and monetary relief—the interpretation of Section 1252(g) does not depend upon the nature of the case.<sup>125</sup> Still, despite *AADC*'s clear instruction to read Section 1252(g) narrowly, some courts have applied it broadly and have found that it bars review in particular cases.<sup>126</sup>

---

the petitioner was “challenging the government’s very *authority* to commence [removal] proceedings”); *United States v. Hovsepian*, 359 F.3d 1144, 1155–56 (9th Cir. 2004) (en banc) (same); *Madu v. Att’y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) (finding court had jurisdiction over a constitutional challenge to detention and impending removal because § 1252(g) “does not proscribe substantive review of the underlying legal bases for [ ] discretionary decisions and actions”); *see also Mustata v. U.S. Dep’t of Justice*, 179 F.3d 1017, 1022 (6th Cir. 1999) (holding § 1252(g) does not bar review of ineffective assistance of counsel claim and noting that petitioners “are not claiming that the Attorney General should grant them discretionary, deferred-action-type relief”); *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 380 (5th Cir. 2005) (finding that § 1252(g) does not bar jurisdiction over a challenge to the constitutionality of the statutory scheme allowing Attorney General the discretion to choose between regular and expedited removal proceedings).

<sup>124</sup> *See, e.g., Lanuza v. Love*, 134 F. Supp. 1290, 1297 (W.D. Wash. 2015) (holding that § 1252(g) did not bar review where a DHS official allegedly falsified an immigration form that resulted in a removal order because, *inter alia*, such action was not “discretionary”); *Avalos-Palma*, 2014 WL 3524758, at \*6–8 (holding that § 1252(g) does not bar review of government’s removal of plaintiff in violation of a mandatory stay).

<sup>125</sup> *Hovsepian*, 359 F.3d at 1155 (noting that “the same [statutory construction] principle applies” for the interpretation of § 1252(g) whether a case arises in the context of a habeas petition or a district court action for injunctive relief).

<sup>126</sup> *See, e.g., Silva v. United States*, 866 F.3d 938, 940–42 (8th Cir. 2017) (affirming § 1252(g)’s applicability to review of deportation in violation of an automatic stay regulation because the claim was “‘connected directly and immediately’ to a decision to execute a removal order” and thus arose from that decision) (quotation omitted); *Gupta v. McGahey*, 709 F. 3d 1062, 1065 (11th Cir. 2013) (per curiam) (concluding that the arrest of plaintiff and related actions by ICE agents arose from an action to commence removal proceedings); *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) (finding § 1252(g) applied where plaintiff’s detention arose from a decision to commence expedited removal proceedings). *But see Silva*, 866 F.3d at 942 (Kelly, J., dissenting) (concluding that § 1252(g) was inapplicable because automatic stay divested the agency of authority to execute the removal order); *Arce*, 899 F.3d at 801 (rejecting majority’s analysis in *Silva*); *Roe*, 2019 WL 1227940, at \*3–4 (following *Arce*).