UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D.J.C.V., MINOR CHILD, AND G.C., HIS FATHER Plaintiffs, v. UNITED STATES OF AMERICA, Defendants.	Index No. 1:20-cv-5747

BRIEF OF *AMICI CURIAE* STEPHEN I. VLADECK, GREG C. SISK, AND LARRY W. YACKLE

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INTEREST OF AMICI

Amici curiae are scholars at universities across the United States teaching the law of federal courts and constitutional law. *Amici* are nationally recognized experts in the area of federal courts and join together to provide the Court with their understanding of the discretionary function exception, its intent, and its inapplicability to the instant case.

Amicus Stephen I. Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law and is a nationally recognized expert on the federal courts, constitutional law, national security law, and military justice. He teaches and writes extensively about statutory interpretation and the relationship between the federal courts and administrative agencies. Professor Vladeck has written numerous articles on the remedies available in federal courts, including *The Disingenuous Demise of and Death of Bivens*, CATO Sup. Ct. Rev. 263 (2020); *Constitutional Remedies in Federalisms' Forgotten Shadow*, 107 Cal. L. Rev. 1043 (2019); and *State Law, the Westfall Act, and the Nature of the Bivens Questions*, 161 U. Pa. L. Rev. 509 (2013), and has argued cases involving federal remedies at every level of the federal courts, including *Hernandez v. Mesa*, 140 S. Ct. 735 (2020).

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SUMMARY OF ARGUMENT

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), embodies Congress's determination to provide remedies for persons injured by the common law torts of government agents. Its purpose was to draw back the curtain on sovereign immunity and to dispel the notion that "the King can do no wrong." Adin Pearl, *Assigning the Burden of Proof for the Discretionary Function Exception to the Federal Tort Claims Act: An Optimal Approach*, NYU Survey of American Law, 275, 276 (2018). The FTCA thus both ensures that private citizens can be made whole and incentivizes the government to properly train its employees by holding them financial responsible for their tortious conduct. It does not, however, completely eviscerate sovereign immunity. Rather, the FTCA includes, for example, a "discretionary function exception," which seeks to ensure that government employees are free to make appropriate day-to-day and policy decisions without fear of

creating civil liability. But the discretionary function exception was not intended to shield the government from liability for actions that do not and cannot fall within an official's exercise of discretion and it certainly should not be applied to immunize decisions and actions which violate the law, including the constitutional rights of victims.

In this case, government employees took action to separate Plaintiffs, a father (Mr. C), from D.J.V.C., his then 19-month old son, although Mr. C did not present a danger to his son or was otherwise an unfit parent. Complaint, (ECF No. 1) ¶ 88. In nonetheless separating Mr. C. from and D.J.V.C. without notice and an opportunity to be heard, and continuing their separation for five (5) months, also without a hearing of any kind, the Government violated their constitutional right to due process. Summary Order, D.J.C.V. v. U.S. Immigration & Customs Enf't, No. 18 CIV. 9115 (AKH), 2018 WL 10436675 (S.D.N.Y. Oct. 15, 2018), ECF No. 21. Because, *amici* respectfully submit, the discretionary function exception of the FTCA does not apply to such constitutional violations or indeed, to any violations of law, the Government's motion to dismiss on the basis of that provision should be denied.

ARGUMENT

A. THE FEDERAL TORT CLAIMS ACT WAS INTENDED TO LIMIT THE GOVERNMENT'S SOVERIGN IMMUNITY

Until 1946, the doctrine of sovereign immunity posed a nearly insuperable obstacle to persons seeking compensation for injuries negligently caused by federal governmental action or inaction. Paul Figley, *Ethical Intersections & The Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. St. Thomas L.J. 347, 348-49 (2011). Such sovereign immunity, at least for the United States, is "grounded in the Appropriations

Clause," which states "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law...." *Id.* at 349 (citing U.S. CONST. art. I, § 9, cl. 7.)). In sum, the doctrine of sovereign immunity provides that the Government can be sued for domestic torts only to the extent that the legislative branch has authorized.[1] *Id.* (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940).

Before 1946, there was but one way around this for governmental torts: "the only means for parties to seek redress for injury caused by the government was 'through the cumbersome mechanism of private bills issued by Congress.'" Andrew Hyer, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, B.Y.U. L. Rev. 1091, 1093-94 (2007) (quoting Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. Rev. 871, 875-76 (1991)). But this private bill process overburdened Congress and caused immeasurable hardship to the victims of Governments negligence. Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act,* 51 S. Tex. L. Rev. 259, 267 (2009). It also required private citizens to lobby Congress to enact bills affording relief in each individual case, spurring public concern "that the private bill system was unjust and wrought with political favoritism." *Id.* Moreover, the record of private bills suggests that "Congress was inclined primarily to grant relief in only a few factual situations, most

[1] *Amici* understand that Plaintiffs argue that the Government does not enjoy federal sovereign immunity from claims for *jus cogens* violations brought in U.S. courts. *Amici* take no position on this question, but only consider the distinct question regarding the FTCA's waiver of sovereign immunity for state law torts and whether the congressionally enacted "discretionary function" exception covers unlawful conduct. Even though *amici* take no position on the *jus cogen* sovereign immunity question, we can observe the position Plaintiffs take is not necessarily inconsistent with the framework governing sovereign immunity in the FTCA context.

notably vehicle accidents." Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, Maine L. Rev. 366, 368 (1995).

The FTCA derived from a sense that rather than limiting government responsibility in this way, "the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite v. United States*, 346 U.S. 15, 24 (1953). That is, "Congress intended the federal district courts' doors to swing open for victims of the government's torts and for courts to use their authority, powers, experience, and knowledge to award compensation." Pearl, *supra* at 276. As well, "by waiving the government's immunity from suit, the FTCA evinces a concern for deterring repeated government negligence." Krent, *supra* at 885; *see also Loumiet v. United States*, 828 F.3d 935, 941 (D.C. Cir. 2016) (FTCA sought to "deter tortious conduct of federal personnel" by incentivizing the Government to carefully supervise its employees.).

In particular, Congress undertook to overhaul how the federal government compensates those whom it negligently injures — and to make it easier for tort victims to obtain relief — by dramatically limiting the extent to which the government could invoke sovereign immunity to shield itself and its agents from suit. "[T]he very purpose of the [FTCA] was to waive the Government's traditional all-encompassing immunity from tort action and to establish novel and unprecedented governmental liability." *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957). Thus, the FTCA "waives the Government's immunity from suit in sweeping language" specifically seeking to hold the federal government liable for tortious acts "in the same manner and to the same extent as private individuals under like circumstances…." *United States v. Yellow Cab*, 340 U.S. 543, 547

(1951) (*citing* 28 U.S.C. § 2674). Though it did not create any new federal causes of action against the United States — in most cases, the substantive law of the state where the tort occurred defines the substantive liability of the United States in an FTCA case, 28 U.S.C. § 1346(b)(1)—the FTCA waived the United States' sovereign immunity for certain types of state tort law claims. *See, e.g., Wang v. United States*, No. 01 CIV. 1326 (HB), 2001 WL 1297793, *1, *2 (S.D.N.Y. Oct. 25, 2001), *aff'd*, 61 F. App'x 757 (2d Cir. 2003), and *aff'd*, 61 F. App'x 757 (2d Cir. 2003) ("[The FTCA] serves to convey jurisdiction when the alleged breach of duty is tortious under state law, or when the Government has breached a duty under federal law that is analogous to a duty of care recognized by state law.") (*citing Medina v. United States,* 259 F.3d 220 (4th Cir. 2001)); *see also Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 508 (D.C. Cir. 2009) ("This statutory text does not create a cause of action against the United States; it allows the United States to be liable if a private party would be liable under similar circumstances in the relevant jurisdiction."); *Pornomo v. United States*, 814 F.3d 681, 687 (4th Cir. 2016) ("The FTCA does not create a new cause of action; rather, it permits the United States to be held liable in tort by providing a limited waiver of sovereign immunity.").

That said, the FTCA does not, however, act as a complete waiver of sovereign immunity. In order to protect the solvency of the public and not unduly hamper government officials in the performance of their everyday duties, Mark C. Niles, *"Nothing But Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 Admin. L. Rev. 1275, 1283 (2002), Congress included, in what has since been codified in 28 U.S.C. § 2680, thirteen (13) exceptions to the FTCA's waiver of sovereign immunity including the discretionary function exception, at issue here. That exception states that

> [t]he provisions of [the FTCA] shall not apply to —… (a) 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, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

Despite the many versions of the FTCA that were considered by Congress in the early 1940s, the legislative history of the discretionary function exception is sparse. *See* Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act,* Utah L. Rev. 687, 700 (1989) (Congress considered more than 25 bills before enacting the FTCA.). Specifically, although Congress did not address the full implications of the discretionary function exception when enacting the FTCA, it did express concern over the prospect of regulatory agencies being held liable for day-to-day decisions. Thus, the House of Representatives report on the final version of the FTCA characterizes the discretionary function exception as being

> designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission and the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of, or provide a remedy on account of, such discretionary acts, even though negligently performed and involving an abuse of discretion.

Tort Claims Against the United States, Hearings on S.2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess. 6 (1940). Thus, the legislative record reflects a desire to prevent suits "growing out of legally authorized activity." Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the Comm. on the Judiciary H.R., 77th Cong., 2d Sess. 1, 28 (1942). As Assistant Attorney General Francis Shea described it:

> [The discretionary function exception] is a highly important exception, designed to avoid any possibility that the act may be construed to authorize damage suits against the government growing out of legally authorized activity, such as a flood-control or irrigation project . . . . It is neither desirable nor intended that the constitutionality of legislation, the legality of regulation, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort.

Id.

Thus, the discretionary function exception represents Congress's determination to ensure that government employees are free to make decisions "grounded in social, economic, and public policy" without fear of liability and, to that extent, limits the FTCA's waiver of sovereign immunity. *United States v. Gaubert*, 499 U.S. 315, 323 (1991). In particular, Congress considered judicial second guessing of day-to-day executive decisions to be "inappropriate" because "such judgments are more appropriately left to the political branches of our governmental system." Niles, *supra* at 1308; *see also* Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. Davis L. Rev. 691, 703 (1997) (explaining that the discretionary function exception reflects "separation-of-powers concerns.") But that said, the historical record does not suggest that the discretionary function exception was intended to shield the government

from liability for clear violations of law, or of the Constitution. And that, of course, is what this case is about.

B. THE DISCRETIONARY FUNCTION EXCEPTION, BY DEFINITION, APPLIES ONLY TO DECISIONS THAT ARE "DISCRETIONARY" IN NATURE.

From the inception of the FTCA, the meaning and scope of the discretionary function exception has been extensively litigated. Pearl, *supra* at 276. Given the lack of definition in the statute, courts have been tasked with articulating the functions that Congress intended to be "discretionary," and thus off-limits to civil suit, even as they assure that the core function of the FTCA, to hold the Government responsible for the harm it causes is fulfilled. *Dalehite*, 346 U.S. at 24. In fulfilling this task, courts have viewed the discretionary function exception as serving two primary purposes: (1) to avoid judicial second-guessing of "legislative and administrative decisions grounded in social, economic, and public policy through the medium tort," *Gaubert*, 499 U.S. at 323, and (2) to "protect the Government from liability that would seriously handicap efficient government operations." *United States v. Varig Airlines*, 467 U.S. 797 (1984) (quoting *United States v. Muniz*, 374 U.S. 150, 163 (1963)).

Specifying precisely which government actions fall within the discretionary functions of government employees and which do not has, however, proven difficult, in practice. And although the Supreme Court has vacillated in its interpretation of the discretionary function exception, including extending it at times to government activity that, it appears, it would not immunize today, the Court has never extended the discretionary

function exception to unconstitutional conduct, as the Government seeks the Court to do in this case. *Id.* at 37-38; *see* Motion to Dismiss (ECF No. 2) at 19.

The Court's decision in *Dalehite*, for example, in which it first interpreted the discretionary function exception, held that the exception applied both to policy decisions made at the highest planning levels in the executive branch as well as to the actions of government employees in carrying out those plans. 346 U.S. at 35-36. Specifically, the Court held that the discretionary function exception barred claims questioning the "determinations made by executives or administrators in establishing plans, specifications, or schedules of operations…" as well as the "acts of subordinates in carrying out the operations of government in accordance with official directions." *Id.*

In dissent, Justice Jackson criticized the majority for applying the discretionary function exception to so broad a swath of conduct, specifically, to day-to-day decisions regarding shipping labels, manufacturing, and storing potentially hazardous material. *See id.* at 53-61. "Surely," Justice Jackson wrote, "a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that 'the King can do no wrong' has not been uprooted [by the FTCA]; it has merely been amended to read, 'the King can do only little wrongs." *Id.* at 54. Justice Jackson would have applied the discretionary function exception to planning level decisions, involving broad policy considerations, but not to the Government's careless execution of the planning level decisions. *Id.* at 61. The dissent, however, captures the inherent tension between holding the Government liable for the harm it causes and, at the same time, being sensitive to the impact on the fisc. *Id.* at 54; *see also* Niles, *supra* at 1283. Still, nothing in the Court's

decision even hinted at so broad an exception — one that would excuse tortious behavior that violates the constitution or laws — as the Government seeks here.

This tension was embodied in the subsequent caselaw as well. Thus, in *Indian Towing Co. v. United States*, 350 U.S 61 (1955), the Court retreated somewhat from the broad definition of "discretionary function" set forth in *Dalehite* so as to allow for the imposition of FTCA liability on the Coast Guard for its negligent operation of a government-operated lighthouse. The Government conceded that the discretionary function exception would not excuse its alleged negligence, but it argued, citing *Dalehite*,— that it could not be liable because the activity involved was uniquely governmental. *Id.* at 64 (citing *Dalehite*, 346 U.S. at 28 ("[I]t was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function."). The Court, however, rejected this interpretation of the FTCA, at least in part based upon "[t]he broad and just purpose which the [FTCA] was designed to effect … to compensate the victims of negligence in the conduct of governmental activities in circumstances like those in which a private person would be liable…." *Id.* at 69; *see also Rayonier,* 352 U.S. at 319 ("the very purpose of the [FTCA] was to waive the Government's traditional all-encompassing immunity from tort actions and to establish a novel and unprecedented governmental liability."). While the Court did not specifically address the discretionary function exception in *Indian Towing Co.*, it subsequently relied upon that decision to affirm a circuit court ruling holding that the discretionary function exception did not shield the Government from liability for the negligence of a federal air traffic controller. *Union Trust Co. v. United States*, 350 U.S. 907, 907 (1955) (*per curiam*). Thus, both *Indian Towing Co. and Union Trust Co.*, stand for the proposition "that negligence at the operational level" is not protected

by the discretionary function exception, which is consistent with the FTCA's purpose of holding the Government liable for its negligence in a manner similar to private citizens. *See Yellow Cab*, 340 U.S. at 547 (detailing that the FTCA intended that the Government be held liable for its negligence.); *Krent*, *supra,* at 880.

More recently, the Court has sought to vindicate the purposes and yet limit the application of the FTCA by outlining a test for the application of the discretionary function exception. Thus, in *Varig Airlines*, the Court, clarified the proper application of the discretionary function exception as follows:

> First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case….Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee – whatever his or her rank – are of the nature and quality that Congress intended to shield from tort liability. Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.... Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.

467 U.S. 798.

Perhaps most significantly, the Court in *Berkovitz v. United* States, 486 U.S. 531, 536 (1988), applied this test to reverse a holding applying the discretionary function exception to the actions of federal employees that contravened federal statutes, holding that the exception "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* at 536, 541. That is, an employee "has no rightful option but to adhere to the directive. And if the employee's conduct cannot

appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect." *Id.* at 536. That is, a federal officer or employee lacks the discretion to ignore a federal statute which mandates certain conduct; that is, such actions, since dictated by the law, simply cannot be viewed as discretionary. *See id.* It followed that the Government could not raise the discretionary function exception in those circumstances. *Id.* at 546-47 ("if the [Government's] policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful.").

Precisely the same logic applies here, to government conduct that violates the constitution or laws; although the Court has never expressly considered whether the discretionary function applied in these circumstances, *Berkovitz* and other cases limit the discretionary function exception to those acts that involve an element of judgment or choice, i.e., the exercise of discretion. *See id; see also Gaubert*, 499 U.S. 322-323 (the discretionary function exception applies when the challenged government action involves "an element of judgment or choice" and when the complained-of choice is "the kind that the discretionary function exception was designed to shield"). And, as is described below, numerous Circuit courts, consistent with the reasoning in *Bertkovitz*, have held that the discretionary function exception does not apply when the Government flouts the constitution. (*See*, Section B, *infra*).

Moreover, the caselaw has also been consistent in holding the federal government liable for tortious acts "in the same manner and to the same extent as private individuals under like circumstances…," *Yellow Cab*, 340 U.S. at 54. And tort theory, at its most basic,

utilizes a reasonable person standard in order to determine liability. That is, negligent actions, of the sort that the FTCA is intended to redress, are those which do not meet the standard of objective reasonableness. *See* Restatement (Second) of Torts § 283 (1965); 2A Stuart M. Speiser, Charles F. Krause, Alfred W. Gans, *American Law of Torts*, § 9:5 (Monique C. M. Leahy ed., 2017); *see, e.g., Breitkopf v. Gentile*, 41 F. Supp. 3d 220, 271 (E.D.N.Y. 2014) ("[n]egligence is conduct that falls beneath the standard of care which would be exercised by a reasonably prudent person in similar circumstances at the time of the conduct at issue."); *LeGrande v. United States*, 774 F. Supp. 2d 910, 919 (N.D. Ill. 2011), aff'd, 687 F.3d 800 (7th Cir. 2012), as amended (Aug. 14, 2012) ("[n]egligence actions can be based on either "acts of omission or acts of commission;" an act of omission involves the "failure to do an act that a person is under a duty to do and that a person of ordinary prudence would have done under the same or similar circumstances…."); *Beahan v. St. Louis Pub. Serv. Co.*, 361 MO. 807, 811, (1951) ("it is fundamental that the standard by which the conduct of a person in a particular situation is to be judged in determining whether he was negligent is the care which a reasonable and prudent person would be expected to exercise under the same or similar circumstances."). And an action cannot, under the law of torts, be reasonable if it would violate the law. *See* Restatement (Second) of Torts § 288B (1965) ("where a statute or ordinance is adopted by the court as defining the standard of conduct of a reasonable man under the particular circumstances…the unexcused violation of the provision is a clear departure from that standard, and is conclusive on the issue of an actor's negligence."). In sum, whether a matter of the definition of "discretionary," or the simple application of tort law, the FTCA cannot and should not

be interpreted to bar recovery of those victimized by tortious conduct that violates the law, including the Constitution.

C. THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT SHIELD THE GOVERNMENT FROM LIABILITY.

As noted, the discretionary function exception acts as jurisdictional bar, preventing courts from hearing claims 'based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal employee." 28 U.S.C. § 2680(a). The discretionary function exception applies when (1) the challenged government action involves "an element of judgment or choice" by a government agent, and (2) the complained-of choice is "the kind that the discretionary function exception was designed to shield." *Gaubert,* 499 U.S. at 322-23 (quotation omitted). And, it must be "narrowly construed" so as not to circumvent the FTCA's purpose of providing recovery to victims of tortious conduct on the part of those acting on behalf of the Government. *Dolan v United States Postal Serv.*, 546 U.S. 481, 492 (2006).

As discussed above, the Courts of Appeals, including the Second Circuit, are in agreement that governmental conduct cannot be discretionary if it violates a legal mandate. *See*, e.g., *Myers & Myers, Inc. v. United States Postal Service.*, 527 F.2d 1252, 1261 (2d Cir. 1975); *see also United States Fidelity & Guaranty Co. v. United States*, 837 F.2d 116, 120 (3d Cir.) cert. denied, 487 U.S. 1235 (1988). Further, and even more to the point, six Circuits have relied on the Supreme Court's discretionary function jurisprudence to specifically hold that the discretionary function does not apply to actions that are unconstitutional. *See Loumiet*, 828 F.3d at 941("We hold that the FTCA's discretionary-function exception does not provide a blanket immunity against tortious conduct that a

plaintiff plausibly alleges also flouts a constitutional prescription"); *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) ("[w]e have already held that the defendants violated the Constitution," thus, "the FTCA's discretionary function exception will not apply"); *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003) (recognizing that actions that are "unauthorized" because they violate the Constitution or a statute do not fall within the discretionary function exception); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (same); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (noting that 'federal officials do not possess discretion to violate constitutional rights or federal statutes'); *Prisco v. Talty*, 993 F.2d 21, 26 n.14 (3d Cir. 1993) (concluding that the discretionary function exception was inapplicable to unconstitutional conduct); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (same).

In *Nurse v. United States*, for example, the Ninth Circuit held that "[i]n general, governmental conduct cannot be discretionary if it violates a legal mandate," including a constitutional mandate. 226 F.3d 996, 1002 (9th Cir. 2000). Thus, the court held the discretionary function exception inapplicable in that case because the plaintiff had alleged tort claims based on "discriminatory, unconstitutional policies which the[ ] [defendants] had no discretion to create." *Id.* Likewise, the Eighth Circuit in *Raz v. United States* held that the FBI's "alleged surveillance activities f[e]ll outside the FTCA's discretionary-function exception" where the plaintiff had "alleged they were conducted in violation of his First and Fourth Amendment rights." 343 F.3d at 948.

The Second Circuit has not specifically spoken to whether the discretionary function shields the Government from liability for constitutional violations; however, it has considered whether the exception applies to conduct that falls outside a federal employee's

mandate and concluded that it does not. Thus, in *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978), the court held that "[a] discretionary function can derive only from properly delegated authority. Authority generally stems from a statute or regulation, or at least, from a jurisdictional grant that brings the discretionary function within the competence of the agency." *Id.* at 329 (*citing Myers*, 527 F.2d at 1261 (no discretion to violate regulations); *Griffin v. United States*, 500 F.2d 1059, 1068 (3d Cir. 1974) (same); *United Air Lines v. Wiener*, 335 F.2d 379, 393-94 (9th Cir.) (same), *cert. dismissed*, 379 U.S. 951, 85 (1964)). Similarly, the D.C. Circuit has held that "a decision cannot be shielded from liability [under the discretionary function exception] if the decisionmaker is acting without actual authority. A government official has no discretion to violate the binding laws, regulations, or policies that define the extent of his official powers." *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986). "Discretion may be as elastic as a rubber-band, but it, too, has a breaking point," and for the Second Circuit that breaking point is most certainly, a violation of the law, as is alleged here. *Birnbaum*, 588 F.2d at 329.

Specifically, where the actions at issue fall outside of the legal authority of the actor, whether because they violate the constitution or run afoul of the laws, the discretionary function exception simply does not apply. Greg Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, Notre Dame L. Rev., 1, 49 (December 12, 2020) ("...any discretionary function exception immunity is withdrawn when federal government officials transgress constitutional lines"); *see also Loumiet*, 828 F.3d at 941 ("We hold that the FTCA's discretionary-function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription."). Here, the complaint alleges that

the Government forcibly separated Plaintiffs, a father his then-19-month-old child. Complaint, ¶ 80. Thus the Complaint alleges that Mr. C and his son fled Honduras to seek asylum in the United States due to "threats of violence" from MS-13. *Id.* at ¶ 81. Upon their arrival, government officials "apprehended Mr. C and his son and took them" to a detention center. *Id.* ¶ 84. Just three days after their arrival, the Government informed Mr. C "that they were going to deport him and take D.J.C.V." *Id.* at ¶¶ 88, 89. Later that day, government officials "arrived at the cell where Mr. C and D.J.C.V. were housed" and "then forcibly pulled D.J.C.V." from his father's hands. *Id.* at ¶ 90. Mr. C. and D.J.C.V were separated for "166 excruciating days." *Id.* at ¶ 92. As alleged, the separation of Plaintiffs and their continued separation was unconstitutional. *Id.* at ¶¶ 6, 28, 73.

Indeed, that has been the conclusion of the Courts. *See* Summary Order, *D.J.C.V. v. U.S. Immigration & Customs Enf't*, No. 18 CIV. 9115 (AKH), 2018 WL 10436675 (S.D.N.Y. Oct. 15, 2018), ECF No. 21 (holding the family separation policy to be unconstitutional saying "[e]xcept in the most dreadful circumstances, a court should not countenance the cruelty of the separation of a parent and child by the government. Here, the government does not allege that Petitioner Mr. C. is unwilling or unfit to care for Petitioner D.J.V.C., his child, or any other adequate reason why petitioners should not be reunited.")); *Ms. L. v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018) (ordering the government to cease its family separation policy as it violated the constitution.). And in *Ms. L*, the United States District Court for the Southern District of California found the Governments family separation policy to be "brutal" and "offensive," saying that the policy failed "to comport with traditional notions of fair play and decency." *Ms. L.*, 310 F. Supp. 3d at 1166. "At a minimum", the court wrote, "the government[s]

conduct at issue "shocks the conscience" and violates Plaintiffs' constitutional right to family integrity." *Id.* (*citing Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, (1998)). These decisions confirm that which is obvious: that the actions of the Government in this case, violated the law, including the Constitution. *Ms. L.*, 302 F. Supp. 3d at 1166-67.

As such, the Government, through its agents did not have the discretion to take the actions it did; and those actions, as alleged here,[2] do not fall within the purview of the discretionary function exception. Sisk, *supra* at 50 ("when the Constitution precludes the action…the discretion is removed entirely and no remnant of general executive authority remains"); *see also Myers*, 527 F.2d at 1261 (the Government does not have discretion to violate regulations). Indeed, any other ruling would not only close the courthouse door to deserving tort plaintiffs, thus contravening the original intent of the statute, but would also, contrary to hornbook tort law which governs the FTCA, and to the caselaw discussed herein, allow the Government to make not only unreasonable but, as in this case, illegal choices.

CONCLUSION

As explained above, the discretionary function exception was intended to limit liability for actions taken by Government employees that are, as the denomination of the exception implies, discretionary in nature. The exception should, therefore, cover only discretionary actions, i.e., actions based upon decisions that could reasonably have gone one way or the other. But a decision to violate the law cannot go one way or the other. The discretionary function exception jurisprudence makes this clear but the principle should,

[2] Of course , the allegation of the Complaint must, on this present motion, be accepted as true, *Serta Simmons Bedding, LLC v. Casper Sleep Inc.,* No. 17- CV- 7468, 2018 WL 11226100, *1, *1 (S.D.N.Y. Jan. 25, 2018) (citing *Patane v. Clark*, 503 F.3d 106, 111 (2d Cir. 2007)).

and is, irrefutable: the Government should not be able to break the law or violate the constitution, and then evade liability based upon the argument that it was just exercising its discretion when it did so. For these reasons, *Amici* most respectfully urge the Court to deny the Government's motion to dismiss Count I, II, and III on the basis of the discretionary function exception to the Federal Tort Claims Act .

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Respectfully Submitted,

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