UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D.J.C.V., a minor child, and G.C., his father, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	20 Civ. 5747 (PAE)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs seek to hold Defendant liable for making the reasonable determination that a person who was arrested and pleaded guilty to swinging a machete at his wife should held in a secure detention facility—as opposed to a facility that housed families. Far from constituting a tortious action, a federal court has already found Defendant's decision to be a reasonable one. Once the discretionary determination was made to house G.C. in a secure detention facility, an established statutory framework dictated that he had to be separated from D.J.C.V. because, pursuant to the Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") and *Flores* Settlement Agreement, children cannot be housed in a secure detention facility.

In their opposition to Defendant's motion to dismiss ("Government's Motion" or "Motion" or "Def. Mem."), Plaintiffs paint with a broad brush by arguing that any separation pursuant to the "Trump administration's . . . family separation policy" leaves the Government subject to tort liability. *See* Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint ("Plaintiffs' Motion" or "Pl. Mem."), Dkt. No. 35 at 1. However, Plaintiffs' argument overlooks well-established limitations on the Government's waiver of sovereign immunity under the Federal Tort Claims Act ("FTCA"). Moreover, as courts have recognized, there are undoubtedly circumstances where separation is justified. In fact, the *Ms. L.* court has already determined that the Government's decision to house G.C. in a secure detention facility was a reasonable one, thus, justifying the resultant separation. While the United States has denounced the prior practice of separating children form their families at the United States-Mexico border and committed itself to family reunification, this case is simply not about a family separation policy or its application to any other parent and child. Rather, this case concerns only G.C. and D.J.C.V. and Defendant's reasonable determination to house G.C. in a secure detention facility.

ARGUMENT

I. The Discretionary Function Exception Bars Plaintiffs' Claims

The gravamen of Plaintiffs' argument as to why the numerous defenses asserted by the Government are inapplicable is that the separation of D.J.C.V. and G.C. was unconstitutional because it violated their right to family integrity. *See* Pl. Mem. at 10-11. Plaintiffs argue that there is "a broad consensus of district courts recognizing that the enforced separation violated the families' due process right to family integrity." Pl. Mem. at 34, n.4 (collecting cases). None of the cases cited by Plaintiffs, however, addressed the circumstances present here of a parent who was justifiably securely detained due to that parent's violent criminal history.

Plaintiffs attempt to minimize this criminal history by referring to it as a "single misdemeanor conviction from eight years ago." Pl. Mem. at 8. However, this description conveniently omits the nature of the offense—G.C. assaulted his wife with a machete. *See* Def. Mem. at 5. As explained in the Motion, it was well within the Government's authority to determine that G.C. should be detained upon his illegal re-entry into the United States. *See* Def. Mem. at 8-9. As a federal court has already found, the fact that the Government decided to detain G.C. in a secure detention facility (rather than a family residential center or releasing him into the public) in light of this criminal history is entirely reasonable and does not violate any right to family integrity. *See* Declaration of Alexander J. Hogan ("Hogan Decl."), Dkt. No. 23, Ex. 2 at 3 (*Ms. L.* court stated, "Defendants have exercised their statutorily prescribed discretion in a reasonable manner").

Plaintiffs allege that this justification is a mere pretext for the decision to separate G.C. from his son. *See* Pl. Mem. at 16. Yet, according to Plaintiffs' own allegations, the Government informed G.C. from the outset of his detention that his criminal history was the reason for the separation. *Id.* at 3 ("Soon after, CBP agents began advising Mr. C. that as a result of an eight-

year-old misdemeanor, the U.S. planned to deport him and take custody of his son."). Moreover, the Supreme Court has unequivocally held, in analyzing the applicability of the discretionary function exception, "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991). By arguing that Defendant's stated reasons for the detention decision are "pretext," *see* Pl. Mem. at 16, Plaintiffs are asking the Court to consider the Government's subjective intent when taking these discretionary actions—an inquiry that the Supreme Court has squarely held is irrelevant.[1] Rather, the relevant inquiry focuses on the nature of the action and whether it is susceptible to policy analysis. *See In re Joint East. & South. Dists. Asbestos Litig*., 891 F.2d 31, 37 (2d Cir. 1989) ("We believe that it is unimportant whether the government actually balanced economic, social, and political concerns in reaching its decision . . . The discretionary function exception applies where there is room for policy judgment . . . Thus, the relevant question is not whether an explicit balancing is proved, but whether the decision is susceptible to policy analysis.") (internal quotations and citations omitted). Here, the decision to detain or release someone with a violent criminal history (and where to detain that person) assuredly is one that is susceptible to policy analysis. *See* Def. Mem. at 20-23.[2] *See, e.g., Pena Arita v. United States*,

[1] Plaintiffs also challenge the Government's intent under the due care exception, arguing that the Government intended for family separations to deter illegal entry into the United States and "inflict maximal punishment and torment on a family seeking refuge in the U.S." Pl. Mem. at 19. However, Plaintiffs cite no authority holding that the alleged motivations behind the decision to enforce federal statutes should be treated differently with respect to subjective intent than the discretionary function exception.

[2] Plaintiffs cite to *C.M. v. United States*, No. 19-cv-5217 (PHX), 2020 WL 1698191 (D. Ariz. Mar. 30, 2020), to support its argument that the Government's actions are not subject to the discretionary function exception. While the Government does not agree with the conclusions in *C.M.*, in any

470 F. Supp. 3d 663, 686-87 (S.D. Tex. 2020) (claim for intentional infliction of emotional distress based upon family separation barred by discretionary function exception).

Plaintiffs similarly try to minimize the finding in *Ms. L*. that the Government made a reasonable determination in not reunifying G.C. and D.J.C.V. Plaintiffs argue "the district court's exclusion of Mr. C. in the class for injunctive relief under governing class action procedural rules did not in any way opine upon or foreclose application of due process principles protecting Mr. C.'s or D.J.C.V.'s rights to family integrity." Pl. Mem. at 7. Far from a procedural motion, in *Ms. L.*, Plaintiff (*i.e.* G.C. in his individual capacity) argued, "[t]he government has no reasonable justification for keeping . . . Mr. C. apart from [his] child[]. For the reasons above, this Court should order their immediate reunification." Hogan Decl., Ex. 1, at 9. The *Ms. L.* court rejected the specific application brought by G.C. and held that "Defendants have exercised their statutorily prescribed discretion in a reasonable manner." Hogan Decl., Ex. 2, at 3.

The Government's actions here do not violate Plaintiffs' substantive due process rights under the Fifth Amendment, which protects an individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). To allege a violation of their right to substantive due process, the conduct at issue must "shock[] the conscience" – a standard "[which] is not subject to a rigid list of established elements." *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133, 1142-43 (S.D. Cal. 2018) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998)). "[A]n investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements[.]" *Id*. (quoting

event, *C.M.*, like the many other cases cited by Plaintiffs, is distinguishable because, there, the separation was not predicated upon the parent's criminal history.

Armstrong v. Squadrito, 152 F.3d 564, 570 (7th Cir. 1998)). The decision to detain someone with a violent criminal history in a secure detention center does not shock the conscience and does not amount to the exercise of power without any reasonable justification.[3] *See Ms. L. v. U.S. Immigration and Customs Enf't*, 331 F.R.D. 529, 537 (S.D. Cal. 2018) ("[T]he Government would have a legitimate interest in continuing detention of individuals who posed a flight risk or danger to the community or others in a family detention facility because of that person's criminal history."). The fact that the *Ms. L.* court has already found the conduct at issue to be reasonable only underscores that the Government's exercise of its power here was not conscience shocking.

In any event, even if the Court were to conclude that the Government violated the Constitution by not releasing G.C. or housing him with other families, the substantive due process right to family integrity while in immigration detention was not "clearly established" at the time of Plaintiffs' separation. The Supreme Court has long recognized that conduct may be discretionary even if it is later determined to have violated the Constitution. The common law doctrine of immunity thus applies to the exercise of "discretionary functions" even when conduct violates the Constitution, as long as the constitutional right was not defined sufficiently so that the Government should have known the act was prohibited. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded

[3] Plaintiffs argue that numerous courts have held that separating parents and children violated the right to family integrity. However, none of Plaintiffs' cited cases addressed a situation where the Government determined the parent could not be housed in a family residential center because the parent had a violent criminal history. *See* Pl. Mem. 15. And Plaintiffs' cited case *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1125 (N.D. Ill. 2018), acknowledged that there are circumstances where an initial separation can be warranted (in that case, due to the father's criminal detention). Furthermore, the *W.S.R.* court noted that the right to family integrity did not require the parents to be released (rather, if reunification was to occur, housing parent and child together at a family residential center would be required). *Id*. at 1132. Here, the Government was under no obligation to release G.C. and housing him in a family center was not viable in light of his criminal history.

from liability for civil damages insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known."); *Denson v. United States*, 574 F.3d 1318, 1337-38 (11th Cir. 2009) (allegations of constitutional violations do not defeat discretionary function exception unless evidence is sufficient to establish a *Bivens* claim based on that same conduct, which requires a showing the constitutional right was clearly established).

Prior to the separation at issue, the alleged right to family integrity while in immigration detention was not clearly established. Indeed, the existence of such a right in the context of immigration detention has been denied by a court of appeals. *See Reyna as next friend of J.F.G. v Hott*, 921 F.3d 204, 210-11 (4th Cir. 2019) (decisions regarding the right to family integrity "hardly support the asserted right to be detained in the same state as one's children, the right to be visited by children while in detention, or a general right to 'family unity' in the context of detention."). Given the lack of specificity in the Fifth Amendment and that the alleged right to family integrity while in immigration detention was not clearly established at the time of Plaintiffs' separation, the alleged violation of Plaintiffs' substantive due process rights does not preclude application of the discretionary function exception.[4] This conclusion is particularly warranted in light of the facts

[4] In addition, courts had held that separating alien parents from their citizen children through deportation did not violate the Constitution. *See e.g.*, *Marin-Garcia v. Holder*, 647 F.3d 666, 674 (7th Cir. 2011) ("nothing in the Constitution prohibits" separation of citizen children from parents when parents deported); *Payne-Barahona v. Gonzales*, 474 F.3d 1, 2 & n.1 (1st Cir. 2007) ("The circuits that have addressed the constitutional issue (under varying incarnations of the immigration laws and in varying procedural postures) have uniformly held that a parent's otherwise valid deportation does not violate a child's constitutional right."). More generally, courts had held that separating individuals charged with federal crimes from their children while they were detained and awaiting criminal trials did not violate the Constitution. *See Olim v. Wakinekona*, 461 U.S. 238, 247-48 n.8 (1983) (interstate transfer of criminal detainee does not violate any due process right, even if transfer leaves detainee separated thousands of miles from family); *Southerland v. Thigpen*, 784 F.2d 713, 716-17 (5th Cir. 1986) ("The considerations that underlie our penal system justify the separation of prisoners from their spouses and children and necessitate the curtailment of many parental rights that otherwise would be protected."); *White v. Pazin*, 2016 WL 6124234,

presented here. Putting aside any alleged general right to family integrity in the detention context, it was assuredly not clearly established that this right to family integrity was sufficient to overcome the Government's reasonable decision to detain a person with a violent criminal history in a secure detention facility as opposed to releasing him or detaining him in a family residential center.

Plaintiffs also raise a procedural due process issue arguing that there needed to be an opportunity to be heard before G.C. and D.J.C.V. were separated. Pl. Mem. at 11, 14. However, Plaintiffs' argument ignores the unique facts of this case – that G.C. had a criminal history and was detained in a secure detention center. This is not a case where a determination of G.C.'s fitness as a parent was at issue, as once G.C. was detained in a secure facility, there was no way for D.J.C.V. to be detained with him consistent with the *Flores* Settlement Agreement. Def. Mem. at 26 n.12. And due to his criminal history, G.C. was not a member of the *Ms. L.* class, where the injunction prevented the Government from detaining class member parents apart from their children unless there was a determination that the parent was unfit or a danger. *Ms. L.*, 310 F. Supp. 3d at 1149. Despite not being part of the class, G.C. moved the *Ms. L.* court to reunify him with his son, and therefore, was heard on this issue, and his requested relief was denied.

II. Plaintiffs' Claims Are Barred by the FTCA's Due Care Exception

Plaintiffs argue that the due care exception does not apply because (1) there was no statute or regulation that mandated Plaintiffs' separation, and (2) instead, the Government was acting pursuant to executive policy that had an "independent . . . aim of punishing and deterring asylum seekers." Pl. Mem. at 20-22.

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at *11 (E.D. Cal. Feb. 16, 2017) (there is not "any clearly established right protecting an inmate from policies banning visitations with his minor children").

As an initial matter, Plaintiffs are incorrect that "[t]he failure to identify any lawful authority 'specifically prescribing' the removal of D.J.C.V. from Mr. C.'s custody is fatal." Pl. Mem. at 20 (citing *Watson v. United States*, 179 F. Supp. 3d 251, 271 (E.D.N.Y. 2016), *aff'd in part, rev'd in part*, 865 F.3d 123 (2d Cir. 2017)). Plaintiffs' citation to *Watson* is inapposite. *Watson* involved a statute that compelled a specific outcome, but that statute only applied to aliens, not citizens, so the statute did not apply to the plaintiff in that case. 179 F. Supp. 3d at 271. Here, the relevant statutes specifically authorized the Government's conduct in this case with respect to these Plaintiffs. *See generally* Def. Mem. at 23-25. As numerous courts have explained, the FTCA bars claims against the Government for harms caused by a course of action that the Government is authorized to take by statute or regulation. *See e.g.*, *Borquez v. United States*, 773 F.2d 1050, 1052 (9th Cir. 1985) (due care exception barred claim based on exercise of authority in statute, which provided that the Secretary of the Interior was "authorized, in his discretion, to transfer . . . the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe"); *see also* Def. Mem. at 23-24. Plaintiffs rely on the test laid out in *Welch v. United States*, 409 F.3d 646 (4th Cir. 2005); however, as Plaintiffs acknowledge, Pl. Mem. at 19, the Second Circuit has not set forth a test for the due care exception.[5]

Moreover, even under the standard Plaintiffs advocate, the due care exception still would bar Plaintiffs' claims because, while the initial decision to securely detain a parent reflects an exercise of discretion, the applicable statutory and regulatory framework requires separation once a parent is securely detained. Specifically, execution of the TVPRA, 8 U.S.C. § 1232(b)(3), required the transfer of G.C.'s minor son to ORR once he was determined to be a UAC under 6 U.S.C. § 279(g) due to G.C.'s detention in a secure facility. And while Plaintiffs counter that

[5] The Government acknowledges that district courts in this Circuit have applied the test in *Welch*.

D.J.C.V. was not a UAC because he entered the country with his father who was available to provide care, Pl. Mem. at 21-22, this argument ignores the fact that once the discretionary decision was made to detain G.C. in a secure facility, he was unavailable to care for his son. And in fact, Section 279(g) specifically contemplates situations where parents are physically present in the U.S. but are not "available to provide care and physical custody" of their children. 6 U.S.C. § 279(g)(2). Such a situation was found in *D.B. v. Cardall*, 826 F.3d 721 (4th Cir. 2016), where the court determined that a minor was a UAC even though she lived with her mother because the mother was "unavailable" since she lacked fitness to care for her child. Here, Plaintiff G.C. illegally re-entered the United States, and consistent with relevant statutory authority, was detained in a secure detention facility where his son could not also be placed under the terms of the *Flores* Settlement Agreement.[6] Under those circumstances, it was reasonable to determine that G.C. was not "available to provide care and physical custody" of his son. Plaintiffs selectively cite *Bunikyte v. Chertoff*, Nos. A-07-CA-164-166, 2007 WL 1074070, at *2 (W.D. Tex. Apr. 9, 2007), which states that children "who are apprehended by DHS while in the company of their parents are not in fact 'unaccompanied.'" Pl. Mem. at 22. However, Plaintiffs ignore *Bunikyte's* explanation that if an adult is in a secure facility, to comply with the *Flores* Agreement, DHS must "releas[e] the children to adult relatives not in custody, adult friends designated by their parents, or even state-operated foster care[.]" *Bunikyte*, 2007 WL 1074070 at *16.[7]

[6] The *Flores* Agreement precludes detention of minors in a secure detention facility, absent circumstances not alleged here, and under no circumstances in secure adult detention. Def. Mem. at 26 n.12. Thus, even if D.J.C.V. was not classified as a UAC, as long as G.C. was detained in a secure facility, Plaintiffs still would have been separated.

[7] Moreover, Plaintiffs cannot mount a challenge under the FTCA to the manner in which an agency interpreted a federal statute. *See Dupree v. United States*, 247 F.2d 819, 824 (3d Cir. 1957) (the "Tort Claims Act did not contemplate that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort."); H.R. Rep. No.

Plaintiffs also argue that the due care exception does not apply because the Government's actions resulted from the Trump administration's alleged "family separation policy," not a statute or regulation. Pl. Mem. at 20-21, 24. However, the separation did not occur solely pursuant to the administration's policy as laid out in then-applicable Executive Orders. Instead, Executive Orders and other memoranda directed agencies to strictly enforce existing federal criminal and immigration statutes, *see* Def. Mem., Legal Framework Section C, and it was the execution of those statutes and complying with the TVPRA that resulted in Plaintiffs' separation. In any event, actions taken pursuant to the dictates of an Executive Order are shielded by the due care exception. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 577 (D.D.C. 1952), *aff'd* 343 U.S. 579 (1953).

III. Plaintiffs' Separation After G.C. Is Released From Custody

Plaintiffs note that Judge Hellerstein has already determined that Plaintiffs' separation violated the Constitution. *See D.J.C.V. v. ICE*, No. 18-cv-9115 (AKH) (S.D.N.Y. 2018). This argument, however, glosses over a critical distinction—when Judge Hellerstein made this determination, G.C. had already been released from secure detention. G.C. was released from secure detention on October 10, 2018, and filed a *habeas corpus* petition seeking to be reunified with his son. Judge Hellerstein held a hearing on the matter on October 15, ordered Plaintiffs to

77-2245, 77th Cong., 2d Sess., at 10 (noting that it was not "desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort"). Therefore, while the Government submits that when a parent is in a secure detention facility—and therefore unable to provide care and physical custody-the child is unaccompanied; in any event, the FTCA is not the means to challenge the Government's interpretation of who may be properly classified as a UAC under the TVPRA.

be reunited, and Plaintiffs were reunited that day. Accordingly, there was a five-day period when G.C. had been released from secure detention, but Plaintiffs had not yet been reunited.[8]

The Government's actions (and the resulting continued separation of Plaintiffs) during that five-day period are protected both by the due care and discretionary function exceptions. Once a child is in ORR custody, the Government cannot circumvent the statutory framework governing the child's placement. The framework prescribes a process that the agency must follow to ensure, based on its own inquiry, that the individuals who receive custody of the children are who they say they are and that the health and safety of the children will be ensured. Specifically, the TVPRA states that a UAC may be released to a proposed custodian only after ORR "makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A). Among other things, ORR must "verify" the information and make its own "independent finding" after investigating the custodian's past activities: "Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child." *Id.* The TVPRA does not contemplate immediate release as it states, "[n]ot later than 2 weeks after receiving a request from the Secretary of Health and Human Services, the Secretary of Homeland Security shall provide information necessary to conduct suitability assessments." *Id*. § 1232(c)(3)(C). Thus, decisions on where to place children, and to whom to release them, are governed by the TVPRA and, once within that regulatory regime, imbued with discretion regarding the ultimate decision and timing of the decision.

[8] To the extent the Court believes that this five-day period is categorically distinct from the period when G.C. was detained in a secure facility and that the separation during this five-day period is the only potential source of liability, then the Court should dismiss the claims to the extent they are premised on conduct outside of this five-day period.

ORR policies also discuss the multi-step process before the Government can release a UAC to a sponsor. All potential sponsors, including parents, must complete an application in order for a child to be released to them, and must provide documentation of identity, address, and relationship to the child they seek to sponsor. *See* ORR Policy Guide, Children Entering the United States Unaccompanied, Sections 2.2.1, .3, .4, available at https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#foot3. In addition, ORR requires a background check of potential sponsors and their adult household members. *Id.* at Section 2.5. The due care and discretionary function exceptions apply to the five-day period starting October 10, 2018. Once the discretionary determination was made to securely detain G.C. (causing D.J.C.V. to be rendered unaccompanied), a statutorily prescribed process had to be followed before D.J.C.V. could be released and, as the TVPRA provides, this process cannot be done immediately.

IV. Lack of a Private Analog

FTCA jurisdiction exists only if a plaintiff alleges "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." 28 U.S.C. § 1346(b)(1); 28 U.S.C. § 2674 (FTCA allows for tort recovery against United States only "in the same manner and to the same extent as a private individual under like circumstances"). While the Government does not dispute that "the FTCA's requirement that a claim address 'like circumstances' does not mean 'under the same circumstances,'" *see* Pl. Mem. at 24 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955)), this does not change the conclusion that a private analog does not exist here.

Plaintiffs' claims fundamentally arise from the fact that the Government detained G.C. in a secure detention facility (an action it had the legal authority to take), rather than detaining him

in a different facility or releasing him from custody. There is no question that a private person cannot take such actions. Plaintiffs contend that there is a private analog here because "private individuals could intentionally inflict emotional distress on a parent by harming their child, there is an 'appropriate' private analog based on 'like' if not identical factual circumstances." Pl. Mem. at 27 (collecting cases where emotional distress claims were recognized where a private individual inflicted emotional distress on another by threatening that person's children). Plaintiffs' alleged analog is impermissibly broad as they are essentially arguing that there is a private analog to any intentional infliction of emotional distress claim, no matter how the claim arose, because a private person is always capable of inflicting emotional distress on another. However, this argument overlooks the circumstances in which Plaintiffs' separation occurred—Plaintiffs contend the Government inflicted emotional distress upon them by detaining G.C. in a secure detention facility rather than releasing him or placing him in a family residential center. A private individual simply cannot take this action and there is no "like" circumstance.

Moreover, the Second Circuit has declined to find a private analog in cases where the alleged harm is due to actions that are uniquely governmental in nature. Specifically, in *Akutowicz v. United States*, 859 F.2d 1122 (2d Cir. 1988), the plaintiff "alleged, in his FTCA claim, that the Department wrongfully fabricated and distorted information relevant to his case, enabling it negligently to deprive him of his citizenship." *Id*. at 1124. The court concluded that a private analog did not exist and stated, "the withdrawal of a person's citizenship constitutes a quasi-adjudicative action for which no private analog exists." *Id*. at 1126. Similarly, in *McGowan v. United States*, 825 F.3d 118 (2d Cir. 2016), the plaintiff brought an FTCA action alleging that he was imprisoned in an overly secure facility, thus, amounting to the tort of wrongful confinement. In effect, the plaintiff in *McGowan* argued that he should not have been detained as he was, which

is exactly what Plaintiffs allege here. Critical to the court's conclusion that no private analog existed was the fact that "[p]rivate persons cannot establish facilities to detain other persons." *Id*. at 127.[9] Here, Plaintiffs attempt to distinguish *McGowan* by noting *McGowan*'s statement that the private analog inquiry "asks whether private individuals may create a relationship with third parties that is similar to the relationship between a governmental actor and a citizen." *Id*. at 126-127 (internal citation and quotation omitted). Plaintiffs contend that "[h]ere because a private individual can create a relationship similar to the federal government's relationship with Plaintiffs, it can cause analogous harm." Pl. Mem. at 28 n.3. Plaintiffs' argument fails because the heart of the harm alleged here was the Government's use of its authority to detain people illegally crossing the border and determining where to detain them. The relationship between the Government and an individual detained for violating immigration laws is not one that can be created among private individuals, and is certainly far afield from "a noncustodial parent [who] falsely reported child abuse to Child Services and the Family Court in order to instill fear in her ex-partner about losing her child." *Id*. at 27.[10]

[9] The Supreme Court's decision in *United States v. Muniz*, 374 U.S. 150 (1963), is not to the contrary. There, the Supreme Court permitted prisoners to bring FTCA actions despite the fact that they were imprisoned. However, providing negligent medical care clearly has a private analog and the allegedly negligent action is entirely distinct from the incarceration itself. By contrast, here (as in *McGowan*) the actions being challenged are decisions relating to the incarceration itself. Similarly, Plaintiffs' citation to *Avalos–Palma*, No. 13-cv-5481 (FLW), 2014 WL 3524758, at *12 (D.N.J. July 16, 2014), does not change this conclusion. There, the court concluded that a statute required ICE to stay a person's deportation, which ICE failed to do. The court determined this was analogous to a situation where a private individual violates a duty required by statute and harms another person. Such a comparison is absent here because the alleged harm arises directly from G.C.'s detention, which a private person cannot do.

[10] Plaintiffs' argument that the state law criminal offense of kidnapping provides a private analog is similarly misguided, particularly where law enforcement officers effectuated the separation pursuant to the Government's legal authority.

V. Plaintiffs Fail to State a Claim Under New York Law

A. Application of *Barker v. Kallash*

In *Barker v. Kallash*, the New York Court of Appeals found that "when the plaintiff has engaged in activities prohibited, as opposed to merely regulated, by law, the courts will not entertain the suit if the plaintiff's conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation." 63 N.Y.2d 19, 24 (1984).

Plaintiffs mischaracterize the Government's position by arguing that "[s]eeking blanket impunity [sic], [the Government] contends that Plaintiffs have no recourse for any conduct committed by the Government following their entry into the U.S. because Mr. C. crossed into the United States in violation of criminal immigration law." Pl. Mem. at 30 (internal quotation omitted). The Government does not contend that Plaintiffs have no recourse with respect to "any" Government conduct that occurred after Plaintiffs entered the United States. Rather, as the Government noted, Plaintiffs' "separation was not an attenuated harm arising from G.C.'s criminal behavior, but rather a direct consequence thereof." Def. Mem. at 37. There are countless examples of individuals who engage in criminal behavior, are taken into government custody, and suffer harms during detention that would not warrant application of the *Barker* rule. For example, in a tort case where a prisoner alleges negligent medical care received while incarcerated, the *Barker* rule would not apply because that alleged harm is not a "direct result of" the criminal violation. *See Barker*, 63 N.Y.2d at 24. Here, however, the alleged harm is indeed a direct result of the criminal violation—Plaintiffs crossed the border illegally, were apprehended, and, as a result, detained. The only intervening step between their criminal activity and the alleged harm was that the Government determined that they could not be detained together due to G.C.'s criminal

history.[11] The separation, which is the harm Plaintiffs alleged they suffered, was undoubtedly a direct result of the criminal violation and the consequent secured detention of G.C.[12]

B. Plaintiffs' Failure to State a Claim

Putting aside the threshold hurdle imposed by *Barker*, Plaintiffs also fail to state a claim for intentional infliction of emotional distress ("IIED"), negligent infliction of emotional distress ("NIED"), or negligence.

1. Extreme and Outrageous Conduct

In its Motion, the Government argued that conduct permitted by law (and in fact found to be reasonable by a federal court) cannot amount to extreme and outrageous conduct, as necessary to state a claim for IIED or NIED and that, concluding otherwise, would violate the Supremacy Clause. *See* Def. Mem. at 37-41. Plaintiffs insist that Defendant's actions were unlawful and, thus, are extreme and outrageous and unprotected by the Supremacy Clause. *See* Pl. Mem. at 36.[13]

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[11] Plaintiffs state they were "lawfully seeking asylum in this country." Pl. Mem. at 31. The Government does not take this to mean that Plaintiffs believe they did not commit a criminal offense by entering the country. The fact that G.C. sought asylum does not alter the illegal nature of his entry between the ports of entry. The offense of illegal entry begins at the time of entry and continues until the alien is discovered. *United States v. Forrester*, No. 02-Cr-302 (WHP), 2002 WL 1610940, at *4 (S.D.N.Y. July 22, 2002).

[12] Plaintiffs seemingly do not dispute that G.C.'s criminal activity was serious. While they note other cases where serious conduct was found, *see* Pl. Mem. at 30-31, they do not argue that G.C.'s conduct does not fall within this category. In any event, the Government submits, as the court found in *Farley v. Greyhound Canada Trans. Corp.*, No. 03-cv-0344 (SR), 2009 WL 1851037 (W.D.N.Y. June 26, 2009), *see* Def. Mem. at 36, Plaintiffs' conduct is at least as sufficiently serious as using illegal fireworks, "resisting arrest," "elevator surfing," and driving a "stolen vehicle." *See* Pl. Mem. at 31 (citing cases where activities were serious within the *Barker* context).

[13] Plaintiffs also claim the Government's attempt to "coerce Mr. C. into abandoning hope of protection in the U.S." inflicted emotional distress. Pl. Mem. at 23. Plaintiffs allege they are not bringing an independent claim for misrepresentation, and instead these allegations merely form part of their other claims. *Id.* However, to the extent that Plaintiffs' IIED and negligence claims are based on misrepresentations made in an attempt to "*coerce* Mr. C. into abandoning" his asylum claims, *id.*, they are barred by the misrepresentation exception to the FTCA, 28 U.S.C. § 2680(h),

As discussed above and in its Motion, the Government had the discretionary authority to detain Plaintiffs and then, further, to decide to detain G.C. in a secure detention facility, thus, necessitating his separation from D.J.C.V. Such lawful conduct cannot be extreme or outrageous and warrants Supremacy Clause protection.[14] Plaintiffs incorrectly characterize the Government's position as being "that state law is preempted by the operations of federal instrumentalities," which would "negate the congressional command in the FTCA to look to state law duties in ascribing liability against the United States." *Id*. (internal quotation and citation omitted). The Government's position does not go so far. There are countless instances where an alleged tort committed by the Government does not conflict with a federal policy or interest, and, thus, bringing a state-law based claim pursuant to the FTCA would not raise any Supremacy Clause concerns. For example, a slip and fall action on federal property would not raise Supremacy Clause concerns. But, here, Plaintiffs seek to pursue claims that would make tortious exactly what the Government had the discretionary authority to do under federal law—detain G.C., determine that he should be housed in a secure facility, and, as a result, separate him from D.J.C.V.

2. NIED and Negligence Claims

With respect to their NIED and negligence claims, Plaintiffs make contradictory statements. They state, "Plaintiffs' claims that the Government impeded communication between father and son are not independent tort claims, but rather facts that demonstrate aspects of the cruel nature of the Government's policy . . . ." Pl. Mem. at 24. Then, several pages later, Plaintiffs state, "the Government's documented failure to keep records of the whereabouts of separated

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and, in any event, Plaintiffs do not allege any actual harm given G.C. did not waive his right to apply for asylum or related protection. *See* Def. Mem. at 27.

[14] The same is true with respect to the five-day period in October 2018. As discussed in Section III, there is a required process the Government must follow before releasing UACs to a sponsor.

children and to permit Mr. C. to communicate with his child, among other neglected duties of care, states a claim for NIED and negligence." Pl. Mem. at 32.

To the extent Plaintiffs intend to assert claims based upon the Government's alleged failure to permit G.C. to communicate with D.J.C.V., keep records of the whereabouts of separated children, or allege that the separation amounted to NIED, the Government submits that these claims fail for the reasons discussed in its Motion. *See* Def. Mem. at 41-44. The only argument asserted by the Government with respect to these claims with which Plaintiffs engage is that, in order to state an NIED claim, a plaintiff must allege that he "suffered an emotional injury from a defendant's breach of a duty which unreasonably endangered her own physical safety or caused her to fear for her physical safety." *Sanderson v. Leg Apparel LLC*, No. 19-cv-8423 (GHW), 2020 WL 3100256, at *12 (S.D.N.Y. June 11, 2020) (internal citations and quotations omitted). The Government does not dispute that G.C. alleges that he feared for D.J.C.V.'s wellbeing. However, lawful conduct (even if potentially distressing) cannot be extreme and outrageous. *See Kraft v. City of New York*, 696 F. Supp. 2d 403, 424 (S.D.N.Y. 2010) (denying emotional distress claim arising from arrest because there was probable cause for that arrest); *Brown v. City of New York*, 306 F. Supp. 2d 473, 481 (S.D.N.Y. 2004) (same).[15]

[15] With respect to their negligence claim, rather than rebut the arguments made by Defendant in its Motion, *see* Def. Mem. at 32-34, 41-43, Plaintiffs argue, in a conclusory paragraph, that they have stated a claim for negligence because "federal officers and officials had a duty to Plaintiffs to act with ordinary care and prudence, and the federal officers breached that duty by separating Mr. C. and D.J.C.V., failing to record which children belong to witch [sic] parents, failing to provide adequate communication between Mr. C. and D.J.C.V., failing to develop a reunification plan for parents and their children." *See* Pl. Mem. at 39. Plaintiffs cite *Ruiz ex rel. E.R. v. United States*, No. 13-cv-1241 (KAM), 2014 WL 4662241, at *8 (E.D.N.Y. Sept. 18, 2014), as an example of a case where a motion to dismiss was denied because a child was not permitted to contact her parents. *Ruiz* involved a child that was detained after coming into the United States with her grandfather. During her first several hours in custody, she was not permitted to contact her parents and inform them of her whereabouts, which the court found to have delayed the minor's release. It was not the lack of communication itself that was at issue, but rather its effect on the minor's

VI. The Government is Immune from the International Law Claims Plaintiffs Assert

Plaintiffs contend that their claims of torture and crimes against humanity are *jus cogens* norms of international law with respect to which the Government does not have sovereign immunity. They argue that, under federal common law, the Government does not enjoy immunity in federal courts for *jus cogens* violations and that, even if it did, it has waived such immunity. *See* Pl. Mem. at 41. As the Fifth Circuit has noted with respect to a plaintiff's argument that the Government lacked immunity with respect to alleged *jus cogens* violations, "the plaintiffs' theory has yet to be adopted by any circuit court of appeals and has been repeatedly rejected, and that is because it has no valid foundation in the American constitutional structure, in the [Alien Tort Statute] ATS, or in Supreme Court precedent." *See Hernandez v. United States*, 785 F.3d 117, 128 (5th Cir. 2015) (Jones, J., concurring), *vacated on other grounds by, Hernandez v. Mesa*, 137 S. Ct. 2003 (2017);[16] *see also Perez v. United States*, No. 13-cv-1417 (WQH), 2014 WL 4385473, at *6 (S.D. Cal. Sept. 3, 2014) ("Plaintiffs have cited no authority for the proposition that alleging a *jus cogens* violation waives the domestic sovereign immunity of the United States, a principle firmly rooted in domestic law."); *Smith v. Scalia*, 44 F. Supp. 3d 28, 39 (D.D.C. 2014) (holding that government does not waive sovereign immunity by allegedly committing *jus cogens* violations); *Gonzalez-Vera v. Kissinger*, No. 02-cv-2240 (HHK), 2004 WL 5584378, at *4-5

"reuni[fication] with her parents without unnecessary delay." *Id*. This is wholly distinct from the situation here where Plaintiffs came into the country together, were separated, and claim that the Government had an unspecified duty to provide an unspecified number of communications between parent and child after the separation.

[16] While Plaintiffs cite a lone district court case to support their argument that the Government is not immune from suit for alleged *jus cogens* violations, *see Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935 (E.D. Va. 2019), the Government submits that, for the reasons stated herein, that case was wrongly decided.

(D.D.C. 2004) (sovereign immunity applies despite alleged *jus cogens* violations and stating, "there can be no implied waiver of federal sovereign immunity").

It is an elementary concept that only Congress can waive the Government's sovereign immunity and it must do so expressly. *See, e.g., FAA v. Cooper*, 566 U.S. 284, 290 (2012) ("a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text") (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal quotation and citation omitted). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The Second Circuit likewise has repeatedly held that sovereign immunity bars suit against the United States unless Congress has enacted a clear and unambiguous waiver in the text of a federal statute. *See, e.g.*, *Binder & Binder*, 818 F.3d 66, 70 (2d Cir. 2016).

The fundamental principle that the "United States, as sovereign, is immune from suit save as it consents to be sued," *Mitchell*, 445 U.S. at 538, is not a recent innovation. The Supreme Court nearly two hundred years ago described the principle that the [U.S.] may not be sued without its consent as "universally received opinion." *Cohens v. Virginia*, 19 U.S. 264, 411-412 (1821).[17]

Congress has not enacted a statute that waives sovereign immunity for claims based on alleged violations of international law. Plaintiffs' claims are brought under the ATS, but courts have repeatedly held that the ATS does not waive the Government's immunity. *See* Def. Mem. at

[17] Plaintiffs themselves acknowledge that sovereign immunity is well-established in common law. *See* Pl. Mem. at 42 ("federal sovereign immunity is a creature . . . of federal common law."). And as a case cited by Plaintiffs notes, "a party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (internal quotation and citation omitted). Plaintiffs are bringing suit based upon the ATS and there is no support for the proposition that, through the ATS, Congress sought to upend the principle that the United States was immune from suit.

44 (collecting cases). As these cases note, "any party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit." *See Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). If it were the case, as Plaintiffs contend, that the Government simply was not immune from violations of international law, then these cases would not have dismissed plaintiffs' claims for lack of jurisdiction. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205-206 (D.C. Cir. 1985) (finding no waiver of sovereign immunity where federal defendants alleged to have funded Nicaraguan contra forces, who executed, raped, tortured and murdered people); *Al Janko v. Gates*, 831 F. Supp. 2d 272, 281 (D.D.C. 2011) (immunity not waived under ATS where plaintiff alleged torture).

While Congress has not enacted a statute waiving the Government's immunity, it did pass the Torture Victim Protection Act of 1991 ("TVPA") that creates an express cause of action for torture and extrajudicial killings. *See* TVPA, Pub. L. No. 102-256, 106 Stat. 73. Liability arises under this statute for "an *individual* who, under actual or apparent authority, or color of law, of any *foreign* nation" subjects someone to torture or an extrajudicial killing. *Id*. (emphasis added). The Supreme Court has recognized that the TVPA does not create an exception to foreign sovereign immunity. *See Mohamed v. Palestinian Auth*., 566 U.S. 449, 453 (2012). And by its own terms the statute does not waive the sovereign immunity of the United States. Had Congress sought to waive the Government's immunity with respect to claims for torture, the passage of the TVPA was a ripe opportunity to do so, but no such waiver appears in the statute. In short, the principle of law is a basic one—the United States is not subject to suit unless it consents to suit, which it has not done with respect to Plaintiffs' international law claims.

Plaintiffs claim that sovereign immunity must yield to these norms of international law because the "prohibitory norm would be toothless" if there was no means of redressing the

violation. *See* Pl. Mem. at 44 (internal quotation and citation omitted). However, this is a fundamental misunderstanding of the nature of international law. International law does not by itself, without some basis in domestic law, create legal rights or obligations enforceable in United States courts. "[N]ot all international law obligations automatically constitute binding federal law enforceable in United States courts." *Medellin v. Texas*, 552 U.S. 491, 504 (2008). For example, non-self-executing treaties are not judicially enforceable absent implementing legislation. *Id*. at 520-521. As the Supreme Court explained, a "treaty is primarily a compact between independent nations," and "[i]t depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884) ("It is obvious that with all this the judicial courts have nothing to do and can give no redress."). Even self-executing treaties that create individual rights do not necessarily create corresponding remedies as a matter of domestic law. "Even when treaties are self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellin*, 552 U.S. at 506 n.3 (internal quotation omitted); *see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343-350 (2006) (violation of a treaty obligation does not entitle a defendant in criminal prosecution to suppression of evidence).

These principles apply with at least equal force in analyzing the extent to which customary international law is enforceable in federal courts. "[C]ustomary international law is not a source of judicially enforceable private rights in the absence of a statute conferring jurisdiction over such claims." *Serra v. Lappin*, 600 F.3d 1191, 1197 (9th Cir. 2010); *see also, e.g., Igartùa-De La Rosa v. United States*, 417 F.3d 145, 151 (1st Cir. 2005) (en banc) (rejecting a claim under customary international law seeking judicial enforcement of a right to vote in the United States). International

law is not "a self-executing code that trumps domestic law whenever the two conflict." *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991). "[T]he role of judges . . . is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law." *Id.*; *see also United States v. Yousef*, 327 F.3d 56, 91 (2d Cir. 2003) ("United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law").

Accordingly, it is insufficient to argue that for every wrong there must be a remedy. *See* Pl. Mem. at 48-49. As the above demonstrates, international law often imposes rights that do not have enforceable remedies. *See Perez*, 2014 WL 4385473 at *6 ("[N]o authority requires a waiver of sovereign immunity to remedy that *jus cogens* violation."). Indeed, even the ATS, which provides an express statutory basis to look to customary international law in certain circumstances, does not incorporate every international law norm, and the Supreme Court has emphasized the need "for great caution in adapting the law of nations to private rights." *Sosa v. Alvarez*, 542 U.S. 692, 728 (2004); *see also Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402-1403 (2018) (emphasizing appropriateness of judicial deference to legislative authority to create new actions). *Sosa* confirmed that international law enters into domestic law primarily through an affirmative act of the political branches. Here, the political branches have not waived the United States' immunity for any alleged violations of international law.

Therefore, the Court must reject Plaintiffs' argument that sovereign immunity has been waived because: (1) a right requires a remedy; (2) the Government has ascribed to multinational agreements; and (3) the United States is a member of the international community.[18] The mere

[18] Plaintiffs note that the Second Circuit has rejected the argument that an implicit waiver of foreign sovereign immunity can be found by virtue of that foreign sovereign being a member of the community of nations. *See* Pl. Mem. at 45 (citing *Smith v. Socialist People's Libyan Arab*

fact that international laws and norms exist does not amount to there being remedies with respect to those rights in federal court—especially against a sovereign who has not waived its immunity. And, the notion that the United States has waived its immunity simply by existing in the international community runs afoul of well-established doctrine that the United States is immune from suit except as it consents to be sued—a centuries-old doctrine that would have no meaning if the United States' mere existence waived its sovereign immunity.[19]

Similarly, the argument that immunity must be waived because "the federal government is limited by delegation of power by the People as sovereign, who in turn may not legitimately

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Jamahiriya, 1010 F.3d 239 (2d Cir. 1996)). Plaintiffs contend, however, that the instant case is distinct because, in *Smith*, the court was analyzing statutory language as to whether Congress waived foreign sovereign immunity. Specifically, whether *jus cogens* violations of international law amounted to an implicit waiver of immunity under the Foreign Sovereign Immunities Act. *See* 28 U.S.C. § 1605(a)(1). Plaintiffs argue that, here, there is no such statute that must be interpreted with respect to the scope of any waiver of immunity. *See* Pl. Mem. at 45. That, however, is the very problem. There is no statute waiving the Government's immunity for the claims that Plaintiffs bring. And, even if there were some statute, the Second Circuit has already determined that the mere existence in the community of nations is insufficient to implicitly waive immunity. *See also Saleh v. Bush*, 848 F.3d 880, 893 (9th Cir. 2017) ("[I]t should be easier for the violation of a *jus cogens* norm to override foreign sovereign immunity than domestic official immunity. Therefore, our holding in *Siderman de Blake*—that Congress can provide immunity to a foreign government for its *jus cogens* violations, even when such immunity is inconsistent with principles of international law—compels the conclusion that Congress also can provide immunity for federal officers for *jus cogens* violations."). Similarly, Plaintiffs' argument that recognizing a remedy for *jus cogens* violations "to promote harmony in international relations" is misguided. Pl. Mem. at 47 (internal citation and quotation omitted). "When the Executive Branch is the party advancing a construction of a statute with potential foreign policy implications, we presume that 'the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States.'" *Perez*, 2014 WL 4385473, at *6 (quoting *ARC Ecology v U.S. Dep't of Air Force*, 411. F.3d 1092, 1102 (9th Cir. 2005)).

[19] Similarly, Plaintiffs argue that immunity should be waived because the Government "participated in the Nuremberg trials and the parallel development of peremptory norms of international law." Pl. Mem. at 49. The connection between the participation in the Nuremberg trials and Plaintiffs' contention that the Government has waived immunity is unclear. And, the mere fact that the United States "developed" norms of international law does not mean it has waived its immunity with respect to private individuals suing them for alleged violations thereof.

delegate to the government the power to engage in *jus cogens* violations," is also unavailing. Pl. Mem. at 49 (internal quotation and citation omitted). By analogy, the United States has been held to be immune from suit for monetary damage arising from constitutional violations. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit.); *see also Meyer*, 510 U.S. at 484-86. Presumably, Plaintiffs' argument would apply with equal force in that context—that the Government derives its power from the constitutional compact it made with the people and, therefore, has no authority to act outside of the terms of that compact. Nonetheless, the Government enjoys immunity from suit for monetary damages arising from constitutional violations. The mere fact that there has been an alleged wrong does not necessarily mean there must be a remedy. Rather, for a remedy to lie against the United States, Congress must have expressly waived the Government's immunity, which it has not done.[20]

CONCLUSION

For the reasons discussed herein, this case should be dismissed.

[20] The Government further submits that, for the reasons discussed above, its actions do not constitute torture, persecution, or crimes against humanity given the actions here were taken for a lawful, reasonable purpose. *See* Amicus Brief of International Human Rights Organizations and International Law Scholars, Dkt. No. 47-2, at 8-11 (discussing need for impermissible purpose with respect to crimes against humanity); Amicus Brief of Doctors Beth Van Schaack, Daryn Reicherter, and Ryan Matlow, Dkt. No. 46-1, at 4 (to constitute torture, the act must be done for an impermissible purpose).

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Respectfully submitted,

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