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, *Defendants*.	20 Civ. 5747 (PAE)

PLAINTIFFS RESPONSE MEMORANDUM OF LAW IN FURTHER OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Rayza B. Goldsmith
Meena Roldan Oberdick
Ghita Schwarz
LatinoJustice PRLDEF
475 Riverside Drive, Suite #1901
New York, New York 10115
+1 (212) 256-1910
rgoldsmith@latinojustice.org
moberdick@latinojustice.org

Zane Memeger (*Pro Hac Vice*)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
+1 (215) 963-5750
zane.memeger@morganlewis.com

Jonathan York (*Pro Hac Vice*)
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541
+1 (202) 739-5394
jonathan.york@morganlewis.com

Baher Azmy
Jessica Vosburgh **PHV forthcoming*
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
+1 (212) 614-6427
bazmy@ccrjustice.org

Counsel for Plaintiffs D.J.C.V., a minor child, and G.C., his father

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PRELIMINARY STATEMENT

In 2021, the government disavowed at oral argument that Plaintiffs' separation was based on G.C.'s referral for criminal prosecution. Instead, it claimed Plaintiffs were separated because of G.C.'s criminal history — a claim anchored to a single line from an e-mail referencing G.C.'s eight-year-old misdemeanor conviction. Thus began a two-year inquiry into the basis for Plaintiffs' separation. In a complete about-face, the government now asserts for the first time that the separation was based on a policy requiring separation based upon mere referral for prosecution. Beyond forcing the parties and this Court down a winding, time-consuming road, the changing theories call into question the government's capacity to prove by a preponderance of the evidence that it was acting pursuant to lawful discretion.

Both parties apparently now agree that there was no policy to separate families based on prior criminal history alone and there was a policy of prioritizing individuals with criminal history for federal prosecution for unlawful (re)entry. The evidence also bears out that 1) the Zero Tolerance Policy[1] consisted of the practice of separating families based on referral for prosecution, initiated by the United States to further its goals of punishment and deterrence; and 2) the practice was in effect beginning in 2017, before the official policy announcement and at the time Plaintiffs were separated. It follows that the Zero Tolerance Policy, not prior criminal history alone, caused

[1] "Zero Tolerance" is shorthand for an approach to immigration enforcement adopted by the Trump Administration in 2017 that involved separating family unit adults from their children after referring them to the Department of Justice ("DOJ") for prosecution for unauthorized entry or re-entry and then classifying family unit children as unaccompanied children ("UACs") based on the parent's referral. The goal of this highly escalated enforcement policy was to exert pain and punishment on vulnerable migrants to deter others seeking asylum at the Southern Border. While the government previously prioritized adults with criminal history and other "aggravating circumstances" for DOJ prosecution referral, it did not previously separate families unless the DOJ actually prosecuted the adult and the adult was sentenced to incarceration in U.S. Marshals Service ("USMS") custody. Zero Tolerance is distinct from prior practice because: 1) the government took the novel position that a parent's "amenability to prosecution" alone justified designating children UACs and separating the family, rather than actual prosecution and transfer to USMS; and 2) the explicit goal of this policy was separate as many families as possible to deter family units from seeking asylum in the United States.

Plaintiffs' separation. Because it was clearly unconstitutional, Zero Tolerance cannot give the government discretion under the Federal Tort Claims Act ("FTCA").

Even if G.C.'s referral for prosecution were independent of Zero Tolerance's goal of separation for punishment and deterrence, it would not cure the illegality of the *separation*, both because U.S. Border Patrol ("USBP") was aware the DOJ declined to prosecute G.C. prior to the separation, and because separation based on prosecution referral alone, without a welfare or fitness determination, violates due process.

Faced with a complete lack of evidence of a policy authorizing USBP to separate families based on a parent's criminal history alone, the government avoids the Court's jurisdictional question by focusing on *other distinct actions* in the chain of events, which also do not cure USBP's unlawful separation decision: 1) USBP's decision to *refer* G.C. for prosecution on May 1; 2) USBP's decision to *label* D.J.C.V. an UAC and *refer* him to the Office of Refugee Resettlement ("ORR") on May 1; and 3) U.S. Immigration and Customs Enforcement's ("ICE") decision to accept G.C. into Enforcement and Removal Operations ("ERO") custody on May 3. In doing so, the government conflates broad prosecutorial and detention authority with USBP's purported discretion under "a longstanding practice" to separate families without a scintilla of process. Having failed to assert authority for its proposition that USBP had discretion to separate Plaintiffs on May 2, 2018 based on a prosecution referral, the government's arguments fail both prongs of *Berkovitz/Gaubert*. The discretionary function exemption ("DFE") does not apply.

Finally, the government's reliance on ICE's putative authority to keep Plaintiffs separate is a red herring. ICE played no role in USBP's decision to unlawfully separate Plaintiffs. Whatever authority ICE might have had to separate later is irrelevant to whether actions taken by USBP were unlawful; because they were unlawful, the government may not invoke the DFE.

CORRECT LEGAL STANDARD

The government is incorrect that "[a]ny waiver of the government's sovereign immunity is to be strictly construed in favor of the government." Gov. Br. at 29 (citing *Long Island Radio Co. v. NLRB*, 841 F.2d 474, 477 (2d Cir. 1988)). As the Supreme Court subsequently held, "this principle is 'unhelpful' in the FTCA context, where unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute . . . which waives the Government's immunity from suit in sweeping language." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (internal citations and quotations omitted).

The government is also incorrect that it is Plaintiffs' burden to prove the DFE does not apply. "Federal courts have jurisdiction over [FTCA] claims if . . . [the claim] alleges the six elements of § 1346(b)." *Brownback v. King*, 141 S. Ct. 740, 746 (2021). Plaintiffs, having sufficiently alleged all six elements of 28 U.S.C. § 1346(b), have met their burden under this standard. Which party has the burden to establish applicability of the DFE under 28 U.S.C. § 2680 is a separate question. In the Second Circuit, Plaintiffs bear the *initial burden to allege* a claim not barred by the DFE. *Molchatsky v. United States*, 713 F.3d 159, 162 (2d Cir. 1991); *Cangemi v. United States*, 13 F.4th 115, 130 (2d Cir. 2021). However, "[o]nce a plaintiff satisfies this pleading requirement, the burden shifts to the government to prove that the exception applies." *Saint-Guillen v. United States*, 657 F. Supp. 2d 376, 387 (E.D.N.Y. 2009); *see also* Pl. Br. at 12–13.[2] As

[2] Another reason that Plaintiffs do not bear the ultimate burden of disproving the applicability of the DFE is that the DFE is not a "jurisdictional provision," but is more akin to an affirmative defense to a cause of action. In *Arbaugh v. Y&H Corp.*, the Supreme Court admonished lower courts for frequent "drive-by jurisdictional rulings that should be accorded no precedential effect" and created a "readily administrable bright line" rule that a statutory provision is only jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." 546 U.S. 500, 514–15 (2006). While 28 U.S.C. § 1346(b) is jurisdictional because it includes a clear statement that "the district courts . . . shall have exclusive jurisdiction" over federal tort claims if the subsequent six listed elements are met, the DFE is an entirely separate provision, located in an entirely different statutory section at 28 U.S.C. § 2680(a), and contains no such jurisdictional language. The DFE therefore does not meet *Arbaugh*'s bright line jurisdictional test. In addition, the DFE's placement in a sub-section titled "Procedure" is additional

this Court held, ECF No. 127 at 28–29, Plaintiffs sufficiently pled and proffered substantial evidence that their separation was driven by the unconstitutional Zero Tolerance policy, not by a separation policy based on criminal history alone. The burden must shift to the government to show the separation was executed pursuant to a valid exercise of discretion. *See* Pl. Br. at 13 (citing *Anson v. United States,* 294 F. Supp. 3d 144 (W.D.N.Y. 2018) ("the Government will generally be in the best position to prove facts relevant to the applicability of the [DFE]").

Relatedly, a few points regarding appropriate application of the two-step test derived from *Berkovitz v. United States*, 486 U.S. 531 (1988) and *United States v. Gaubert*, 499 U.S. 315 (1991) require clarification. At step one, courts "emphasize[] the importance of the regulatory structure in which the government actors worked" and the extent to which that structure has "specific policy objectives." *Andrulonis v. United States*, 952 F.2d 652, 654 (2d Cir. 1991). This is critical because, at step two, if a regulation permits employee discretion, the "very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation." *Gaubert,* 499 U.S. at 324. But absent a *clearly defined* regulatory structure, the Second Circuit has declined to apply a presumption that exercising discretion implicates broad policy judgements. *Andrulonis*, 952 F.2d at 655; *cf. Gaubert*, 499 U.S. at 332 (applying presumption where agency's written resolution, along with statutory provisions, established clear government policy). Here, the presumption is

evidence that it is not a "jurisdictional provision." *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011) (provision's placement in a subchapter titled "Procedure" suggested provision was not jurisdictional). Lastly, in other sovereign immunity contexts, it is well established that once plaintiffs meet their initial burden of coming forward with facts that show immunity should not be granted, to the extent that disputed issues of fact remain, the defendant sovereign must shoulder the ultimate burden of persuasion. *See, e.g.*, Second Circuit Federal Sovereign Immunities Act jurisprudence: *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 141 (2d Cir. 2001); *Virtual Countries, Inc. v. Republic of S. Afr.*, 300 F.3d 230, 241 (2d Cir. 2002); *Compania del Bajo Caroni (Caromin) v. Bolivarian Republic of Venezuela*, 556 F. Supp. 2d 272, 277 (S.D.N.Y. 2008), aff'd sub nom. *Compania Del Bajo Caroni (Caromin), C.A. v. Bolivarian Republic of Venezuela*, 341 F. App'x 722 (2d Cir. 2009).

inapplicable because there is no clearly defined framework, other than Zero Tolerance, governing the challenged conduct: separation of family units based only on a prosecution referral to deter.[3]

Absent a clearly defined regulatory or policy framework other than the unconstitutional Zero Tolerance Policy authorizing the separation of family units, the Court should decline to presume that separation was grounded in public policy. *Cf. K.O. by & through E.O. v. United States*, No. CV 4:20-12015-TSH, 2023 WL 131411, at *8 (D. Mass. Jan. 9, 2023) (quoting *D.J.C.V. v. United States*, 605 F. Supp. 3d 571, 597–98 (S.D.N.Y. 2022)) (holding that the Customs & Border Patrol ("CBP") Manual and the *Flores* settlement do not establish policy, but do set forth that only "an articulable safety or security concern" or legal requirements can justify separation and that children should be placed in the "least restrictive setting," and in that case, where the only conceivable reason for separation was the "in terrorem" effect it may have on others, the conduct was not susceptible to policy analysis and DFE did not apply).

SUPPLEMENTAL FACTUAL BACKGROUND

Plaintiffs incorporate by reference the facts set forth in the parties' Joint Statement of Facts ("JSOF"), ECF No. 176, and in the Factual Background from Plaintiffs' Memorandum of Law in Opposition to the government's Motion to Dismiss, ECF No. 184 at 7–23. Plaintiffs set forth

[3] Moreover, if the Court were to apply this presumption despite the lack of a clear regulatory framework, it "can be overcome if the plaintiff can show that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Clarke v. United States*, 107 F. Supp. 3d 238, 247 (E.D.N.Y. 2015) (internal citations omitted). To make this determination, courts focus "not on the agent's subjective intent . . . but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Focusing on the "nature of the action taken" is a narrow and fact-specific inquiry. "The proper question to ask is not whether the Government as a whole had discretion at any point, but whether its allegedly negligent agents did in each instance." *Nat'l Union Fire Ins. v. United States*, 115 F.3d 1415, 1421 (9th Cir. 1997) (internal citations and quotations omitted); *see also United States v. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984) (focusing on the "challenged acts"); *Loumiet v. United States*, 828 F.3d 935, 945 (D.C. Cir. 2016) ("We drew the line between conduct tied to the quintessentially discretionary decision to prosecute, which we held was immunized, and discrete and separable activity such as disclosing grant jury testimony to unauthorized third parties, which we held was not") (internal quotations omitted); *Simone v. United States*, No. 09CV3904TCPAKT, 2010 WL 11632765, at *10 (E.D.N.Y. June 17, 2010) (DFE does not shield actions "sufficiently separable" from related discretionary decisions).

additional facts addressing separation timeline, the lack of a policy to separate for criminal history alone, and CBP's exclusive role in separating Plaintiffs.

Clarity of timeline. The government wrongly states: "It is unclear from the record whether G.C. was transferred to the USMS prior to the prosecution declination." Gov. Br. at 33, n.15. But the record is clear. The facts — set out in government documents — clearly establish G.C. was *not* transferred out of USBP custody prior to his prosecution declination. York Declaration in Support of Plaintiff's Response Memorandum of Law (hereinafter "York Decl.") Ex. 41 at USA000162. He was in USBP custody until he was permanently booked out on May 3, 2018 at 2:36 AM. York Decl. Ex. 42 at USA000162; JSOF ¶ 25. D.J.C.V. was also in USBP custody until permanently booked out on May 2, 2018 at 10:53 AM. York Decl. Ex. 42 at USA000158; JSOF ¶ 23.

"Criminal history" separations prior to Zero Tolerance. The former ORR director (from March 2015 until January 2017) previously attested to the *Ms. L.* court that, in his experience, separations of families on the basis of the parents' criminal histories only occurred where "there was credible evidence that the parent was a serious danger to their own child. I could only remember one instance where a child under five years of age was separated from his or her parent because of the parent's alleged criminal conduct, and that was an instance where the parent allegedly was involved in sex trafficking their own child." York Decl. Ex. 43 at 2–3.

Manoj Govindaiah, Director of Family Detention Services at RAICES, which provides legal services to detained families at the Karnes County Residential Center in Karnes City, Texas, attested to the *Ms. L.* court that parents, including fathers with criminal convictions, were sometimes housed together in family detention. Govindaiah Decl., ECF No. 87-4

CBP's exclusive role in the May 2018 separation of G.C. and D.J.C.V. The narrow jurisdictional question in this case is what policy formed the basis of the government's decision to

initially separate G.C. from D.J.C.V. *See, e.g.*, ECF No. 88 at 1–2; ECF No. 127 at 48. ICE played no role in the initial separation decision. JSOF ¶¶ 42–43. ICE has no authority, influence over, or awareness regarding USBP family separation decisions. York Decl. Ex. 45 at 39:2–9; 39:10–14; 39:17–40:3 ("[redacted]"); 40:5–10. Prior to the *Ms. L.* decision on June 26, 2018 there was no mechanism for USBP to notify ICE that it had separated a family unit, York Decl. Ex. 45 at 44:7–19; 45:7–17; 30:2–15; 32:15–20, nor was there a process for ICE to communicate with ORR regarding the location, placement and reunification of separated family units. *Id*. at 46:11–17; 47:11–21. Like CBP, ICE has produced no evidence of a policy in May 2018 to separate children from parents based on a parent's criminal history alone.

Throughout the course of jurisdictional discovery, both parties operated consistent with the understanding that agents of USBP's RGV sector, a subpart of CBP, were the decisionmakers in the separation of D.J.C.V. and G.C. It was thus reasonable for Plaintiffs to limit initial deposition notices to USBP and CBP officials with a nexus to Plaintiffs or the RGV Sector. ECF No. 147 at 1–2 (Plaintiffs explaining nexus of proposed national-level deponents to RGV); ECF No. 151 at 1–2 (government challenging nexus of same). The government rejected testimony on "post-separation coordination" and "implementation" of the Zero Tolerance Policy, which it argued "plainly goes beyond the question of why plaintiffs were separated." *Id.*

During a dispute over the scope of 30(b)(6) testimony, the government reaffirmed this understanding of the jurisdictional question. Specifically, it sought to limit 30(b)(6) testimony to the extent it was 1) "not limited to the questions of why plaintiffs were separated and what CBP officials in RGV Sector knew or thought at the time;" 2) beyond the timeframe of "January 1 to May 2, 2018;" and 3) not "solely directed to CBP, the agency that made the initial separation decision in this case." ECF No. 153 at 3. Likewise, in a February 23, 2023 letter, the government

objected to testimony on family separation policies and practices for children under five by any agency other than USBP. York Decl. Ex. 44 at 2 ("only USBP's policies and practices are relevant to the jurisdictional question at issue. The Government will, therefore, interpret [the topic] as seeking USBP policies and practices on the identified subject matter.").

The government ultimately designated Monique Grame the USBP 30(b)(6) deponent and Robert Guadian the ICE 30(b)(6) deponent. During the Guadian deposition, the government opposed Plaintiffs' attempts to probe ICE's general practices relating to family separation. *See* York Decl. Ex. 45 at 40:11–43:21 (government counsel instructing 30(b)(6) witness not to respond to questions about ICE practices prior to the official Zero Tolerance announcement in May 2018).

The parties' approach to jurisdictional discovery is responsive to the core questions posed by this Court, namely "who the deciders are," "what was acting on them," and "when the [separation] decision [was] made." Status Conf. Tr. (Mar. 27 2023) at 16:15–20, 19:20–21. Because ICE played no role in the initial decision to separate G.C. and D.J.C.V., Plaintiffs have not assessed ICE's reunification policies and processes, which regardless go to the merits of this case, not to the question of whether this court has jurisdiction.

ARGUMENT

A. The government has not established that Plaintiffs' separation based on G.C.'s referral for prosecution is covered by the DFE.

1. The government concedes there was no policy to separate families based on criminal history.

In its initial brief, as in discovery, the government fails to identify any written or verbal policy to separate families based on criminal history. Instead, it outlines a policy of referring adults in family units for prosecution, often prioritizing parents with criminal histories, and separating parent from child. Indeed, the government acknowledges that the separation in this case was based

on a referral of G.C. for prosecution, not for his past misdemeanor alone. "It is also undisputed that this criminal assault was the stated reason why the BPA who reviewed the records check sought permission *to refer G.C. for prosecution and separate* Plaintiffs." Gov. Br. at 26 (emphasis added). This description is completely at odds with the government's prior assertion at oral argument that "**Now, obviously, referring someone to prosecution wasn't what caused the separation in this case**," ECF No. 85 at 16:4–7. This about-face amounts to a concession that the initial basis for the government's reliance on the DFE was wrong.

In any event, the government refers to a "longstanding practice" to "prioritize for prosecution of noncitizens with prior criminal history, particularly violent criminal history." *Id.* Despite use of the word "longstanding," the government provides no evidence that such a policy existed prior to implementation of its family separation practices and indeed, at every possible juncture, resisted discovery related to policy and practice before April 2018 in the RGV. ECF No. 151, 153; York Decl. Ex. 44. Ultimately, the government's most recently asserted reason for the separation is the same as Plaintiffs': it was pursuant to a policy of separating families premised on the prosecution of the adult family member, whether or not that adult was ever actually prosecuted.

To be clear, Plaintiffs do not challenge the government's authority to make prosecution referrals or prioritize individuals for prosecution for legitimate, lawful reasons. What happened to Plaintiffs, and all families subjected to Zero Tolerance, went further: the government separated parents from children based on "amenability to prosecution" alone; it did so regardless of whether the parent was in fact charged or incarcerated; and it made no interest-of-the-child determinations. This Court and several others have held this practice is unlawful. ECF No. 127 at 28–29 (citing cases). These courts recognize the fundamental difference between a lawful policy of *prioritizing* those with criminal history for *prosecution referral* and an unlawful policy of *separating families*

based on that referral, which the government admits began in 2017. No policy to separate families based solely on a parent's criminal history existed.

2. The government's unconstitutional Zero Tolerance Policy was in full force and effect well before May 5, 2018 and the facts establish that G.C. and D.J.C.V. were separated pursuant to that policy.

The government contends that the Zero Tolerance Memorandum issued by then-Attorney General Sessions on April 6, 2018 "was a DOJ prosecution policy and effected no changes within USBP in the RGV Sector on its own, although it led to the DHS Referral Policy." Gov. Br. at 27. It asserts that the "referral policy" was not signed until May 4, 2018 and that "USBP was not authorized to implement the Referral Policy until May 5, 2018." *Id.* (internal citations omitted). According to the government, the referral policy was implemented in RGV around May 7, 2018. *Id.* at 28. It concludes: "[b]ecause the DHS Referral Policy was not in effect in RGV Sector at the time the BPA made the decision to separate Plaintiffs, it did not play any role in that decision." *Id.*

This characterization of the Zero Tolerance timeline is not borne out by the facts. First, the so-called referral policy was announced to border sectors before May 5, 2018. On April 27, 2018, CBP Associate Chief Matthew Roggow sent an e-mail instructing Southwest Border chiefs and deputies to "begin referring all single adults to your respective U.S. Attorney's Office for prosecution under section 1325(a) of Title 8." York Decl. Ex. 21 at CD-US-0048995. Roggow's e-mail explicitly stated "[t]his guidance is not new (reference April 6, 2018 memorandum from AG Sessions to Federal Prosecutors) to the US Attorney's Office, but our action of referring all amenable cases is new." *Id.* Several sectors replied with various iterations of "we already do this," acknowledging that many sectors were already pursuing immigration prosecution for all amenable adults before May 5, 2018. *See, e.g., id.*; *id.* at CD-US-00016754 and CD-US-00016706.

Second, the Zero Tolerance family separation policy — and its concomitant *in terrorem* goals of punishment and deterrence — was being implemented long before the memorandum was issued on April 6, 2018. *See* Pl. Br. at 11–13; 26–29. Indeed, courts across the country have held the government was practicing family separation well before April 6, 2018. *See, e.g.*, Pl. Br. at 30 (citing cases). In *A.P.F. v. United States*, six fathers and their children were separated in November 2017 and May 2018. 492 F. Supp. 3d 989, 993 (D. Ariz. 2020). The *A.P.F.* Court, in denying the government's motion to dismiss on DFE grounds, explained that

> In an effort to deter border crossings from Central America, the Trump Administration implemented a policy of separating families at the United States–Mexico border through a pilot program beginning in July 2017. Pursuant to this policy, the United States targeted families for prosecution, separated children from parents, classified the children as [UAC], and sent the children across the country without documenting the familial relationship. In April 2018, the U.S. Attorney General announced a formal policy of family separation.

Id. at 992. The court did not differentiate between plaintiffs separated in November 2017 and May 2018 based on an understanding that the policy began as early as July 2017, and certainly not as late as April 2018. Another court held that despite the argument that plaintiffs were apprehended "prior to any official date for the Zero-Tolerance Policy," "various governmental reports recognize that the Government enforced and pursued such policy prior to the formal written policy . . . **the Court accords no weight to the Government's position that this case occurred before the Zero-Tolerance Policy**." *C.M. on behalf of D.V. v. United States*, No. 5:21-CV-0234-JKP-ESC, 2023 WL 3261612, at *23 (W.D. Tex. May 4, 2023). As Plaintiffs already detailed, such a violation of the fundamental right to family integrity, absent adequate procedural safeguards, is unconstitutional and thus precludes invocation of the DFE. Pl. Br. at 24–26.

In short, the Zero Tolerance family separation policy in effect from March or July 2017 through June 2018 sought to deter migration by family units at the Southwest Border by

threatening family separation. It explicitly required maximum referral of parents for criminal prosecution, with children unlawfully designated UACs to justify their transfer to ORR custody. G.C. and D.J.C.V. were subjected to this policy when they were apprehended on April 30, 2018, held at RGV CPC, and then separated because G.C. was designated "amenable to prosecution."

3. The government cannot meet its burden of establishing the DFE applies to Plaintiffs' separation based on G.C.'s referral for prosecution.

Any remaining ambiguity about the start date of the Zero Tolerance aside, it should not affect the Court's ultimate disposition of this case. This is because, even as the government argues, contrary to voluminous evidence, that the Zero Tolerance Policy was not implemented until May 5, 2018, it does concede that separations based on mere referrals for prosecution were taking place well before the Zero Tolerance prosecution policy was officially announced on April 6, 2018. But labels ultimately do not matter; practices do. There is no practical difference between the policy the government states it applied to G.C. and D.J.C.V. and what has become known as Zero Tolerance: family separation at the border without any unfitness determination or due process.

The government states "G.C.'s treatment was consistent with longstanding DHS practices that predated the Zero Tolerance Memorandum and DHS Referral Policy." Gov. Br. at 40.

> Since at least November 2014, RGV Sector's practice has been to prioritize for prosecution noncitizens with prior criminal history, including single heads of households, even if that necessitated a family separation. This practice was designed to safeguard the welfare of the minors in USBP custody, protect public safety, and promote enforcement of criminal and immigration laws. Consistent with this practice, a number of family units were separated in the RGV CPC in the year prior to the issuance of the Zero Tolerance Memorandum and/or DHS Referral Policy to facilitate the prosecution of a single head of household with prior criminal history.

Gov. Br. at 39 (internal citations omitted).

Plaintiffs are not disputing that USBP or RGV prioritized those with criminal histories for prosecution. However, the government concedes that while the RGV Sector had been prioritizing

individuals with criminal histories for prosecution since at least November 2014, it was not until the "year prior to the issuance of the Zero Tolerance Memorandum" that family units were *separated* based on a parent's *referral* for prosecution rather than *actual* prosecution. *Id.* Citing to examples of separations of families "to facilitate the prosecution of a single head of household," the government asserts that "[t]hese examples—all of which pre-date both the Zero Tolerance Memorandum and implementation of the DHS Referral Policy in the RGV Sector—are consistent with Plaintiffs' treatment and thus, according to the government, rebut any assertion that G.C.'s criminal history was merely a pretext for the application of zero tolerance-related family separation policies." Gov. Br. at 40. But these examples are perfectly consistent with the Zero Tolerance[4] practice of separating family units based on a parent's mere referral for prosecution, prioritizing those with criminal histories.[5] The government cannot conflate its alleged pre-2017 policy of prioritizing for prosecution single heads of households with criminal history with its 2017-2018 policy of separating parents and children based on mere referral for prosecution. In fact, the government seems to admit that in 2017, it did begin to separate families based on a parent's referral for prosecution. This new practice was at the core of Zero Tolerance, and it was illegal.

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[4] In the alternative, the government argues that even if the Zero Tolerance Policy played some role in the decision to refer G.C. to the DOJ for prosecution, the referral would still be protected by the DFE. Gov Br. at 41 n. 14. This is incorrect first, because this Court already held that "the separation of G.C. and D.J.C.V. at the border, if based on the Zero Tolerance Policy, does not fall within the DFE" because there is no discretion to violate the constitution ECF No. 127 at 30–31; 35. Second, that the RGV sector "never achieved 100% prosecution referrals due to resource limitations, and BPAs continued to exercise their discretion to select noncitizens for prosecution referrals due to resource constraints," Gov. Br. at 41 n. 14, does not make the family separation policy any less unconstitutional. Such an argument would be tantamount to saying that to violate the constitution, an actor must act unconstitutionally 100% of the time. To Plaintiffs' knowledge, among the dozens of family separation cases nationwide, no court has found that the DFE shields the government from liability for family separations occurring along the southern border between 2017 and 2018 because the sectors were unable to achieve 100% separations.

[5] The government's examples of families separated where the parent had a criminal history seem geared toward suggesting that *only* parents with criminal histories were referred for prosecution and separated prior to May 2018, which is patently false. *See, e.g.*, *supra* Section A.2; *A.F.P. v. United States*, No. 121CV00780DADEPG, 2022 WL 2704570, at *12 (E.D. Cal. July 12, 2022) (A.F.P. and J.F.C.'s separation on January 29, 2018 was considered to be part of the government's family separation policy and deemed unconstitutional); *F.R. v. United States*, in which plaintiffs were separated in March 2018. No. CV-21-00339-PHX-DLR, 2022 WL 2905040, at *1 (D. Ariz. July 22, 2022) (finding the DFE did not apply to the unconstitutional separation of parent and six-year-old child).

There is simply no basis in law for the proposition that a referral for prosecution alone can justify the violation of parent and child's fundamental right to family integrity. In an attempt to establish the first prong of the DFE, the government cites cases that merely reinforce the government's discretion to refer individuals for prosecution. Gov. Br. at 29 (citing *Sw. Env't Ctr. v. Sessions*, 355 F. Supp. 3d 1121 (D.N.M. 2018) (challenge brought by two community organizations to enjoin the DOJ and DHS from prosecuting illegal entry offenses); *Huntress v. United States*, No. 18 CIV 2974 (JPO), 2019 WL 1434572 (S.D.N.Y. Mar. 29, 2019), *aff'd*, 810 F. App'x 74 (2d Cir. 2020) (challenge to the *manner* in which the Environmental Protection Agency pursued an indictment and actual prosecution of Plaintiffs)). But Plaintiffs do not challenge the government's authority to *prosecute* illegal entry offenses nor the manner in which the government carries out prosecutions; Plaintiffs challenge a practice of family separation — absent due process — based on the mere referral (unconsummated in this case) to prosecution.

The only authority cited by the government that directly discusses the link between prosecution and family separation is *S.E.B.M.* That District of New Mexico case involved actual prosecution and transfer of the parent to USMS custody and is inconsistent with the majority of courts deciding the same issue. *Compare S.E.B.M. by & through Felipe v. United States,* No. 1:21-cv-00095-JHR-LF, 2023 WL 2383784, at *1 (D.N.M. Mar. 6, 2023), *with, e.g., C.M. on behalf of D.V.*, 2023 WL 3261612 at *22–23, 40 (finding DFE didn't apply in case where father was actually prosecuted and incarcerated), and *D.A. v. United States*, No. EP-22-cv-00295-FM, E023 WL 2619167 at *9–10 (W.D. Tex Mar. 23, 2023) (DFE didn't apply to family's continued separation after mother was prosecuted and incarcerated), and *A.I.I.L. v. Sessions*, No. CV-19-00481-TUC-JCH, 2022 WL 992543 (D. Ariz. Mar. 31, 2022) (DFE did not apply where at least some Plaintiff family unit adults were prosecuted), and *F.R.*, 2022 WL 2905040, at *5 (decision to prosecute

could not shield government from liability for separation). The government cited no authority for the assertion that prosecution referral alone could justify USBP's separation of family units.

Under the second prong of the DFE test, the government argues that *the decision to refer G.C. for prosecution* was "susceptible to policy analysis" because such prosecution referrals "are grounded in policy considerations such as immigration enforcement priorities, safety concerns, border security, and resource allocation." Gov. Br. at 39. But a policy to refer a parent for prosecution does not explain how the distinct act of separating a parent from his child absent actual prosecution implicates the same policy concerns. *See Nat'l Union Fire Ins.*, 115 F.3d at 1421 (proper inquiry is "not whether the Government as a whole had discretion at any point, but whether its allegedly negligent agents did in each instance"); *see also Gaubert*, 499 U.S. at 325 (proper inquiry is to look to the "nature of the actions taken," not the government's discretion as a whole). It is thus insufficient to point to general prosecution considerations, as the government does in listing factually distinct cases, without application to this case involving separation. Gov. Br. at 40. Here, once DOJ declined to prosecute G.C. while he and D.J.C.V. were both in USBP custody, the exercise of prosecutorial discretion was complete. Untethered from any prosecutorial purpose, the ensuing separation of D.J.C.V. and G.C. in USBP custody was not grounded in the same policy considerations governing prosecution referrals.

Likewise, the government has not cited any support for its contention that mere referral of a parent for prosecution justifies designating a child a UAC. Gov. Br. at 33–34. While Plaintiffs do not challenge the assertion that USBP has authority to refer actual UACs to ORR for care and custody, the government is plainly incorrect that it has discretion to "designate" or "de-designate" *children who arrive and are detained with their parents* as UACs however and whenever it sees fit. *See* Gov. Br. at 32 n.14, 37 n.17; *see also* Pl. Br. at 34-35 (citing cases).

The government's argument thus fails at step one of *Berkovitz/Gaubert*. The practice of labeling children UACs based merely on a parent's prosecution referral is both part and parcel of Zero Tolerance and directly contravenes USBP's own family separation standards. *See* Pl. Br. at 16, 20, 31 (citing TEDS policy requiring CBP to maintain family unity absent a *legal requirement* or an *articulable safety or security concern*) (emphasis added); *see also K.O. by & through E.O.*, No. CV 4:20-12015-TSH, 2023 WL 131411, at *8 (D. Mass. Jan. 9, 2023) (discussed *supra*); *Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf't*, 319 F. Supp. 3d 491, 495 n.2 (D.D.C. 2018) (children were not "true unaccompanied minors within the meaning of the statute" where their mother was held in civil immigration detention and the children were "rendered unaccompanied by the unilateral and likely unconstitutional actions of defendants"); *A.I.I.L.*, 2022 WL 992543, at *4 (appearing to accept Plaintiffs' arguments that "officials administered the same statutes and regulations through 2017 without separating families [and that] the TVPRA, the only statute which mandates the transfer of minors to HHS custody, concerns children who arrive *without* their parents, but the children here arrived *with* their parents, were separated by the government, subsequently labeled [UAC] and transferred to HHS custody.").

Likewise, the government cannot meet its burden under step two of *Berkovitz/Gaubert*. It cannot demonstrate that its decision to designate and treat D.J.C.V. as a UAC is sufficiently grounded in valid policy considerations. The government cites only to *Molchatsky* in support of its step two argument, which is clearly distinguishable. In *Molchatsky*, the Second Circuit shielded the SEC from liability under the DFE for its decision *not* to investigate Bernard Madoff's financial fraud, explaining that the SEC's "complete discretion over when, whether and to what extent to investigate and bring an action against an individual or entity" was grounded in policy considerations regarding "allocation of agency time and resources" 713 F.3d at 162 (citing *Bd. of*

Trade of City of Chicago v. SEC, 883 F.2d 525, 531 (7th Cir. 1989)) (explaining fact-driven reasoning that decisions not to prosecute are naturally cost and resource saving).

Setting aside that the Zero Tolerance policy was developed for the unconstitutional purpose of deterring immigration of asylum-seeking families, it is difficult to see how increasing the number of UACs in ORR custody — based on a novel and erroneous interpretation of the TVPRA — serves the goal of saving "the agency's limited resources." Gov. Br. at 43. Expanding the definition of "UAC" to apply to children in family units, unlike prioritizing certain categories of individuals for prosecution, is not cost or resource-saving.[6] Moreover, the government's alternative argument that it classified children in family units as UACs to achieve "deterrence and public safety," "border security," or "law enforcement," goals, while more consistent with the facts, is tantamount to saying USBP classified children as UACs for deterrent *in terrorem* effect. As this Court already held, that is not a valid policy basis. ECF No. 127 at 27–35.

Even if USBP's decision to *prioritize* certain individuals for DOJ referral is grounded in policy considerations, said considerations do not extend to USBP's purposefully broad policy to *separate* as many families as possible by referring parents for prosecution and reclassifying children as UACs to send a cruel message of deterrence. The logic applied in *K.O. by & through E.O.* (discussed *supra*) applies here. The government's separation of G.C. and D.J.C.V. was not a valid exercise of discretion susceptible to policy analysis. The DFE does not apply.

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[6] To the contrary, the practice of creating *more* UACs was notoriously expensive and resource-intensive. *See, e.g.*, York Decl. Ex. 45 at 37:7–10, 38:6–18 the referral policy required ICE to create additional beds and posters); York Decl. Ex. 46 at 75:17–76:14, 79:3–10 (explaining that the RGV sector did not have the resource to achieve 100% prosecution referrals); Michelle Mark, *Trump's Family Separation Crisis Has Reportedly Cost Tens of Millions of Dollars and Taken Funds Away from Health Programs*, INSIDER (July 18, 2018), https://www.insider.com/cost-of-trump-family-separation-crisis-2018-7 (noting the high cost of temporary shelters to house the influx of separated children); Caitlin Dickerson, *The Price Tag of Migrant Family Separation: $80 Million and Rising*, N.Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/us/family-separation-migrant-children.html.

B. The DCE does not apply to the government's decision to refer D.J.C.V. to ORR custody, and therefore does not protect the government from liability for the separation of G.C. and D.J.C.V.

While the government cites the DFE with respect to detention and prosecution authority, it largely cites the due care exception ("DCE") to shield itself from liability for its decision to refer D.J.C.V. to ORR after designating him a UAC based on the unsupportable argument that the referral was "compelled by statute." Gov. Br. at 32.

Many courts in the Second Circuit apply the test derived from *Welch v. United States,* 409 F.3d 646 (4th Cir. 2005) for DCE application. ECF No. 127 at 20. The inquiry is two-fold: 1) the court must "determine[] whether the statute or regulation [] specifically prescribes a course of action"; and 2) if so, the court "inquires as to whether the officer exercised due care in following the dictates of that statute or regulation." *Id.* (citing *Clayton v. United States*, No. 18 Civ. 5867, 2019 WL 9283977, at *12 (E.D.N.Y. Aug. 1, 2019) (cleaned up), *report and recommendation adopted*, No. 18 Civ. 5867, 2020 WL 1545542 (E.D.N.Y. Mar. 31, 2020)). This Court has pointed out that "[d]ue care 'implies at least some minimal concern for the rights of others.'" ECF No. 27 at 20 (quoting *Gjidija v. United States*, 848 F. App'x 451, 454 (2d Cir. 2021)) (additional citations omitted). Unlike the DFE, the DCE "applies to situations where a statute or regulation *requires* an action be taken." *Watson v. United States*, 179 F. Supp. 3d 251, 270 (E.D.N.Y. 2016) (emphasis in original), *aff'd in part, rev'd in part*, 865 F. 3d 123 (2d Cir. 2017).

This Court already found that "the DCE covers only actions taken pursuant to a statute or regulation," rejecting the argument that *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (D.D.C.), *aff'd*, 343 U.S. 579 (1952), construes an Executive Order as a "regulation." ECF No. 127 at 35 (additional citations omitted). This Court also already rightly identified some of the many

family separation cases brought under the FTCA that reject the government's argument that the DCE covers separation pursuant to the family separation policy. *Id.*

Now, for the first time in this case, the government asserts its conduct is shielded by the DCE because "the TVPRA and HSA required USBP to refer D.J.C.V. to ORR once the determination had been made to refer G.C. for prosecution." Gov. Br. at 32.

> Pursuant to those statutes, once G.C. was no longer available to provide care and physical custody of D.J.C.V., D.J.C.V. became a UAC and USBP had only 72 hours to transfer him to ORR. *See* 6 U.S.C. § 279(g)(2); 8 U.S.C. §§ 1232(b)(3), (c)(2)(A). Accordingly, USBP exercised due care in complying with these requirements by designating D.J.C.V. a UAC once it determined to refer G.C. for prosecution to ensure that the 72-hour deadline was met.

Gov. Br. at 32 (additional citations omitted). The government asserts that "[w]hen a parent is charged with a criminal offense, the law ordinarily requires separation of the family." Gov. Br. at 33 (quoting *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1139 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019)). Glossing over the fact that G.C. was never charged, the government explains:

> The fact that G.C. was not ultimately prosecuted does not change this analysis. Because USBP had referred G.C. for prosecution and D.J.C.V. could not remain with his father during the anticipated criminal proceedings, and in light of the strict timing requirements for referral to ORR under the TVPRA and the large volume of migrants in USBP custody during the first half of 2018, USBP exercised due care in taking reasonable steps to ensure compliance with its statutory obligations.

Id.

This argument has been rejected by district courts across the country. First, the TVPRA in no way mandates the government to designate a child as a UAC for a parent's mere referral to prosecution, nor does it mandate family separation. Courts have repeatedly rejected that interpretation. *See, e.g.*, *A.P.F.*, 492 F. Supp. 3d at 995–96 ("The United States cites no statute or regulation requiring the detention of individuals who are 'amenable to prosecution' in facilities different from those who are not 'amenable to prosecution,' or any statute more generally requiring

the separation of Plaintiffs upon their entry into the country."); *A.I.I.L.*, 2022 WL 992543, at *5 ("Because none of the statutory provisions cited by the government [including 8 U.S.C. §§ 1232(b)(3), (c)(2)(A) and 6 U.S.C. § 279(g)] expressly mandate enforcement of a family separation policy, the [DCE] does not apply."); *C.M. v. United States*, No. CV-19-05217-PHX-SRB, 2020 WL 1698191, at *3 at n.4 (D. Ariz. Mar. 30, 2020) ("The United States postulates that parents who are "amenable to prosecution" under immigration statutes are "unavailable to provide care or custody" to their children, which in turn renders their children "unaccompanied" and subject to § 1232(b)(3)'s custodial-transfer requirement . . . [it] fails to explain how a parent who is merely "amenable" to prosecution—but has not been charged with a crime—is, for that reason, unavailable to care for her child."). Absent a statute or regulation mandating the family separation because a parent is referred for prosecution, the government cannot satisfy the first prong of *Welch*.

Second, the DCE does not shield the government from liability when acting pursuant to policy or executive order. Courts have repeatedly found that family separations were conducted pursuant to executive policy, and thus not protected by the DCE. *See, e.g.*, *A.P.F.*, 492 F. Supp. 3d at 996; *Nunez Euceda v. United States*, No. 220CV10793VAPGJSX, 2021 WL 4895748, at *4 (C.D. Cal. Apr. 27, 2021) ("The separations were conducted pursuant to executive policy, not pursuant to any statute or regulation; such actions are not shielded by the [DCE].").

Finally, even if this Court were to find, contrary to its prior holding, that an applicable statute or regulation mandated the separation of G.C. and D.J.C.V., the DCE still does not apply because the government failed to act with the required due care in effectuating the separation — and failed to present supportive evidence. *A.F.P.*, 2022 WL 2704570, at *15 ("even if a statute or regulation did mandate separation of the plaintiffs, the government has not shown—indeed, it has made no argument at all—that due care was actually taken as required under the second prong of

the *Welch* test."). Due care "implies at least some minimal concern for the rights of others." *Hatahley v. United States*, 351 U.S. 173, 181 (1956). On a motion to dismiss, plaintiff can overcome its initial burden by alleging "the welfare of [the child] took a back seat to the decision to prosecute the father for a misdemeanor offense of unlawful entry." *C.M. on behalf of D.V.*, 2023 WL 3261612, at *22. In *C.M. on behalf of D.V.*, the court found the government's arguments failed the second prong of the DCE analysis even where the father was prosecuted. Relying on the government's failure to take "steps to reunite the family while it processed their asylum application,"[7] *id.* at 23, the court held the plaintiff alleged claims "outside the realm of the [DCE]." *Id.* Thus, the government's DCE argument fails under the second *Welch* prong.

The government's argument that the DCE shields it from liability for the separation of G.C. and D.J.C.V. fails both prongs of *Welch*. As with this Court's earlier holding that the DCE does not apply, ECF No. 127 at 35, the government's new argument fails. This court has jurisdiction.

C. ICE's "decision" to accept G.C. into ERO custody goes to the question of reunification, not the initial decision to separate, and there is no evidence of any ICE decision-making relevant to the jurisdictional question.

Instead of addressing the limited jurisdictional question of whether USBP had discretionary authority to separate D.J.C.V. and G.C. on May 2, 2018, the government ignores the limited nature of discovery granted in this case and focuses on the post-separation period, arguing: "the DFE applies to G.C.'s detention in a secure facility from May 3, 2018 through October 10, 2018." Gov. Br. at 43. It is undisputed that "after SDTX declined G.C.'s prosecution," "USBP referred G.C. to ICE ERO" and "ICE accepted the referral and detained G.C. [] from May 3, 2018" onwards. Gov. Br. at 43. However, to the extent that the government is now arguing that the separation of G.C.

[7] The court gave weight to the fact that, though noncitizens in expedited removal proceedings are not entitled to release on bond, the government may grant temporary parole for urgent humanitarian reasons or significant public benefit. "[R]euniting a seven-year-old child with his parent may qualify as an urgent humanitarian reason." *Id.* at *23.

and D.J.C.V. for the period of May 3, 2018 through October 10, 2018 is shielded by ICE's decision to detain G.C. in ICE ERO custody, that argument should be rejected for several reasons.

First, as the government concedes, ***ICE played no role in the initial decision to separate D.J.C.V. and G.C.*** *See supra* Supplemental Factual Background ("SFB"); JSOF ¶¶ 42–43 ("ICE does not have authority over USBP prosecution referrals"). In determining whether challenged conduct is protected by the FTCA, courts look not to whether "the Government as a whole had discretion at any point, but whether its allegedly negligent acts did in each instance." *Nat'l Union Fire Ins.*, 115 F.3d at 1421. *See also Varig Airlines*, 467 U.S. at 813. Here, the decision to separate D.J.C.V. and G.C. was unilaterally made and executed by RGV CPC USBP agents on May 1–2, 2018. That is the subject of the limited jurisdictional discovery authorized by this Court, which shows the reason Plaintiffs were initially separated, and the subsequent time spent in custody, was unlawful. *See supra* SFB; ECF No. 127 at 42, 48.

The government asks the Court to ignore this and instead focus on DHS's broad, theoretical immigration detention discretion. But nothing in the record supports the government's implicit assertion that *ICE's* discretion to detain noncitizens pending removal gives *USBP* agents discretion to violate noncitizens' fundamental right to family integrity. Indeed, ICE was fully detached from USBP family separation decisions. *See supra* SFB. Nor is there evidence ICE rendered any actual separation *decision* based on this theoretical discretion; USBP decided to separate. Because the grounds and consequences of *that* decision are unlawful, the government cannot invoke the DFE.

Second, the only decision ICE potentially faced as of May 3, 2018 was one of *reunification*, not separation. After USBP transferred D.J.C.V. to ORR custody on May 2, 2018 and G.C. to ICE ERO custody on May 3, 2018, the separation was complete. ICE had no opportunity to consider whether to hold D.J.C.V. and G.C. in a family residential center ("FRC") or release them with

conditions — G.C. was already in ERO custody as a single adult. Any argument about what ICE would have done is purely hypothetical and unsupported by the factual record.

Third, the parties and this Court have all treated the jurisdictional question as narrowly tailored to probe the basis for the initial separation decision. Consistent with this, Plaintiffs focused their depositions on relevant CBP and USBP policies, emphasizing how and when policies were communicated to USBP RGV agents. Likewise, the government prevented Plaintiffs from seeking deposition testimony on policies without a direct nexus to RGV USBP and post-separation coordination between relevant agencies, including ICE's reunification processes. *See supra* SFB.

Yet now, the government hinges its defense on ICE's "decision" to detain G.C. "in a secure facility for the [mandatory detention] period, rather than in an FRC or releasing him," [8] which is effectively the same as saying ICE decided not to reunify Plaintiffs. Gov Br. at 36. The parties had no opportunity to develop a record on that claim. There is currently no evidence for whether ICE made that assessment. Far from post-separation processes being "duplicative and not appropriately tailored to the scope of jurisdictional discovery," as previously argued, ECF No. 151 at 3, the government now attempts to wield conclusory assertions on the same topic as a core argument to apply the DFE. It cannot use the narrow scope of jurisdictional discovery as a sword and a shield.

Finally, the government takes for granted that if G.C. were subject to "mandatory detention,"[9] it would necessitate his separation from D.J.C.V. No authority known to Plaintiffs bars

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[8] The government uses the phrase "secure facility" to describe adult immigration detention in contrast to FRCs. But this distinction is misleading. FRCs are also secure and residents are not free to leave. *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1069–70 (C.D. Cal. 2017), aff'd sub nom. *Flores v. Barr*, 934 F.3d 910, 912 (9th Cir. 2019) (noting the government did "not dispute that the [FRCs] are secure" and finding "[FRCs] are secure, unlicensed facilities.")

[9] It is not settled that G.C. was subject to mandatory detention at the time of his separation from D.J.C.V. on May 2, 2018. Even the government contends in brief, "while the statutory language in 8 U.S.C. § 1231(a)(2) provides that the Secretary 'shall' detain a noncitizen with a reinstated order of removal for the 90-day removal period, and a noncitizen detained pursuant to that provision is not entitled to a bond hearing, DHS retains law enforcement discretion to detain or release noncitizens during the removal period who have not been found inadmissible or deportable on specified grounds." Gov. Br. at 35, n.16 (citing *Arizona v. Biden*, 31 F.4th 469, 479 (6th Cir. 2022) (holding that

G.C. from placement at a FRC due to his reinstated order of removal or misdemeanor conviction. Moreover, in and around 2018, ICE routinely detained adults with prior removal orders in family detention centers along with their minor children. *See, e.g.*, INGRID EAGLY ET AL., AM. IMMIGR. COUNCIL, DETAINING FAMILIES 13 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining_families_a_study_of_asylum_adjudication_in_family_detention_final.pdf (noting "the relative prevalence of expedited removal and reinstatement in the family detention context."). Indeed, the reasonable fear screenings and withholding-only proceedings associated with reinstatement of removal are a common feature of life in family detention. *See id*. at 10–12. G.C.'s reinstated prior order did not bar him from being detained with his son nor create a legal impediment to his release on bond or other appropriate conditions with his son.

The Court cannot assume that G.C. and D.J.C.V. would have been separated in ICE custody even if CBP had never separated them. The government proffered no evidence of any decision by ICE *not* to reunify Plaintiffs. And it cannot proffer evidence of a decision to separate in the first instance, since G.C. entered ICE ERO custody as a single adult. Instead of evidence, the government relies on the abstract principle that: "'[I]t is unimportant whether the government actually balanced economic, social, and political concerns in reaching its decision'" because "the relevant question" is 'whether the *decision* is susceptible to policy analysis.'" Gov. Br. at 37, n.17 (quoting *In re Joint E. & S. Districts Asbestos Litig.*, 891 F.2d 31, 37 (1989)[10] (emphasis added). But the government lacks evidence of any *decision* that could be susceptible to policy analysis that could shield ICE from liability. Absent proof of decision-making related to the cause of Plaintiffs'

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although Section 1231(a) has "mandatory language," it is "unlikely" that it "displaces the Department's longstanding discretion in enforcing the many moving parts of the nation's immigration laws")) (additional citations omitted).

[10] The *In re Joint E. and S. Districts Asbestos Litig.* court cites approvingly to *Dube v. Pittsburgh Corning*, which it says "recognized 'that the susceptible of discretion' approach . . . is a valid approach in *some* circumstances,' particularly 'where government actors employ broad policy discretion in pursuit of the public good.'" 870 F.2d at 38–38 (quoting 870 F.2d 790, 798 (1st Cir.1989) (emphasis added). It holds: "We have no doubt that the record before us presents such circumstances." Those circumstances are clearly not present in the instant case.

separation, the Court cannot assume what ICE might have hypothetically done. The DFE cannot apply absent a "decision" subject to "policy analysis."

Plaintiffs reasonably understood the Court's order to engage in jurisdictional discovery as limited to CBP and USBP because the 1) the government made clear, and the facts support, that ICE was not a decisionmaker; and 2) if USBP's initial separation decision was unlawful, which it was, the resulting decisions and actions are tainted, and thus also unlawful. This Court should set aside any arguments with respect to ICE until after ruling on the instant motion to dismiss.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the government's Motion to Dismiss.

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Respectfully submitted,

/s/ *Rayza B. Goldsmith*

Zane Memeger
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
+1 (215) 963-5750
zane.memeger@morganlewis.com

Jonathan York
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541
+1 (202) 739-5394
jonathan.york@morganlewis.com

Attorneys for Plaintiffs D.J.C.V., minor child and G.C.

Rayza B. Goldsmith
Meena Roldan Oberdick
Ghita Schwarz
LatinoJustice PRLDEF
475 Riverside Drive, Suite #1901
New York, New York 10115
+1 (212) 256-1910
rgoldsmith@latinojustice.org
moberdick@latinojustice.org

Baher Azmy
Jessica Vosburgh **PHV forthcoming*
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
+1 (212) 614-6427
bazmy@ccrjustice.org