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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Reynoldo Ambros-Marciel, <i>et al.</i>	)	
	)	CIV-03-230 TUC JMR
Plaintiffs,	)	
v.	)	<b>BRIEF OF WASHINGTON LEGAL</b>
	)	<b>FOUNDATION, ALLIED EDUCATIONAL</b>
United States of America,	)	<b>FOUNDATION, AND FRIENDS OF</b>
	)	<b>IMMIGRATION LAW ENFORCEMENT</b>
Defendant.	)	<b>AS <i>AMICI CURIAE</i> IN SUPPORT OF</b>
_____	)	<b>MOTION TO DISMISS COMPLAINT</b>

**INTRODUCTION**

Both the Executive Branch and Congress have determined that stemming the flow of illegal immigrants across our nation's borders is essential to our national security and a matter of highest priority. For example, in a memorandum ordering a multi-pronged effort to strengthen border control, President Clinton stated:

It is a fundamental right and duty for a nation to protect the integrity of its borders and its laws. This administration shall stand firm against illegal immigration and the continued abuse of our immigration laws. By closing the back door to illegal immigration, we will continue to open the front door to legal immigration.

Presidential Memorandum, "Deterring Illegal Immigration," 60 Fed. Reg. 7885 (Feb. 7, 1995).

The Border Patrol has responded with measures designed to tighten our nation's

borders, particularly the border between the United States and Mexico.<sup>1</sup> The initial phases of that effort have focused on intercepting illegal aliens crossing the border into California and Texas. Not surprisingly, many illegal aliens intent on reaching the United States have responded by seeking other entry points -- particularly the Arizona desert. The Border Patrol's border tightening policy has been based on an assumption that the harsh desert terrain would deter inordinately large numbers of illegal aliens from seeking entry in this manner, even without the assignment of large numbers of agents to the area. That assumption will no longer be valid if the federal government is *required* to permit installation of water stations designed to ease travel across the desert; once prospective illegal entrants learn of those stations, they will be far more likely to risk crossing the desert. The Court should not permit the Federal Tort Claims Act to be used as a means of undermining federal immigration policy in this manner.

#### **INTERESTS OF *AMICI CURIAE***

The interests of *amici curiae* Washington Legal Foundation, Allied Educational Foundation, and Friends of Immigration Law Enforcement are set forth in the accompanying motion for leave to file this brief.

#### **STATEMENT OF FACTS**

For purposes of this motion to dismiss, *amici curiae* accept as true the factual

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<sup>1</sup> The Border Patrol is the federal agency with primary responsibility for securing the nation's borders. The Border Patrol is now a part of the Bureau of Customs and Border Protection within the newly formed Department of Homeland Security.

allegations contained in the Complaint.

In brief, Plaintiffs are relatives of 11 aliens who perished in May 2001 in an area within the Arizona desert known as the Cabeza Prieta National Wildlife Refuge (the “Refuge”). The Refuge (located in southwestern Arizona along the Mexican border) is owned by the United States and is managed by the U.S. Fish and Wildlife Service (FWS). In early 2001, representatives of Humane Borders, a social welfare organization, sought (but were denied) permission from FWS to place water stations in the Refuge. Plaintiffs allege that one of Humane Borders's proposed water stations would have been placed “in the exact area” where their relatives died.<sup>2</sup> Plaintiffs allege that the United States was negligent in refusing to permit installation of the water stations, given that FWS employees were well aware that many illegal aliens were dying from lack of water while attempting to cross the Refuge. Plaintiffs allege that their relatives would not have died had Humane Borders been permitted to install its proposed water stations.

On May 1, 2003, Plaintiffs filed suit against the United States under the Federal Tort Claims Act (FTCA), seeking to recover \$42,000,000 in damages. The United States has filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction, claiming that the United States has not waived its sovereign immunity for

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<sup>2</sup> In its motion to dismiss, the United States denies that allegation and contends that the nearest proposed water station was 14 miles from the spot of the deaths. *Amici* do not believe that this factual dispute is material to the legal issues raised by the motion to dismiss.

damages resulting from discretionary actions of its officers and employees. The United States claims that its decision not to permit Humane Borders to install its proposed water stations was a discretionary action that is not subject to second-guessing under the FTCA.

### **SUMMARY OF ARGUMENT**

In adopting the FTCA, Congress permitted the United States to be subject to tort suits but placed very strict limits on the types of government actions that could form the basis for such suits. One such limitation is the “discretionary function” exception, 28 U.S.C. § 2680(a). That exception precludes FTCA challenges to legislative and administrative decisions grounded in social, economic, and/or political policy. The exception has its roots in the constitutional doctrine of separation of powers, for without it courts would repeatedly be called on to second-guess policy judgments of the other branches of government.

The government conduct challenged in this case -- the FWS’s refusal to permit installation of water stations -- is a classic example of discretionary conduct that federal courts lack jurisdiction to review under the FTCA. There is no statute or regulation that restricts the discretion of FWS employees to decline permission to install water stations. Moreover, there can be little dispute that the decision whether to permit installation is one capable of being based on social, economic, or political policy. For example, one could decide to deny permission in order to minimize impact on the natural habitat or to make the area a less hospitable entry point for aliens seeking to enter the country illegally;

alternatively, one could decide to *grant* permission in order to reduce the number of desert deaths. Under those circumstances, the decision to deny permission qualifies as a “discretionary function” of the federal government that is excepted from judicial review under the FTCA.

This is not a close case; the “discretionary function” exception to the FTCA is clearly applicable. But even if the issue were not so clear-cut, dismissal would still be warranted because Plaintiffs’ claims threaten to undermine the ability of the federal government to take effective steps to prevent aliens from entering the United States illegally across our southwest border. Immigration issues have long been considered uniquely the province of the political branches of government, such that courts have properly been reluctant to intrude in any significant way in such issues. There is simply no evidence that Congress contemplated that federal courts would be permitted to interfere with enforcement of our immigration laws based on assertions that the federal government must take more steps to protect aliens from dangers brought upon themselves by their efforts to enter this country illegally.

Plaintiffs contend that the government “negligently” breached an alleged duty to protect their relatives from risk, by failing to permit installation of water stations. *Amici* disagree with that assessment; but more importantly, any alleged “negligence” is wholly irrelevant to this case -- the government made a policy decision not to permit installation of water stations, and that policy decision is not subject to judicial review in a suit for

money damages.

## ARGUMENT

### **I. The “Discretionary Function” Exception to the FTCA Precludes Judicial Review of the Government's Decision Not to Permit Installation of Water Stations**

Plaintiffs seek to recover damages from the federal government based on a decision of the FWS not to permit the installation of water stations in the Refuge. Regardless of the wisdom of that FWS decision, it is not subject to judicial review in a suit for money damages. The FWS decision was a discretionary act of the type for which the federal government has not waived sovereign immunity.

Under the FTCA, the federal government may not held liable based upon the exercise of a “discretionary function” by government agencies or employees.<sup>3</sup> The Supreme Court has explained the purpose of the “discretionary function” exception to the FTCA as follows: “Congress wished to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through

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<sup>3</sup> 28 U.S.C. § 2680(a) provides in relevant part:

The provisions of the [FTCA] shall not apply to --

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

the medium of an action in tort.” *United States v. S.A. Empresa De Viacao Aerea Rio Grandense [Varig Airlines]*, 467 U.S. 797, 814 (1984).

The Ninth Circuit recently summarized as follows the “two-pronged test” for determining the applicability of the discretionary function exception:

First, we ask whether the alleged wrongful conduct violated a specific and mandatory regulation or statute. [*United States v. Gaubert*, 499 U.S. 315, 324-25 (1991).] If so, the conduct is outside the realm of discretion. *Id.* If there is no mandatory regulation or statute involved, we then ask whether the conduct was susceptible to being based upon social, economic, or political policy. *Id.*; *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

*Bibeau v. Pacific Northwest Research Foundation, Inc.*, 339 F.3d 942, 945 (9th Cir. 2003). Because the FTCA is a “limited waiver of sovereign immunity,” the discretionary function exception (and all other FTCA exceptions) are to be “strictly construed” in favor of the United States. *Id.*

First, as the United States explains in its motion to dismiss, the FWS decision not to permit installation of the water stations did not violate any specific and mandatory regulation or statute. Motion to Dismiss at 5-7, 9. FWS's administration of the Refuge is governed by the National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd-668ee; and the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136. Neither of the statutes, nor the regulations implementing the statutes, includes any provision that limited the FWS's discretion to deny permission to install the water stations.<sup>4</sup>

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<sup>4</sup> 16 U.S.C. § 668dd(a)(4) lists 14 policy objectives to guide FWS’s administration of the National Wildlife Refuge System. None of those objectives

Second, the decision to deny permission “was susceptible to being based upon social, economic, or political policy.” There are numerous policy-related reasons why a government decision-maker *might* want to deny permission. For example, he/she *might* want to deny permission because it might increase human traffic in the critical habitat of protected wildlife; because it would trigger compliance requirements under the Endangered Species Act; because it would aid and abet an illegal activity (illegal entry into the United States); because injuries or death could result if someone intentionally contaminated water at the water stations; because the stations would alter the wilderness character of the Refuge; because of problems related to trash, fires, and habitat destruction at the station sites; or because allowing the water stations to be established might lock the FWS into a long-term commitment to maintain the stations. Because the decision to deny permission was susceptible to being based upon social, economic, or political policy, the decision falls within the discretionary function exception. It matters not whether any of the preceding policy considerations played a role in the ultimate decision to deny permission. The key is that they *could have been considered* as bases for the FWS's decision; because there can be no serious dispute that this second test was met, the FWS's decision is not subject to challenge under the FTCA.

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relates in any way to the provision of amenities to those traversing a wildlife refuge. Indeed, 16 U.S.C. § 668dd(d)(1) makes clear that non-wildlife uses of a wildlife refuge are permissible *only* to the extent that such uses “are compatible” with the principal objective of preserving wildlife.



In fact, all of the policy considerations outlined above apparently went into the FWS's decision to deny permission to install water stations. *See* Attachment 2 to Exhibit A to Motion to Dismiss (April 13, 2001 memorandum from Donald Tiller to the Regional Chief of the National Wildlife Refugee System) (listing 17 policy reasons why FWS had decided to deny permission). But the Court need not rely on the accuracy of the April 13, 2001 letter in order to grant the motion to dismiss. In order to invoke the discretionary function exception to the FTCA, the federal government need not show that it actually relied on policy considerations in declining to grant Humane Borders's request; it is sufficient for the government to show that its action was the type that lent itself to resolution based on policy considerations.

The Complaint alleges that FWS knew that the safety of illegal aliens depended on making water available to them at the proposed water stations. But the fact that the safety of humans entered into the equation does not make the FWS's decision any less a policy decision. As the Ninth Circuit has repeatedly noted, “[D]etermination of safety requirements involves a balancing of social, economic, or political policies’ and . . . ‘when Congress leaves the establishment and enforcement of safety standards to an agency, it intends an exercise of that discretion to fall within the discretionary function exception.’” *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1176-77 (9th Cir. 2002) (quoting *West v. FAA*, 830 F.2d 1044, 1047-48 (9th Cir. 1988)). *See also Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993) (FTCA suit alleging negligent failure to

place warning signs on unstable rock formations at petroglyph site was barred by discretionary function exception because the decision not to post signs was part of a policy to preserve natural scenery); *Zumwalt v. United States*, 928 F.2d 951, 953 (10th Cir. 1991) (employing similar rationale, court invokes discretionary function exception to dismiss suit alleging failure to erect signs warning of danger of caves in Pinnacles National Monument).

A comparison of the facts of this case to those in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), well illustrates why the discretionary function exception is applicable here. *Indian Towing* involved a claim under the FTCA for damages to cargo aboard a vessel that ran aground, allegedly owing to the failure of the light in a lighthouse operated by the Coast Guard. The plaintiffs contended that the Coast Guard had been negligent in inspecting, maintaining, and repairing the light. The Court found that the complaint stated a cause of action under the FTCA.<sup>5</sup> The Court subsequently explained that while "the initial decision to undertake and maintain lighthouse service was a discretionary judgment, . . . the failure to maintain the lighthouse in good condition subjected the Government to suit under the FTCA. . . . The latter course of conduct did not involve any permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 538 n.3.

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<sup>5</sup> The Court's decision did not directly address the discretionary function exception because the federal government had conceded the inapplicability of the exception. *Id.* at 64-65. Nonetheless, the Court subsequently cited *Indian Towing* as a case that "illuminates the appropriate scope of the discretionary function exception." *Berkovitz*, 486 U.S. at 538 n.3.

Per *Indian Towing*, the FWS could be held liable under the FTCA had it agreed to maintain water stations in the Refuge but then had done so in a negligent manner. But, of course, that is not what happened in this case. Rather, the FWS not only did not agree to erect the requested water stations, it also denied permission to Humane Borders to do so. Just as the Coast Guard in *Indian Towing* would not have been answerable under the FTCA for a decision not to erect a lighthouse (no matter how rocky and dangerous the coastline), so too the FWS cannot be held answerable under the FTCA for its denial of Humane Borders's request to erect water stations (no matter how dangerous desert crossings may be for those seeking to enter the country illegally).

## **II. Dismissal Is Warranted Because Plaintiffs' Claims Threaten to Undermine the Government's Ability to Secure the Border with Mexico**

*Amici* are not filing this brief simply to vindicate the federal government's sovereign immunity rights and to ensure that the discretionary function exception is read as broadly as Congress intended. Rather, *amici*'s principal reason for filing is that they view Plaintiffs' suit as a threat to the federal government's ability to take effective steps to prevent aliens from entering the United States illegally across our southwest border. A monetary judgment against the United States in this case would effectively require the erection of new water stations along Arizona's border with Mexico, a step that would encourage even more aliens to attempt to enter the country illegally. Such a result would be totally at odds with the strong policy of Congress and the Executive Branch to try to discourage such attempts. Given that immigration issues have long been considered

uniquely the province of the political branches of government, any court should pause at length before authorizing suits that would undermine the political branches' immigration policy so dramatically.

The extent of the illegal immigration crisis facing this country cannot easily be overstated. Senior immigration officials estimated in 2001 that upwards of 11 million aliens were living in this country illegally. General Accounting Office, *INS' Southwest Border Strategy: Resource and Impact Issues Remain After Seven Years* (August 2001) at 1 (hereinafter "GAO 2001"). The most significant point of entry by illegal aliens into the country is across the U.S.-Mexico border.<sup>6</sup> Between October 1984 and March 1998, the U.S. Border Patrol apprehended more than 16 million unauthorized crossers in the nine border sectors comprising the U.S.-Mexico border. Bean, Capps, and Haynes, "An Estimate of the Number of Border Patrol Personnel Needed at the Southwest Border to Achieve the Level of Effectiveness of Operation 'Hold the Line,'" Testimony before Subcommittee on Immigration and Claims of the House Judiciary Committee (Feb. 25, 1999). The Border Patrol made another 1.6 million arrests for illegal entry along the southwest border in fiscal year 2000. GAO 2001 at 1. Given the consensus among experts that the Border Patrol historically has apprehended no more than 1 in 3 illegal

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<sup>6</sup> For example, of the 1.6 million illegal aliens apprehended by the Border Patrol in Fiscal Year 1996, 92% (1.5 million) were apprehended along the southwest border. General Accounting Office, *Illegal Immigration: Southwest Border Strategy Results Inconclusive; More Evaluation Needed* (December 1997) at 7 (hereinafter "GAO 1997").

crossers, the extent of the problem is readily apparent.

Congress and the Executive Branch have taken strong measures in an effort to stem the flow of illegal immigrants. The Violent Crime and Law Enforcement Act of 1994, Pub. L. 103-322, mandated implementation of numerous new measures designed to improve border control, including a doubling of the number of Border Patrol agents assigned the task of apprehending those attempting to enter the country illegally. Congress adopted additional enforcement measures in connection with its enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546. The INS's overall budget was more than doubled between 1993 and 1997 to \$3.1 billion, with a sizeable percentage of that total allocated to the Border Patrol. GAO 1997 at 5.

The Executive Branch has moved decisively to implement these mandates. In 1994, the Attorney General and the INS Commissioner announced a comprehensive five-part strategy to strengthen enforcement of the nation's immigration laws. The first priority under that strategy was "strengthening the border." GAO 1997 at 64. As part of those efforts, the number of Border Patrol agents doubled from 1994 to 1998, to more than 8,000. General Accounting Office, *Illegal Immigration: Status of Southwest Border Strategy Implementation* (May 1999) at 4, 32. Approximately 93% of those agents were deployed along the southwest border. *Id.* at 4. Deployment along the southwest border increased to 9,500 agents by June 2003, with the Border Patrol still looking to add another

2,200 agents to reach the minimum number “needed to fully implement the southwest border strategy.” “Challenges Facing the Department of Homeland Security in Balancing its Border Security and Trade Facility Missions,” Statement of Richard M. Stana, Director of Homeland Security and Justice Issues, before the House Select Committee on Homeland Security, Subcommittee on Infrastructure and Border Security (June 16, 2003).

The Border Patrol has been implementing its increased southwest border security strategy in four phases. Phase I focused on strengthening enforcement in the San Diego and El Paso Sectors.<sup>7</sup> During Fiscal Year 1997, the Border Patrol began implementing Phase II, which focused on strengthening border enforcement in the Tucson Sector and three Sectors in south Texas.<sup>8</sup> Difficulties in reaching hiring goals has delayed implementation of Phase III, which is intended to focus on the remaining three Sectors, including the Yuma Sector.

The primary focus of the Border Patrol’s stepped-up enforcement activity along the southwest border has been the more heavily populated areas. Even with its beefed-up staff, the Border Patrol cannot possibly keep a constant watch on the entire U.S.-Mexico

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<sup>7</sup> The Border Patrol divides the U.S.-Mexico border into nine “Sectors.” The Arizona-Mexico border comprises two of those sectors: the Tucson Sector and the Yuma Sector.

<sup>8</sup> The name given to the stepped-up enforcement effort in the Tucson Sector is “Operation Safeguard.” The Complaint makes reference to an Operation “Gatekeeper,” a plan allegedly designed “to drive Plaintiffs into the dangerous and hostile desert.” Complaint at 5. In fact, Operation Gatekeeper is the Border Patrol's name for its stepped-up enforcement effort in the San Diego Sector.

border. Instead, the Border Patrol has been required, as part of its enforcement strategy, to rely on the desert's extremely inhospitable terrain as one means of holding down the number of people entering the country illegally through the desert. Not surprisingly, the tightening of border security in populated areas has caused many would-be illegal entrants to seek entrance in more isolated areas, such as the Arizona desert. But many have learned through bitter experience just how difficult entry across the desert can be. Newspaper accounts indicate that in recent years, anywhere from 145 to 205 people per year have died attempting to make the trek.

The Border Patrol has not been insensitive to these deaths. For example, it began a "Border Safety Initiative" in June 1998. The initiative:

[F]ocuses on (1) educating those who may be contemplating crossing illegally on the dangers of crossing and (2) searching for and rescuing those who may become abandoned or lost. Working with the Mexican government, INS has produced public service announcements that are shown on television in Mexico to warn people of the dangers of crossing -- for example, exposure to heat and cold, dehydration, snakes, and bandits that rob and assault those who cross in remote areas. Border Patrol sectors show detained aliens a similar video announcement. Signs have been posted on both sides of border fences in various locations that also warn about the dangers of crossing.

GAO 2001 at 25.

But the Border Patrol has resisted taking steps (such as the erection of large numbers of water stations) that would make it easier for aliens to sneak across the desert and enter the United States illegally. Such steps would run counter to the Border Patrol's mission to stop illegal entries. Such entries are a major problem in Arizona; for example,

apprehensions in the Tucson Sector nearly tripled from 1994 to 2000, going from just over 200,000 in 1994 to more than 600,000 in 2000. *See* GAO 2001 at 12. Initiatives (such as water stations) that would increase the likelihood of successful, undetected desert crossings would serve only to make those numbers worse, without necessarily doing anything to decrease the loss of life in the desert.

As noted above, Congress did not intend when it adopted the FTCA to empower courts to second-guess the Executive Branch on such quintessentially policy decisions as how best to balance the need to secure our borders with a desire to prevent loss of life among border crossers. Such second-guessing is particularly inappropriate in the field of immigration policy. As the Supreme Court has repeatedly stated, “The power to regulate immigration -- an attribute of sovereignty essential to the preservation of any nation -- has been entrusted by the Constitution to the political branches of the Federal Government.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982). As a result, the Court has “underscore[d] the limited scope of judicial inquiry” into immigration-related matters. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Because any judgment for Plaintiffs in this case would undermine the Executive branch’s policy of preventing successful illegal immigration into this country through the Arizona desert, any doubt whatsoever regarding the applicability of the discretionary function exception should be resolved in favor of the government. That is particularly true now that the events of September 11, 2001 have made the need to protect the nation's borders an essential component of national survival.



## CONCLUSION

*Amici curiae* Washington Legal Foundation, Allied Educational Foundation, and Friends of Immigration Law Enforcement respectfully request that the Court grant the motion to dismiss based on lack of subject matter jurisdiction.

Respectfully submitted,

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Dated: November 4, 2003

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November, 2003, copies of the foregoing motion for leave to file an *amicus curiae* brief, and the proposed brief, were deposited in the U.S. Mail, first-class postage prepaid, addressed to the following:

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