UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Estate of James Redd, M.D., et. al, **Plaintiffs,** **v.** **United States of America,** **Defendant.**	**No. 2:11-cv-01162-TS**

DEFENDANT UNITED STATES OF AMERICA'S
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This Court has dismissed all but two of Plaintiffs' claims: (1) intentional infliction of emotional distress ("IIED"),[1] and (2) wrongful death.[2] Plaintiffs' remaining claims hinge on the Court's previous ruling that the discretionary function exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a), did not mandate dismissal of the allegation that the United States "dispatched 100 plus heavily armed officers to execute the Redd warrants" on June 10, 2009. Order at 22; *see* Complaint ("Compl.") ¶¶ 54, 130, ECF No. 2. Specifically, in denying the United States' Rule 12(b)(1) and 12(b)(6) motion to dismiss with respect to these two claims, the Court noted that "the decision of how to execute an arrest warrant is quintessential discretionary conduct." Order at 15 (citation omitted). However, accepting all of Plaintiffs' allegations as true, the Court reasoned that the alleged decision to dispatch "100 plus" officers to the Redd home, was constitutionally "unreasonable and therefore nondiscretionary." *Id.* at 16. Thus, the Court allowed Plaintiffs' claims for IIED and wrongful death to continue only to the

[1] Plaintiffs have since clarified that their IIED claim relates solely to alleged emotional distress experienced by the decedent, Dr. Redd. *See* Ex. 46 (Letter from S. Baddarudin to E. Blege dated June 15, 2015 ("June 15 Letter")) at 3 ("At this time, and at the time of trial, it is the desire of Plaintiffs to pursue an Intentional Infliction of Emotional Distress Claim on behalf of the Estate of James D. Redd and only the Estate of James D. Redd.").

[2] *See* Mem. Dec. and Order ("Order") at 22, ECF No. 25 (holding that the discretionary function exception, 28 U.S.C. § 2680(a), bars Plaintiffs' claims for: (1) malicious prosecution; (2) abuse of process; (3) false arrest; and (4) false imprisonment); *id.* at 20-22 (holding that the detention of goods exception, 28 U.S.C. § 2680(a), bars Plaintiffs' claims for (1) conversion, (2) trespass to chattels, (3) replevin, and (4) post-raid negligence); *id.* at 16-17 (holding that because the United States did not specifically argue that Plaintiffs failed to state a valid claim for relief with respect to their IIED and wrongful death claims, these two claims survived the United States' Motion to Dismiss).

extent that they are based upon the number of federal personnel dispatched to the Redd residence. *Id.*[3]

Yet, Plaintiffs' allegation that over 100 federal agents were dispatched to the Redd residence[4] is baseless and belied by the undisputed facts. Contrary to the hyperbole in Plaintiffs' complaint, there were no more than thirteen federal personnel at the Redd residence upon Dr. Redd's arrival. *See infra* pp. 7-8. By the time Dr. Redd was transported from his residence, for booking and processing, no more than twenty-two federal personnel had arrived at the Redd residence. *See id.* Not one was dressed in "paramilitary gear." *Id.*; Order at 3 ("Dr. Redd was driving home from an early-morning errand when he saw over 100 officers on his property in 'paramilitary gear.'"). Moreover, although a partial Special Weapons and Tactics ("SWAT") team was convened after Dr. Redd left the property, this was done in response to a threatening voice-message left by Javalan Redd.[5]

Given that the Court's ruling on the United States' motion to dismiss was based on Plaintiffs' erroneous allegation that over 100 agents were dispatched to the Redd residence, the

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[3] *See* Order at 17-18 (holding that the discretionary function exception prohibits Plaintiffs from relying upon allegations relating to "the conduct of [the United States'] agents during the raid.").

[4] For purposes of this motion, the terms "residence," "home," and "property," are used by Defendant United States to describe both the interior and the exterior (the surrounding premises) of the Redd property located at 550 Santa Fe Heights, Blanding, Utah.

[5] *See infra* pp. 11. In response to written discovery served by the United States, all Plaintiffs except for Javalan Redd indicated that they "believe the message was left by Javalan Redd." *See* Ex. 37 (Pls.' Resp. 3d Interrogs.) at 4-5. In response to the same written discovery, Javalan Redd asserted "his Fifth Amendment Privilege not to answer." *See id.* The Supreme Court has held that the Fifth Amendment does not forbid adverse inferences against parties to civil actions "when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.'" *Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1976) (citation omitted); cited by the Tenth Circuit in *Freddie v. Marten Transp., Ltd.* 428 Fed. Appx. 801, 803, n.1 (10th Cir. 2011); this case was also cited very recently by this Court in *SEC v. Bliss*, Case No. 2:15-cv-00098-RJS, 2015 U.S. Dist. LEXIS 107456, *9-10, n.14 (D. Utah Aug. 14, 2015).

United States submits that summary judgment on Plaintiffs' two remaining claims is appropriate pursuant to the discretionary function exception. *See* 28 U.S.C. § 2680(a). Once Plaintiffs' hyperbole is set aside, and the actual number of federal personnel dispatched to the Redd residence is considered, there is no doubt that the United States' actions were quintessentially discretionary and fell well within the bounds of constitutional reasonableness. The United States therefore is entitled to summary judgment on Plaintiffs' remaining claims.

The United States is also entitled to summary judgment on the grounds of causation. Specifically, Plaintiffs cannot meet their burden to prove that the number of federal personnel dispatched to the Redd residence on the morning of June 10, 2009, was a "but for" cause of Dr. Redd's suicide. Indeed, Plaintiffs' own complaint alleges that the untimely death of Dr. Redd was caused by the conduct of federal personnel during his arrest and interrogation, not the number of federal personnel who were dispatched to carry out his arrest and the search of his residence.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule DUCivR 56-1(b)(2)(A) and (B), the United States identifies the following legal elements to prevail on its summary judgment motion:

(1) Summary judgment is proper where the movant demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986); *Thrasher v. B&B Chem. Co*., 2 F.3d 95, 996 (10th Cir. 1993). The movant bears the initial burden of demonstrating that there is an absence of evidence to support a nonmoving party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, Rule 56(e) requires the nonmoving party to designate specific facts to

demonstrate that there is a genuine issue triable before the court. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 256.

(2) The discretionary function exception poses a jurisdictional prerequisite to FTCA suits, which "the plaintiff must ultimately meet as part of his overall burden to establish subject matter jurisdiction." *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir.1998) (quotations omitted). The FTCA's discretionary function exception provides that the FTCA "shall not apply to" a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The exception protects challenged conduct by the government "if it involves judgment or choice, and is conduct of a kind that can fairly be considered to be based on public policy." *United States v. Gaubert*, 499 U.S. 315, 324-25 (1991). Following the Supreme Court's decision in *Gaubert*, a two prong test is applied to determine whether a claim is barred by the discretionary function exception.

A. Prong One: First, the presiding court must decide whether the conduct at issue is discretionary in that it "involve[s] an element of judgment or choice." *Gaubert*, 499 U.S. at 322. Where a government official performing his statutory duties acts "without reliance upon a fixed or readily ascertainable standard," the decision he makes is discretionary and falls within the exception. *Barton v. United States*, 609 F.2d 977, 979 (10th Cir. 1979). Thus, in order to avoid application of the discretionary function exception under the first prong, a Plaintiff must identify a mandatory and specific directive that governs the conduct at issue. *See, e.g.*, *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

B. Prong Two: If the plaintiff fails to identify a mandatory directive governing the conduct at issue, the court must then determine whether the decisions in question involved the exercise of judgment based on public policy considerations. *Garcia v. United States Air Force*, 533 F.3d 1170, 1176 (10th Cir. 2008). This inquiry centers on the nature of the governmental actions and on "whether they are susceptible to policy analysis." *Id*. The purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 323.

(3) Pursuant to the Federal Tort Claims Act ("FTCA"), if jurisdiction is proper, Plaintiffs' claims would be governed by Utah law. *See* 28 U.S.C. § 1346(b) (dictating that the United States can only be liable to the extent that "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."); *Flynn v. United States*, 902 F.2d 1524, 1527 (10th Cir. 1990). Under Utah law, proximate causation is an essential element of both of Plaintiffs' remaining claims. *See Retherford v. AT&T Commc'ns of Mountain States, Inc.*, 844 P.2d 949, 970-71 (Utah 1992) (discussing necessary elements to prevail on an IIED claim, including proximate cause).[6]

[6] Although a wrongful death claim is an independent cause of action under Utah law, a claim for wrongful death must be based on a viable underlying theory of liability. *See Miller v. Gastronomy, Inc.*, 110 P.3d 144, 146 (Utah Ct. App. 2005) ("Plaintiffs, as Decedent's heirs, may recover under Utah's wrongful death act, . . . if Decedent, had his injuries not proven fatal, could himself have recovered.") (citations omitted). Therefore, if Plaintiffs' IIED claim is dismissed, their claim for wrongful death must also be dismissed. *See id.* at 149 (affirming dismissal of wrongful death claim where plaintiffs failed to present a viable underlying theory of liability); *see also* Utah Code Ann. § 78B-3-106 ("[W]hen the death of a person is ***caused by*** the wrongful act or neglect of another, his heirs . . . may maintain an action for damages against the person causing the death . . .") (emphasis added).

(4) In order to establish proximate causation, a plaintiff must first prove that the defendant was a "but for" cause of plaintiff's harm. *See Mahmood v. Ross*, 990 P.2d 933, 938 (Utah 1999) (defining proximate cause as "that cause which, in the natural and continuous sequence (unbroken by an efficient intervening cause), produces the injury and ***without which the result would not have occurred***. It is the efficient cause-the one that necessarily sets in operation the factors that accomplish the injury.") (citation omitted) (emphasis added); *Raab v. Utah Ry. Co.*, 221 P.3d 219, 226 (Utah 2009) ("For a particular negligent act to be the [proximate] cause of a plaintiff's injuries, there must be some greater level of connection between the act and the injury than mere 'but for' causation.").

In accordance with DUCivR 56-1(b)(2)(C), the United States submits the attached Statement of Undisputed Material Facts in support of its motion for summary judgment. *See* Ex. 1 ("SOMF").

BACKGROUND

I. The planning and execution of the Redd warrants on June 10, 2009, was part of the larger Operation Cerberus.

The June 10, 2009 arrest of James Redd and his wife, and the search of the Redd property, was part of a much larger, joint federal investigation by the Bureau of Land Management ("BLM") and the Federal Bureau of Investigation ("FBI") investigating the illegal trafficking of Native American artifacts in Southern Utah and the Four Corners Region. *See* SOMF ¶ 2; Ex. 2 ("Ops Plan") at FBI000012. The joint federal investigation was known as "Operation Cerberus." SOMF ¶ 1. As a result of the investigation, numerous search and arrest warrants, including 12 search warrants and 19 arrest warrants in Southern Utah, were executed simultaneously on June 10, 2009. *See* SOMF ¶¶ 3-5; Ex. 8 ("April 1 EC") at FBI000117 ("[I]t is

necessary to execute search warrants fairly simultaneously because of the nature of this illegal network[.]").[7]

Further, in planning the execution of the arrest and search warrants, federal law enforcement officials anticipated that additional federal officials beyond the initial search team might be required to assist in the search for and identification of artifacts at other search sites. *See* SOMF ¶¶ 14-15. As teams completed their assigned duties, they were reassigned to help with search, arrests, and transport where needed. *Id*. ¶ 14. For example, the Operations Plan for the execution of the Redd search and arrest warrants provided that once the site was secured and the search completed, federal officials could be reassigned to assist ongoing searches at certain sites. *See, e.g*., Ex. 2 at FBI000012.

II. There were not 100 federal agents dispatched to the Redd residence on June 10, 2009.

Contrary to the assertions in Plaintiffs' complaint, the undisputed facts show that the number of federal personnel dispatched to the Redd property on June 10, 2009, was nowhere near one-hundred, let alone one-hundred and forty. *See* Compl. ¶ 54 (alleging that "there were approximately 80 agents in the home at any one point in time, with approximately 140 different agents despoiling the home during the course of the day"); *id.* ¶ 130 ("Defendant's agents, officers, and employees, numbering over 100 strong . . ."). In fact, upon Dr. Redd's arrival at the residence at approximately 6:55 am, there were no more than twelve law enforcement officers present to carry out the two arrest warrants and commence the search for and

[7] An arrest warrant scheduled to be served earlier that morning at approximately 6:00 a.m. was carried out by a SWAT team. SOMF ¶ 6.

identification of artifacts to be seized pursuant to the warrant.[8] *See* SOMF ¶ 29-30; *see also id.* ¶¶ 16, 20. Plaintiffs' allegation that Dr. Redd was greeted by "paramilitary federal agents" in his driveway is unsupported by the contemporaneous records. Compl. ¶ 40. None of the twelve law enforcement officers who initially arrived at the Redd residence were equipped with special tactical or SWAT gear on their person when they approached the residence to effect the arrest warrants. *See* Ex. 2 at FBI000017. Rather, and as was instructed by the Operations Plan for the Redd residence, agents were dressed in "casual clothing" with insignia identifying them as law enforcement personnel. *Id.*[9] In addition to the twelve law enforcement officers who appeared initially at the Redd property, there was one unarmed cultural specialist, who arrived at 6:45 a.m., and assisted only with the search operation at the residence. *See* SOMF ¶¶ 20, 30.[10]

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[8] The number of people initially assigned to the Redd residence was consistent with the number assigned to the other search and arrest locations, which ranged from 8 to 21. *See* Ex. 4 (Search Warrant Locs.) at FBI000006-10; Ex. 10 (Bretzing Decl.) ¶ 18; *see also* SOMF ¶¶ 16, 18, 20.

[9] *See* Ex. 7 (May 26 EC) at FBI000034 (In reference to a location other than the Redd residence, the document states: "the first subject to be served will be [redacted] at 6:00 a.m. This will be a SWAT operation."); *see also* SOMF ¶ 63. To carry out a mission, members of an FBI SWAT unit are outfitted distinctly from ordinary special agents. *See* SOMF ¶ 69 (https://www.fbi.gov/about-us/capabilities/fbi-swat-graphic, which describes how FBI SWAT agents are outfitted for a mission. (last visited on September 9, 2015)). SWAT teams utilize any of the following tools when carrying out a mission: helmets, goggles, gas masks, military-issue fatigues and gloves, and may carry Heckler & Koch MP5 sub-machine guns. *See* Ex. 48. BLM does not have SWAT or tactical teams. SOMF ¶ 69.

In the case of the arrest of Dr. Redd, law enforcement officers (none of whom were SWAT agents) were armed, as required by agency policy, with their agency-issued handgun and ammunition, and outfitted with a standard-issued bullet proof vest which their agency policy required them to have when effectuating any felony arrest warrants. SOMF ¶¶ 64-67; Ex. 10 ¶ 25.

[10] *See also* SOMF ¶¶ 7-15, which describes the organization and planning of the search and arrest teams that participated in the June 10, 2009 operation.

Law enforcement officers met Dr. Redd in his driveway, identified him as James Redd, one of the individuals believed to reside at this location and the subject of a federal arrest warrant, and placed him into custody without incident. *Id.* ¶ 31. After the site was secured, federal personnel took entry photos of the residence from about 7:14 a.m. to 7:50 a.m. *Id.* ¶ 40. Federal officials began searching the residence at approximately 7:57 a.m. *Id.* ¶ 41.

It soon became apparent that the personnel assigned to the Redd residence would need help identifying and cataloging the volume of artifacts found. SOMF ¶¶ 42, 43, 57-58. To that end, additional personnel were assigned (after completing their tasks at other search and arrest sites) to assist with the ongoing search at the Redd residence. *Id.* at 43.

Dr. Redd was transported from his residence to the BLM office in Monticello no later than 10:34 a.m. for booking and processing. *See id.* ¶¶ 32-36; Ex. 7 at FBI000035 ("Arrested subjects will be transported to Monticello, UT by agents"); Ex. 6 at Redd_BLM-0241-42. During the approximately three and a half hours from the time he arrived at his home until he was transported to Monticello, no more than twenty-two federal personnel–12 members of the initial entry team and one cultural specialist, and 9 additional federal personnel–had made their way to the Redd residence. *See* SOMF ¶¶ 36-37. Specifically, while Dr. Redd was at the residence, the initial team of twelve law enforcement officers and one cultural specialist was joined by nine federal officials, one of whom was an unarmed cultural specialist. SOMF ¶¶ 37-39. The nine additional federal personnel who arrived during this time frame either assisted with the ongoing search or observed the operations in a supervisory capacity. *Id.* ¶ 38. Of those nine additional federal personnel, six stayed fewer than fifteen minutes. *Id.*[11] Indeed, the total

[11] Two of the officers who left after staying fewer than 15 minutes at the residence returned later in the day at 1:45 p.m. *See* Ex 43 (10:34a - 5:36p Arrival.) at lines 32 and 33.

number of federal personnel at the residence by the time Dr. Redd departed the property at 10:34 a.m., was no more than sixteen. *See id.* ¶ 39.

During the time that Dr. Redd was at the residence, he could not have observed all sixteen – or event twenty-two – federal officials at the residence since they were dispersed throughout the property. Indeed, Plaintiffs allege that Dr. Redd was detained in his garage, where he was interrogated "for four hours." Compl. ¶ 41; *see also* SOMF ¶¶ 32-35. Given that Dr. Redd was detained in his garage upon his arrival, he could not have seen all of the federal officials who were dispersed throughout the vast residence.

After Dr. Redd left the property, thirty-three additional federal officials came and went over the course of the entire day to assist with the large-scale search of the residence.[12] SOMF ¶ 56 n.5. Of these thirty-three additional federal personnel who arrived after Dr. Redd's departure, five were unarmed cultural specialists. *See* Ex. 43 (10:34 a. – 5:36 p.) at lines 9, 12, 16, 17, 20. Federal officials concluded the search at approximately 5:15 p.m., and then conducted a final survey with exit photos. SOMF ¶¶ 53-54. Federal officials exited the residence at approximately 5:36 p.m. *Id.* ¶ 55.[13] At that time, there were no more than thirty-five federal personnel at the residence, including two unarmed cultural specialists. *See id.* ¶ 56;

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[12] This number includes the two federal personnel who arrived earlier in the day but stayed less than 15 minutes. *See* Ex. 43 at lines 32, 33.

[13] In response to an interrogatory from the United States, Dr. Redd's adult daughter, Jerrica, contended that she, Dr. Redd, and Mrs. Redd returned to their home at 5:00 p.m. SOMF ¶ 50. However, in response to a Request for Admission served by federal agent Daniel Love in the parallel *Bivens* action, *Estate of James Redd v. Daniel Love et al.*, Case No. 2:11-cv-478-RJS, (D. Utah), Plaintiffs admit that "James, Jeanne and Jerrica Redd returned to their home around 6:30 pm" on the day in question. *Id.* ¶ 51. The 6:30 p.m. return time indicated by Plaintiffs is consistent with the documentary evidence from that day. *Id.* ¶ 52. By that time, federal officials had left the residence. *Id.* Even assuming Dr. Redd returned to the residence at 5:00 p.m., he did not interact with any of the agents. *See* Ex. 36 at 3 ("Dad was on the phone until the Agents left.").

Ex. 11 ¶ 28. In total, no more than fifty-three federal personnel–seven of whom were unarmed cultural specialists–entered the Redd property on June 10, 2009. SOMF ¶ 56.

III. The decision to assemble SWAT-trained agents already on site around the Redd residence was necessitated by a threatening voice-message left by one of the Plaintiffs.

While the search was underway, and after Dr. Redd had departed the residence, two threatening messages were left on the answering machine in the Redd home. SOMF ¶ 44. At approximately 11:55 a.m., the first message was received and stated:

> "Is anybody there? I know somebody's there. A whole bunch of you. You gonna' pick up the phone? All right. I'll be in there in a little bit. Be ready."

Id. A second message was left at approximately 1:13 p.m. by the same caller who stated:

> "Hey, you guys still too scared to answer the phone? Don't touch anything of mine. Trust me. You don't want to."

Id. Law enforcement agents at the scene believed the caller was one of the Redds' adult sons. *Id*. ¶ 45. Plaintiffs' responses to the United States' written discovery indicate that the calls were made by Javalan Redd, who is a Plaintiff in this action. *See supra* note 5.

Because of the threat, law enforcement officials decided to enlist the help of SWAT-trained agents, who were already on site assisting with the search, to ensure the safety of federal personnel engaged in the search operation at the site. SOMF ¶ 47. None of the federal agents who made up this partial SWAT team, however, participated in the arrest of Dr. Redd. *See* SOMF ¶ 6. Rather, prior to the threat, these SWAT agents were already on site assisting with the meticulous search operation. *Id*. ¶ 47. Only after the first voice-message was received did these agents stop participating in the search and assume a protective role. *Id*. ¶ 48. They acquired long guns from their vehicles and took up tactical positions at or around the residence to ensure that no one could approach undetected in a hostile manner. *Id*. ¶¶ 48-49.

ARGUMENT

I. The discretionary function exception bars Plaintiffs' surviving claims.

The discretionary function exception, 28 U.S.C. § 2680(a), bars Plaintiffs' remaining claims as a matter of law. *See Franklin Savings Corp. v. United States*, 180 F.3d 1124 (10th Cir. 1999), *cert. denied* 528 U.S. 964 (1999) ("to avoid dismissal of an FTCA claim under the discretionary function exception, a plaintiff must allege facts that place its claim facially outside the exception."); *see also Aragon*, 146 F.3d at 823 (noting the discretionary function exception is a jurisdictional precondition which Plaintiffs must satisfy "as part of [their] overall burden to establish subject matter jurisdiction"). As a sovereign, the United States is immune from suit unless it waives such immunity. *FDIC v. Meyer*, 510 U.S. 471 (1994). The FTCA constitutes a limited waiver of the federal government's sovereign immunity from private suits. *Tippett v. United States*, 108 F.3d 1194, 1196 (10th Cir. 1997); *see* 28 U.S.C. § 1346(b). Under the FTCA, a plaintiff may pursue a civil claim against the United States for injuries:

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

The FTCA preserves the government's immunity and excludes, under this limited waiver, any claim based on the government's performance of "discretionary functions." *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997). In pertinent part, the discretionary function exception retains the United States' sovereign immunity and deprives federal courts of jurisdiction to hear claims:

> based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). It "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984).

The exception must be strictly construed in favor of the United States. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992). As a threshold jurisdictional issue, it is immaterial whether the government employees were negligent. *Elder v. United States*, 312 F.3d 1172, 1176 (10th Cir. 2002); *see* 28 U.S.C. § 2680(a) (discretionary function exception applies "whether or not the discretion involved [was] abused."). If the exception applies to the challenged governmental conduct, the United States retains its sovereign immunity, and the district court lacks subject matter jurisdiction to hear the suit. *Aragon*, 146 F.3d at 823.

"The determination of whether the discretionary function exception applies to a particular act involves a two-pronged analysis by the court." *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 972 (10th Cir. 1994) (citing *Berkovitz*, 486 U.S. at 536-37); *Kiehn v. United States*, 984 F.2d 1100, 1102 (10th Cir. 1993). First, the presiding court must decide whether the conduct at issue is discretionary in that it "involve[s] an element of judgment or choice." *Gaubert*, 499 U.S. at 322. To overcome the first prong, Plaintiffs must show that "[the government] violated a federal statute, regulation, or policy that is both 'specific and mandatory.'" *Elder*, 312 F.3d at 1176-77 (quoting *Aragon*, 146 F.3d at 823). Put another way, Plaintiffs "must demonstrate that the challenged decision involved no element of 'judgment or choice.'" *Id.* at 1175.

The second prong of the discretionary function analysis requires the court to analyze whether the exercise of judgment or choice at issue "is the kind that the discretionary function

exception was designed to shield." *Berkovitz*, 486 U.S. at 536. The exception was intended to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," *Varig Airlines*, 467 U.S. at 813. Thus, the applicability of the discretionary function exception turns on whether the "governmental actions and decisions [at issue are] based on considerations of public policy," *Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 486 U.S. at 537), and the court must inquire "whether the decisions [at issue] implicate the exercise of policy judgment of a social, economic, or political nature." *Elder*, 312 F.3d at 1181 (internal punctuation and citation omitted).

In order to avoid summary judgment, Plaintiffs must establish subject-matter jurisdiction by proving that their surviving claims are not based upon actions immunized from liability under the discretionary function exception. If they establish jurisdiction, they would then have the burden of proving intentional infliction of emotion distress and their wrongful death claim. *See Elder*, 312 F.3d at 1176 (stating that plaintiff must address discretionary function exception as a jurisdictional prerequisite to suit before addressing negligence) (citations and internal quotations omitted).

As set forth below, the decisions as to: (1) how many law enforcement agents to send as part of the initial arrest and search team to the Redd residence; (2) whether to send additional personnel to assist with the search; and (3) whether to assemble a partial SWAT team after a threatening call was received, all fall squarely within the discretionary function exception.[14]

A. Plaintiffs fail to identify a single statute, regulation or mandatory directive prescribing the number of officers to be used to carry out a search and arrest.

[14] *See, e.g., McFarland v. Warden*, 557 F. Appx. 915, 916 (11th Cir.), *cert. denied sub nom. McFarland v. United States*, 135 S. Ct. 237, 190 L. Ed. 2d 178 (2014), *reh'g denied*, 135 S. Ct. 1542 (2015) ("the [Bureau of Prisons] officials [ ] exercised discretion in determining how many officers to have on duty . . . .").

When a plaintiffs' allegation implicates the discretionary function exception, the plaintiff bears the burden of identifying a specific mandatory statute or regulation that precludes discretion for the conduct alleged to be actionable. *See Gaubert*, 499 U.S. at 324-25; *Elder*, 312 F.3d at 1177 (citing *Aragon*, 146 F.3d at 823).

Here, Plaintiffs cannot prevail on the first prong of the discretionary function analysis because there is no mandatory directive, regulation, policy or guideline for BLM or FBI that establishes the number of officers that should to be used to effectuate an arrest or search. *See* SOMF ¶¶ 63-69. To eliminate discretion, a mandatory directive must be "unambiguous" and "define[] the proper level of conduct." *Irving v. United States*, 162 F.3d 154, 165 (1st Cir. 1998); *see also Mgmt. Activities, Inc. v. United States*, 21 F. Supp. 2d 1157, 1164 (C.D. Cal. 1998) (a mandatory directive must command "specific conduct" by the government). To the contrary, the FBI's arrest policy in effect as of June 2009 contemplated substantial discretion as to the number of officers and provided that an arrest team should "consist of *enough* agents/officers, whenever possible to cope *properly* with . . . other situations which might arise." *See* Ex. 18 (FBI-Arrests) at FBI000036 (emphasis added).

The FBI arrest policy does not specify a how many agents should comprise an arrest team (or search team incident to a valid warrant, for that matter) or define what establishes proper coping with existing situations. *Id*. Instead, the policy gives the Special Agent in Charge discretion to determine how many agents may comprise an arrest team or search team incident to a warrant. *Id*.; *see Elder*, 312 F.3d at 1177 ("[T]he [guideline] does not remove [ ] employees' choice or judgment regarding what measure to take. It does not 'specifically prescribe[ ] a course of action for an employee to follow . . . .' Hence, Plaintiffs cannot rely on the [guideline] to remove the challenged conduct from the ambit of the discretionary function exception[.]");

Flynn, 902 F.2d at 1531 ("There being no fixed standards . . . the conduct of the federal employees falls within the discretionary function of the FTCA.").[15]

Plaintiffs additionally cannot point to a mandatory directive, regulation, policy or guideline governing when law enforcement can enlist assistance of SWAT-trained agents who were already on site assisting in the search, for purposes of protecting those carrying out the search at the residence.[16] *Hobdy v. United States*, 968 F.2d 20 (10th Cir. 1992) ("[P]laintiff fail[s] to set forth the governing regulations. We will not manufacture her argument for her."); *Limar Shipping Ltd. v. United States*, 324 F.3d 1, 7 (1st Cir. 2003) ("[I]f there is no mandatory regulation that requires a particular course of action, then the discretionary function exception can apply.") (citation omitted); *see, e.g., Hart v. United States*, 894 F.2d 1539, 1547 (11th Cir. 1990) ("There is no guideline or standard defining appropriately thorough search procedures.").

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[15] *See also Franklin*, 180 F.3d at 1131 ("Unless a regulation specifically mandates a particular action, such decisions satisfy the first branch of *Berkovitz*.") (citation omitted); *Cruz v. United States*, 684 F. Supp. 2d 217, 223 (D.P.R. 2010) ("[T]he . . . regulatory language is not specific enough for us to conclude that the [agency] has violated a mandatory regulation and has thus engaged in non-discretionary conduct."); *Shea Homes Ltd. P'ship v. United States*, 397 F. Supp. 2d 1194, 1199 (N.D. Cal. 2005) ("On its face, this language fails to mandate a specific course of action. Instead, it calls for discretionary judgments . . . ."); *Roath v. United States*, No. 10-C-0228, 2012 WL 4718123, at *2 (E.D. Wis. Sept. 28, 2012) (holding a federal Practice Standard which did not specify how the government was to implement a wetland restoration program gave discretion to the agency on how to implement that program).

[16] When they are not performing a SWAT mission, SWAT-trained agents are engaged in duties as regular FBI law enforcement agents. *See* Ex. 49 (Critical Incident Response Group) (https://www.fbi.gov/about-us/cirg/tactical-operations) at 2 ("[SWAT-certified agents] . . . must pass rigorous fitness tests and be expert marksmen *in addition to carrying out their regular investigative duties as special agents*.") (emphasis added)). Here, SWAT-trained agents who appeared at the Redd residence to assist with the ongoing search were performing their standard FBI agent duties, and did not assume a protective SWAT role until there was a threat made on the safety of federal personnel at the residence. *See* SOMF ¶¶ 44-49. By that time, however, Dr. Redd had already left the residence. *See id.* ¶36.

Finally, Plaintiffs cannot circumvent the discretionary function exception by claiming that the acts at issue violated the Constitution. Any endeavor to assert of action based on the alleged violation of a constitutional right under the guise of an FTCA claim fails because the United States has not waived sovereign immunity with respect to constitutional tort claims. *See Meyer*, 510 U.S. at 1001-02; *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69-70 (2001) ("[T]o allow a Bivens claim against federal agencies 'would mean the evisceration of the Bivens remedy, rather than its extension.'"). The FTCA allows claims to be brought against the United States for tort liability "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). However, claims alleging violations of a citizen's constitutional rights by a federal official must be brought against the individual federal employee in their individual capacity. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

While some courts have held that the discretionary function exception does not immunize the government from liability for "conduct that transgresses the Constitution," a constitutional mandate must be sufficiently specific enough to place the actor on notice that his conduct would be clearly unlawful. *See Devillier v. United States*, No. CIV.A.09-00263, 2010 WL 476722, at *3 (W.D. La. Feb. 10, 2010) (citation omitted);[17] *McElroy v. United States*, 861 F. Supp. 585, 593 (W.D. Tex. 1994) ([I]n the FTCA context, "the statutory or constitutional mandate that eliminates discretion *must be specific and intelligible* so that the officers knows or should know

[17] *See also Denson v. United States*, 574 F.3d 1318, 1337 (11th Cir. 2009); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001); *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004).

he loses discretion when the particular circumstances arise which the mandate controls . . . .") (emphasis added); *Fazi v. United States*, 935 F.2d 535, 538 (2d Cir. 1991) (If a regulation, statute, or policy "is not sufficiently specific to control the conduct in question . . . or is not mandatory, there is room for discretion . . . ."). [18] Here, there exists no "unambiguous" mandatory directive in the Constitution setting forth the number of officers that a federal agency must use to carry out an arrest or search incident to a lawfully obtained warrant. *See Rogers v. United States*, 187 F. Supp. 2d 626 (N.D. Miss. 2001), *aff'd sub nom. Rogers v. United States, Operating through U.S. Dep't of Hous. & Urban Dev.*, 58 Fed. Appx. 595 (5th Cir. 2003) (holding that the discretionary function exception to the FTCA applied to the government actions because the due process clause of the Constitution did not set forth a "specific and intelligible" mandate regarding those actions taken by the Department of Housing and Urban Development).

Indeed, "nothing in the fourth amendment specifies *how many* officers may respond to a call." *McNair v. Coffey*, 279 F.3d 463, 466 (7th Cir. 2002) (emphasis added). [19] Rather, the challenged decision at issue –the number of federal officials sent to the Redd residence during the course of executing two arrests and a search warrant–"involved the element of judgment or choice" shielded from judicial second-guessing. *Elder*, 312 F.3d at 1176-77. Permitting an

[18] As explained in Individual Defendant Love's summary judgment motion in the related *Bivens* case, there is no genuine issue of material fact as to the constitutional reasonableness of the number of federal personnel actually at the Redd residence on June 10, 2009. *See* Ex. 47 (*Bivens* Motion). And even if there were some room to argue this point, clearly established constitutional law did not put all federal officials on notice that the number would have violated the Constitution. Thus, the Constitution could not be said to have imposed a specific and mandatory duty to send some other number of federal officials to the Redd residence.

[19] *McElroy*, 861 F. Supp at 593 n.15 ("Examples of such specific and intelligible constitutional mandates include: the requirement that an officer read Miranda warnings and the requirement that an officer refrain from using unnecessary or excessive force while physically restraining a suspect.").

FTCA plaintiff to evade the discretionary function exception merely by purporting to assert a constitutional violation, even if the constitutional obligation in question did not command "specific conduct," would undercut the discretionary function exception's paramount purpose: "to prevent judicial second-guessing of legislative and administrative decisions . . . through the medium of an action in tort." *Gaubert*, 499 U.S. at 323 (quotation marks omitted); *see also McElroy*, 861 F. Supp at 593 ("[O]ne could argue that *every* decision an officer makes while conducting a search or an arrest is non-discretionary if it does not comply with the Fourth Amendment . . . if successful, these arguments would transform the discretionary function shield from steel to paper.") (emphasis added); *Rogers*, 187 F. Supp. 2d at 633.

Furthermore, the number of federal personnel who visited the Redd residence over the course of the day was constitutionally reasonable.[20] As discussed below, the execution of the search and arrest warrants at the Redd residence was a complex and multi-faceted undertaking which entailed an extensive search for delicate Native American artifacts of cultural and historical significance. *See infra* pp. 21-28. In light of the extensive search necessary to gather such delicate and voluminous evidence subject to the search warrant after the execution of the

[20] *See supra* note 18; *see also* Ex. 47 ¶¶ 8-19. As set out in the *Bivens* motion, numerous courts have rejected "excessive force" claims under analogous circumstances. *See* Ex. 47 (citing, among others, *United States v. Simon*, No. 3:10-CR-56 RM, 2010 WL 4236833, at *2 (N.D. Ind. Oct. 20, 2010) (holding that the use of eleven Internal Revenue Service agents armed and dressed with body armor and flak jackets to execute a search warrant was not unreasonable when taking into consideration the 4,000 square foot residence and scope of the search warrant: "Given the house's size and the warrant's scope, there seems nothing facially unreasonable about the number of agents who executed the warrant or the time it took for them to do so."); *United States v. Haque*, Nos. 07-3086, 07-3087, and 07-3117, Fed. Appx. 510, 519, 2009 WL 484600 (6th Cir. Feb. 26, 2009) (unpublished) (nothing unreasonable about the number of officers who took part in serving a nighttime search warrant for illegal firearms when "entry into [the] residence [had been] secured by ten to twelve SWAT team members and the remaining twelve to fourteen entered the residence after it was secured and the SWAT team . . . left."); *see also United States v. Lockhart*, No. 7:12-CR-08-SS-ART, 2013 WL 1412336, at *10 (E.D. Ky. Apr. 4, 2013) (holding the use of fifteen agents to search a pharmacy with five employees was reasonable).

Redd arrest warrants, the decision to assign more federal personnel throughout the day to the Redd residence was an objectively reasonable exercise of discretionary decision-making. *McElroy*, 861 F. Supp. at 593 ("decisions made during the arrest that are based purely on the officer's judgment and experience, decisions not traditionally governed by policy guidelines, federal statutes, or the Constitution, remain protected by the discretionary function exception of the FTCA."); *Dalia v. United States*, 441 U.S. 238, 257 (199(("[I]t is generally left to the discretion of the executing officers to determine the detail of how best to proceed with the performance of a search authorized by warrant."); *see also Redd v. United States*, 62 F. Supp. 3d 1268, 1278 (D. Utah 2014) (noting the "significant discretionary authority to determine" how to execute arrest and search warrants"); *Ruttenberg v. Jones*, No. 07-1037, 283 Fed. Appx. 121, 137 2008 WL 2436157 (4th Cir. 2008) (unpublished) ("The very term 'reasonableness' implies reasonable latitude and room for judgment.").[21]

Likewise, Plaintiffs can identify no authority establishing that a partial SWAT team informally assembled not to forcibly enter a house or personally carry out arrests, but rather to guard the home's exterior during a search after a threat was received, violated any clearly established constitutional right of the absent owner. *See* Ex. 47 ¶ 188 (citing *Phillips v. James*, 422 F.3d 1075, 1082 (10th Cir. 2005) ("In this case, the SWAT team was not requested to execute an arrest . . . or to search [the plaintiff's] residence; the SWAT team in this instance was called in as back up and performed the more passive role of securing the perimeter.")).

Moreover, because Dr. Redd was not present at the time the partial SWAT team was assembled, the presence of the SWAT team necessarily cannot have caused him personal harm.

[21] Indeed, had fewer federal personnel been responsible for the search process, it would have taken substantially longer to complete the search at the Redd property.

See Swoboda v. Dubach, 992 F.2d 286, 290 (10th Cir. 1993) (rejecting constitutional tort claim because plaintiff "stated no specific facts connecting the allegedly unconstitutional conditions with his own experiences … or indicating how the conditions caused him injury"); *Morrison v. Carleton Woolen Mills*, 108 F.3d 429, 440 (1st Cir. 1997) ("Morrison could not have been injured by hostility at a workplace she did not attend."). Similarly, even if Dr. Redd had returned to the residence at 5:00 p.m., Plaintiffs' own interrogatory response indicates Dr. Redd had no interaction with agents at the residence, and that he "was on the phone until the Agents left." *See* Ex. 36 ¶ 3.

Therefore, because Plaintiffs are unable to show that the United States, "violated a federal statute, regulation, or policy that is both 'specific and mandatory,'" *Elder*, 312 F.3d at 1176-77, or that the United States violated a constitutional obligation rising to the level of a mandatory directive commanding "specific conduct" by the government, they fail to satisfy the first prong of the discretionary function test. *Berkovitz* 486 U.S. at 536 (A federal statute must "specifically prescribe" conduct to overcome the discretionary function exception.).

B. The number of law enforcement agents assigned to the initial arrest team, the decision to send additional personnel to assist the ongoing search operation, and the decision to assemble a partial SWAT team from SWAT-trained FBI agents already on-site in light of a threat, are all the type of policy judgments the discretionary function exception is designed to shield.

The judgments and choices made by federal officials during the course of the day at the Redd residence are the precise kind of policy-based decision-making that the discretionary function exception protects from judicial second-guessing. *Gaubert*, 499 U.S. at 323; *Franklin Sav. Corp.*, 180 F.3d at 1135 ("The Court has stressed that the main congressional purpose in creating the [discretionary-function] exception was to prevent litigants and courts from using [the] FTCA as a vehicle for 'second guessing' executive-branch decisions based on public

policy."); *Allen v. United States*, 816 F.2d 1417, 1420 (10th Cir. 1987) ("Where there is room for policy judgment and decision, there is discretion.") (citation omitted).[22] As this Court has previously noted, "the decision of how to execute an arrest warrant is quintessential discretionary conduct." Order at 15 (citation omitted).

Here, federal officials who arrived at the Redd residence were, among other things, balancing the need to effectuate arrests expeditiously while ensuring that the Native American artifacts present at the residence were safely retrieved. The latter goal–the conservation efforts to secure irreplaceable parts of America's heritage –was the impetus behind the Archaeological Resources Protection Act ("ARPA") passed by Congress in 1979.[23] Federal personnel were tasked with securing "for the present and future benefit of the American people, the protection of archeological resources. . ."[24] and to "prevent the loss and destruction of these archeological resources . . . resulting from uncontrolled excavations and pillage . . . ." 16 U.S.C. §§ 470aa *et. seq.* To that end, the search conducted at the Redd residence on June 10, 2009, involved decisions that required the balancing of competing policy interests to effectively accomplish the

[22] *See also Priah v. United States*, 590 F. Supp. 2d 920, 928 (N.D. Ohio 2008), *as amended* (Jan. 27, 2009) ("Any planning that requires flexibility must necessarily require discretion").

[23] *See also* the Native American Graves and Repatriation Act, 25 U.S.C. 3001 *et seq.*

[24] Under the Act, the term "archaeological resource" refers to "any material remains of past human life or activities which are of archaeological interest . . . . [they] shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context." Archaeological Resources Protection Act, Pub. L. 96–95,1979, 93 Stat 721 (1979).

stated purpose of ARPA–the protection and preservation of America's archeological resources – as well as the stated mission described in the Operations Plan. *See* Ex. 2 (Ops Plan).[25]

Federal personnel were tasked with the complicated and sensitive task of searching for delicate Native American artifacts of cultural and historical significance at the Redd residence. Given the nature of the evidence to be seized, the plan for executing the Operation Cerberus search warrants contemplated a meticulous evidence collection process. *See* Ex. 11 ¶¶ 33 – 35.[26] Officers balanced the need to methodically search the Redd residence against the meticulous evidence collection process required for the hundreds of delicate and irreplaceable artifacts found

[25] *See, e.g., Shansky v. United States*, 164 F.3d 688 (1st Cir. 1999) (park service's conduct in rehabilitating a national historic site was discretionary and policy driven that included aesthetic considerations to preserve the historical accuracy of the landmark); *Georgia Casualty & Surety Co. v. United States*, 823 F.2d 260, 263 (8th Cir.1987) (determining that the FBI's decision to refrain from notifying third parties of an investigation out of concern for secrecy involved balancing of policy considerations protected under the discretionary function exception); *Johnson v. U.S. Dep't of Interior*, 949 F.2d 332, 339 (10th Cir. 1991) (holding a park rangers decision on "if, when or how" to rescue a park visitor inherently involves the balancing of safety objectives against practical considerations such as staffing, funding and minimizing government intrusion); *Castillo v. United States*, 166 Fed. Appx. 587, 589 (3d Cir. 2006) (where prison officials determined that bringing rival inmates together in a controlled environment was safer than releasing them onto the open prison compound, the court found that "the safety of inmates and orderly operation of the prison" was a policy consideration).

[26] *See* Ex. 10 ¶ 34; Ex. 8 at FBI000117 ("A photographer and scribe will set up at a location in the house/business. Items will be brought to them, photographed with a scale, color correction strip, and an ID number . . . . A scribe collects the ID number, item description, and where the artifact was found and runs the photo log that captures all data."); Ex. 8 at FBI000116 ("Because highly valuable artifacts will be seized, certain precautions are needed to properly process each scene."). The removal of artifacts, some of which were hundreds of years old, necessitated exceptional care and preservation by federal personnel who had received training related to special handling practices for the types of artifacts that were the focus of the Cerberus Operation. Ex. 11 ¶¶ 33-35; Ex. 10 ¶ 34; Ex. 8 at FBI000116. The search of the Redd residence led to the seizure of over 800 Native American artifacts. SOMF ¶¶ 57, 58. Additionally, Mrs. Redd and Jerrica Redd both pled guilty to charges of theft of government property and tribal property. *See* SOMF ¶¶ 61, 62.

at the residence.[27] Artifacts were located throughout the property, in display cases, the living room, bedrooms, closets, and boxes. SOMF ¶ 42. Federal officials were instructed to label, photograph, and inventory all artifacts subject to the warrant discovered at the Redd property.[28] Ex. 11 ¶¶ 32-35; SOMF ¶¶ 10, 13. Given the delicacy of the artifacts, federal personnel were required to handle the evidence seized at the Redd residence with care.[29] SOMF ¶ 59-60. The search and seizure was complicated by the presence of additional artifacts that were not subject to the search warrant. Although these artifacts were not seized, law enforcement personnel were required to document and photograph these artifacts. SOMF ¶ 13; *see also* Ex. 2 at FBI000012 ("All items that are not seized will be 'Frozen' in place at the subject residence."); Ex. 8 (April 1 EC) at FBI000117.

In light of the volume of artifacts at the Redd property and the meticulous collection process involved, additional personnel were called to the residence to assist with the search

[27] The search for valuable and delicate Native American artifacts, some of which included human remains and relics of cultural and historical importance spanned over both the interior and exterior of the expansive residence, and required the dispatch of additional federal personnel to the Redd residence. *See* Ex. 11 ¶¶ 30-32; Ex. 10 ¶ 31; Ex. 8 (April 1 EC) at FBI000116 ("Because highly valuable artifacts will be seized, certain precautions are needed to properly process each scene.").

[28] The search warrant for the Redd residence commanded federal personnel to seize as evidence "any and all artifacts . . . illegally obtained artifacts . . . sacred objects and or items of cultural patrimony . . . ." The search warrant also authorized the use of an archeologist or cultural artifact expert to assist in "identifying and authenticating" the artifacts subject to seizure. Ex. 19 (Search Warrant) at Redd_BLM_0030. The items seized from the Redd residence by federal personnel included ceramics, bone beads, sandals, stone tools, and other artifacts. *See* Ex. 22 (Bill of Particulars). Plaintiffs have acknowledged that the volume of the artifacts and other items seized from the residence necessitated "the use of rental trucks" to transport. Compl. ¶ 9.

[29] *See also, e.g.*, National Park Service, *Museum Handbook*, Ch.7, § 32 ("Treat collections subject to [the Native American Grave Protection and Grave Repatriation Act] with great sensitivity, because of their cultural significance, sacred importance to descendants, tribal leaders, elders, and traditional religious leaders."), *available at* http://www.nps.gov/museum/publications/MHi/CHAP7.pdf (last accessed July 2015).

operation. SOMF ¶ 14, 15. In the span of a day, federal officials completed an extensive search of the Redd residence. SOMF ¶¶ 53-55. All told, over 800 Native American artifacts were ultimately seized and inventoried from the Redd home. *Id*. ¶¶ 57, 58. Indeed, had fewer federal personnel been reallocated to help with the search process at the Redd residence, it likely would have taken considerably longer to complete the search.[30]

Decisions regarding how the search would be accomplished were intertwined with social and political considerations surrounding the nature of the evidence that federal officials expected to find at the Redd residence. *See Commercial Union Ins. Co. v. United States*, No. CIV. A. 87-3913, 1989 WL 145978, at *6 (E.D. La. Nov. 14, 1989), *aff'd*, 928 F.2d 176 (5th Cir. 1991) ("Judgments [ ] requiring the balancing of . . . social considerations . . . clearly fall within this exceptions purview."). Many of the items seized pursuant to the warrant were artifacts of "cultural significance . . ." and "undoubtedly important to the scientific, academic, and Native American communities." *See* Ex. 8 at FBI000115. For example, some of the artifacts of cultural and historical significance found at the Redd residence included an Apache Gan mask, a cradleboard used to carry an infant which had been taken from a child's burial site, and human remains found in a box in the basement of the Redd home with an assemblage of random

[30] Yet, under any analysis of the discretionary function exception, it is immaterial whether federal officials involved in the search *actually* engaged in these policy considerations. *See Kiehn*, 984 F.2d at 1105 ("The lack of record evidence describing an analysis of public policy factors in the NPS decision not to post warnings is immaterial."); *Johnson*, 949 F.2d at 339 (so long as the Park Service's search and rescue program allowed room for the rangers to make independent policy judgments, the court "need not find evidence [ ] that the rangers [ ] considered each of the identified policy factors."); *Shansky*, 164 F.3d at 692 ("The critical question is whether the conduct was of the type associated with the exercise of official susceptible to a policy-driven analysis, not whether they were the end product of a policy driven analysis."); *Gotha v. United States*, 115 F.3d 176, 180 (3d Cir. 1997) ("The test is not whether the government actually considered each possible alternative in the universe of options, but whether the conduct was of the type associated with the exercise of official discretion.").

artifacts. Ex. 11 ¶¶ 36-37. Artifacts located in and around the residence could not be grabbed and thrown together in boxes, but required sensitive handling for which FBI and BLM agents had received special training. *See* Ex. 10 ¶ 35.

Other social considerations included balancing the appropriate display of law enforcement presence against the responsibility of ensuring the safety of federal personnel who were carrying out the search at the Redd residence. While the search was underway, federal personnel received a threat from one of the Plaintiffs. *See* SOMF ¶¶ 44-46. As a result of the threat, a partial SWAT team was assembled solely for the purpose of protecting federal personnel who were conducting the search. *Id*. Furthermore, under an analysis of the discretionary function exception, whether law enforcement agents in fact perceived the voice messages as threats at the time and, as a result, sought to protect the safety of personnel at the residence by assembling a partial SWAT team, is inconsequential. As the Tenth Circuit underscored in *Elder v. United States*, the application of the second prong of the discretionary function test does not require proof of the thought processes of the pertinent decisionmakers. 312 F.3d at 1182 ("Plaintiffs misconceive the nature of the inquiry. On the contrary, 'courts should not inquire into the actual state of mind or decisionmaking process of federal officials charged with performing discretionary functions.'"); *Clark v. United States*, IV. 12-1160 MV/KBM, 2014 WL 7653392, at *15 (D.N.M. Sept. 25, 2014) ("The extent of the evidence demonstrating that the [federal agency] actually balanced these factors is of no moment, as '[a]pplication of *Berkovitz's* second prong does not require proof of the thought processes of the pertinent decisionmakers.'"); *see also supra* note 30.

Moreover, decisions as to how federal personnel allocated federal resources between the various search and arrest sites on the day in question (as well as the time of day to execute the

arrest, whether to execute the warrants simultaneously, and which federal officials would arrest which suspect), are also *precisely* the kind of judgments that are protected from suit by the discretionary function exception. They are based on the observations and expertise of federal personnel at the scene who determined what resources would be necessary to fulfill their search objective. The allocation of an agency's resources to perform a governmental function or service has been consistently recognized by federal courts as the type of action susceptible to policy analysis. *See Kiehn*, 984 F.2d 1100 (holding the amount of staffing to devote to a rescue operation was discretionary – "Limited staff and financial resources require . . . an assessment of each situation as it arises, balancing the potential need for assistance with the resources available."); *Sharp ex rel. Estate of Sharp v. United States*, 401 F.3d 440 (6th Cir. 2005) ([P]lacement of law enforcement personnel at national forest was discretionary because it was the product of "assessing and balancing the needs of all parts of the [forest] [and] budgetary constraints . . . ."); *Alfrey v. United States*, 2576 F.3d 557, 567 (9th Cir. 2002) (finding the length and nature of a prison cell search implicated the kind of interests that balanced the allocation of resources, privacy concerns, and nature of the suspected threat during the search); *Davis v. United States*, 597 F.3d 646, 650-51 (5th Cir. 2009) (holding the discretionary function exception protected rescuers from liability in the wake of Hurricane Katrina, where "safety, efficiency, timeliness, and allocation of resources were all necessary to consider, [and] the very policy considerations . . . that made the acts discretionary"). Thus, in choosing how the search and arrests at the Redd residence would be executed, federal officials reasonably could have considered the resources at their disposal to execute all 19 arrest warrants and 12 search warrants, and reallocated those resources to the Redd residence or other sites when it became necessary.

In sum, the discretionary function exception to the FTCA applies to the surviving allegations set forth in Plaintiffs' Complaint. The arrest of Dr. Redd and his wife and the search of the Redd residence on June 10, 2009, implicated the type of "balancing of incommensurable values – including safety . . . and allocation of resources – typically associated with policy judgment." *Shansky*, 164 F.3d at 695. There exists no genuine question as to whether the discretionary acts challenged by Plaintiffs in this lawsuit were susceptible to policy considerations. *See Kiehn*, 984 F.2d at 1108 n.12 ("Nothing in the record rebuts the presumption that under circumstances such as this, the government's actions and decisions were grounded in policy.") (citation omitted). Because there has been no waiver of sovereign immunity, the Court lacks jurisdiction to hear this remaining claim must grant summary judgment against Plaintiffs' remaining claims for intentional infliction of emotional distress and wrongful death. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (the court must strictly construe the FTCA's waiver of sovereign immunity in favor of the United States).

II. Plaintiffs' remaining claims also fail because Plaintiffs cannot prove causation.

In addition, Plaintiffs' remaining two claims should be dismissed because they cannot meet their burden with respect to the essential element of proximate causation. *See Retherford*, 844 P.2d at 970-71 (discussing necessary elements to prevail on an IIED claim, including proximate cause).[31] In order to prove proximate cause, Plaintiffs must first establish that the

[31] Although a wrongful death claim is an independent cause of action under Utah law, a claim for wrongful death must be based on a viable underlying theory of liability. *See Miller*, 110 P.3d at 146 ("Plaintiffs, as Decedent's heirs, may recover under Utah's wrongful death act , . . . if Decedent, had his injuries not proven fatal, could himself have recovered.") (citations omitted). Therefore, if Plaintiffs' IIED claim is dismissed, their claim for wrongful death must also be dismissed. *See id.* at 149 (affirming dismissal of wrongful death claim where plaintiffs failed to present a viable underlying theory of liability); *see also* Utah Code Ann. § 78B-3-106 ("[W]hen the death of a person is ***caused by*** the wrongful act or neglect of another, his heirs . . . may maintain an action for damages against the person causing the death . . . .") (emphasis added).

United States was a "but for" cause of Dr. Redd's suicide. *See Mahmood*, 990 P.2d at 938 (defining proximate cause as "that cause which, in the natural and continuous sequence (unbroken by an efficient intervening cause), produces the injury and ***without which the result would not have occurred***. It is the efficient cause – the one that necessarily sets in operation the factors that accomplish the injury.") (citation omitted) (emphasis added); *Raab*, 221 P.3d at 226 ("For a particular negligent act to be the [proximate] cause of a plaintiff's injuries, there must be some greater level of connection between the act and the injury than mere 'but for' causation."). Specifically, in light of this Court's prior ruling, Plaintiffs must show that the number of federal personnel dispatched to the Redd residence on the morning of June 10, 2009, was a but for cause of Dr. Redd's suicide. *See supra* pp. 1-3.

Plaintiffs cannot meet their burden. In fact, Plaintiffs' own complaint forecloses any argument that Dr. Redd killed himself because of the number of federal personnel dispatched on June 10, 2009. In the portion of the complaint addressing their wrongful death claim, Plaintiffs allege that:

> Dr. Redd's untimely death **would not have occurred but for** the malicious acts of federal agents who aggressively manhandled Dr. Redd, unnecessarily held him in custody, and – most critically – verbally threatened and assaulted him. The federal agents repeatedly stated his sole means of livelihood to provide for his family was lost.

Compl. ¶ 133 (emphasis added). According to Plaintiffs' own allegations, it was the actions of the United States' agents during Dr. Redd's arrest and interrogation that caused his death, not the number of agents dispatched.[32] But for these alleged actions, Dr. Redd's suicide "would not have occurred." *Id.* Since this Court has already ruled that Plaintiffs cannot rely upon the

[32] Moreover, as discussed above, the majority of the federal personnel who were dispatched to the Redd residence on June 10, 2009, arrived *after* Dr. Redd had already left the residence. *See supra* pp. 7-11. The dispatch and alleged actions of these agents necessarily could not have played a causal role in Dr. Redd's suicide.

alleged actions of the United States' agents during Dr. Redd's arrest and interrogation in support of their remaining claims, their case cannot survive this motion. *See* Order at 8, 17-19.

Plaintiffs cannot establish proximate cause, and the United States is therefore entitled to summary judgment on Plaintiffs' remaining claims. *See Triesault v. Greater Salt Lake Business Dist.*, 126 P.3d 781, 785 (Utah Ct. App. 2005) (indicating that summary judgment is appropriate where a plaintiff cannot prove that the factfinder "could conclude, without speculation, that the injury would not have occurred but for the defendant's breach.") (quotations and citations omitted); *Proctor v. Costco Wholesale Corp.*, 311 P.3d 564, 569 (Utah Ct. App. 2013) *cert. denied*, 320 P.3d 676 (Utah 2014) (An "actor's negligent conduct is not a proximate cause in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.") (quoting *Holmstrom v. C.R. England, Inc.*, 8 P.3d 281, 292 (Utah Ct. App. 2000)) (internal brackets removed).

CONCLUSION

For the reasons herein, the United States' motion for summary judgment should be granted.

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Respectfully submitted,

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UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2015, a true and correct copy of the foregoing United States of America's MOTION FOR SUMMARY JUDGMENT, with the clerk of the court by using the CM/ECF system, which will send notice to the following ECF participants:

Shandor S. Badaruddin
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736 South 3rd Street
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/s/ Enyonam Blege
ENYONAM BLEGE