NO. 19-1140

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANTHONY MARTINEZ,
Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

ANSWER BRIEF

On Appeal from the United States District Court
For the District of Colorado
The Honorable Richard P. Matsch
D.C. No. 15-CV-01993-RPM

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ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF ISSUES

1. Did the district court clearly err in finding that Martinez's ambush of the three officers in a public road was not reasonably foreseeable to the officers?

2. Did the district court clearly err in finding that Martinez's decision to ambush the officers constituted an intervening cause, such that the officers' actions were not the proximate cause of Martinez's injury?

3. Did the district court err in not assigning numerical percentages of fault to each of the two parties where it nonetheless concluded that Martinez's negligence was greater than any negligence attributable to the United States?

4. Did the district court act within its discretion to exclude irrelevant evidence of one of the officer's prior performance evaluations?

5. Did the district court clearly err in other factual findings in a manner requiring reversal?

STATEMENT OF THE CASE

Three officers of the Southern Ute Police Department were following up on a report of domestic violence when they were ambushed in a public road. A shouting man leapt from behind a bush and charged them with a raised baseball bat. The officers all drew their weapons and one fired in self-defense. The attacker, Anthony Martinez, was shot once in the side. He brought this lawsuit for negligence under the Federal Tort Claims Act.

After a six-day bench trial, the district court concluded that (1) the ambush was not reasonably foreseeable to the officers, (2) Martinez's own negligence outweighed any unreasonable conduct on the part of the officers, and (3) Martinez's actions were a superseding cause that broke the causal chain between the officers' conduct and the injury. These findings were correct.

A. An incident of domestic violence leads to two brawls at the Martinez home.

Anthony Martinez and Andrew Rossi got into a fight with members of the Price family outside a gas station. Aplt. App. at 100:8-18. Later that night, Martinez hosted a gathering at his father's home in Ignacio, Colorado. *Id.* at 59:23-24; 68:6-8. A Price family sister, her

boyfriend (Fabian Pena), Rossi, Rossi's girlfriend, and Martinez were all at the house. *Id.* at 68:11-14.

When Rossi started hitting his own girlfriend, Pena intervened and the two men fought. *Id.* at 102:21-24; 103:16-20. Martinez forced the two outside, where the fight continued until Pena and Price left the home. *Id.* at 103:19-25.

Around 1 a.m., Pena returned with Price and her brothers, who all then threatened Rossi. *Id.* at 69:19-24; 70:5-7. A brawl ignited after Martinez punched a Price brother. *See id.* at 105:8-10 ("Q. In fact, you threw the first punch, Mr. Martinez; isn't that right? A. Yes."). The Prices and Pena left when Martinez yelled to Rossi that they should "go inside and get the bats." *Id.* at 71:6-9.

B. The police learn that the brawls started after Rossi hit his girlfriend.

The Prices retreated to the nearby intersection of County Road 320 and 320B, where Darien Price called 911. *Id.* at 912:14-20, 913:13-14. An officer from the Southern Ute Police Department, Cheryl Herrera, was dispatched to the intersection along with her field training

officer, Patrick Backer.[1] *Id.* at 515:7-16; 915:25-916:2. Two other officers, Mitchell and Hibbert, arrived to serve as backup. *Id.* at 916:15-17; 918:17-23.

At the intersection, Officer Herrera began taking witness statements. *Id.* at 520:3-13. She and Backer suggested that Mitchell and Hibbert investigate the house where the fight had occurred to try to contact the occupants. *Id.* at 297:15-21.

When Mitchell and Hibbert arrived at the house, there was no doubt in Mitchell's mind that the occupants knew the police were present. *Id.* at 297:7-14; 299:11-21. The house had a clear view of the intersection where numerous emergency vehicles had their lights illuminated. *Id.* (The Ignacio Police Department and other emergency services had also responded to the 911 call. *Id.* at 520:18-521:5.)

Hibbert drove his patrol SUV into the driveway, parked, and walked to the front door. *Id.* at 298:3-5; 298:17-18; 300:2-5. No one

[1] The Southern Ute Police Department, an instrumentality of the Southern Ute Indian Tribe, is funded, in part, pursuant to a contract with the Bureau of Indian Affairs, so its officers are considered federal employees for the purposes of the Federal Tort Claims Act. *See* Aplt. App. at 1104:13-1105:6.

responded to his announcement of the police presence. *Id.* at 300:6-7. (Because they did not want to talk to the police, Martinez and Rossi tried to hide inside the house. *Id.* at 71:13-16; 72:18-21; 107:8-22.)

Mitchell walked around the side of the house and found a window with an unobstructed view of the interior, through which he could see Rossi. *Id.* at 300:7-9. Mitchell called out and shined his flashlight into the window, but Rossi did not respond. *Id.* at 300:8-15. Mitchell and Hibbert gave up on contacting the occupants of the house, told Herrera and Backer what had occurred, and returned to regular duty around 1:30 a.m. *Id.* at 300:16-301:4; 919:7-20. After the two left, Martinez and Rossi tried to relax by taking shots from a bottle of green apple vodka that they passed back and forth. *Id.* at 73:4-5; 121:6-21.

It was not until interviews at Mercy Medical Center over an hour later that Herrera and Backer learned the fight at the Martinez house began after Rossi struck his girlfriend. Aplt. App. at 531:7-20; 920:6-15; 990:17-991:17. Because Rossi's girlfriend was a member of the Southern Ute Tribe, the incident of domestic violence was within Herrera and Backer's jurisdiction. *See Id.* at 991:2-5; 995:24-996:7.

C. The police return to the Martinez home to check on Rossi's girlfriend.

The two officers returned to the Martinez house to try to find Rossi's girlfriend and check on her welfare. Aplt. App. at 415:1-24; 993:18-23. When Herrera and Backer arrived just after 3:30 a.m., they saw the woman's car in the driveway. *Id.* at 534:3-14. They called Mitchell to back them up. *Id.* at 921:19-922:3. The porch light at the Martinez home was illuminated. *Id.* at 318:11-15.

As they approached the house, the officers knew that:

(1) Martinez and Rossi had been in a fight with the Price brothers around 8 p.m., Aplt. App. at 525:6-526:8;

(2) another fight between the same parties had occurred at 1 a.m. *id.* at 564:9-12;

(3) Martinez ended the second fight by threatening to retrieve baseball bats from the house, *id.* at 564:13-17;

(4) the occupants of the house had tried to avoid police contact after the fight, *id.* at 300:2-301:4;

(5) Martinez and Rossi both had a history of violence, *id.* at 523:16-19; 992:11-993:17; and

(6) the 1 a.m. fight began when Rossi had assaulted his girlfriend in the house, *id.* at 531:7-20; 990:17-991:17.

So the officers took certain precautions in approaching the house. As Herrera and Backer turned onto County Road 320B, they turned off the headlights of their patrol SUV. *Id.* at 410:9-12; 994:1-6. They drove past the driveway of the house and parked at the county road's dead end. *Id.* These sorts of precautions are standard police practice when approaching a residence at night. *Id.* at 285:23-287:5; 569:4-570:18. The precautions protect against officers being surprised while vulnerable in their vehicles, if the occupant of a home is unexpectedly armed or hostile. *See id.* at 287:12-288:14.

Mitchell, in contrast, did not turn off his headlights until after he had made the turn from 320 to 320B. *Id.* at 199:9-10. As he drove past the house, he saw two figures in the yard run inside. *Id.* at 318:4-10; 319:3-8. Because he was driving his patrol SUV with reflective Southern Ute Police Department lettering and logos, Mitchell assumed that he had been seen and recognized as a police officer. *Id.* at 319:3-8. He told Backer and Herrera as much when he joined them at the dead end. *Id.* at 318:21-319:1. He expected nothing more than a replay of his fruitless 1:30 a.m. visit to the house. *Id.* at 319:9-20.

To avoid making their presence known and fouling their night vision, the officers did not use flashlights as they walked up the road toward the driveway. *See id.* at 289:11-291:13. They spoke in soft voices and turned their radios to a low volume. *Id.* All three testified that "light and noise discipline" was standard practice in approaching a residence at night, and was particularly appropriate on this call, where the house's potential occupants included individuals known to have recently engaged in violence. *See* 285:23-287:5 (Mitchell); 569:4-570:18 (Backer); 997:10-19 (Herrera). Other witnesses with patrol experience corroborated that these types of precautions are standard practice in policing. *See, e.g.*, *id.* at 954:25-956:1 (Colorado Bureau of Investigation Agent Jeffrey Brown); 1087:3-1088:13 (SUPD Chief Raymond Coriz); 1114:5-22 (BIA Agent J.R. Burge, accepted as police practices expert).

D. Martinez gets shot when he ambushes the officers.

When Martinez and Rossi saw headlights on the road, they went into the yard and found that Rossi's girlfriend had returned. *Id.* at 74:7-9; 75:1-2; 75:19-20; 76:25-77:1. Seeing an SUV turn onto the county road and turn its headlights off, Martinez and Rossi assumed that the Price brothers had returned to resume the fight. *Id.* at 74:10-

16. Martinez hid with a baseball bat behind an overgrown bush at the corner of the driveway and the road. *Id.* at 74:19-25; 76:1-4; 110:11-14; 111:1-3. He sought to threaten the (imagined) Price brothers and scare them away again. *Id.* at 78:11-15.

When the officers heard a rustling in the bushes, Officer Herrera turned on her flashlight and shined it in that direction. *Id.* at 999:22-1000:6. This lit up Martinez, who ran toward the officers, cocked the bat above his head, and shouted something like, "let's do this, motherfuckers!" *Id.* at 542:15-23 (Backer sees Martinez running toward him at "a full sprint"); *id.* at 543:5-10 (Martinez is holding an aluminum baseball bat over his shoulder); 544:4-7 (what Martinez shouted).

All three officers drew their service weapons. *Id.* at 232:19-21; 1001:13-14. Officer Backer fired two shots. *Id.* at 448:24-449:3. The first shot missed, but the second did not. *Id.* at 1166:2-1167:9. It caught Martinez mid-turn, with the bullet entering his right side and traveling laterally across his body to exit on his left. *Id.* at 1327 (district court finding that "Martinez must [have] been starting to turn away from the shooter when he was hit by the second shot"). The entire approach to the house and ambush unfolded over three minutes—

between 3:37 when Mitchell informed dispatch he would be out with Herrera and Backer at the house and 3:40 when he called in shots fired. *See id.* at 921:25-922:7.

Martinez's own expert characterized Martinez's actions as an "ambush" of the officers. *Id.* at 893:1-16. In rushing the officers, Martinez left his father's property and ran into the county road. *Id.* at 142:11-14 (Martinez testifying that he fell "[r]ight there on the road" after being shot); 344:18-25; 547:8-12. Until after the shooting, the officers remained on the public road the whole time. *Id.* at 344:18-25; 547:8-12.

Hours later, a blood test performed on Martinez showed that he had a blood alcohol level of .21—more than double the amount required for "impaired driving." Aplt. App. at 1327; *see also id.* at 1163:10-14 (expert forensic pathologist: "He was acutely intoxicated.").

E. After a six-day trial, the district court rejects Martinez's tort claims against the United States.

Martinez filed two federal lawsuits that were ultimately consolidated into this action. *See* Aplt. App. at 2. He asserted claims against the United States and the individual officers under the Federal Tort Claims Act ("FTCA"), the Fourth Amendment, and Colorado state

law, alleging both intentional torts and negligence. *Id.* at 16-21. The district court concluded that 28 U.S.C. § 2680(h) of the FTCA barred Martinez's intentional tort claims, but that he could pursue a claim for negligence based on the circumstances of the officers' approach to the home. Because he settled with the officers, Martinez proceeded to trial against only the United States. *See* Aplt. App. at 6.

After a six-day bench trial, the district court concluded that (1) the officers should not have reasonably foreseen Martinez's ambush, (2) Martinez's own conduct was a superseding cause of his injury, and (3) due to his unreasonable conduct, the fault attributable to Martinez outweighed any fault attributable to the officers. *See id.* at 1327-28. The district court entered judgment against Martinez. *Id.* at 1329.

SUMMARY OF ARGUMENT

I. Martinez first argues that the district court incorrectly found his conduct was not foreseeable and his actions were contributorily negligent. These are factual findings reviewed only for clear error. And the record supports the district court's conclusions.

But Martinez claims that the district court failed to take into account his "right"—premised on an affirmative defense under Colorado

state criminal law—to defend his property with force from purported trespassers. That right does not apply to civil cases by its own terms and requires one seeking its protection to act reasonably, contrary to the district court's findings regarding Martinez's conduct. Martinez acted well beyond the conduct sanctioned by Colorado's statute.

II. Next, Martinez questions the district court's finding that his ambush of the officers broke the chain of causation between their conduct and his injury. He claims that his actions were within the "scope of the risk" created by the officers' actions, and thus did not constitute a superseding cause. But the scope of the risk analysis applies only where the *type* of harm is foreseeable, but the precise manner in which it occurs or its extent is not. Here, the district court found that the type of harm was not foreseeable, the record supported that conclusion, and the scope of risk analysis does not change the outcome.

III. Martinez claims that the district court erred in not assigning numeral percentages of fault to the parties in its comparative fault analysis. But this Court and the courts of Colorado have held that a lack of numerical percentages is harmless error when it is clear—as it is

here—that the court assessed more than 50% of the fault against the plaintiff, thus precluding his recovery. Moreover, Martinez argues only that the three officers' percentages of fault should have varied. Because the officers' collective fault was all attributable to the United States, however, juggling the percentages of fault assigned to each officer would not have changed the outcome.

IV. The district court excluded one of the officers' prior performance evaluations, offered by Martinez to show that the senior officer had a duty to double-check the decisions of more junior officers. But that very officer testified that no junior officer made any decision the night of the shooting that he disagreed with. The exhibit was irrelevant, and its exclusion within the discretion of the district court.

V. Finally, Martinez points to several facts on which he claims the district court clearly erred. Each challenged finding was supported by the record. This point reinforces the animating spirit of Martinez's appeal: a disagreement with the facts as found by the court. But disagreement is not enough for reversal on clear error review.

ARGUMENT

I. The district court correctly found that Martinez's ambush of the officers was not reasonably foreseeable and constituted contributory negligence.

Martinez argues that the district court erred in assessing reasonable foreseeability and finding Martinez's own actions negligent. He contends that the court failed to account for his state-law right to use reasonable force in defense of property—an error he says is subject to de novo review. But foreseeability and contributory negligence are findings of fact reviewed only for clear error. *See Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1078 (10th Cir. 2009) (findings of fact reviewed under "highly deferential" clear error standard). Ample record evidence supported those findings. The Colorado statute cited by Martinez does not change that analysis.

A. The district court did not clearly err in finding Martinez's actions were not reasonably foreseeable.

Under Colorado law, "a negligence claim requires two distinct and separate foreseeability analyses." *Westin Operator, LLC v. Groh*, 347 P.3d 606, 614 n.5 (Colo. 2015). Foreseeability is both "an integral element of duty" and "the touchstone of proximate cause." *Id.* "The

former is a question of law for the court, the latter is a question of fact for the jury at trial." *Id.*

The foreseeability finding that Martinez challenges relates to proximate causation, not to duty. *See* Aplt. App. at 1327-28 ("That lack of foreseeability breaks the chain of causation. Martinez charged at them which is an intervening cause of his injury. The stealth approach was not the proximate cause of injury to Martinez."). The court's finding regarding foreseeability was thus one of fact, reviewed only for clear error. *See Groh*, 347 P.3d at 614 n.5 (citing *Build It & They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 306 (Colo. 2011)); *Castaneda v. JBS USA, LLC*, 819 F.3d 1237, 1248 (10th Cir. 2016) (after a bench trial, the district court's findings of fact are reviewed for clear error).

Martinez cites two cases for the proposition that the application of an improper legal standard in the resolution of a factual question is reviewed de novo. *See* Aplt. Br. at 24. Both of those cases, however, concerned whether the trial courts had applied the proper legal framework to the precise issues they were deciding. In *Reigel v. SavaSeniorCare, LLC*, 292 P.3d 977, 985 (Colo. App. 2011), the court had erroneously instructed the jury concerning the definition of

proximate cause using a standard the Colorado Supreme Court had expressly rejected. And in *Reid v. Berkowitz*, 315 P.3d 185, 189 (Colo. App. 2013), the trial court correctly applied the Premises Liability Act to determine that the plaintiff was a licensee. Here, in contrast, Martinez does not argue that the district court applied the wrong legal definition of foreseeability altogether. Rather, he asserts that the court should have looked to a completely unrelated statute—§ 18-1-705—to measure whether his actions were foreseeable. He cites no case for the proposition that this alleged error entitles him to de novo review.

The finding that Martinez's conduct was not reasonably foreseeable was amply supported by the record. For example, Officer Mitchell testified that he had no reason to suspect that Martinez (or anyone else) would charge out of the bushes and into the street in response to the officers' approach:

> Q. So at this point [driving up to the house at 3:30], do you recall having any reason to expect anything out of the ordinary on this call?
>
> A. No.
>
> Q. And at this point, do you recall having any reason to expect that someone would charge out of the bushes and attack you with a baseball bat?
>
> A. No.

Aplt. App. at 319:18-24.

Because he believed he had been seen and identified as a police officer as he drove up the county road (*see id.* at 318:6-319:8), Mitchell expected that the encounter would be a futile replay of the 1:30 a.m. visit—where no one had answered the door. *Id.* at 319:14-17. He told the other officers as much. *Id.* at 539:6-8. Backer also testified that in his career in law enforcement, he had never been mistaken for an intruder because he turned off his patrol car's headlights, and he had never heard of any other officer having such an experience. *Id.* at 540:1-12.

More than just the officers' testimony supported the district court's finding that Martinez's actions were not reasonably foreseeable. Martinez's own police practices expert testified that as Martinez waited in the bushes preparing to run into the road, Martinez thought "that [the officers] didn't know he was there." Aplt. App. at 893:15. The expert opined that Martinez's actions that night constituted "an ambush." *Id.* at 893:16.

The district court did not clearly err in concluding that Martinez's attack from the bushes was not reasonably foreseeable to the officers.

See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

B. The district court did not clearly err in finding that Martinez was contributorily negligent.

As to the district court's conclusion that contributory negligence barred recovery, Martinez argues once again that the Court should have taken § 18-1-705 into account, and this Court should review de novo. Whether a plaintiff's conduct was reasonable—the crucial element of a contributory negligence analysis—is a question of fact reviewed for clear error. *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (Colo. 1981) ("[Q]uestions of negligence and proximate cause are issues of fact."). For the reasons stated above with regard to foreseeability, Martinez's cases do not show a right to de novo review.

And, once again, the evidence supported the district court's findings that Martinez "was himself negligent" and that his conduct showed "a lack of reasonable care for his own safety." Aplt. App. at 1328. The district court recognized that Martinez was heavily intoxicated at the time of the incident, with a blood alcohol level "2 1/2 times that for impaired driving." *Id.* at 1327. Martinez did not dispute

that he was "drunk" at the time of the shooting. *Id.* at 122:11-6. In fact, when he was interviewed at the hospital after the incident, he told an investigator that he was "drunk as fuck." *Id.* at 122:11-13. During his incarceration after the incident, Martinez told his mental health counselor that "[w]hen [he] has a problem with someone, there is a tendency toward violence." *Id.* at 755:21-24. He told the counselor that "his big problem is alcohol and that when he drinks, he is less inhibited and quicker to react, feeling invulnerable." *Id.* at 755:9-12. Martinez attributed "his violence to a lack of caring and drinking heavily." *Id.* at 756:3-4.

Martinez also admitted that he could have taken a different course and potentially avoided being shot. He agreed that, instead of ambushing the figures in the road, he could have gone into the house and locked the door. Aplt. App. at 118:4-6. Instead of actually charging into the road with the bat cocked above his head, he could have shouted at the figures to threaten them. *Id.* at 120:3-6. He himself recognized that "there was a lot of other things that I could have did [sic]. But, you know, what I chose to do was try to scare them off with a bat." *Id.* at 118:19-21. All of this evidence supports the district court's finding that

Martinez's conduct was not reasonable, and its conclusion regarding contributory negligence was not clear error. The appellate court is not free to substitute its judgment for that of the district court when conducting clear error review. *United States v. McClatchey*, 316 F.3d 1122, 1128 (10th Cir. 2003).

C. Colo. Rev. Stat. § 18-1-705 does not alter this analysis.

Even do novo consideration of Colo. Rev. Stat. § 18-1-705 would not change the outcome. First, Martinez offers no Colorado cases applying the statute to a civil negligence claim. Second, the statute requires the individual seeking to invoke its protection to act reasonably. But the district court found that Martinez's actions were not reasonable. Martinez's conduct went well beyond the actions permitted by the statute. In no way does the statute lead to the conclusion that the officers should have foreseen Martinez's actions.

1. The statute sets forth an affirmative defense to a criminal charge, not a standard for civil negligence.

Section 18-1-705 appears in a portion of Colorado's statutes entitled "Justification and Exemptions from Criminal Responsibility." *See* Colo. Rev. Stat. Tit. 18, Part 7; *see also People v. McNeese*, 892 P.2d

304, 309 (Colo. 1995) (observing that section 705, like its companion statute 18-1-704.5, is "part of the criminal code"). The statute sets forth an affirmative defense to a criminal charge available to those who use physical force to "prevent or terminate . . . the commission or attempted commission of an unlawful trespass." *See People v. Trujillo*, 83 P.3d 642, 647 (Colo. 2004) (section 705 is an "affirmative defense[] to first-degree assault").

Martinez claims throughout his brief that the statute gives him a "right" to use force to defend property that he occupies. *See, e.g.*, Aplt. Br. at 26. But the function of the statute is not to provide a right to act. It is to provide an affirmative defense to a criminal charge. Instead of empowering property owners to use force, it excuses the use of force from criminal responsibility when such force conforms to the narrow strictures of the statute. By analogy, it may be a valid defense to a negligence claim that the plaintiff assumed the risk of a dangerous activity, but the existence of that affirmative defense does not give the defendant a *right* to be negligent.

The plain language of section 705 says nothing about civil liability or negligence, and speaks entirely in the language of criminal law

("justified in using reasonable and appropriate physical force," "commission or attempted commission of an unlawful trespass," "deadly force," "first degree arson," etc.). The Court should not presume that this lack of any language referencing civil liability in section 705 is accidental—the related statute that provides a defense for using deadly force in defense of a dwelling, § 18-1-704.5, states expressly that anyone using force in the manner privileged by section 704.5 "shall be immune *from civil liability* for injuries or death resulting from the use of such force." Colo. Rev. Stat. § 18-1-704.5(4) (emphasis added). So the Colorado General Assembly's decision to extend section 704.5 to civil actions, but not include a similar provision in section 705, suggests that the latter was not intended apply in the civil context.

Martinez cites no case in which any court has applied section 705 to decide any issue related to negligence in a civil case. The closest Martinez comes is *Molnar ex rel. Molnar v. Law*, 776 P.2d 1156 (Colo. App. 1989). *Molnar* involved a claim by a plaintiff "for personal injuries"—namely, being shot by the defendant—"arising from plaintiff's alleged attempt to rob defendant's house." *Id.* at 1157. After losing at trial, the plaintiff argued that it had been error for the court to

instruct the jury on Colo. Rev. Stat. § 13-80-119, which "limits a right of action for a personal injury received by a plaintiff 'during the commission of or during immediate flight from' the commission of a felony." *Id.* The court rejected this argument. *Id.* at 1157-58.

Martinez argues that, just as it was correct for the court in *Molnar* to instruct the jury regarding § 13-80-119, the district court here should not have ruled on the foreseeability of Martinez's conduct without considering § 18-1-705. But unlike section 705, § 13-80-119 expressly applies to "an action for damages," § 13-80-119(2)(a), and limits the right of a plaintiff "to recover damages." § 13-80-119(1). Section 13-80-119 also appears in the "Courts and Court Procedure" title of the Colorado statutes, and in the Article that also includes statutes of limitations applicable to civil actions. *See* Colo. Rev. Stat. §§ 13-80-101 – 13-80-119. There can thus be no question that that provision—unlike section 705—was intended by the General Assembly to apply in civil actions.

In sum, Martinez has given this Court no basis to conclude that the Colorado General Assembly intended § 18-1-705 to apply to a court's determination of negligence issues in a civil case. This Court should not

stretch Colorado law to extend the statute where it was not meant to apply. *See Amparan v. Lake Powell Car Rental Cos.*, 882 F.3d 943, 948 (10th Cir. 2018) ("[I]t is not a federal court's place to expand state law beyond the bounds set by the highest court of the state." (alterations and quotations omitted)).[2]

2. By its plain language, the statute requires a homeowner to act reasonably, contrary to the court's findings regarding Martinez's conduct.

Martinez's argument suffers from an even more fundamental flaw, however. The statute's plain language requires an individual seeking its protection to act reasonably—not once but three times:

> A person in possession or control of any building, realty, or other premises, or a person who is licensed or privileged to be thereon, is justified in **using reasonable and appropriate physical force** upon another person **when and to the extent that it is reasonably necessary** to prevent or terminate **what he reasonably believes** to be

[2] Martinez did not afford the district court an opportunity to rule in the abstract on the legal question of whether § 18-1-705 applies in a civil negligence case. He raised the statute for the first time in a single paragraph in his trial brief (the court had discouraged the parties from filing such briefs), *see* Aplt. App. at 1319, which was filed on the literal eve of trial. *See id.* at 6. His counsel then discussed the statute in only ten lines of his closing argument. *See id.* at 1227:8-17. This may have been sufficient to preserve the issue for appeal, but it certainly did not give the district court the chance to consider and rule on the broader legal issue (with the benefit of briefing from the United States).

> the commission or attempted commission of an unlawful trespass by the other person in or upon the building, realty, or premises.

Colo. Rev. Stat. § 18-1-705 (emphasis added).

So for the statute to apply at all, the person who used force must: (1) use only reasonable force; (2) to the extent reasonably necessary; (3) to prevent what he reasonably believes to be an unlawful trespass. *See, e.g.*, *People v. Carbajal*, 411 P.3d 674, 680 (Colo. App. 2012) (Richman, J., concurring) (noting that § 18-1-705 requires "reasonable conduct by the [criminal] defendant"), *rev'd*, 328 P.3d 104 (Colo. 2014) (adopting, in part, approach suggested by concurrence below).

The district court's factual findings (and Martinez's conduct) preclude Martinez from meeting this test. The district court found that Martinez "was himself negligent" and showed "a lack of reasonable care for his own safety." Aplt. App. at 1328. Martinez hid in a bush alongside a public road with a baseball bat so he could preemptively jump those coming to ward his father's home, instead of calling the police and defending himself from the relative safety of the house.

His actions went far afield of the conduct contemplated by the statute. The statute protects "[a] person in possession or control of any

building, realty, or other premises" in using force to stop a trespass "in or upon the building, realty, or premises." § 18-1-705. Although Martinez argues that the statute does not require the property owner to remain within the property to defend it, Aplt. Br. at 28, the statute does not expressly allow the owner to leave the property on a preemptive strike at a potential trespasser either. This Court should not create that novel extension of state law. *See Amparan*, 882 F.3d at 948 (this Court should not make novel Colorado law). So to say that the officers should have reasonably foreseen Martinez's ambush in the public road based on the *lack* of language limiting the scope of the statute to force used on the property strains credulity.

Even if Martinez is correct that the statute means that the officers should have foreseen that he, as a property occupant, would use reasonable force to stop their entry onto the property, that is a far cry from a claim that they should have foreseen the property occupant would leave the property before they had even entered it to charge them on a public road with a baseball bat and shouting "Let's do this, motherfuckers." The mismatch between the reasonable conduct sanctioned by the statute and Martinez's undisputed actions the night

of the shooting show that the officers could not reasonably have foreseen Martinez's actions based on the statute he invokes.

II. The district court correctly found that Martinez's actions were an independent, intervening cause of his injury.

Martinez next turns to the district court's finding that his actions in deliberately ambushing the officers constituted an intervening cause that broke the chain of proximate causation between the officers' conduct and Martinez's injuries. He asserts that his decision to charge the officers in the public road was within the foreseeable scope of risks created by the precautions the officers took in approaching his father's house. But substantial evidence supports the district court's factual finding to the contrary. The cases cited by Martinez on the scope of the risk doctrine do not apply here.

A. Proximate causation is a factual finding reviewed only for clear error.

Martinez claims that the district court failed to properly apply Colorado law concerning intervening causes in determining that the officers' conduct was not the proximate cause of his injury. Again, he asserts this failure entitles him to de novo review. But rather than identify an actual legal challenge, he simply quarrels with the court's

factual conclusion regarding proximate causation. That issue is reviewed only for clear error. *See City of Aurora*, 639 P.2d at 1063 ("[Q]uestions of negligence and proximate cause are issues of fact."); *Casteneda*, 819 F.3d at 1247 (factual findings from a bench trial are reviewed for clear error).

B. The finding that Martinez's deliberate decision to ambush people on a public road was an intervening cause of his injury is supported by the record.

Under Colorado law, "a defendant's conduct is not a cause of another's injuries" if it had to be combined with another intervening cause that "would not have been reasonably foreseen by a reasonably careful person under the circumstances" for the injuries to occur. *Moore v. W. Forge Corp.*, 192 P.3d 427, 436 (Colo. App. 2007) (quoting *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89, 93 (Colo. App. 1997)). Whether Martinez's decision to charge the officers is such an intervening cause thus turns on whether his actions were reasonably foreseeable. As detailed above, they were not.

Martinez argues that the dispositive issue for proximate causation should be whether the type of harm suffered falls within the "scope of the risk" created by the negligent conduct. But he admits that a

defendant is only responsible for harms "that are foreseeable" in their general nature. Aplt. Br. at 37; *see also id.* (liability only where "the original negligent act combines with unexpected forces to result in *a foreseeable harm*" (emphasis added)). The "scope of the risk" doctrine applies only to cases where the general type of harm was foreseeable, but "the extent of the harm or the manner in which it occurred" may not have been. *Webb v. Dessert Seed Co.*, 718 P.2d 1057, 1063 (Colo. 1986) (quoting *Restatement (Second) of Torts* § 435); *see also Restatement (Second) of Torts* § 442B cmt. b ("[A]ny harm *which is in itself foreseeable*, as to which the actor has created or increased the *recognizable risk*, is always 'proximate.'" (emphasis added)).

Here, the evidence at trial supported the district court's conclusion that Martinez's decision to ambush the officers was not foreseeable, and thus broke the chain of proximate causation. First, Martinez candidly admitted that his decision to ambush the officers was deliberate and intentional:

> Q. And when you ran out from the bushes toward the figures, you did that on purpose, right?
>
> A. Yeah. My purpose was to scare them off with a bat.

Q. And it wasn't an accident that you ran into the road, correct?

A. Yeah, no.

Q. You made a decision to do it?

A. I did.

Aplt. App. at 114:14-21. *Cf. Restatement (Second) of Torts* § 442B cmt. c (in the case of intentional acts by third parties, the actor "has deliberately assumed control of the situation, and all responsibility for the consequences of his act is shifted to him").

Second, as recounted above, the officers testified that they did not foresee—and had no reason to foresee—that their conduct in walking up the road toward the house in the dark would cause Martinez to attack them. The district court agreed that the officers "had no reason to believe that Martinez would run at them on the county road threatening them with a bat with little time to react." Aplt. App. at 1328. These findings regarding foreseeability foreclose Martinez's argument regarding intervening cause.

Martinez relies heavily on the *Restatement (Third) of Torts – Physical and Emotional Harm*, *see* Aplt. Br. at 36, but Colorado does not appear to have adopted any of the provisions of the Third

Restatement that Martinez cites (the citations to § 1 of the Third Restatement on page 36 of the opening brief appear to actually be cites to § 3). Nor would the outcome be different under the Third Restatement rules. *See Restatement (Third) of Torts – Physical and Emotional Harm* § 34 cmt. e (where intervening acts "are unforeseeable, unusual, or highly culpable they may bear on whether the harm is within the scope of the risk").

C. None of the cases cited by Martinez preclude an intervening actor's deliberate decision from serving as an intervening cause.

The cases cited by Martinez to argue that the district court failed to correctly apply Colorado law on intervening causation do not help him. In his three primary cases, each court noted that the general type of harm suffered was foreseeable, which meant that the intervening acts that set in motion how the harm came to pass or its extent did not relieve the defendant of responsibility. *See Webb v. Dessert Seed Co.*, 718 P.2d 1057, 1063 (Colo. 1986) (noting that one employee of defendant "testified that he was worried this very situation might happen" and noting that defendant was aware that "if [defendant's] seeds were sold to commercial growers in this country someone would be harmed");

Scharrel, 949 P.2d at 94 (where store had adopted policy of not stacking heavy boxes on the top shelf "because of accidents resulting from falling boxes," the fact that defendant could not foresee a particular ladder failing did not mean the type of harm—heavy boxes falling from high shelves—was not foreseeable); *Estate of Newton v. McNew*, 698 P.2d 835, 837 (Colo. App. 1984) ("Here, there was ample evidence from which the jury could infer the foreseeability of the alleged intervening acts…"). The type of harm must be foreseeable, even if the manner in which it occurred was not.

Here, the district court found that it was not foreseeable that Martinez would ambush the officers from his hiding place on the public road. *See* Aplt. App. at 1328. To escape this conclusion, Martinez tries to reframe the type of harm at a high level of abstraction—in his view, the risk created by the officers' actions was of "a threatening confrontation with a homeowner." *See* Aplt. Br. at 39. But because of Martinez's preemptive attack, the officers did not even make it to the boundary of the property. The type of harm here was the officers' self-defense shooting of an attacker in a public road. The district court

concluded this type of harm was not foreseeable. Because that finding was supported by the record, the district court did not clearly err.[3]

III. The district court's order sufficiently apportioned the greater share of total fault to Martinez.

Martinez argues that the district court reversibly erred by not assigning numerical percentages of fault to each person involved in the encounter between Martinez and the officers. The district court

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[3] Martinez cites a number of cases involving police conduct. Aplt. Br. at 40. These cases, however, are procedurally inapposite, and do not support reversal. In *Pauly v. White*, 874 F.3d 1197, 1211 (10th Cir. 2017), for example, the court was reviewing a denial of qualified immunity, and thus viewed the facts "in the light most favorable to plaintiffs." It reached no legal conclusions concerning negligence liability, but rather only whether the plaintiffs' allegations, if proven, established a violation of clearly established constitutional law. *Id.* at 1213. *Attocknie v. Smith*, 798 F.3d 1252, 1258 (10th Cir. 2015) arose in the same posture—an appeal from a denial of qualified immunity. *Greggo v. City of Albany*, 58 A.D.2d 678 (N.Y. App. Div. 1977) is factually light-years from this case, as it involved two plainclothes police officers violently assaulting an African-American man who was not suspected of any misconduct, which victim grabbed one of the officers' guns and fired, hitting a bystander. *Id.* at 678-79. *Mendez v. County of Los Angeles*, 897 F.3d 1067, 1073-74 (9th Cir. 2018) is similarly factually inapposite, because the court in that case concluded that the injuries were proximately caused by the officers' entry into the home in violation of the Fourth Amendment, and specifically *not* by, as Martinez claims, their "negligent failure to announce their presence." Aplt. Br. at 41; *see Mendez*, 897 F.3d at 1078-79 (analyzing failure to knock and announce and unlawful entry separately).

unmistakably concluded that Martinez's share of fault outweighed all fault attributable to the United States, so the lack of a numerical percentage is immaterial to the outcome. Because the United States as defendant acted exclusively through the three officers and no other persons, juggling the percentages of fault attributable to each of the three would not lessen the fault attributable to Martinez.

Although it did not express the relative degrees of fault of the parties via a numerical percentage, the district court did conclude that Martinez's "lack of reasonable care for his own safety [] contributed more to his injury than the stealth approach by the officers." Aplt. App. 1328. So regardless of specific numerical percentages, there can be no doubt that the district court concluded that Martinez's negligence was greater than the total negligence attributable to the officers: "Under Colorado law a plaintiff may not recover damages for negligent conduct if his own negligence was greater than that of a defendant. … Martinez's claim is barred by his own negligence if the police officers were negligent in creating a dangerous circumstance because his negligence was greater than that of the officers." *Id.*

While Colorado Revised Statute § 13-21-111(2)(b) does require fact-finders to state "the degree of negligence of each party, expressed as a percentage," the failure to do so does not require reversal so long as the fact-finder's "intention was clear" regarding the relative degrees of fault of the parties. *Comcast of California/Colorado, L.L.C. v. Express Concrete, Inc.*, 196 P.3d 269, 274-75 (Colo. App. 2007).

In *Comcast*, the Colorado Court of Appeals, reviewing a judgment after a bench trial in which the district court did not express relative fault as a percentage, held that "the award of zero damages is consistent with the view that the court found [plaintiff's] negligence was equal to that of defendant." *Id.* at 275. That rendered the district court's intention sufficiently clear for the appellate court to conclude that any error in failing to assign percentages was harmless. *See id.*; *see also Lonardo v. Litvak Meat Co.*, 676 P.2d 1229, 1232 (Colo. App. 1983) (where a jury found that the plaintiff's own negligence contributed to his injuries and awarded zero damages, but did not express the percentage of the parties' respective negligence numerically, any error was harmless); *Weaver v. Blake*, 454 F.3d 1087, 1099-1100 (10th Cir. 2006) (where a jury failed to follow the precise procedure for

determining damages and allocating fault in § 13-21-111 but nevertheless allocated 50% fault to plaintiff, any error in not following procedure was harmless).

Because the district court here found that Martinez's own negligence "was greater than that of the officers," it effectively stated that his fault was greater than 50% of the total fault.

The district court's lack of assigned percentages makes perfect sense. The defendant at trial was the United States. But the only actors who could create liability for the United States were the three officers. The district court's task under § 13-21-111 was to place all of the fault attributable to the United States (i.e., the fault of the three officers) on one side of the scale, and Martinez's fault on the other. Because all of the officers' fault was on the same side of the scale, juggling their respective percentages would do nothing to change the total weight attributable to the United States, and could not have shifted the balance in Martinez's favor.

This is in stark contrast to *Bethel v. United States*, 456 F. App'x 771 (10th Cir. Feb. 1, 2012) (unpublished), the only purportedly analogous case Martinez cites. Aplt. Br. at 43. *Bethel* involved an

FTCA claim brought against the United States and several doctors, including an anesthesiologist. *Id.* at 772. The district court did *not* conclude that the anesthesiologist was a federal employee, but nevertheless concluded that the United States could be liable for her negligence. *Id.* The court held a bench trial and found in favor of plaintiff, but did not attribute percentages of fault. *Id.* On appeal, this Court held that the district court was wrong on both counts: the United States could not be liable for the conduct of the anesthesiologist and the court was required to apportion fault numerically. *See id.* at 777-84.

Crucially, however, the failure to apportion fault in *Bethel* was reversible error only because "the federal government cannot be held liable for [the anesthesiologist's] negligence." *Id.* at 783. So any fault attributed to the anesthesiologist would reduce the fault—and thus the damages—attributable to the United States. *Id.*; *see also* C.R.S. § 13-21-111.5(1) ("[N]o defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant."). The percentages that the district court omitted in *Bethel* thus made a vital difference to the outcome of the case. Here, in contrast, because all of the fault attributable to all

three officers inheres in the United States, changing their respective percentages cannot change the outcome, and the failure to do so is, at worst, harmless error.

Martinez also points to several facts that, in his view, tend to support a finding of negligence on the part of the officers. Aplt. Br. at 45-47. These purported facts do not go to differentiating between the officers' culpability vis-à-vis one another, but are simply evidence that Martinez believes should have persuaded the district court that the officers' negligence exceeded his own. Simply pointing to the existence of contrary evidence, however, does not establish clear error. *See Watson v. United States*, 485 F.3d 1100, 1109 (10th Cir. 2007).

IV. The district court correctly excluded Officer Mitchell's 2011 performance evaluation.

Martinez claims that the district court should have admitted an excerpt from Officer Mitchell's July 2011 performance evaluation. *See* Aplt. App. 1310-12. While the evaluation is generally laudatory (*see id.* at 1312 [performance is "Commendable" in attendance, ability to "[d]eal[] effectively with changes in priorities, unexpected events or unanticipated demands," and "[d]emonstrates accountability for own work responsibility"]), Martinez fixates on notes that Mitchell needed to

work on double-checking his fellow officers' decisions and expressing his independent judgment. Martinez claims that these suggestions were "relevant to prove [Mitchell's] duty to override the decisions of less experienced officers such as Herrera." Aplt. Br. at 48.

The district court properly excluded the evaluation. Immediately before the exhibit was offered, Mitchell testified that he had a duty as the senior officer on scene "to object or bring to light anything that [he] saw that wasn't in line with current training practices or policy." Aplt. App. 147:19-21. He agreed that he "had an obligation to make [his] voice heard" when in the field. *Id.* at 147:22-25. To the extent the exhibit was offered to prove a "duty to override the decisions of less experienced officers," Aplt. Br. at 48, it was cumulative of the testimony already given. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence.").

Moreover, in light of Mitchell's testimony overall, the performance evaluation was irrelevant because he testified that he did not see any other officer make a decision that night that he disagreed with:

> Q. In the course of this 3:30 call, if Officer Herrera had made a decision that you disagreed with, would you

> have said something to either her or Officer Backer about it?
>
> A. Yes.
>
> Q. Did you?
>
> A. Not that I recall.
>
> Q. Do you recall Officer Herrera making any decisions that you disagreed with or felt were not correct?
>
> A. No.

Aplt. App. 316:7-15. The existence or non-existence of a duty to "double check or cross check" other officers' decisions—the peg on which Martinez hangs the performance evaluation's relevance—is entirely beside the point where Mitchell did not disagree with any decision made by those other officers. The evaluation was thus irrelevant. *See United States v. Shomo*, 786 F.2d 981, 985 (10th Cir. 1986) ("[A]lthough evidence may tend to make the existence of a fact more probable or less probable than it would be without the evidence, the evidence is not relevant unless the fact to be provided or disproved is material.").[4]

[4] Martinez also argues that the performance evaluation was admissible to impeach Mitchell's testimony that he was not "disciplined and/or trained to 'cross-check' or 'double-check' the decisions of other officers in the field." Aplt. Br. at 48. Given that Mitchell testified that he did not, in fact, disagree with any decision made by any other officer that night, impeachment on this issue would have been collateral and

Even if the district court had abused its discretion in excluding the exhibit, any such error would have been harmless. The district court's ultimate decision against Martinez turned on the nature of *his* actions, not the allocation of responsibility among the three officers. Evidence of a duty to cross-check on Mitchell's part thus could not have changed the outcome of the case, and the exclusion of evidence on that point was harmless. *See* Fed. R. Evid. 103(a) (reversal based on evidentiary error is required "only if the error affects a substantial right of the party"); *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1407 n.3 (10th Cir. 1991) (even erroneous exclusion of evidence is harmless error if the evidence "would not have added anything to the evidence presented"). The district court did reversibly err by refusing to admit the performance evaluation.

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immaterial, and the district court did not abuse its discretion in refusing to admit the exhibit. *See United States v. Martinez*, 749 F.2d 601, 607 (10th Cir. 1984) ("To impeach . . . the proffered [evidence] must relate to a material matter, and not pertain to a purely collateral or immaterial matter.") *abrogated on other grounds by Mathews v. United States*, 485 U.S. 58 (1988). Moreover, Mitchell did not deny having received the evaluation and the comments therein and thus open himself to impeachment; he simply refused to accept the characterization of the evaluation and his admitted duty pressed by Martinez's counsel. *See generally* Aplt. App. at 147-50.

V. The factual errors alleged at the end of Martinez's brief do not merit reversal.

Finally, Martinez points to three purported factual errors that he thinks show how the district court's rejection of his tort claim was based on misperceptions about the case. Aplt. Br. at 57. But he has not identified any factual errors at all, let alone any requiring reversal.

A. The officers had reason to believe Rossi might react violently.

Martinez thinks the court first erred by concluding that the officers "had reason to believe that Rossi might react violently if they went directly to the house." Aplt. Br. at 49 (quoting Aplt. App. 1327-28). Both Backer's and Herrera's testimony, however, supports the finding that the officers had reason to believe that an encounter with Rossi at 3:30 a.m. could result in violence.

Backer had responded to calls involving Rossi in the past that included assaults and fights. Aplt. App. 522:21-523:12. In Backer's view, Rossi had displayed violent tendencies on those calls in the past that would raise concerns for officer safety. *See id.* at 523:16-21. Plus, when he and the officers approached the house at 3:30 a.m., Backer knew that Rossi and Martinez had been in two separate fights in the

last 12 hours. *Id.* at 526:3-8; *see also id.* at 564:5-8 (Backer knew "Andrew Rossi had a reputation for being involved in violent encounters"). Similarly, Herrera was familiar with Rossi through her prior work at the La Plata County Detention Center, where she knew that Rossi had been housed "[a]t a higher level" due to security needs. Aplt. App. 993:5-17.

B. The evidence showed that the officers were investigating domestic violence.

Second, Martinez asserts that the district court erroneously analyzed the 3:30 a.m. call as a "domestic violence call" rather than a "welfare check." Had the court not made this error, Martinez claims, it would have understood that the tactics the officers chose in approaching the house were unreasonable. Aplt. Br. At 52-55. But, at the time the officers returned to the house, they knew that the spark that had ignited the earlier fight was Rossi striking his girlfriend. Aplt. App. at 531:7-20; 990:17-991:17. This is the definition of domestic violence. *Id.*

The officers knew that Rossi might be present in the house, since he had been there earlier. *Id.* at 300:7-9. They knew that no law enforcement officer had spoken with the girlfriend since the domestic violence incident. *Id.* at 997:20-998:12. And they knew that the

girlfriend's car was now parked in the driveway of the Martinez home. *Id.* at 534:3-14.

Whether this call is labeled a welfare check or a domestic violence call is irrelevant. The facts gave the officers reason to be cautious.

C. The officers' motives for their stealthy approach is irrelevant to the negligence determination.

Third, Martinez claims that the district court failed to adequately appreciate the officers' true motivation in their stealthy approach. He claims their aim was to circumvent his Fourth Amendment rights. Aplt. Br. at 56-57. Setting aside the robust record support for the district court's view of the officers' motives, *see, e.g.*, Aplt. App. at 415:1-2 ("[Herrera] wanted to go up and do a welfare check on [Rossi's girlfriend]."), Martinez fails to explain why, even if he were correct about their aims, it would matter to the outcome in this case. He cites no case for the proposition that police officers are prohibited by the Fourth Amendment from making a second attempt to contact a potential witness, or that they cannot approach a house unobtrusively to do so. He points to no authority that if officers' motives are impure, their conduct must be unreasonable. No such authority exists. Indeed, Fourth Amendment analysis generally takes an objective approach that

makes officers' subjective motives irrelevant to reasonableness. *Fernandez v. California*, 571 U.S. 292, 302 (2014).

In any event, the record supports the district court's conclusion that the officers were motivated by concerns for the safety of themselves and Rossi's girlfriend. And, as already noted, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson,* 470 U.S. at 574.

CONCLUSION

The judgment in favor of the United States should be affirmed.

DATED: December 6, 2019

Respectfully submitted,

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/s/ KYLE BRENTON
Kyle Brenton
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 9,150 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

DATED: December 6, 2019

/s/ KYLE BRENTON
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CERTIFICATE OF DIGITAL SUBMISSION

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s/ *Erin Prall*
ERIN PRALL
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2019, I electronically filed the foregoing **ANSWER BRIEF** with the Clerk of the court for the United States Court of Appeals for the Tenth Circuit, using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ *Erin Prall*
ERIN PRALL
U.S. Attorney's Office