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.

APPELLEE'S SUPPLEMENTAL 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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June 8, 2020

INTRODUCTION

The Federal Tort Claims Act ("FTCA") represents a limited waiver of sovereign immunity that grants federal courts, under specified circumstances, subject-matter jurisdiction to entertain tort suits against the United States. *See* 28 U.S.C. § 1346(b). Martinez brought his claim for negligence pursuant to that provision, and the district court correctly concluded that, on the merits, Martinez failed to establish negligence under Colorado law.

Martinez's suit is barred for an additional reason. The FTCA includes several exceptions to the waiver of sovereign immunity, including an exception for claims based on a federal employee's "exercise or performance or [] failure to exercise or perform a discretionary function." 28 U.S.C. § 2680(a). Where this discretionary function exception applies, the court lacks subject-matter jurisdiction. *See Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175-76 (10th Cir. 2008).

Martinez's claim here is that the three officers' choice of tactics in approaching his residence was negligent, and set in motion the series of events that resulted in him being shot. This claim falls within the

discretionary function exception, and the court thus lacks subject-matter jurisdiction over it.

In contrast to Article III jurisdictional issues, a court need not consider the application of the FTCA's exceptions sua sponte. *See Cox v. United States*, 881 F.2d 893, 894 n.1 (10th Cir. 1989). The court may, however, affirm a judgment on any ground supported by the record. *See Harvey v. United States*, 685 F.3d 939, 950 n. 5 (10th Cir. 2012). And sovereign immunity may be asserted by the United States at any stage of a proceeding, including for the first time on appeal. *See Governor of Kansas v. Kempthorne*, 516 F.3d 833, 840-41 (10th Cir. 2008); *In re Talbot*, 124 F.3d 1201, 1205 (10th Cir. 1997).

In response to the court's order, the United States now asserts the discretionary function exception. That exception, for the reasons set out below, bars plaintiff's suit.

ARGUMENT

The discretionary function exception deprives the court of subject-matter jurisdiction and requires dismissal.

Under the FTCA's discretionary function exception, the court lacks jurisdiction over "[a]ny claim based upon … the exercise or performance or the failure to exercise or perform a discretionary

function or duty ... whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). This exception to the waiver of sovereign immunity elsewhere in the FTCA "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).

To determine whether the exception applies, this court applies the two-part test articulated by the Supreme Court in *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). *See Garling v. U.S. Envt'l Prot. Agency*, 849 F.3d 1289, 1295 (10th Cir. 2017). The court first "determine[s] whether the conduct was discretionary—whether it was a matter of judgment or choice for the acting employee." *Id.* (quotation marks omitted). Second, the court considers whether the conduct at issue "required the exercise of judgment based on considerations of public policy." *Id.* (quotation marks omitted). If both prongs of this test are met, the exception is satisfied, sovereign immunity bars the claim, and the court lacks subject-matter jurisdiction. *See id.*

The applicability of the discretionary function exception is an issue of law that this court considers de novo based on "the evidence in the record." *Garcia* 533 F.3d at 1175. Because the exception is jurisdictional, the burden rests with the plaintiff to prove it does not apply. *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1220 (10th Cir. 2016).

A. The officers had discretion in choosing the tactics they used in approaching the house.

The first prong is met where the conduct at issue "involves an element of judgment or choice." *Berkovitz*, 486 U.S. at 536. Where, in contrast, "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" and "the employee has no rightful option but to adhere to the directive," the action is not discretionary. *Id.*

In conducting the discretionary function analysis, the court's "initial task … is to ascertain the precise governmental conduct at issue." *Domme v. United States*, 61 F.3d 787, 790 (10th Cir. 1995). Here, Martinez claims that the tactics the officers chose to use in approaching his home constituted negligence, which set in motion the series of events that led to him being shot while ambushing the officers.

See Apl't Br. at 19-20. These tactics—which Martinez labels a "blackout approach"—encompassed several discrete tactical decisions, including turning off lights (including headlights) in police vehicles, staying away from light sources, parking at a distance from the residence, covering up reflective parts of the uniform, and moving quietly and turning down radios while approaching the scene. *See id.* at 4 (cataloging the elements of the "blackout approach").

Martinez has argued that "[t]here are no official" Bureau of Indian Affairs "policies, procedures, or other guidelines regarding the blackout approach." *Id.* at 5. He asserted that use of these tactics "is left to officer discretion." *Id.* Similarly, in his closing argument before the district court, he argued that the United States "leave[s] it up to officer discretion" when to employ stealth approaches, and that "officers [have] unfettered discretion to use these stealth tactics." Apl't App. at 1209:24-25; 1235:6-7. These arguments are consistent with the testimony at trial. *See, e.g.*, *id.* at 163:15-164:9 (Officer Mitchell); 788:8-25 (the Acting Chief of the Southern Ute Police Department at the time of the shooting); 890:25-891:6 (plaintiff's police practices expert

agreeing that officers "should use good judgment" in choosing tactics to protect themselves).

There is thus no reasonable dispute that the officers' choice of tactics "involve[d] an element of judgment or choice," *Berkovitz*, 486 U.S. at 536, and the first element is satisfied.[1]

B. The choice of tactics used in approaching a reported domestic violence incident is susceptible to policy analysis.

With the first element met, the court must then consider "whether the decision in question is one requiring the exercise of judgment based on considerations of public policy." *Garcia*, 533 F.3d at 1176. When making this assessment, the court is "not to consider the subjective intent of the particular actor or whether he or she was animated by a concern for public policy." *Lopez v. United States*, 376 F.3d 1055, 1057 (10th Cir. 2004). Rather, the court looks to "whether the nature of the

[1] There was evidence presented at trial concerning certain provisions of the BIA Law Enforcement Handbook. *See, e.g.*, Apl't App. at 1099:1-1102:14; 1305. But these policies do not comprehensively encompass all of the aspects of the "blackout approach" tactics in a way that would add up to a "prescribe[d] course of action" for the officers to follow. *Berkovitz*, 486 U.S. at 536. Martinez made this point at trial. *See id.* at 375:2-378:18; 1099:1-1102:14.

actions taken implicate public policy concerns, or are 'susceptible to policy analysis.'" *Id.* at 1057 (quoting *United States v. Gaubert*, 499 U.S. 315, 325 (1991)).

The district court recognized two public policy rationales involved in the use of stealth approach tactics. The court found that such tactics are "designed to protect police officers from a possible shooting from inside the house," or in other words, to protect officer safety. Aplt. App. at 1325; *see also id.* at 405:8-10; 533:6-17; 886:6-17; 1327. The court also found, however, that using stealth approach tactics "could be misinterpreted and cause the occupants to believe that they were about to be assaulted." *Id.* at 1328.

Those two contrasting findings demonstrate the need for officers to balance the risk of misidentification and confrontation that arises from the use of stealth tactics against the benefits those tactics provide to officer safety. How best to strike that balance is "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. On that basis alone, the second prong of the *Berkovitz* analysis is met.

In addition to those public policy rationales cited by the district court, the evidence at trial revealed other policy-infused reasons for using the tactics at issue. Stealth approaches promote public safety because they can allow officers to surprise, subdue, and apprehend violent offenders more quickly than if the offenders were aware of the police approach. Aplt. App. at 293:1-4. If a perpetrator of domestic violence knows the authorities are approaching, they are more likely to injure their victims, but a stealth approach minimizes this risk. *Id.* at 1120:2-8. Using a stealth approach avoids unnecessary disruption of other nearby residences, while coming in with lights and sirens blazing could awaken an entire neighborhood. *See id.* at 292:20-293:1. And approaching quietly allows officers to listen and learn more about an unfolding situation before a subject's awareness of the police presence disrupts that situation. *Id.* at 1114:9-18.

In light of the above, an officer's decision whether to use stealth tactics in the field "inherently involves the balancing of safety objectives against such practical considerations" as the risk of misidentification and potential public disruption. *See Johnson v. U.S. Dep't of Interior*, 949 F.2d 332, 339 (10th Cir. 1991) (finding that park rangers' decisions

whether and how to conduct rescue operations of stranded mountain climbers, in light of potentially competing policy goals, falls within the discretionary function exception).

These decisions are thus "grounded in social and economic policy," and "are shielded from liability under the FTCA discretionary function exception." *Id.*; *see also Shuler v. United States*, 531 F.3d 930, 934 (D.C. Cir. 2008) ("Decisions regarding the timing of arrests are the kind of discretionary government decisions, rife with consideration of public policy, that Congress did not want the judiciary second-guessing.") (citation and internal quotation marks omitted); *Suter v. United States*, 441 F.3d 306, 312 (4th Cir. 2006) ("[D]iscretionary, policy-based decisions concerning undercover operations are protected from civil liability by the discretionary function exception, even when those decisions result in harm to innocent third parties."); *Deuser v. Vecera*, 139 F.3d 1190, 1195-96 (8th Cir. 1998) (decision by officers to terminate arrest was discretionary in light of the "[s]ocial, economic, and political goals" of law enforcement in policing a public fair).

CONCLUSION

Both prongs of the *Berkovitz* test are met here. Because the discretionary function exception applies, this court lacks subject-matter jurisdiction, and the case should be remanded with instructions to dismiss.

DATED: June 8, 2020

Respectfully submitted,

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

This brief complies with the length limitation stated in the Court's order of May 7, 2020.

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: June 8, 2020

/s/ KYLE BRENTON
KYLE BRENTON
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

(1) all required privacy redactions have been made;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

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

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2020, I electronically filed the foregoing **Supplemental Brief Regarding Jurisdiction** with the Clerk of the court for the United States Court of Appeals for the Tenth Circuit, using the CM/ECF system.

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s/ *Erin Prall*
ERIN PRALL
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