UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTATE OF ASHLI BABBITT, and AARON BABBITT, individually and on behalf of the ESTATE OF ASHLI BABBITT, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	)	Case No. 1:24cv1701-ACR

DEFENDANT'S PRE-MOTION NOTICE

In accordance with Paragraph 7(f) of this Court's Standing Order and this Court's Minute Order dated July 17, 2024, Defendant United States of America submits this notice to request a pre-motion conference regarding the partial motion to dismiss it seeks to file in this case.

On January 6, 2021, a U.S. Capitol Police Officer fatally shot Ashli Babbitt when she tried to climb through a broken sidelight into the Speaker's Lobby during the riot at the U.S. Capitol. Aaron Babbitt, individually and on behalf of the Estate of Ashli Babbitt, sues the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346; 2671-2680 (2018), seeking damages for her death. Three of his seven claims allege negligent acts or omissions by federal officials other than the officer who shot Ms. Babbitt. ECF No. 1 (Compl.). Count III faults nearby federal officers for not taking action with respect to rioters who broke out the panel of the sidelight Ms. Babbitt tried to climb through. Counts IV and V fault Capitol Police for negligent retention, supervision, discipline, and training. The United States seeks dismissal of those claims for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). Immediate dismissal of those claims will simplify discovery and streamline the litigation. *Cf.* FED. R. CIV. P. 26(b)(1).

The FTCA waives sovereign immunity for certain tort claims, however it "did not waive the sovereign immunity of the United States in all respects." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). Relevant here, the FTCA waives immunity, and vests district court jurisdiction, only "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). The FTCA also excepts from the sovereign-immunity waiver any 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). Accordingly, "in the unique context of the FTCA," section 1346(b)(1) requires a plaintiff to invoke subject matter jurisdiction by plausibly alleging "all elements of a meritorious claim," *Brownback v. King*, 592 U.S. 209, 217 (2021), while section 2680(a) requires pleading conduct outside the FTCA's discretionary-function exception. *See Shuler v. United States*, 531 F.3d 930, 933-34 (D.C. Cir. 2008); *Donahue v. United States*, 870 F. Supp. 2d 97, 104 n.4 (D.D.C. 2012). When evaluating a facial challenge to subject matter jurisdiction, the court assumes the complaint's factual allegations and draws all reasonable inferences in the plaintiff's favor. *See RELX, Inc. v. Baran*, 397 F. Supp. 3d 41, 47 (D.D.C. 2019).

Private Person Analog. Count III alleges negligent acts or omissions by eight officers who were nearby when Ms. Babbitt came to harm. The complaint alleges the officers breached a duty to "protect [Ms. Babbitt] from harm," Compl. ¶ 63, when they failed to "control, de-escalate, or stop" the two rioters who broke the window Ms. Babbitt tried to climb through. *Id.* ¶¶ 69-72. That theory does not plausibly allege circumstances in which a private person would be liable under D.C. law.

Under section 1346(b)(1), a court must "look to the law of the local jurisdiction—in this case, the District of Columbia[.]" *Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 508 (D.C. Cir. 2009). Under D.C. law generally "no liability exists in tort for harm resulting from the criminal acts of third parties[.]" *Hall v. Ford Enterprises, Ltd.*, 445 A.2d 610, 611 (D.C. 1982); *see Workman v. United Methodist Comm.,* 320 F.3d 259, 262 (D.C. Cir. 2003). The eight officers, therefore, had no "duty to protect" Ms. Babbitt from consequences allegedly traceable to the criminal acts of the two rioters. The only potentially relevant exception to D.C.'s general rule depends on establishing a "defendant's increased awareness of the danger of a particular criminal act" that "was so foreseeable that it became the defendant's duty to guard against" it. *Bd. of Trustees of Univ. of D.C. v. DiSalvo*, 974 A.2d 868, 872 (D.C. 2009) (citations omitted). The complaint has not plausibly alleged any increased awareness of the danger to Ms. Babbitt from the particular criminal acts of two other rioters. Mr. Babbitt has not alleged, for example, harm resulting from a similar crime in the same place. *See id*. at 873-74.

Alternatively, even if the duty at issue was that of a "reasonably prudent officer," as Mr. Babbitt asserts, Compl. ¶ 63, the same result would lie. The public duty doctrine holds that police officers are under "no general duty to provide … police protection to any particular individual." *Klahr v. Dist. of Columbia*, 576 A.2d 718, 720 (D.C. 1990) (cleaned up). When a "governmental entity undertakes to furnish police services, it assumes a duty only to the public at large and not to individual members of the community." *Warren v. Dist. of Columbia*, 444 A.2d 1, 3 (D.C. 1981) (en banc). The eight officers in this case therefore had no duty "to protect [Ms. Babbitt] from harm," Compl. ¶ 63, because they had "a duty only to the public at large," *Warren*, 444 A.2d at 3.

Discretionary-Function Exception. Count III and Mr. Babbitt's negligent supervision, discipline, and retention (Count IV) and negligent training (Count V) claims are all barred by the FTCA's discretionary-function exception. 28 U.S.C. § 2680(a). The discretionary-function exception immunizes the government from a tort claim when the challenged action involves an element of judgment or choice and that judgment or choice is "susceptible" to policy analysis. *Gaubert v. United States*, 499 U.S. 315, 322, 325 (1991).

Courts have long recognized that personnel decisions typically involve a host of judgments that are susceptible to policy analysis. Accordingly, negligent supervision, discipline, retention, and training claims fall within the discretionary-function exception. *See Burkhart v. Washington Metro. Area Transit Auth*., 112 F.3d 1207, 1217 (D.C. Cir. 1997); *Smith v. United States*, 157 F. Supp. 3d 32, 42 (D.D.C. 2016); *Bostic v. U.S. Capitol Police*, 644 F. Supp. 2d 106, 110 (D.D.C. 2009). Likewise, the type of negligence claim Mr. Babbitt brings in Count III—faulting eight nearby officers for not taking action with respect to the rioters who smashed the sidelight before Ms. Babbitt tried to climb through it—is also barred by the exception. Decisions regarding when to arrest or to take or refrain from taking certain actions to protect others are the kind of discretionary government decisions, "rife with considerations of public policy, that Congress did not want the judiciary second-guessing." *Shuler*, 531 F.3d at 934 (cleaned up); *Olaniyi v. Dist. of Columbia*, 763 F. Supp. 2d 70, 88-89 (D.D.C. 2011).

The United States respectfully requests that the Court schedule a pre-motion conference in anticipation of its motion.

Dated: July 24, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
Civil Division

C. SALVATORE D'ALESSIO, JR.
Director, Torts Branch, Civil Division

RICHARD MONTAGUE
Senior Trial Counsel

/s/ Sarah E. Whitman
SARAH E. WHITMAN
MA Bar 657726
Senior Trial Counsel, Torts Branch, Civil Division
United States Department of Justice
175 N Street, NE
Washington, DC 20002
Tel: (202) 616-0089; F: (202) 616-4314
Sarah.whitman@usdoj.gov

/s/ Joseph A. Gonzalez
JOSEPH A. GONZALEZ
D.C. Bar No. 995057
Trial Attorney, Torts Branch, Civil Division
United States Department of Justice
175 N Street, NE
Washington, DC 20002
Tel: (202) 598-3888; F: (202) 616-4314
Joseph.a.gonzalez@usdoj.gov

Counsel for Defendant United States of America

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

ESTATE OF ASHLI BABBITT and AARON BABBITT, individually and on behalf of the ESTATE OF ASHLI BABBITT,

Case No. 1:24-cv-01701-ACR

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.
/

PLAINTIFFS' RESPONSE TO DEFENDANT'S PRE-MOTION NOTICE

Plaintiffs' Motion to Retransfer Venue. On July 20, 2024, Plaintiffs moved for an order retransferring venue to the Southern District of California so that they can seek review of that Court's order transferring this case to the District of Columbia in a mandamus proceeding in the U.S. Court of Appeals for the Ninth Circuit. ECF 21. Defendant's response to the motion is due August 5, 2024. LCvR 7(b). Plaintiffs' reply would be due August 12, 2024. LCvR 7(d). Oral argument is requested. No hearing date has been set.

A Pre-motion Conference regarding Defendant's partial motion to dismiss has been set on August 6, 2024. Notice of Hearing, July 26, 2024. However, it makes more sense to resolve venue before requiring the parties to brief a dismissal motion, to avoid the potential waste of time and resources and duplication of effort and promote judicial efficiency. ECF 6 (Dft's App. for Ext. of Time to Respond to Complaint) at 3 ("But it makes little sense to require the parties to spend time, energy, and resources briefing a dismissal motion before knowing in which venue the case will proceed."); *see also* ECF 8 (Order Granting Def's App.) at 2. Also, a motion to dismiss should be decided by the district court in which the case will ultimately proceed as there

may be a conflict of law between the two circuits. *Id*.; *Moore v. Valder*, 65 F.3d 189, 195 n.9 (D.C. Cir. 1995). Accordingly, Plaintiffs request that the motion to dismiss be held in abeyance until their motion to retransfer is decided and venue is ultimately resolved.

Private Person Analog. It is important to properly and fairly characterize Count III as negligence when police officers are using deadly force. ECF 1 (Compl.) ¶¶ 22, 25-27, 62, and cases cited therein; *Hayes v. County of San Diego*, 57 Cal. 4th 622 (2013). One must consider the totality of the circumstances. *Id*. Lt. Byrd did not act alone when he shot Ashli Babbitt. Many officers were involved in the killing, including eight officers identified in Count III. Plaintiffs allege their negligence, not criminal acts of two rioters, caused Ashli's death. This case is thus readily distinguishable from Defendant's cases, *Hall v. Ford Enterprises, Ltd.*, 445 A.2d 610 (D.C. 1982), *Workman v. United Methodist Comm.*, 320 F.3d 259 (D.C. Cir. 2003), *Bd. of Trustees of Univ. of D.C. v. DiSalvo*, 974 A.2d 868 (D.C. 2009), *Klahr v. District of Columbia*, 576 A.2d 718 (D.C. 1990), and *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981), which all involve victims of criminal assaults by third parties.

Shifting blame to the two rioters fails also because of the special relationship between Ashli, the U.S. Capitol, and the Capitol Police, Compl. ¶ 66 ("Call fucking help!"), and the heightened foreseeability of an assault on the lobby doors, *id*. ¶ 49(c) ("barricade of heavy furniture and chairs," "all units go there and hold the glass"), *id*. ¶ 49(d) ("shots fired through the House main door"). *See Hall*, 445 A.2d at 611 n.4 (traditional special relationships); *Workman*, 320 F.3d at 262 (""plaintiff is not … required to show 'previous occurrences of the particular type of harm'"), *id*. at 263 ("defendant should be held liable as a matter of policy" as being "in the better position to know about security threats and to protect against them."); *DiSalvo*, 974 A.2d at 871 n.2 ("existence of a duty is also shaped by considerations of fairness"). The two

rioters' crime "was so foreseeable that it became [Defendant's] duty to guard against it." *DiSalvo*, 974 A.2d at 872 (internal quotes and citation omitted).

Similarly, the public duty doctrine does not apply because Capitol Police assumed a special duty to Ashli by affirmative conduct that led her into the broken window where she was shot and killed, including directing her movement to the House, Compl. ¶ 11, guarding the lobby doors, *id*. ¶ 64, inducing reliance on police protection, *id*. ¶ 66, and abandoning the lobby doors, *id*., ¶ 67-70. *See Warren v. District of Columbia*, 444 A.2d 1, 10-12 (D.C. 1981) (*en banc*) (Kelly, J. dissenting).

"[A]n officer possesses an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers." *Moore v. District of Columbia*, 79 F. Supp. 3d 121, 134-35 (D.D.C. 2015) (collecting cases). The eight officers thus had an affirmative duty to protect Ashli Babbitt from being shot by Lt. Byrd as the shooting was an unlawful seizure under the Fourth Amendment. Compl. ¶ 22.

Discretionary Function Exception. While negligent supervision, discipline, retention, and training claims may fall within the DFE, such determinations turn on whether actions taken were discretionary or whether regulations, statutes, the constitution, or internal policies contain mandatory actions that were not followed. Discovery is necessary to determine the existence of such rules and procedures, whether they allow for discretion, and whether Capitol Police violated any mandatory actions. A merits ruling on the DFE regarding Counts IV and V should await Plaintiffs' discovery. *Briscoe v. United States*, 268 F. Supp. 3rd 1, 12-14 (D.D.C. 2017).

Similarly, jurisdictional discovery is necessary to determine if Lt. Byrd engaged in any prior acts of misconduct involving use of a firearm, including intentional or non-intentional discharge of a firearm when on or off duty. The DFE "does not provide a blanket immunity

against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription." *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016). Plaintiffs allege Lt. Byrd violated a constitutional standard on deadly force set forth in *Graham v. Connor,* 490 U.S. 386 (1989) and *Tennessee v. Garner*, 471 U.S. 1 (1985) when he shot Ashli Babbitt. Compl. ¶ 22. Plaintiffs also allege a prior off-duty shooting by Lt. Byrd that was found to be not justified, Compl. ¶ 80, and a prior use of force matter that was sustained, *id*. ¶ 81. The DFE does not shield officials who retain an officer with a propensity to violate a legal or constitutional mandate.

Similar discovery of training materials and records is necessary to determine whether officer training meets the constitutional standard. Plaintiffs allege Lt. Byrd told a worldwide media audience he followed his training when he shot Ashli. Compl. ¶ 88, p.12 n.3. This portends a constitutional deficiency in training not shielded by the DFE. Records of how Capitol Police handled all prior instances of intentional or non-intentional discharges of a firearm by officers on or off duty are necessary to determine whether a pattern exists and thus a policy of ignoring a constitutional standard. *See City of Canton v. Harris*, 489 U.S. 378 (1989).

Regarding Count III, while decisions pertaining to arrests may fall within the DFE, negligent or reckless conduct is not protected. *Coulthurst v. United States*, 214 F.3d 106, 109 (2nd Cir. 2000). Discovery is necessary to determine whether the conduct of the eight officers and decisions they made are shielded by the DFE. *Id*. (given "numerous potential ways" in which negligence may trigger the alleged injury, the nature of the asserted conduct is potentially determinative of the applicability of the DFE); *Woodriffe v. United States*, 2020 U.S. Dist. LEXIS 107761, *4, *17 (D.D.C. 2020); *Sledge v. Fed. Bureau of Prisons*, 2013 U.S. App. LEXIS 25940, *14 (D.C. Cir. 2013) (officer's "decision to pack up early" on the clock is unprotected.)

Dated: July 31, 2024 Respectfully submitted,

JUDICIAL WATCH, INC.

By: */s/ Robert Patrick Sticht.*
ROBERT PATRICK STICHT
D.C. Bar No. 423395
Judicial Watch, Inc.
425 Third Street SW, Suite 800
Washington, D.C. 20024
(202) 646-5172
rsticht@judicialwatch.org

Attorney for Plaintiffs Estate of Ashli Babbitt and Aaron Babbitt

CERTIFICATE OF SERVICE

I certify that on the date set forth below, the foregoing response was filed using this Court's CM/ECF system, which will electronically serve notice on all counsel of record.

Dated: July 31, 2024

/s/ Robert Patrick Sticht.
ROBERT PATRICK STICHT

Attorney for Plaintiffs Estate of Ashli Babbitt and Aaron Babbitt