APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 20-1523

A. MICHAEL DAVALLOU,

Plaintiff, Appellant,

v.

UNITED STATES,

Defendant, Appellee,

ANCIENT AND HONORABLE ARTILLERY COMPANY OF MASSACHUSETTS; EMERY A. MADDOCKS, JR.,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Leo T. Sorokin, U.S. District Judge]

Before

Lynch, Kayatta, and Barron,
Circuit Judges.

Scott E. Charnas, with whom Charnas Law Firm, P.C., Thomas R. Murphy, Law Offices of

Thomas R. Murphy, LLC, Kevin J. Powers, and Law Offices of Kevin J. Powers were on brief, for appellant.

Thomas E. Kanwit, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, was on brief, for appellee.

May 25, 2021

KAYATTA, Circuit Judge. Michael Davallou alleges that he suffered permanent hearing damage when the Massachusetts Army National Guard (MANG) negligently fired military artillery "in close proximity" to him while he walked through Boston Common. He filed suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680. The district court dismissed the suit, finding that the United States was entitled to sovereign immunity pursuant to the FTCA's so-called "discretionary function exception." See id. § 2680(a). For the following reasons, we affirm.[1]

I.

We recite the facts alleged in Davallou's complaint, taking as true all well-pleaded facts and drawing all reasonable inferences in Davallou's favor. See Fothergill v. United States, 566 F.3d 248, 251 (1st Cir. 2009). On June 1, 2015, the Ancient and Honorable Artillery Company of Massachusetts

[1] Given that we affirm the district court's application of the discretionary function exception, we do not address its alternative conclusion that the FTCA does not apply because a private individual would not be liable for the challenged conduct under like circumstances. See 28 U.S.C. § 2674.

(AHAC), a historic military organization with no present-day military functions, conducted its annual "Change of Command" ceremony, also known as the "June Day" ceremony. AHAC "organized, directed, arranged, supervised and controlled" the ceremony, as it had done each year since at least 2010. As part of the annual ceremony, AHAC "arranged for military artillery to be fired within Boston Common [by MANG] . . . in the presence of members of the public." In keeping with this tradition, MANG performed an artillery salute during the June 2015 ceremony, firing blank rounds from howitzers (a type of cannon). The noise produced by the howitzers caused Davallou, who was walking on Boston Common at the time, to suffer permanent hearing damage. Davallou filed suit against the United States, alleging that MANG negligently caused his hearing loss by failing to warn him before firing the howitzers and by failing to ensure that he remained at a safe distance from the howitzers.[2] The government moved to dismiss the suit pursuant to the doctrine of sovereign immunity, arguing that Davallou's negligence claim arose out of MANG members' "performance [of] . . . a discretionary function." 28 U.S.C. § 2680(a). The district court agreed and dismissed Davallou's suit against the United States for lack of subjectmatter jurisdiction. Davallou appeals.

II.

We review de novo the district court's dismissal for lack of subject-matter jurisdiction. See Shansky v. United States, 164 F.3d 688, 690 (1st Cir. 1999).

[2] Davallou also brought negligence claims against AHAC and its Executive Secretary, Emery A. Maddocks, Jr., but later stipulated to their dismissal pursuant to a settlement agreement.

Federal courts lack subjectmatter jurisdiction over claims against the United States absent a waiver of sovereign immunity. See Villanueva v. United States, 662 F.3d 124, 126 (1st Cir. 2011). The FTCA "waives the [federal] government's sovereign immunity for certain torts committed by its employees in the scope of their employment."[3] Mahon v. United States, 742 F.3d 11, 12 (1st Cir. 2014); see also 28 U.S.C. § 1346(b)(1). But that waiver does not extend to claims based upon a government employee's exercise or failure to exercise a "discretionary function." See Mahon, 742 F.3d at 12; 28 U.S.C. § 2680(a). The pivotal question is whether Davallou's claim falls within the scope of this "discretionary function exception." If so, it must be dismissed for lack of subject-matter jurisdiction. See Bolduc v. United States, 402 F.3d 50, 55 (1st Cir. 2005). To determine whether the discretionary function exception applies, we follow a "familiar analytic framework." Shansky, 164 F.3d at 690. First, we must "identify the conduct that allegedly caused the harm." Id. at 690–91. Here, Davallou focuses on two omissions by MANG: failing to issue a warning before firing the howitzers and failing to ensure that bystanders maintained a safe distance from the howitzers. Second, we must ask whether that conduct is both "discretionary," id. at 691, and "susceptible to policy analysis," id. at 692. Because no federal statute, regulation, or policy dictated MANG's safety protocols during the June Day ceremony, the parties agree that the challenged conduct was discretionary. Davallou's claim therefore turns on his contention that MANG's exercise of

[3] The government concedes that MANG members were acting as federal employees at all times relevant to the complaint.

discretion under the circumstances was not susceptible to policy analysis.

Although we employ a "case-by-case approach" when evaluating whether challenged government conduct is susceptible to policy analysis, id. at 693, several principles guide our inquiry. First, the discretionary function exception is not limited to highlevel policymaking or planning functions. Rather, it can apply as well to day-to-day operational decisions. United States v. Gaubert, 499 U.S. 315, 325 (1991). Second, it does not matter whether MANG consciously engaged in any analysis of any policy considerations, see Shansky, 164 F.3d at 692, or whether its decision on how to proceed "was in fact motivated by a policy concern," Hajdusek v. United States, 895 F.3d 146, 150 (1st Cir. 2018). Rather, we ask only whether "some plausible policy justification could have undergirded" MANG's conduct. Shansky, 164 F.3d at 692. Nor does it matter, for purposes of the discretionary function exception, whether MANG's conduct was ultimately negligent: The exception shields the government from liability for discretionary policy choices "whether or not the discretion involved be abused." Evans v. United States, 876 F.3d 375, 381 (1st Cir. 2017) (quoting 28 U.S.C. § 2680(a)). Finally, because the law presumes that government employees' discretionary decisions do indeed involve policy judgments, Davallou bears the burden of alleging facts that would support a finding that MANG's exercise of discretion in this instance was not susceptible to policy analysis. See Gaubert, 499 U.S. at 324–25 ("For a complaint to survive a motion to dismiss [based on the discretionary function exception], it must allege facts which would support a finding that the challenged

actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.").

Considering all the circumstances alleged, we conclude that Davallou has not met this burden. Deciding how to handle safety considerations at the annual June Day ceremony implicated a number of competing values, including the efficient allocation of resources, the historical and ceremonial functions of the event, the public's ability to view the event, and the value of the event as a military training or recruitment exercise. Cf. Mahon, 742 F.3d at 16 (applying the discretionary function exception to the government's decision not to raise the railing height in a historic building because it actually or potentially involved considerations of efficiency, safety, aesthetics, and cost). Given that AHAC allegedly "organized, directed, arranged, supervised and controlled" the June Day ceremony for years without any prior report of injury, it is plausible that MANG could have weighed the various policy considerations and favored the lower cost and greater efficiency of relying on AHAC generally when it came to safely managing spectators. Cf. Carroll v. United States, 661 F.3d 87, 104 (1st Cir. 2011) (applying the discretionary function exception where the government ceded responsibility for managing known safety risks to independent contractors); Wood v. United States, 290 F.3d 29, 40 (1st Cir. 2002) (holding that the "delegation of the responsibility for safety issues to the contractor suggests that . . . the [Navy] had determined already that in obtaining the 'best value' for the American taxpayer, worker safety should be a primary concern of the contractor" rather than the Navy).

One can imagine circumstances in which such policy considerations could not plausibly have informed MANG's conduct. Imagine, for example, that unprotected individuals were standing an arm's length away from the howitzers as MANG prepared to fire. With MANG thus on notice that AHAC's safety precautions were failing and that spectators were in imminent danger, the government's proffered policy justifications for firing the howitzers "may be so far-fetched as to defy any plausible nexus between the challenged conduct and the asserted justification." Shansky, 164 F.3d at 695; accord Hajdusek, 895 F.3d at 152 (predicting that a decision to have Marine Corps recruits "jump off a twenty-foot high cliff onto concrete" during training would not be protected, as such a decision would "amount to a complete rejection" of safety considerations).

Such cases, though, "invariably involve extreme circumstances." Shansky, 164 F.3d at 695. As in Hajdusek, Davallou's complaint alleges no facts "supporting an inference that [the defendant] would have [had] reason to know ex ante that the [challenged conduct] was sufficiently likely to cause serious injury as to deem it the product of a rejection of a policy goal rather than a balancing of such goals." 895 F.3d at 153. Rather, the complaint alleges in conclusory terms that MANG fired artillery in a ceremony organized and controlled by AHAC without first issuing a warning or making a "reasonable effort to keep members of the public including plaintiff a safe distance from said artillery." In similarly vague terms, the complaint further alleges that MANG fired that artillery "in close proximity to civilians," including Davallou, even though "[t]he level of noise and/or sonic waves produced by the firing of said military artillery . . . was sufficient to cause tinnitus,

permanent damage to hearing, and other injury to human beings." We do not know from the complaint where in the park the ceremony was held, how close AHAC allowed the public (including Davallou) to get to the howitzers at the time of the artillery salute, or whether anyone was even aware of Davallou's presence when the howitzers were fired. We also do not know how far from the howitzers the public would have had to stand in order to avoid any substantial risk of hearing loss. Nor is there reason to believe that anyone else had previously suffered injury as a result of AHAC's supervision of the annual June Day ceremony. Without at least some such averments, Davallou has not carried his burden of alleging facts that could support a finding that MANG exhibited such a complete disregard for public safety that its decisions could not have been driven by policy analysis. See Gaubert, 499 U.S. at 324–25.

In arguing to the contrary, Davallou points to a line of cases from the Ninth Circuit holding that a "decision not to warn of a specific, known hazard for which the acting agency is responsible is not the kind of broader social, economic or political policy decision that the discretionary function exception is intended to protect." Sutton v. Earles, 26 F.3d 903, 910 (9th Cir. 1994) (emphasis added); accord, e.g., Green v. United States, 630 F.3d 1245, 1252 (9th Cir. 2011) (finding that the discretionary function exception did not apply to the Forest Service's failure to warn property owners of its decision to light a backfire nearby). But none of the Ninth Circuit cases Davallou relies on dealt with the policy consideration applicable here (the advantages of relying on AHAC as before). And if we were to read those cases as broadly as Davallou does, they would place outside the discretionary function exception all instances in which the

government knowingly creates a risk of injury without issuing a warning, even if the risk is minimal and a particular type of warning would undermine competing policy interests. Such a sweeping approach is contrary to our precedents. We have previously rejected the notion that "when safety becomes an issue, all else must yield." Shansky, 164 F.3d at 693 (explaining that "there is no principled basis for superimposing a generalized 'safety exception' upon the discretionary function defense"). Rather, as we have already explained, a "case-by-case approach is required." Id.; accord Hajdusek, 895 F.3d at 150.

Davallou falls back on the argument that MANG's conduct was "not readily amenable to policy analysis" because it implicated only "technical safety assessments conducted pursuant to prior policy choices." Shansky, 164 F.3d at 694; see also Berkovitz v. United States, 486 U.S. 531, 547 (1988) (concluding that the government's approval of an unsafe vaccine batch was not susceptible to policy analysis because the government had failed to follow already-settled scientific criteria for assessing vaccine safety). In advancing this argument, he relies solely on a training manual prepared by the U.S. Army Public Health Command, entitled "Readiness through Hearing Loss Prevention," which recognizes that firing a 155-millimeter howitzer creates a risk of hearing loss. But, unlike the vaccine safety standards in Berkovitz, the training manual does not purport to establish concrete safety criteria that account for any risk to public safety or any of the other competing interests that MANG might have considered in this instance. Rather, the manual simply explains how noise can cause hearing loss, how service members using military equipment can protect themselves from noise, and how hearing loss can adversely affect

readiness for combat. This sort of general educational information does not remove MANG's conduct in this case from the realm of policy decisions. Cf. Shuman v. United States, 765 F.2d 283, 285–86, 293–94 (1st Cir. 1985) (finding that the Navy's promulgation of advisory safety guidelines for shipyards did not eliminate the Navy's discretion to prioritize production over safety).

III.

This is a challenging case, and a sad one. Assuming that his allegations are true, Davallou was simply taking a walk through one of our country's most celebrated city parks when, through no fault of his own, he was exposed to noise loud enough to cause permanent hearing damage. Our federal government, however, does not allow itself to be sued for its discretionary decisions, even bad ones, so long as they are reasonably susceptible to policy analysis. And on the facts alleged, additional precautions were not so obviously needed that the decisions to proceed according to tradition and to leave the management of spectators to AHAC fell outside the realm of possible policy decisions. We therefore affirm the judgment of the district court.

APPENDIX B

06/25/2019

46

District Judge Leo T. Sorokin:

ELECTRONIC ORDER entered.

Magistrate Judge Boal, acting under the authority of a referral, Doc. No. 29, issued a Report and Recommendation, Doc. No. 40, recommending that the Court allow the Motion to Dismiss for Lack of Jurisdiction filed by the United States, Doc. No. 20. The plaintiff filed an objection to Judge Boal's recommendation, Doc. No. 41, and later supplemented with an argument not advanced before Judge Boal, Doc. No. 42. The United States filed a reply, Doc. No. 45, arguing that the Court ought to adopt Judge Boal's recommendation. After de novo review of the Motion to Dismiss, the Court ADOPTS Judge Boal's recommendation, ALLOWS the Motion to Dismiss, Doc. No. 20, and DISMISSES this action as to the United States for lack of subject matter jurisdiction for the reasons expressed in Judge Boal's recommendation. As to the argument first advanced in the supplemental objection, the Court allows the motion to dismiss for failure to advance the argument before Judge Boal and for the reasons expressed in the reply of the United States, each of which alone is sufficient grounds to overrule that objection. As to the remaining defendants, the case shall proceed on the schedule established by Judge Boal pursuant to the existing referral. (Montes, Mariliz) (Entered: 06/25/2019)

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

A. MICHAEL DAVALLOU,
Plaintiff,
v. Civil Action No. 18-10822-LTS

ANCIENT & HONORABLE ARTILLERY COMPANY OF MASSACHUSETTS, EMERY A. MADDOCKS, JR., and UNITED STATES OF AMERICA,
Defendants.

REPORT AND RECOMMENDATION
ON GOVERNMENT'S MOTION TO DISMISS
[Docket No. 20]

May 23, 2019

Boal, M.J.

Plaintiff A. Michael Davallou alleges that defendants, Ancient & Honorable Artillery Company of Massachusetts ("AHAC"), Emery A. Maddocks, Jr. and the United States of America, fired "military artillery" in connection with an annual ceremonial salute that caused Davallou permanent hearing damage. Docket No. 1 ("Compl.").[1] The government has moved to dismiss the complaint. Docket No. 20.

[1] Citations to "Docket No. ___" are to documents appearing on the Court's electronic docket. They reference the docket number assigned by CM/ECF, and include pincites to the page numbers appearing in the top right corner of each page within the header appended by CM/ECF.

For the following reasons, the undersigned recommends[2] that the District Judge grant the motion.

I. PROCEDURAL HISTORY

On April 27, 2018, Davallou filed the instant complaint, in which he alleges negligence against the United States, acting through the Massachusetts Army National Guard ("MANG"),[3] pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674. Compl. ¶¶ 9, 11, 14, 33- 41. On September 20, 2018, the government filed a motion to dismiss. Docket No. 20. Davallou opposed the motion and the government filed a reply brief. Docket Nos. 24, 28. This Court heard oral argument on May 1, 2019.

II. FACTS[4]

Every June, between at least 2010 and 2014, AHAC held a change of command ceremony on the

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[2] On November 19, 2018, the District Judge referred this case to the undersigned for full pretrial management and a report and recommendation on dispositive and non-dispositive motions. Docket No. 29.

[3] For purposes of the motion to dismiss only, the United States concedes that the MANG guardsmen were acting as federal employees at the time of the incident. Docket No. 21 at 2 n.2, 3 n.4. Whether a national guardsman is acting as a state or federal employee at the time of a particular incident is a complicated question. See Charles v. Rice, 28 F.3d 1312, 1315 (1st Cir. 1994).

[4] Because this case is presently before this Court on a motion to dismiss, this Court sets forth the facts taking as true all well-pleaded allegations in the complaint and drawing all reasonable inferences in Davallou's favor. See Morales-Tañon v. P.R. Elec. Power Auth., 524 F.3d 15, 17 (1st Cir. 2008).

Boston Common in Boston, Massachusetts. Id. ¶¶ 15, 16. The ceremony celebrated AHAC's annual change of officers and involved the firing of military artillery in the presence of members of the public. Id. ¶¶ 15, 17. Davallou alleges that during the ceremony, which was controlled by AHAC, MANG provided and fired the military artillery. Id. ¶¶ 16, 20. Davallou further alleges that when fired, the artillery produced a level of noise more than twice the City of Boston's legal limit, which is sufficient to cause permanent hearing damage. Id. ¶¶ 18, 19. On June 1, 2015, Davallou was present on the Boston Common during the ceremony, and consequently alleges that he suffered serious and permanent injury. Id. ¶¶ 25, 32.

Davallou alleges that MANG was negligent for reasons including (1) failure to warn the public of the risk; and (2) failure to keep members of the public outside of the zone of danger. Id. ¶¶ 26, 31.

III. DISCUSSION

A. Standard Of Review

Federal courts are courts of limited jurisdiction. Destek Grp., Inc. v. State of N.H. Pub. Util. Comm'n, 318 F.3d 32, 38 (1st Cir. 2003) (noting that the Constitution expressly limits the power of lower courts). The proper vehicle for challenging a court's subject matter jurisdiction, including a challenge based on sovereign immunity, is Rule 12(b)(1) of the Federal Rules of Civil Procedure. Valentin v. Hosp. Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001); see also Adams v. Mass. Dep't of Revenue, Child Support Enf't Div., 510 F. Supp. 2d 157, 159 (D. Mass. 2007). Here, the government has moved to dismiss the complaint under Rule 12(b)(1)

for lack of subject matter jurisdiction and under Rule 12(b)(6) because it fails to state a claim on which relief can be granted. In particular, it argues that there is no waiver of sovereign immunity because the discretionary function exception to the FTCA applies and there is no private person analog for liability. This Court finds that the motion is properly decided under Rule 12(b)(1) because the grounds on which the government moves are jurisdictional. See McCloskey v. Mueller, 446 F.3d 262, 266-70 (1st Cir. 2006).

The party claiming that there is jurisdiction carries the burden of showing that the court has jurisdiction. Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995). When considering a motion to dismiss under Rule 12(b)(1), "the district court must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff." Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996) (citation omitted). A court may also consider matters outside the pleadings. Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002) ("While the court generally may not consider materials outside the pleadings on a Rule 12(b)(6) motion, it may consider such materials on a Rule 12(b)(1) motion."). Therefore, this Court will consider a U.S. Army manual provided by Davallou, Docket No. 24-1, as well as factual statements made by the United States that are not contained in the complaint. See, e.g., Docket No. 28 at 6 & n.4.

B. This Court Lacks Subject Matter Jurisdiction Over Davallou's FTCA Claim

Under the doctrine of sovereign immunity, the United States is immune from suit unless it has

consented to be sued. Skwira v. United States, 344 F.3d 64, 72 (1st Cir. 2003) (citing United States v. Mitchell, 445 U.S. 535, 538 (1980)). However, the FTCA provides a limited waiver of sovereign immunity for tort actions against the United States. Sosa v. AlvarezMachain, 542 U.S. 692, 700 (2004). Specifically, the FTCA permits individuals to sue the government

> for injury or loss of property, or personal injury or death 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)(1). "As with all waivers of sovereign immunity, the FTCA must be 'construed strictly in favor of the federal government, and must not be enlarged beyond such boundaries as its language plainly requires.'" Bolduc v. United States, 402 F.3d 50, 56 (1st Cir. 2005) (citation omitted). The government argues that this Court lacks subject matter jurisdiction over the FTCA claim here because the waiver of the United States' sovereign immunity does not extend to matters that are committed to the discretion of federal actors nor to acts for which there is no liability for private persons under state law. Docket No. 20.

1. Discretionary Function Exception

Any waiver of sovereign immunity under the FTCA does not apply to "discretionary functions." Section 2680(a) provides that the FTCA shall not apply to:

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

28 U.S.C. § 2680(a). Therefore,

> [e]ven where the government conduct would create state tort liability in a suit against a private party, the FTCA provides that sovereign immunity is not waived if the challenged governmental action involved the exercise of discretion. 28 U.S.C. § 2680(a). This provision is known as the discretionary function exception. In general, that exception, in turn, is inapplicable if the government action is contrary to the requirements of Federal law. United States v. Gaubert, 499 U.S. 315, 324-25, 111 S. Ct. 1267, 113 L.Ed.2d 335 (1991).

Abreu v. United States, 468 F.3d 20, 23 (1st Cir. 2006). In carving out this exception, Congress intended to prevent courts from second-guessing the discretionary choices of federal agents who implement the government's policy choices. Hajdusek v. United States, 895 F.3d 146, 153 (1st Cir. 2018); see United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984). The Supreme Court has promulgated a two-part test to determine when the discretionary function exception applies: "first, whether the act had an element of choice so that no federal statute, rule, or regulation specifically prescribes how the agency must act; second, whether the act in question is based on public policy considerations or 'susceptible to policy analysis.'" Mahon v. United States, 865 F. Supp. 2d 143, 147 (D. Mass. 2012), aff'd, 742 F.3d 11 (1st Cir. 2014) (citing Gaubert, 499 U.S. at 324-25). "There is no 'requirement that the government, as a prerequisite to invoking the discretionary function exception, demonstrate that a policy judgment was made. The discretionary function exception applies to all acts and omissions that are susceptible to policy analysis, whether or not that analysis has been performed on a given occasion.'" Mahon, 865 F. Supp. 2d at 147 (quoting Fothergill v. United States, 566 F.3d 248, 253 (1st Cir. 2009)). If an action meets both prongs of the discretionary function test and therefore falls within that exception, even an abuse or negligent exercise of discretion is not actionable. McCloskey v. Mueller, 385 F. Supp. 2d 74, 80 (D. Mass. 2005), aff'd, 446 F.3d 262 (1st Cir. 2006).

Davallou challenges two discrete actions on the part of the government: its alleged failure to (1) warn him of a specific, known health hazard, namely the possibility of hearing impairment as a result of its

firing artillery; and (2) maintain a safety zone for bystanders during such firing. Docket No. 24 at 8.[5] He concedes that these actions are discretionary.[6] Id. at 10. Accordingly, for purposes of deciding the motion to dismiss, the first part of the discretionary function exception is met.

With respect to the second prong, Davallou bears the burden of demonstrating that the government's conduct was not susceptible to policy analysis. See Evans v. United States, 876 F.3d 375, 383 (1st Cir. 2017). The word "susceptible" is critical. A court must not ask whether the alleged federal tortfeasor was in fact motivated by a policy concern, but rather whether the decision in question was of the type that policy analysis could inform. Hajdusek, 895 F.3d at 150. The law presumes that it is. Mahon, 742 F.3d at 16. Therefore, Davallou must rebut that presumption, which he has not done. Here, choosing whether and how to provide warnings and/or safe zones for bystanders during the ceremonial firing of artillery involves decisions about which reasonable people could differ. The government cites to the following considerations that make the decisions susceptible to policy analysis: potential harm to third persons, enhancement of public relations, support of historical and ceremonial functions, resources, and military training. Docket No. 28 at 7. The potential

[5] The government cites to a lengthier list of potentially discretionary acts that form the basis of Davallou's complaint. Docket No. 21 at 10-11. Davallou's brief makes clear that his allegations against the government are based on only two acts. Docket No. 24 at 8

[6] For this reason, this Court need not address the government's arguments pertaining to Boston city ordinances or Army regulations.

policy decisions here could have been informed by a need to balance all those factors. In other words, those choices are readily susceptible to policy analysis. So long as there is room for differing policy judgments, there is discretion of the type and kind shielded by Section 2680(a). Fothergill, 566 F.3d at 253 (citing Berkovitz v. United States, 486 U.S. 531, 537 (1988); Shansky v. United States, 164 F.3d 688, 692-93 (1st Cir. 1999)). Such is the case here. Davallou has failed to carry his burden to convince this Court otherwise. Rather, he argues that the government did not make the correct policy decisions. He cites to a 2014 U.S. Army pamphlet regarding hearing loss prevention. See Docket No. 24-1. He then argues that the government made the decisions at issue in the case in the face of "known health hazards." Docket No. 24 at 10. He also states that the challenged conduct cannot be justified based on, for example, "policy considerations of aesthetics versus safety." Id. at 11. That is not the correct test. The question, for purposes of determining if the discretionary function exception should apply, is whether the decision is susceptible to policy analysis, not whether such analysis was correctly applied. To the extent that Davallou argues that the government exercised its discretion negligently, that argument is to no avail. If the subject actions satisfy the exception to sovereign immunity, the exception applies whether the decision maker acted negligently or abused the granted discretion. Fothergill, 566 F.3d at 254. Accordingly, the discretionary function exception to the FTCA applies and this Court lacks subject matter jurisdiction over the claim.

2. FTCA And "Private Person" Analogy

Even if the conduct at issue were not protected by the discretionary function exception, this Court lacks jurisdiction over the FTCA claim under the "private person" analogy. Courts only have jurisdiction to hear FTCA claims against the United States where its liability is coextensive with that of a "private individual under like circumstances." 28 U.S.C. § 2674; Soto-Cintron v. United States, 901 F.3d 29, 33 (1st Cir. 2018); McCloskey, 385 F. Supp. 2d at 81. "This requirement is to be read liberally." Soto-Cintron v. United States, 227 F. Supp. 3d 178, 183 (D.P.R. 2017), aff'd, 901 F.3d 29 (1st Cir. 2018). As the Supreme Court has stressed, the phrase "like circumstances" does not restrict a court's inquiry to the same circumstances, but rather requires it to look further afield for "private person" analogies to the conduct in question. Id. (citing United States v. Olson, 546 U.S. 43, 46 (2005)); see Indian Towing Co. v. United States, 350 U.S. 61, 64, 67 (1955) (The "presence of identical private activity" is not required to find a private analog because the FTCA's statutory phrase "under like circumstances" does not mean "under the same circumstances.") (emphasis in original). "[F]or liability to arise under the FTCA, a plaintiff's cause of action must be comparable to a cause of action against a private citizen recognized in the jurisdiction where the tort occurred, and his allegations, taken as true, must satisfy the necessary elements of that comparable state cause of action." Abreu, 468 F.3d at 23 (citations and internal punctuation omitted). The fact that a case involves a peculiarly governmental function does not necessarily preclude FTCA coverage. Butt v. United States, 714 F. Supp. 2d 217, 218 (D. Mass. 2010) (citing Sea Air

Shuttle Corp. v. United States, 112 F.3d 532, 536 (1st Cir. 1997)). However, Davallou must identify a basis for holding a private person liable in tort for acts comparable to those alleged here.

In this case, the analysis must be performed under Massachusetts law because all the allegedly tortious acts occurred in Massachusetts. See Bolduc, 402 F.3d at 56 (citing 28 U.S.C. § 1346(b)(1); FDIC v. Meyer, 510 U.S. 471, 478 (1994)) (citation omitted). To maintain a cause of action for negligence in Massachusetts, a plaintiff must show (1) a duty of reasonable care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. Matouk v. Marriott Hotel Servs., Inc., No. 11-12294-LTS, 2013 WL 6152333, at *1 (D. Mass. Nov. 21, 2013) (citing Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 39 (2009)). Davallou maintains that the most analogous "private person" is one handling a dangerous instrumentality in a public setting. Docket No. 21 at 3-6. He specifically claims that a private person can purchase and fire a working reproduction military howitzer, and if that person does so and injures a bystander, he or she would be civilly liable under Massachusetts negligence law. Id. at 13. He also argues that Massachusetts law imposes a heightened duty of care on persons dealing with dangerous instrumentalities, such as firearms. Docket No. 24 at 14 (citing to Jupin v. Kask, 447 Mass. 141, 151 (2006)). Accordingly, Davallou argues that the government is liable under the FTCA.

This Court disagrees. First, Davallou incorrectly cites to the duty imposed by Jupin on gun owners. The private analog requirement, however,

focuses on liability. 28 U.S.C. § 1346(b)(1). Second, in the most comparable cases, courts have applied state immunity statutes to suits alleging torts by members of the National Guard. For example, in Ecker v. United States, the U.S. Court of Appeals for the Fifth Circuit concluded that the Mississippi Emergency Management Law ("MEML") immunized a National Guard member involved in a car accident from Mississippi tort liability and, in turn, the FTCA. Ecker, 358 Fed. Appx. 551, 552-53 (5th Cir. 2009). The Fifth Circuit explained that "[t]reating the United States as a private individual in similar circumstances, that is, as a private individual engaged in emergency management activities for the state of Mississippi, means the United States is also immune under [the MEML]." Id. at 553; see also Lumpkin v. Lanfair, No. 09-6248, 2010 WL 3825427, at *4-5 (E.D. La. Sept. 23, 2010) (same under Louisiana law). Massachusetts similarly has a law, M.G.L. c. 33, § 53, which immunizes officers and enlisted persons for civil liability arising from damage to property or injury that they cause while performing military duties.[7] Due to M.G.L. c. 33, § 53's grant of

[7] M.G.L. c. 33, § 53 provides:

> [n]o officers or enlisted persons shall be liable, either civilly or criminally, for any damage to property or injury to any person, including consequential death, caused by them or by their order, while performing any military duty lawfully ordered under this chapter, unless the act or order causing such damage or injury was manifestly beyond the scope of the authority of such officers or enlisted persons and except as otherwise provided by chapter 258.

M.G.L. c. 33, § 53. An "Enlisted person" is defined as "a member, other than a commissioned officer or a warrant officer, in the military forces of the commonwealth." M.G.L. c. 33, § 1. "Military

immunity, it appears that this Court lacks subject matter jurisdiction over the FTCA claim. Davallou has cited no contrary authority. Instead, he argues that M.G.L. c. 33, § 53 is not dispositive of the private person analog because it does not pertain to "private persons" and would "effectively superimpose a 'state actor' standard over the 'private person' standard," rendering that standard meaningless. Docket No. 24 at 5-6.

However, the First Circuit has framed the inquiry as follows:

> The search for analogous state-law liability is circumscribed by the explicit language of the FTCA, which restricts that search to private liability. In other words, we must look for "some relationship between the governmental employee[ ] and the plaintiff to which state law would attach a duty of care in purely private circumstances." The flip side of this coin is that we are not at liberty to derive analogues from instances in which state law enforcement officers—and only state law enforcement officers—would be liable under state law.

McCloskey, 446 F.3d at 267 (citations omitted; emphasis in original). To the extent the challenged

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forces of the commonwealth" includes the "organized militia" and "members of the unorganized militia." Id. The "organized militia" is composed of, inter alia, the "armed forces of the commonwealth," which consists of the active and inactive national guard. M.G.L. c. 33, §§ 4, 10.

actions here have no private counterpart in state law, FTCA liability cannot result. See Bolduc, 402 F.3d at 57; McCloskey, 446 F.3d at 267. For all of these reasons, this Court finds that the private person analog requirement of the FTCA precludes jurisdiction over the claims against the United States.

IV. RECOMMENDATION

For the foregoing reasons, the undersigned recommends that the District Judge grant the motion to dismiss.

V. REVIEW BY DISTRICT JUDGE

The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72(b), any party who objects to these proposed findings and recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of service of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. *See* Fed. R. Civ. P. 72. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Fed. R. Civ. P. 72(b) will preclude further appellate review of the District Court's order based on this Report and Recommendation. See Phinney v. Wentworth Douglas Hosp., 199 F.3d 1 (1st Cir. 1999); Sunview Condo. Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962 (1st Cir. 1997); Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993).

/s/ Jennifer C. Boal
JENNIFER C. BOAL
United States Magistrate Judge