

United States Court of Appeals for the Fifth Circuit

No. 25-20180

JUSTINA GARCIA; ULYSSES VALLADARES,

Plaintiffs—Appellees,

versus

UNITED STATES OF AMERICA,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-3196

Before STEWART, HIGGINSON, and HO, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

This case involves the tragic death of a hostage who was accidentally shot and killed by a federal agent during an unsuccessful rescue operation. After a three-day bench trial, the district court held that the Government was liable under the Federal Tort Claims Act¹ (FTCA) and awarded damages and attorney’s fees to the plaintiffs. For the following reasons, we AFFIRM

¹ 28 U.S.C. §§ 2671–2680.

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as to liability but REVERSE and REMAND with respect to damages and attorney's fees.

I. FACTUAL & PROCEDURAL BACKGROUND

On January 24, 2018, Ulises Valladares and his twelve-year-old son, Ulysses Valladares, were at their home in Houston, Texas when two intruders, Nicholas Chase Cunningham and Jimmy Tony Sanchez, entered the residence. Once inside the home, Cunningham and Sanchez bound Ulises and Ulysses with duct tape and attempted to obtain information from Ulises about his brother, Ernesto Valladares.² The intruders then took Ulises from his home (still bound) and moved him to a different location. After his father was taken, Ulysses was able to break free and go to a neighbor's house where he called for help.

Law enforcement arrived to investigate the kidnapping and ultimately contacted the Federal Bureau of Investigation (FBI) to assist in the search and rescue of Ulises. After being contacted to help with the rescue, the FBI determined that a Special Weapons and Tactics (SWAT) team would attempt the rescue. Prior to being deployed, the SWAT team was briefed on the FBI's Policy Statement regarding the "Use of Deadly Force." The Policy stated in pertinent part that federal agents and law enforcement "may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person."

² The plaintiffs' Third Amended Complaint alleges that Cunningham and Sanchez were acting at the direction of (or in concert with) two individuals named Delia Velasquez and Sophia Heath.

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After receiving the news that Ulises had been moved to a house at a different location, the SWAT team was briefed on a new operational plan.³ Special Agents Jeffrey Hawkins and Gavin Lappe were assigned to the south side of the house where Agent Hawkins was tasked with porting (*i.e.*, breaking) a window using a Halligan tool. The plan was for Agent Hawkins to then enter the home through the window and provide intelligence from inside. Meanwhile, other members of the SWAT team were assigned to enter the house from the front.

When Agents Hawkins and Lappe approached the house, it was dark outside. To avoid detection, they did not use a flashlight. The agents then approached the window closest to the front of the house, and after receiving the command, Agent Hawkins began to port the window with the Halligan tool. As he was breaking the window, Agent Hawkins inadvertently dropped the Halligan tool inside the house, so he quickly moved away from the window, and Agent Lappe provided cover.

According to the record, Agent Hawkins stated that he then turned away from the broken window, heard yelling, looked back at the broken window, and saw a silhouette of a person within the house leaning out of the window. Agent Hawkins stated that the individual in the window appeared to be in a “shooting stance” which led him to believe the person may have a weapon. Agent Hawkins then heard two gunshots and although he did not know where the shots came from, he believed they came from inside of the house. After the shots were fired, Agent Lappe stated, “I shot” and “he grabbed my gun,” referring to the individual inside the house.⁴ It was quickly

³ The facts provided in the Government’s brief on appeal detailing its account of the shooting are taken in large part from its Motion to Dismiss.

⁴ The Government notes in its brief on appeal that “Agent Hawkins later testified that agents have the discretion to use lethal force if someone grabs an agent’s gun.”

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determined that the person who was shot was the hostage, Ulises, who passed away shortly after the shooting.

In September 2018, Brooke Pearce, acting as next friend of Ulysses and sole managing conservator, filed suit against Agent Lappe⁵ in his individual capacity advancing a *Bivens*⁶ claim for damages. Later, Ulysses and his mother, Justina Garcia (collectively referred to as “the plaintiffs”), filed an amended suit. They sued the kidnappers, Cunningham, Sanchez, Sophia Heath, and Delia Velasquez.⁷ They also listed the United States as a defendant, alleging claims under the FTCA. The plaintiffs’ amended complaint included claims for false imprisonment, assault and battery, negligence, gross negligence, and wrongful death. It also included a survival claim and a claim that the federal agents were improperly trained, disciplined, and used improper techniques and strategies that resulted in Ulises’s suffering and death.

The kidnappers never answered, and the plaintiffs abandoned their civil law claims against them. Agent Lappe then moved to dismiss the plaintiffs’ *Bivens* claim against him, asserting both qualified immunity and failure to state a claim. The district court denied Agent Lappe’s motion, and he filed an interlocutory appeal in this court. On interlocutory appeal, a panel of this court reversed the district court’s denial of qualified immunity to Agent Lappe. *See Pearce v. Doe*, No. 20-20372, 849 F. App’x 472 (5th Cir.

⁵ Agent Lappe was originally referred to as “FBI Agent Doe” for purposes of confidentiality.

⁶ *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁷ The plaintiffs allege in their Third Amended Complaint that Sophia Heath and Delia Velasquez contrived the plan to kidnap Ulises to obtain information about Ernesto Valladares.

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Mar. 9, 2021) (per curiam). In reversing the district court’s order denying qualified immunity, the panel explained that “[h]ere, the only plausible reading of the allegations is that Doe accidentally shot Ulises while trying to help him by ending the hostage situation. Such accidental conduct does not result in a Fourth Amendment seizure.” *Id.* at 475.

The matter was then remanded to the district court and on October 17, 2024, the case proceeded to a three-day bench trial on the plaintiffs’ FTCA claim against the Government. On March 3, 2025, the district court issued a “Memorandum of Findings of Fact, Conclusions of Law and Final Judgment.” In its memorandum opinion, the district court determined that the United States was liable under the FTCA and that the discretionary function exception did not apply. In so holding, it reasoned that:

With respect to the two-prong test set out in *Gonzalez*,⁸ the question to be addressed by the [c]ourt is whether Agent [] Lappe[’s] use[] [of] deadly force on the occasion was a matter of choice, and whether his judgment was of a kind that the discretionary function exception was designed to shield. Agent Lappe was authorized to use deadly force only in a circumstance where Agent Hawkins[’s] [life] or his life was threatened. The [c]ourt determines that the discretionary function exception was not designed to shield the United States where, as here, Agent Lappe acted negligently, even grossly negligent, in shooting the silhouette in the window without knowing who he was shooting and, furthermore, when there was no threat directed toward him or Agent Hawkins. The evidence is conclusive, he shot the silhouette after Agent Hawkins had completed his assignment.

⁸ In *Gonzalez v. United States*, this court examined the two-prong test that is used to determine when the discretionary function exception applies to “preserve[] the federal government’s immunity [from suit] when an employee’s acts involve the exercise of judgment or choice.” 851 F.3d 538, 543–44 (5th Cir. 2017).

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The district court then concluded based on that reasoning that the discretionary function exception did not apply, Agent Lappe was negligent or grossly negligent in his actions during the incident, and the shots he fired were “the sole cause of [Ulises’s] death.”

The district court further determined that the plaintiffs were entitled to compensatory, economic and non-economic damages, pursuant to Texas law. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(8). It awarded a total of \$611,000 in damages to Garcia: (1) \$103,500 for the loss of financial support derived from Ulises; (2) \$500,000 for pecuniary losses; and (3) \$7,500 for funeral expenses and travel costs. It awarded a total of \$1,304,000 in damages to Ulysses: (1) \$654,000 for the loss of financial support derived from Ulises’s income; (2) \$150,000 for the loss of inheritance; and (3) \$500,000 for pecuniary losses. The district court also awarded attorney’s fees to the plaintiffs in the amount of \$475,000, “representing approximately 25% of the total award pursuant to 28 U.S.C. § 2678.”

After the district court issued its final judgment, the plaintiffs moved for reconsideration. In their motion, they asked the district court to reconsider the damages award in light of other recent cases involving shootings by federal agents. They requested that the district court increase their damages to a minimum of \$5,000,000 each “consistent with other FTCA wrongful death claims and in the interest of justice and equal protection under the law.” The district court denied their motion for reconsideration without reasons.⁹

The Government also moved for reconsideration of the district court’s final judgment on grounds that the district court improperly issued a

⁹ On appeal, the plaintiffs do not brief an argument challenging the district court’s denial of their motion for reconsideration thus we do not address the issue herein.

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separate award of attorney's fees under the FTCA. *See* 28 U.S.C. § 2678; The district court did not expressly rule on the Government's motion but issued an amended final judgment increasing Garcia's total damages award from \$611,000 to \$762,525 and Ulysses's total damages award from \$1,304,000 to \$1,627,475. The amended judgment then provided that "attorney's fees are limited to 25% of the judgment" pursuant to 28 U.S.C. § 2678, without providing a separate dollar amount.

The Government filed this appeal.¹⁰

II. DISCUSSION

On appeal, the Government advances two primary arguments. We first review its contention that the district court erred in holding that the United States is liable under the FTCA on grounds that Agent Lappe acted negligently in shooting and killing Ulises during the hostage situation. We then address its argument that the district court improperly inflated the plaintiffs' damages awards to provide a separate award of attorney's fees.

A. Liability

(1) Standard of Review

When reviewing a district court's decision after a bench trial, we review legal issues de novo and the court's findings of fact for clear error. *Hess Corp. v. Schlumberger Tech. Corp.*, 26 F.4th 229, 232–33 (5th Cir. 2022). Factual findings made during a bench trial are given great deference on

¹⁰ Both parties appealed the district court's final judgment and related opinions and orders. The plaintiffs, however, do not brief any arguments in support of their cross-appeal, and instead only include arguments in their responsive brief to the Government. We thus consider their cross-appeal abandoned and any issues they purport to have raised in it forfeited. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021) ("A party forfeits an argument . . . by failing to adequately brief the argument on appeal."); *see also* FED. R. APP. P. 28.1(c)(1)–(2).

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appeal. *Id.* at 233. A district court’s fact-findings, “whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.” *Le v. United States*, 138 F.4th 264, 274 (5th Cir. 2025); *see also* FED. R. CIV. P. 52(a)(6).

A “district court’s finding of fact is clear error only if it is implausible in the light of the record considered as a whole.” *Le*, 138 F.4th at 274 (cleaned up). “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Hess Corp.*, 26 F.4th at 233 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)). We give “even greater deference to the trial court’s findings when they are based on determinations of credibility.” *Id.* (quoting *Deloach Marine Servs. L.L.C. v. Marquette Transp. Co.*, 974 F.3d 601, 607 (5th Cir. 2020)).

(2) *Law & Analysis*

“The United States enjoys sovereign immunity from suit, meaning it cannot be sued without consent.” *Gonzalez v. United States*, 851 F.3d 538, 543 (5th Cir. 2017). The FTCA, however, “provid[es] a waiver of sovereign immunity and [] the sole basis of recovery for tort claims against the United States.” *Id.* Thus, under the FTCA, lawsuits may be brought against the United States for claims arising under state law for the recovery of damages. *Battieste v. United States*, 173 F.4th 654, 656–57 (5th Cir. 2026); 28 U.S.C. § 2674. This waiver, however, is subject to what is known as the “discretionary function exception,” which “preserves the federal government’s immunity . . . when an employee’s acts involve the exercise of judgment or choice.” *Gonzalez*, 851 F.3d at 543.

The exception is provided in 28 U.S.C. § 2680(a):

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute

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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.

“A two-prong test determines whether the exception applies: (1) the conduct must be a matter of choice for the acting employee; and (2) the judgment must be of the kind that the discretionary function exception was designed to shield.” *Gonzalez*, 851 F.3d at 543–44 (cleaned up). The exception only applies if both prongs are met. *Id.* at 544.

After the bench trial in this case, the district court held that (1) Agent Lappe was negligent, even grossly negligent, in his response to the hostage situation; (2) the shot(s) that Agent Lappe fired were the sole cause of Ulises’s death; and (3) the discretionary function exception was not designed to shield the Government where Agent Lappe acted negligently in shooting an unidentified figure in a window when there was no threat to either agent.

On appeal, the Government contends that the district court erred in finding that Agent Lappe acted negligently in firing his weapon because its factual findings underlying that conclusion are not supported by the record. The Government continues that, at a minimum, the district court erred in making adverse credibility findings against Agents Lappe and Hawkins. In support of its argument, the Government points to numerous fact-findings that the district court made that it avers are unsupported by record evidence. The Government concedes that while some of its contended errors may not be material when viewed in isolation, when taken together, they demonstrate “that the district court was issuing a judgment based on a course of events that never happened.”

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The Government first takes issue with the district court's fact-finding that, contrary to the agents' statements, there was no record evidence to support that Ulises leaned out the window, was able to see either agent, pointed or extended his hands through the window toward either agent, grabbed Agent Lappe's weapon, or in any manner threatened the safety of the agents. The Government further challenges the district court's fact-findings that: (1) the FBI knew where Ulises was being held or where the kidnappers were; (2) Agent Lappe was out of view from the inside of the room; (3) Agent Hawkins saw a silhouette through the window when Agent Lappe fired shots at the silhouette; (4) there was a photograph in the record of the window in the room where Ulises was being held and there was evidence in the record regarding the speed at which the events developed; (5) Heath's testimony refutes Agent Lappe's statements after he shot Ulises; (6) Agents Hawkins and Lappe knew where Ulises and the kidnapper were located and assumed Ulises was in or near the room where the window was ported; (7) Agents Hawkins and Lappe saw Ulises rise from the couch and turn toward the window after the window was broken; (8) Ulises was immediately shot when he turned toward the window; (9) the agents intended to or confirmed they did create a dangerous situation; (10) it was feasible for Agent Lappe to give a verbal warning before shooting Ulises; (11) Ulises never came in contact with Agent Lappe's weapon; and (12) Ulises's autopsy report contradicted the agents' statements as to the position of Ulises's body when he was shot.

According to the Government, the record contains no evidence of what the district court "considered that contradicted the statements, reports, and remarks Agents Hawkins and Lappe made that [Ulises] leaned out the window, was able to see either [a]gent, pointed his hands through the window toward either agent, grabbed Agent Lappe's weapon, and possibly threatened the safety of the [a]gents." The Government further maintains

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that, even if Agent Hawkins was mistaken as to the facts, there is no evidence that he intentionally lied about them “as opposed to misperceived the threat in a fast-moving, tense situation.”

Contrary to the Government’s position, however, the district court did consider and rely on substantial record evidence when it determined that the agents’ statements regarding the shooting were not credible. During the three-day bench trial, the district court reviewed at least six exhibits and heard testimony from multiple witnesses. A particular witness that provided testimony on which the district court relied was Sophia Heath, one of the individuals involved in the kidnapping.¹¹ Heath was an eyewitness to the entire incident because she was in the room with Ulises when he was shot by Agent Lappe. Heath testified that prior to the shooting, she and Ulises were in a large room that had a small lamp on the nightstand. Ulises was blindfolded with a black bandana, and his hands were bound during the entire incident. Just prior to the shooting, he had been placed on a couch under the window. Heath further testified that when Ulises heard Agent Hawkins break the glass, he stood up from the couch and turned toward the window. Upon standing, Ulises pushed the window curtains aside and was immediately shot. Heath further confirmed that Ulises remained blindfolded with his hands bound during the entire incident, never leaned out of the window, never crouched in a position as if to shoot someone, never had a weapon or anything else in his hands, and never made any threatening gestures to anyone given that he was bound and gagged.¹²

¹¹ According to the record, Heath had agreed to assist the kidnappers by holding Ulises at her residence.

¹² A photograph of the outside of the house was presented to Heath during her testimony and was then entered into the record over the Government’s objection.

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Heath's statements about Ulises's position in the room and his actions prior to the shooting undoubtedly contradicted those of Agents Lappe and Hawkins.¹³ The record evidence, however, supports Heath's version of events over that of the agents. The undisputed fact that Ulises was blindfolded with his hands bound during the entire incident supports Heath's testimony that Ulises could not have seen the agents, pointed his hands at the agents, grabbed an agent's gun, physically threatened an agent, or gotten into a shooting stance. Indeed, it was presumably impossible for Ulises to see the window, the agents, or their weapons given that his vision was entirely obstructed by the blindfold. Further, it would have been extremely difficult, if not completely infeasible, for Ulises to grab an agent's weapon or make threatening gestures towards the agents while his hands were bound with duct tape.

The record thus supports the district court's fact-findings¹⁴ underlying its conclusion that Agent Lappe was negligent in shooting Ulises given that there is sufficient evidence that he had not yet identified his target and there was no threat to either agent when he fired his weapon. Moreover,

¹³ Neither agent testified at the bench trial, but Agent Hawkins's deposition was admitted as a trial exhibit.

¹⁴ The Government also takes issue with the district court's fact-finding related to Ulises's autopsy report. According to the Government, the district court erred in concluding that the autopsy report established that the agents' statements were fabricated and untrue as to the position of Ulises's body when he was shot. Although the Government is correct that the district court's reliance on the autopsy report cannot carry the day, the autopsy report was just another piece of evidence that the district court reviewed when making its fact-findings that were otherwise adequately supported by Heath's testimony and other record evidence. *See Hathaway v. Bazany*, 507 F.3d 312, 322 (5th Cir. 2007) (explaining that an "autopsy report is at best a scintilla of evidence" in support of a theory) (cleaned up).

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the district court's decision to credit Heath's version of events over those set forth by the agents was a credibility determination to which we give great deference. *See Hess Corp.*, 26 F.4th at 233. For these reasons, we hold that the district court did not clearly err in determining that the Government is liable to the plaintiffs under the FTCA. *See Le*, 138 F.4th at 274 (“[A] district court's finding of fact is clear error only if it is implausible in the light of the record considered as a whole.”).

B. Damages and Attorney's Fees

The Government next argues that the district court erred by inflating the plaintiffs' damages awards to grant attorney's fees in a manner that is not authorized by the FTCA and is unsupported by the record evidence. According to the Government, the plaintiffs are not entitled to separate attorney's fees under the FTCA, and the district court erred in increasing its final damages award by \$475,000 after the Government filed its motion for reconsideration.

(1) Standard of Review

“A court's damages award is a finding of fact reviewed for clear error.” *Le*, 138 F.4th at 278. If a damages award is plausible in light of the record, it is not considered clearly erroneous. *Id.* A damages award “will not be reversed for excessiveness except on the strongest showings that it exceeds the bounds of reasonable recovery.” *Id.* (cleaned up). We review damages awards based on intangible harms with great deference. *Id.*

We review a district court's conclusions of law underlying its award of attorney's fees de novo. *See Tex. Food Indus. Ass'n v. U.S. Dept. of Agric.*, 81 F.3d 578, 580 (5th Cir. 1996).

(2) Law & Analysis

Under the FTCA, plaintiffs may seek damages:

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for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of an 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). Recovery under the FTCA is limited to actual and compensatory damages. *Id.* at § 2674. Because the incident in this case occurred in Texas, we look to Texas law on compensatory damages. *See* 28 U.S.C. § 1346(b)(1). Under Texas law, “compensatory damages” include economic and noneconomic damages. TEX. CIV. PRAC. & REM. CODE § 41.001(8). “Economic damages,” are “compensatory damages intended to compensate a claimant for actual economic or pecuniary loss.” *Id.* § 41.001(4). “[N]oneconomic damages” are intended to “compensat[e] a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.” *Id.* § 41.001(12). Attorney’s fees under the FTCA are limited to 25% of the total damages award rendered under 28 U.S.C. § 1346(b). *See* 28 U.S.C. § 2678.

Here, the district court determined that the plaintiffs were entitled to compensatory, economic and non-economic damages, pursuant to Texas law. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(8). In its original final judgment, the district court issued to the plaintiffs a total damages award of \$1,915,000. Recall that in issuing the damages award, the district court awarded \$611,000 to Garcia with the specific amounts delineated as follows: (1) \$103,500 for the loss of financial support derived from Ulises; (2) \$500,000 for pecuniary losses; and (3) \$7,500 for funeral expenses and travel

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costs. It further awarded a total of \$1,304,000 in damages to Ulysses with the specific amounts as follows: (1) \$654,000 for the loss of financial support derived from Ulises's income; (2) \$150,000 for the loss of inheritance; and (3) \$500,000 for pecuniary losses. Lastly, the district court listed a separate attorney's fee award of \$475,000 "representing approximately 25% of the total award pursuant to 28 U.S.C. § 2678."

After the district court issued its final judgment, the Government moved for reconsideration on grounds that the district court improperly issued a separate, standalone award of attorney's fees, which is not authorized under the FTCA. *See* 28 U.S.C. § 2678. The district court did not expressly rule on the Government's motion, but it subsequently rendered an amended final judgment increasing Garcia's total damages award from \$611,000 to \$762,525 and Ulysses's total damages award from \$1,304,000 to \$1,627,475. As a result, the total damages award to both plaintiffs was increased from \$1,915,000 to \$2,390,000. In other words, the damages award was increased by exactly \$475,000. The amended judgment then provided that "attorney's fees are limited to 25% of the judgment," without providing a separate dollar amount.

As the Government correctly argues, the district court's attorney's fee award must be limited to 25% of the total damages award that it issued under the FTCA. 28 U.S.C. § 2678. Here, the district court's original final judgment mistakenly listed the attorney's fee award as a separate, standalone amount of \$475,000, rather than 25% of the total damages award of \$1,915,000. Thus, under the original damages award, the plaintiffs would have received the full amount of the damages listed in the final judgment (\$1,915,000) and their attorneys would have received an additional \$475,000 in fees, for a total award of \$2,390,000. We agree with the Government that this award would not have complied with the FTCA because the statute requires the attorney's fees to be carved out of the total damages award,

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rather than issued in addition to it. *See* 28 U.S.C. § 2678. Nonetheless, instead of recalculating the attorney's fees to equate to 25% of the original damages award, the district court increased the damages award by exactly \$475,000 so that the attorney's fees would stay the same but still be encompassed by the increased damages award.

The district court's decision to increase the damages award to \$2,390,000 was problematic because the increased dollar amounts in its amended judgment are not independently supported by the record. The district court's original damages award of \$1,915,000, however, was supported by the record. Accordingly, we reverse the district court's amended judgment as to damages and direct it to reissue its original damages award with attorney's fees limited to 25% of the total award in accordance with the FTCA. *See* 28 U.S.C. §§ 2678; 1346.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's holding that the Government is liable to the plaintiffs under the FTCA. We REVERSE the district court's amended final judgment with respect to damages and attorney's fees and REMAND for it to reissue its original damages award with attorney's fees limited to 25% of the total award.

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JAMES C. HO, *Circuit Judge*, dissenting:

It's unquestionably tragic that this hostage situation resulted in the hostage's death. But it's the kidnappers who should be punished—not the FBI agents who attempted to rescue the hostage in good faith.

The record indicates that, far from “represent[ing] intentional falsehoods,” the agents' testimony aligns with Sophia Heath, the witness credited by the district court. Heath was in the room with the hostage, Ulises Valladares, during the rescue operation.

According to Heath, Valladares was sitting on the couch under the window, blindfolded, and with his hands bound. When Heath and Valladares heard a loud noise on the roof, Valladares stood up on the couch, “pushed the curtain open,” and “looked out the window.” The subsequent events “happened very fast.” The window glass broke, and Valladares fell to the ground.

The majority contends that, because Valladares was blindfolded and his hands were bound, he “could not have seen the agents, pointed his hands at the agents, grabbed an agent's gun, physically threatened an agent, or gotten into a shooting stance.” *Ante*, at 12.

But none of that is necessary for Agent Lappe to have had a reasonable belief in the imminent danger of death or serious physical injury to himself and Agent Hawkins. It was enough that Agent Lappe perceived Valladares's actions as such, given the gravity of the situation. A figure standing on a couch, with hands held together, raised forward—if merely to push open a curtain—could easily resemble a person in a threatening shooting stance, especially during a high-stakes rescue mission.

What's more, Heath's own statements reinforce the split-second nature of the incident: “There was so much going on at that moment. . . . I

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didn't know what happened. I just know that [Valladares] opened the curtain and there was a gunshot.”

If Heath, who was keeping watch over the hostage in her own home, did not have enough time to process the sequence of events, it's understandable that Agent Lappe likewise only had a moment to react when Valladares revealed himself behind the curtain.

Nor is it reasonable to require Agent Lappe to warn Valladares before using deadly force in that critical moment. The district court's findings that the agents told “intentional falsehoods,” and that Agent Lappe “acted negligently,” are clearly erroneous.

The discretionary function exception under § 2680(a) of the FTCA should therefore protect the United States from suit. Agent Lappe was authorized by the FBI's Policy Statement to use deadly force “when necessary”—that is, “when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury.” The record shows that Agent Lappe had the necessary reasonable belief. So the judgment to use force in this case was precisely the kind that the FTCA discretionary function exception was “designed to shield.” *Gonzalez v. United States*, 851 F.3d 538, 544 (5th Cir. 2017).

It's unfortunate but plainly true that the dangerous reality of hostage rescue operations means that not all of them will be successful. This one was a particularly tragic example. But we need to stop blaming law enforcement, and start blaming criminals, when people are harmed by their crimes. *See, e.g., Winzer v. Kaufman Cnty.*, 940 F.3d 900, 901 (5th Cir. 2019) (Ho, J., dissenting from the denial of rehearing en banc) (“If we want to stop mass shootings, we should stop punishing police officers who put their lives on the line to prevent them.”); *Cole v. Carson*, 935 F.3d 444, 476 (5th Cir. 2019) (Ho & Oldham, JJ., dissenting from the denial of rehearing en banc) (“No

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member of this court has stared down a fleeing felon on the interstate or confronted a mentally disturbed teenager who is brandishing a loaded gun near his school. . . . [We have] no basis for sneering at cops on the beat from the safety of our chambers.”).

I respectfully dissent.