

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 7, 2026

Christopher M. Wolpert
Clerk of Court

DAVID GRAY,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 25-7081
(D.C. No. 6:25-CV-00077-JAR)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **MATHESON**, and **PHILLIPS**, Circuit Judges.

David Gray traded feeder-cattle put options on the Chicago Mercantile Exchange (CME). After the Federal Crop Insurance Corporation (FCIC) changed the terms of a subsidized insurance program for cattle producers, Mr. Gray sued the United States under the Federal Tort Claims Act (FTCA).¹ He alleged the changes distorted the options market in which he traded. The government moved to dismiss,

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Mr. Gray proceeds pro se, we liberally construe his filings, but we do not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

arguing the district court lacked jurisdiction under the FTCA’s so-called “discretionary function exception,” which bars claims based on conduct involving an element of judgment or choice. The district court agreed and dismissed the suit. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.²

I. Background

Cattle producers face risk in the pasture and in the marketplace. A drop in prices before cattle are sold can turn an expected profit into a loss. Two tools producers use to manage that risk are relevant here: the options markets and federally subsidized insurance.

Congress created the FCIC in 1938 to improve “the economic stability of agriculture through a sound system of crop insurance.” 7 U.S.C. §§ 1502(a), 1503. In 2000, Congress expanded the program to encompass livestock. It directed the FCIC to conduct pilot programs designed to give livestock producers “reasonable protection from the financial risks of price or income fluctuations inherent in the production and marketing of livestock.” *Id.* § 1523(b)(2)(A). Private parties may develop insurance products for these pilot programs and submit them to the FCIC’s Board of Directors (the Board) for approval. *See generally id.* §§ 1508(h), 1523(a)(1).

One such pilot program, Livestock Risk Protection (LRP), insures cattle producers against a drop in market prices. Producers select a coverage price and a

² The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c)(1); R. vol. I at 123.

coverage period. If the market price at the end of that period falls below the coverage price, LRP pays an indemnity based on the difference.

In 2020, the Board approved two changes to the LRP program that form the basis of this suit. First, the Board let producers defer the payment of the LRP premium until after the coverage period ended. Second, the Board increased premium subsidies, reducing the cost of the premium paid by producers. Those changes, in Mr. Gray's view, distorted the options markets.

From 2003 until 2022, Mr. Gray traded CME feeder-cattle put options. A put option is a contract that gives its holder the right to sell one feeder-cattle futures contract at a set price before the option expires.³ Selling a futures contract, in turn, means agreeing to sell a fixed quantity of feeder cattle at that price on a later date. A put thus lets cattle producers set a selling price for their livestock in advance, protecting them if prices fall. Mr. Gray describes his role as that of a market maker. Market makers continuously quote buy and sell prices and stand ready to transact so that market participants like cattle producers can trade when they need to.

Mr. Gray brought this FTCA action against the United States, asserting claims for negligence and negligence per se under Oklahoma law. He alleged the Board approved the 2020 changes without applying the FCIC's "General Guidelines, Considerations, and Criteria for Feasibility of Insurance Product Development" (the

³ Feeder cattle are generally young cattle being raised for further growth before finishing. See U.S. Dep't of Agric., Agric. Mktg. Serv., *LPGMN Reporter's Handbook* 33 (2021).

Guidelines), a 2012 document written to guide private parties who propose insurance products. R. vol. I at 9–10 (allegations); *see id.* at 87–93 (Guidelines). He reasoned the increased subsidies and deferred premiums drew cattle producers away from buying CME put options and toward cheaper LRP coverage. In his telling, he continued quoting buy and sell prices, but with fewer buyers it became “common for [him] to buy ‘puts’ but extremely difficult to sell them.”⁴ *Id.* at 12–13. He sought \$3,748,219, which he calculated as the amount he overpaid for the puts he bought between July 2020 and May 2022.

The government moved to dismiss for lack of subject-matter jurisdiction, arguing in part that the discretionary function exception barred his claims. The district court granted the motion.⁵

II. Discussion

Mr. Gray contends the discretionary function exception does not strip the district court of jurisdiction to hear his FTCA claims. We conclude that it does.

⁴ Mr. Gray also alleged that the changes invited “subsidy harvesting,” in which producers bought subsidized LRP coverage and then sold CME puts to collect the premium income, deepening the sell-side imbalance. R. vol. I at 13.

⁵ The district court also concluded that Mr. Gray’s claims fall within the FTCA’s exception for claims “arising out of . . . interference with contract rights,” 28 U.S.C. § 2680(h); *see* R. vol. I at 128–30; that his negligence claim lacks a private-person analogue under Oklahoma law, *id.* at 135–37; and that his negligence per se claim fails because the Oklahoma statute he invokes does not reach insurance policies, *id.* at 137–38.

A. The Discretionary Function Exception

The FTCA waives the United States’ sovereign immunity for “certain torts committed by federal employees acting within the scope of their employment.” *Martin v. United States*, 605 U.S. 395, 400 (2025) (quoting *Brownback v. King*, 592 U.S. 209, 212 (2021)); *see* 28 U.S.C. § 1346(b)(1). “But the FTCA’s waiver of sovereign immunity comes with strings attached.” *Ramirez v. Reddish*, 104 F.4th 1219, 1224 (10th Cir. 2024). The waiver is subject to thirteen statutory exceptions. Among them is 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). In other words, the discretionary function exception leaves the United States immune from suit over the choices its employees are charged with making, even when they choose poorly.

The exception applies only if two conditions are met. “First, the challenged conduct must be ‘a matter of choice for the acting employee.’” *Strawberry Water Users Ass’n v. United States*, 109 F.4th 1287, 1293 (10th Cir. 2024) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). “Second, even if the conduct in the first step was discretionary, . . . the discretionary action or decision must be based on considerations of public policy.” *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1220 (10th Cir. 2016). That is, the decision must be “grounded in social, economic, or political concerns.” *Id.* at 1222. A plaintiff may defeat the exception at either step. *See id.* at 1220. Because it is jurisdictional,

Mr. Gray bears the burden of showing that the exception does not apply. *See id.* Whether he has met that burden is a question that we review de novo. *Knezovich v. United States*, 82 F.4th 931, 937 (10th Cir. 2023).

B. Judgment or Choice

At the first step, Mr. Gray must demonstrate that the Board’s approval of the 2020 changes “involved no element of judgment or choice.” *Elder v. United States*, 312 F.3d 1172, 1177 (10th Cir. 2002) (internal quotation marks omitted). To do so, he must show the Board “violated a federal statute, regulation, or policy that is both specific and mandatory.” *Id.* (internal quotation marks omitted). “Language that meets this standard will leave little room for judgment calls.” *Knezovich*, 82 F.4th at 937.

Here, the statutory scheme is replete with discretion. “Except as otherwise provided in [§ 1523],” the FCIC “may, at the sole discretion of the Corporation, conduct a pilot program,” 7 U.S.C. § 1523(a)(1). It may also “operate the . . . program, including any modifications.” § 1523(a)(4)(B). As for livestock, Congress required the FCIC to conduct livestock pilot programs, but largely left their design to the agency. The risk-management tools available to the FCIC include “futures and options contracts and policies and plans of insurance,” § 1523(b)(2), and the FCIC may “subsidize the purchase of” those contracts and policies, § 1523(b)(6). The subsection further allows policies offered under livestock pilot programs to be “prepared without regard to the limitations of [the Federal Crop Insurance Act].” § 1523(b)(5). And where § 1523(b) does restrict the introduction of livestock pilot

programs, it leaves the key determination to the FCIC itself: “No action may be undertaken with respect to a risk under this subsection *if the Corporation determines* that insurance protection for livestock producers against the risk is generally available from private companies.” § 1523(b)(7) (emphasis added).

Nevertheless, Mr. Gray argues the 2012 Guidelines placed a mandatory requirement on the FCIC that the Board breached by approving the 2020 changes. The Guidelines, he insists, “are mandatory for private submitters [of insurance products], and because the FCIC is required by statute to review and approve those submissions under the same standards, the guidelines are equally mandatory for the FCIC.” Opening Br. at 13 (capitalization omitted). We disagree.

The Guidelines describe themselves—in their first sentence—as “general information that *may be helpful* to private entities who are interested in developing crop insurance products for either crops or livestock.” R. vol. I at 87 (emphasis added). They then direct submitters elsewhere for the authorities governing a submission, identifying “[t]he Act, Code of Federal Regulations (CFR), and Board Procedures” as “the official documents that provide the requirements for ultimately submitting a privately developed product and must be followed for any insurance products submitted to the [FCIC].” *Id.* As the district court explained, “[b]ecause the Guidelines are clearly advisory in nature, addressed to private parties, and do not

bind FCIC employees, they do not constitute a ‘specific and mandatory’ directive.”

Id. at 134 (quoting *Elder*, 312 F.3d at 1177).⁶

Resisting this conclusion, Mr. Gray urges that another statute, 7 U.S.C. § 1508(h)(4), makes the Guidelines mandatory notwithstanding their advisory preface.⁷ The statute, he says, imposes “two layers of mandate.” Opening Br. at 14. The first requires the FCIC to “issue regulations to establish guidelines for the submission, and Board review, of policies.” § 1508(h)(4). The second directs that “[a]t a minimum, [those] guidelines *shall ensure*” a list of specified requirements. *Id.* (emphasis added). He points to paragraphs 5, 6, and 7 of the Guidelines as the “operative sections” that implement § 1508(h)(4)’s command through “binding language.” Opening Br. at 14. Once those criteria were adopted in 2012, he

⁶ Mr. Gray also argues that the FCIC negligently supervised the private submitters. *See* Opening Br. at 14–17. Liberally construing his filings in the district court, we interpret them as challenging the Board’s approval of submissions that allegedly violated the feasibility criteria, not its supervision of private contractors. R. vol. I at 15–16, 56–57. He thus forfeited the negligent-supervision theory by failing to raise it in the district court and has waived appellate review by failing to argue plain error. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127–28, 1131 (10th Cir. 2011). In any event, the theory rests on the same premise we have already rejected: that the Guidelines imposed submission requirements the Board was bound to enforce.

⁷ The government contends that Mr. Gray raises his § 1508(h)(4) argument for the first time on appeal and asks us not to consider it. Resp. Br. at 17 n.3. But he argued below, repeatedly, that the “508(h) submission guidelines” imposed mandatory feasibility requirements on the Board and left it no discretion to approve a noncompliant submission. R. vol. I at 53; *see also id.* at 54–57. Section 508(h) of the Federal Crop Insurance Act is codified at 7 U.S.C. § 1508(h). His reliance on § 1508(h)(4) on appeal thus adds statutory support for that argument and does not present a new theory. *See Baca v. Dep’t of the Army*, 983 F.3d 1131, 1140 (10th Cir. 2020).

contends, neither submitters nor the FCIC “had discretion to disregard them when preparing or approving submissions.” *Id.*

Mr. Gray’s argument mistakes the Guidelines for regulations. Section 1508(h)(4) directs the FCIC to “issue *regulations* to establish *guidelines*.” § 1508(h)(4) (emphasis added). Thus, the *guidelines* the statute contemplates are those established by *regulation*. The 2012 Guidelines are not those regulations, and they acknowledge as much. As we have already explained, the Guidelines’ introduction directs submitters to the Code of Federal Regulations, among other sources, for the requirements that “must be followed.”⁸ R. vol. I at 87.

Nor does the rest of § 1508(h)(4) cabin the Board’s discretion to approve the 2020 changes. The statute sets minimum requirements regarding the mechanics of proposal submission and Board review. *See* § 1508(h)(4)(A)–(E) (discussing confidentiality of submissions, the submitter’s opportunity to present, notice of intent to disapprove, a 120-day decision deadline, and consultation on specified crops).

⁸ Mr. Gray points to paragraphs 5 through 7 of the Guidelines, which use terms such as “must not,” “must be,” and “are not feasible.” Opening Br. at 14 (quoting R. vol. I at 90–91). But those provisions do not prescribe a mandatory course of action. Paragraph 5 repeats the rule that the FCIC may not insure a risk that is generally available from private companies and points to section 508(l) of the Federal Crop Insurance Act, 7 U.S.C. § 1508(l). Whatever constraint that provision imposes on other programs, policies offered under livestock pilot programs “may be prepared without regard to the limitations of [the Federal Crop Insurance Act].” *Id.* § 1523(b)(5). And as we have explained, the similar bar that applies to livestock pilot programs commits that determination to the agency. § 1523(b)(7). Paragraph 6 lists “principles that should be *considered* when determining feasibility,” and paragraph 7 offers “[s]ome additional feasibility requirements to *consider*.” R. vol. I at 91 (boldface omitted) (emphasis added). Read in context, the paragraphs identify what a submitter should weigh and leave the judgment calls to the Board.

None imposes substantive limits on the terms the Board may approve. Mr. Gray has thus failed to demonstrate that the Board’s approval “involved no element of judgment or choice.” *Elder*, 312 F.3d at 1177 (internal quotation marks omitted).

C. Policy Judgment

Even though the Board’s determination was discretionary, Mr. Gray may still establish jurisdiction if the nature of the action “does not implicate public policy concerns, or is not susceptible to policy analysis.” *Sydney v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008) (brackets and internal quotation marks omitted). He contends that “[a]ny policy balancing that could justify the discretionary function exception occurred in 2012,” when the FCIC adopted the Guidelines. Opening Br. at 18. The Guidelines, he says, set “fixed feasibility standards,” and “[n]othing in the guidelines authorizes future policy balancing.” *Id.* “By 2020,” he concludes, “the only remaining task was implementation.” *Id.* We disagree.

Mr. Gray’s argument depends on treating the Guidelines as binding on the Board, a premise we have already rejected. Because the Guidelines did not “specifically prescribe[] a course of action” for the Board to follow, their terms did not exhaust the Board’s policy judgment when it approved the 2020 changes. *Berkovitz*, 486 U.S. at 536.

Turning to the approval itself, “[w]e have little trouble concluding that the nature of the actions taken by the [Board] involved the exercise of policy judgment of the sort the exception is meant to protect.” *Knezovich*, 82 F.4th at 942 (internal quotation marks omitted). Congress authorized pilot programs “to evaluate whether a

proposal or new risk management tool tested by the pilot program is suitable for the marketplace and addresses the needs of producers of agricultural commodities.”

7 U.S.C. § 1523(a)(1). Decisions such as how much to subsidize those programs, and on what payment terms, “are precisely the kind of social, economic, and political concerns the discretionary function exception was designed to shield from judicial second guessing.” *Hardscrabble Ranch*, 840 F.3d at 1223 (internal quotation marks omitted). Mr. Gray has not shown otherwise. *See id.* at 1222. Because the discretionary function exception stripped the district court of jurisdiction to hear Mr. Gray’s claims, the court correctly dismissed the complaint. We therefore need not address the court’s remaining grounds for dismissal. *See supra* note 5.⁹

III. Conclusion

For the foregoing reasons, we affirm the district court’s dismissal of the complaint.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

⁹ We also decline Mr. Gray’s alternative request for remand to amend his complaint to assert negligent supervision. *See* Opening Br. at 21. He did not seek leave to amend in the district court, and “we generally do not entertain arguments not raised before the district court.” *McKenzie v. U.S. Citizenship & Immigr. Servs.*, 761 F.3d 1149, 1158 (10th Cir. 2014).