No. 23-

IN THE

Supreme Court of the United States

BRIAN O'GRADY,

Petitioners,

v.

MICHELLE AND DANIEL SCHURG, BECCIE AND CHAD MILLER, JACKIE LOWE, MAUREEN AND LARRY ERNST, JOLEEN AND RONNIE HARVIE, MARK STERMITZ, MICHELLE STERMITZ AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Rayonier, infra,* this Court held that the Federal Tort Claims Act (FTCA) "makes the United States liable (*with certain exceptions which are not relevant here*) for the negligence of its employees" in responding to wildland fire, ruling that none of the FTCA statutory exceptions apply in this context. (Emphasis added). Yet, four subsequent Circuit Courts of Appeals have all held that the FTCA "discretionary function exception" bars liability for negligent wildland fire response, contrary to *Rayonier.* Given the conflict, is the United States liable for the negligence of its wildland fire managers?

PARTIES TO THE PROCEEDING

The Petitioner, a district court plaintiff, and Ninth Circuit Court of Appeals appellant is Brian O'Grady. The following individuals were also plaintiffs in the district court and appellants in the court of appeals: Michelle and Daniel Schurg, Beccie and Chad Miller, Jackie Lowe, Maureen and Larry Ernst, Joleen and Ronnie Harvie, Mark Stermitz, and Michelle Stermitz. Those plaintiffs are not petitioners here.

The Respondent, the United States of America, was the defendant in the district court and appellee in the court of appeals.

RELATED CASES

The following cases are directly related to the case of the petitioner:

Schurg et al. v. United States Department of Agriculture et al., Case No.: 9:20-cv-00061-DWM, United States District Court, District of Montana, Missoula Division. Judgment entered: February 8, 2022.

Miller et al. v. United States Department of Agriculture et al., Case No.: 9:20-cv-00062-DWM, United States District Court, District of Montana, Missoula Division. Judgment entered: February 8, 2022.

Lowe et al v. United States Department of Agriculture et al., Case No.: 9:20-cv-00063-DWM, United States District Court, District of Montana, Missoula Division. Judgment entered: February 8, 2022.

Ernst et al. v. United States Department of Agriculture et al., Case No.: 9:20-cv-00064-DWM, United States District Court, District of Montana, Missoula Division. Judgment entered: February 8, 2022.

Harvie et al. v. United States Department of Agriculture et al., Case No.: 9:20-cv-00065-DWM, United States District Court, District of Montana, Missoula Division. Judgment entered: February 8, 2022.

Stermitz et al. v. United States Department of Agriculture et al., Case No.: 9:20-cv-00066-DWM, United States District Court, District of Montana, Missoula Division. Judgment entered: February 8, 2022.

Stermitz et al. v. United States Department of Agriculture et al., Case No.: 9:20-cv-00067-DWM, United States District Court, District of Montana, Missoula Division. Judgment entered: February 8, 2022.

O'Grady et al. v. United States Department of Agriculture et al., Case No.: 9:20-cv-00090-DWM, United States District Court, District of Montana, Missoula Division. Judgment entered: February 8, 2022.

Michelle Schurg; Daniel Schurg; Chad Miller; Beccie Miller; Jackie Lowe; Larry A. Ernst; Maureen A. Ernst; Ronnie Harvie; Joleen Harvie; Mark Stermitz; Michell Stermitz; Brian O'Grady v. United States of America, Case No.: 22-35193, United States Court of Appeals for the Ninth Circuit. Judgment entered: March 28, 2023.

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JURISDICTION

The court of appeals entered its judgment on March 28, 2023, and an order denying the Petitioner's petition for rehearing *en banc* on June 7, 2023. Pet. App. 1a, 60a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C.A. § 1346 (b)(1)

Subject to the provisions of chapter 171 of this title [not relevant here], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, 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.A. § 2680(a)

The provisions of this chapter and section 1346(b) of this title 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.

STATEMENT OF THE CASE

This case presents an important subject matter jurisdictional issue concerning Congress's waiver of sovereign immunity under the Federal Tort Claims Act (FTCA), 28 U.S.C.A. § 1346 (b)(1).

1. The facts regarding subject matter jurisdiction are not in material dispute. On July 15, 2017, lightning started the Lolo Peak Fire (the Fire) near the town of Lolo, Montana, in the Lolo National Forest. The Lolo National Forest Supervisor decided to manage the Fire through an "indirect strategy," meaning that firefighters would wait wait and prepare for the fire to reach terrain judged to be safer before actively fighting it. The Supervisor ordered a Type 1 Incident Management Team (the Team), indicating that the fire represented, at least in the Supervisor's estimation, the most complex type

of incident. According to the Supervisor, the Team was ordered because such teams "excel at long-term planning and public communication." Pet. App. 21a-22a.

Petitioner Brian O'Grady (O'Grady) lives in Colorado and owns land near where the Fire started. Pet. App. 21a-22a. He had learned of the Fire shortly after it started in mid-July. O'Grady checked the Forest Service website, InciWeb, "most days" for updates through August 17, 2017. Additionally, "[t]he United States identified [O'Grady] as a landowner likely to be impacted by the Fire and possessed Mr. O'Grady's telephone number on the [Incident Management Team]'s contact list." O'Grady's unrebutted testimony is that the Team planned and executed aerial and ground firing operations "on [his] property without notifying or informing him at any time." Pet. App. 23a-24a, 38a.

By August 1, the Fire had increased in size while growing northward, encompassing over 5,000 acres. The Team described the growth of the Fire in daily, publicly available InciWeb posts. On August 3-4, 2017, and continuing through August 9, the Forest Service believed that O'Grady's property was likely in danger. On August 4, Lolo National Forest staff provided a decision document that considered current fire conditions and set fire management goals. Pet. App. 23a-24a, 38a. In particular, the updated decision stated that the team was required to "[c]onsult with private landowners and local fire district authorities if suppression activities have a high probability of occurring on private lands." Pet. App. 6a, and see 22a.

Between August 4 and August 10, under the indirect strategy, the Fire was allowed to grow northward in the general direction of O'Grady's property. Pet. App. 22a. The Forest Service had completed a strategic plan for their indirect fire management tactics, including the proposed planned ignition of backburns and other "firing operations" on and near O'Grady's property. These tactics entailed "the controlled application of fire between established containment lines and an active fire front." Pet. App. 23a. The Team, however, did not consult with or even inform O'Grady of the planned firing operations. Pet. App. 23a-24a. Between August 13 and 18, the Team continued with its indirect strategy using firing operations. According to O'Grady's expert evidence, from August 14 through 18, 2017, the Team conducted the planned—but undisclosed—firing operations on the O'Grady property using both hand crews and helicopters. CA9 2-ER-129. These four days of planned ignitions "destroyed Mr. O'Grady's property." CA9 2-ER-129.

The government admitted that, on August 14, it had decided to conduct firing operations, but it asserts that firing operations did not occur on O'Grady's land until August 17, 2017. While the government disputed whether it had a duty to contact O'Grady, it did not dispute that fire managers did not contact him before conducting the firing operations on his land. CA9 1-ER-8.

2. After exhausting his administrative remedies, O'Grady filed his civil action on June 20, 2020. CA9 7-ER-1385. Invoking the FTCA, he included counts for negligence, gross negligence, negligent and intentional infliction of emotional distress, intentional trespass, and negligent trespass. CA9 7-ER-1385—ER-1392.

The factual gravamen of the case was the government's failure, acting through the Team, to communicate with him about its plan to ignite his property with "burnout operations." CA9 7-ER-1385—ER-1386-1389. *See, Green v. United States*, 630 F.3d 1245, 1252 (9th Cir. 2011). O'Grady's case was consolidated with seven other actions arising from the Fire. CA9 1-ER-4. The government and the plaintiffs, including O'Grady, filed multiple motions for summary judgment, and an argument at a motion hearing was held on January 26, 2022. Following the hearing, the government's motions for summary judgment were granted, while O'Grady's (and the other plaintiffs') motions were denied. O'Grady argued in his summary judgment briefing that under Ninth Circuit precedent of *Anderson v. United States*, 55 F.3d 1379, 1381 (9th Cir. 1995), as amended on denial of reh'g (June 14, 1995) and this Court's decision in *Rayonier, Inc. v. United States*, 352 U.S. 315, 321 (1957) that sovereign immunity was waived. See, Plfs' Br. in Support of Their R. 56 Mot, for Partial Summary J., 6, 13, fn. 5 (October 15, 2021).

The district court ruled, however, that the discretionary function exception to the FTCA applied. "Summary judgment is granted for the Government across the board, primarily because the Government's communication methods are immunized by the discretionary function exception, 'the government is immunized' from civil liability." In other words, without precisely saying so, the district court ruled it lacked subject matter jurisdiction as the FTCA did not waive sovereign immunity in the firefighting context. CA9 1-ER-13—ER-23.

The district court relied on Ninth Circuit precedent, ruling that a two-step process determines whether the

discretionary function exception applies: "[f]irst, courts must determine whether the challenged actions involve an element of judgment or choice." CA9 1-ER15 (citing *Esquivel v. United States*, 21 F.4th 565, 573 (9th Cir. 2021) (FTCA claim based on negligence in a wildland fire suppression context). If the element of judgment or choice is present, "'the court moves to the second step and must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. Namely, the exception protects only governmental actions and decisions based on social, economic, and political policy.'" CA 9 1-ER15 (citing *Esquivel*, 21 F. 4th at 574). "If the action involves either judgment or choice, and it sounds in policy, the "action is immune from suit-and federal courts lack subject matter jurisdiction-even if the court thinks the government abused its discretion or made the wrong choice." *Id.* (quotation marks omitted). CA9 1-ER-15. "[C]laims involving how the government conducts fire suppression operations are generally barred by the discretionary function exception." CA9 1-ER-16. In addressing the facts of the O'Grady case, the district court stated, "The [Team's] decision not to notify O'Grady before conducting firing operations on his land was also rooted in policy because" the record shows the [Team's] conduct was tied directly to broader fire suppression efforts." CA9 1-ER-20. Judgment of dismissal was accordingly entered on February 8, 2022. CA9 1-ER-3.

3. The Ninth Circuit assumed jurisdiction over the petitioner's appeal and affirmed. Pet. App. 2a-4a. Like the district court, the court of appeals relied on its precedent in *Esquivel*, 21 F.4th at 572–73. It also pointed to *Miller v. United States*, 163 F.3d 591, 594–95 (9th Cir. 1998), both of which applied this Court's decisions in *United States v. Gaubert*, 499 U.S. 315, 322 (1991), and *Berkovitz*

v. United States, 486 U.S. 531, 536 (1988)). The court of appeals held that the FTCA's discretionary function exception preserves sovereign immunity as to claims regarding a government employee's "act or omission ... 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 government employee. Pet. App. 9a (citing *Esquivel*, 21 F.4th at 573). It applied a "two-step test to determine whether the discretionary function exception applies." *Id.* Courts must determine whether (1) "the challenged actions involve an 'element of judgment or choice'" and, if so, whether (2) the "judgment is of the kind that the discretionary function exception was designed to shield." Pet. App. 10a. It held that the federal government is immune from suit if the challenged action satisfies both steps. *Id.* If so, "federal courts lack subject matter jurisdiction" over the dispute, "even if the court thinks the government abused its discretion." *Id.* It then ruled that (a) the challenged actions of the firefighters, in this case, were a matter of judgment or discretion, and (b) their decisions related to consulting with landowners about fire-suppression activities on and near their land were based on "social, economic, and political policy." Pet. App. 17a-18a. Thus, the FTCA did not apply, and the district court had no subject matter jurisdiction over the O'Grady claim.

4. O'Grady sought rehearing en banc. He argued the Team's failure to notify him before and after the it lit the backfires on his property is not subject to the discretionary function exception. The court of appeals denied the petition. Pet. App. 60a.

5. This petition follows.

REASON FOR GRANTING PETITION

The petition should be granted because the four Courts of Appeals who have considered the discretionary function exception in the context of wildland fire suppression have conflicted with a decision of this Court on an essential, jurisdictional question of federal law. The Courts of Appeals have not followed *Rayonier* infra and instead have applied a test intended and useful only for decision-making in a regulatory context. It is crucial for this Court to correct the error as it deprives victims of wildland fire management negligence of a remedy in 20 fire-prone states across the country, from Florida and Georgia (11th Circuit) to Tennesee and Michigan (6th Circuit) to Colorado and New Mexico (10th Circuit), to California, Alaska, and Hawaii (9th Circuit).

I. In *Rayonier,* this Court held that for landowner negligence claims against federal wildland fire managers, the statutory exceptions to the FTCA's waiver of sovereign immunity "are not relevant."

The United States is a sovereign, immune from suit except by consent. *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citing cases.) In 1946, however, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401(b), 2671-2680. The FTCA waives sovereign immunity for claims against the United States for money damages "arising out of torts committed by federal employees." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 217-218 (2008). The Act grants federal district courts "exclusive jurisdiction" over such actions, 28 U.S.C. 1346(b)(1), subject to certain conditions. *See United States v. Kubrick*, 444 U.S. 111, 117-118 (1979). The

FTCA waiver is limited by several statutory exceptions—including the "discretionary function exception" codified at 28 U.S.C. § 2680(a). But in the context of wildland fire management, the United States Supreme Court has held these exceptions "are not relevant." *Rayonier Inc. v. United States*, 352 U.S. 315, 318 (1957).

The Court's original examination of the discretionary function exception was in *Dalehite v. United States*, 346 U.S. 15 (1953) (applying 28 U.S.C. § 2680(a)). On April 16 and 17, 1947, a fire broke out on a government vessel loaded with ammonium nitrate fertilizer in the harbor at Texas City, Texas. The fire spread, and eventually, a devastating explosion ensued. Victims filed some 300 separate personal and property claims in the aggregate amount of two hundred million dollars. A consolidated trial was had in the district court, which eventually entered judgment for plaintiffs on liability. The Court of Appeals for the Fifth Circuit unanimously reversed, however, *In re Texas City Disaster, Litigation*, 197 F.2d 771, and the Court granted certiorari because the case presented an important problem of federal statutory interpretation. *Dalehite*, 346 U.S. at 17.

This Court affirmed the court of appeals. There were three aspects to the holding. The first two were based on the discretionary function exception to the FTCA. First, certain claims arose from a cabinet-level decision to initiate a program to distribute large quantities of ammonium nitrate internationally from the Texas City harbor. *Dalehite*, 346 U.S. at 35–36. The program included establishing plans, specifications, and operations schedules by lower-level administrators, which were also alleged to be negligently executed. *Id.* at 38-41 These

claims rested on acts "performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department." *Id.* at 39-41. The Court held all these claims were within the discretionary function exception, and subject matter jurisdiction was denied. *Id.* at 42. Another set of claims arose from the actions of the Coast Guard in failing to reasonably supervise the storage of the ammonium nitrate compound around the harbor. This set was also barred by the discretionary function exception under the same analysis as the first. *Id.* at 43. Finally, a third set of claims concerned negligence in the Coast Guard's firefighting response. The Court affirmed the court of appeals' holding that these claims, but not based on the discretionary function exception—which neither the government, the appellate court, nor this Court, by the implication of silence, imagined could apply to such claims. Instead, it held that the negligent fire response causes of action were not within the original sovereign immunity waiver of the FTCA. *Id.* at 42-43. The Court reasoned that the FTCA did not create new causes of action not already recognized by traditional tort law. *Id.* at 43. It also noted that "communities and other public bodies" were traditionally immune from liability in tort for injuries caused by a fire response. *Id.* at 44. Thus, the Court held, a cause of action for negligent firefighting could not be maintained because to do so would be to recognize a "novel or unprecedented" tort. *Id.*

In the subsequent case of *Rayonier*, *Dalehite's* firefighting analysis was held not to apply to wildland fire. *Rayonier* involved an FTCA claim based on U.S. Forest Service negligence in suppressing a wildland fire. *Id.*, 352 U.S. at 315–17. The Forest Service allowed highly

inflammable dry grasses, brush, and other materials to accumulate, and sparks from a railroad engine ignited fires "on the right of way and adjoining land." *Id.* at 316. After the fire was "under control" but only "substantially out," Forest Service fire managers relaxed, leaving behind a handful of personnel to staff the smoldering fire—despite strong winds and high fire danger. *Id.* at 316. The fire later "exploded" under the hazardous conditions. It escaped the Forest Service's skeleton crew and destroyed the plaintiffs' property. *Id.* at 316–17.

The plaintiffs sued the United States for negligence under the FTCA. The district court dismissed the action, ruling that under the holding of *Dalehite*, it did not have subject matter jurisdiction of the claim for negligent fire suppression. The Ninth Circuit affirmed on the same precedent. Both courts applied the rule that public entities are not subject to tort liability at common law for damages caused by fire response efforts. *Id.* at 317-318.

Upon this Court's grant of the appellant's certiorari petition, the government "relying primarily on the *Dalehite* case, contend[ed]that Congress by the Tort Claims Act did not waive the United States' immunity from liability for the negligence of its employees when they act as public firemen." *Id.* at 318. Nevertheless, the Court rejected this argument and resolved the case against the United States. In doing so, the Court expressly addressed whether the statutory FTCA exceptions apply to negligent wildland fire suppression cases. It held:

> The Tort Claims Act makes the United States liable (*with certain exceptions which are not relevant here*) for the negligence of its employees

> '* * * in the same manner and to the same extent as a private individual under like circumstances * * *.' 28 U.S.C. § 2674, 28 U.S.C.A. § 2674.

Rayonier, 352 U.S at 318 (emphasis added). Thus, the Court expressly instructed that no exceptions to the FTCA waiver of sovereign immunity, includes the discretionary function exception of 28 U.S.C. § 2608(a), apply to this context. In overruling *Dalehite* as regards federal fire managers, the Court stated: "It may be that it is 'novel and unprecedented' to hold the United States *accountable* for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." *Id.* at 319 (emphasis added). Ultimately, *Rayonier* stands for the bright-line rule that federal courts have subject matter jurisdiction over claims against the United States for negligence in managing wildland fires.

II. Courts of Appeals considering FTCA claims of wildland fire management negligence have all erroneously held that the *Berkovitz* test applies.

Despite the clarity of this Court's holding in *Rayonier*, all four Courts of Appeals to have considered the issue have ruled that the FTCA does not waive sovereign immunity on claims for negligent wildland firefighting and wildland fire management. *Abbott v. United States*, ___ F4th ___, No. 22-5492, 2023 WL 5286966, at *1 (6th Cir. August 17, 2023); *Foster Logging, Inc. v. United States*, 973 F.3d 1152 (11th Cir. 2020); *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216 (10th Cir. 2016); *Miller v. United*

States, 163 F.3d 591 (9th Cir. 1998). Rather, all three have ruled that this Court's two-step regulatory discretion test, first promulgated in *Berkovitz*, 486 U.S. at 536, applies to fire suppression decision-making—and therefore does not waive sovereign immunity in this context. The Ninth Circuit Court of Appeals followed *Miller*, its own precedent, in this case. But *Miller*, *Hardscrabble Ranch, Foster Logging*, *Abbott*—and this case—were all decided in error.

In *Berkovitz,* it was held that the discretionary function exception "marks the boundary between Congress's willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Berkovitz*, at 536 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984)). The exception is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Varig Airlines*, 467 U.S. at 814). The Courts of Appeals applied the *Berkovitz* test in *Miller*, *Hardscrabble Ranch, Foster Logging*, and this case to deny subject matter jurisdiction. *Abbott* was a reversal and is still pending below, but it also instructed the district court to apply *Berkovitz*.

For example, in *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that in the wildland fire suppression context, the application of the discretionary function exception rests on the two-part test articulated in *Berkovitz*. First, it held the exception covers only discretionary acts, which

necessarily involve an element of choice. *Id.* (citing *Berkovitz*, 486 U.S. at 536 and *Blackburn v. United States*, 100 F.3d 1426, 1429 (9th Cir. 1996).

Second, once the court determines that discretion is involved, there must also be a finding that the discretion involves the type of judgment the exception is designed to shield. *Id.* The exception protects only government actions and decisions based on "social, economic, and political policy." *Id.* The decision need not be actually grounded in policy considerations but must be, by its nature, susceptible to a policy analysis. *Id.* citing *Gaubert*, 499 U.S. at 325 and *Federal Deposit Ins. Corp. v. Craft*, 157 F.3d 697, 707 (9th Cir. 1998). Where the government agent is exercising discretion, courts will presume that "the agent's acts are grounded in policy when exercising that discretion.'" *Id.* (citing *Gaubert*, 499 U.S. at 324). Applying the two-step test, the court ruled that the discretionary function exception insulated the government from liability for wildland fire manager negligence. *Id.* at 596-97.

Eighteen years later, the Tenth Circuit Court of Appeals made a similar holding in *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1220 (10th Cir. 2016). The court held that the *Berkovitz* test applied. *Id.* First, it ruled that Hardscrabble Ranch had to show that the action was not "'a matter of choice for the acting employee.'" *Id.* (quoting *Berkovitz* at 486 U.S. at 536). Second, even if the alleged conduct was discretionary, "it must nevertheless be the kind of discretionary judgment the exception was "designed to shield." *Id.* "That is, the discretionary action or decision must be based on considerations of public policy." *Id.* If it is not, even though the conduct might be discretionary, it would not be exempted from the immunity

waiver. The court ruled that the discretionary function exception insulates the government from liability if the negligence involves the permissible exercise of "policy judgment." *Id.* Applying this test, the court ruled that the government was immune from liability for the wildland fire managers' negligence. *Id.* at 1222.

Three years ago, the Eleventh Circuit Court of Appeals applied the same analysis in *Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1157 (11th Cir. 2020). "The Supreme Court has developed a two-part test that courts must apply in determining whether challenged conduct falls within the discretionary-function exception to the FTCA's waiver of sovereign immunity." *Id.* (citing *Gaubert* 499 U.S. at 322). "First, a court examines the nature of the challenged conduct or act to determine whether it is 'discretionary in nature,' meaning that it involves 'an element of judgment or choice.'" *Id.* "Second, if the challenged conduct involves an element of judgment or choice, a court then determines 'whether that judgment is of the kind that the discretionary function exception was designed to shield.'" *Id.* Applying the test, the Court ruled that sovereign immunity was not waived for the alleged negligence. *Id.* at 1164-1165.

Earlier this year, the Sixth Circuit Court of Appeals applied the same analysis for the same reasons. *Abbott v. United States*, ___ F.4th ____, No. 22-5492, 2023 WL 5286966, at *7 (6th Cir. August 17, 2023). The case involved claims of negligence against the U.S. National Park Service for its handling of a wildfire that escaped a National Park, especially a failure to warn neighbors when the fire left the park. *Id.* at *1. The *Abbott* court agreed with the government that the discretionary function

exception to the FTCA requires a two-part test. First, we ask "whether the action is a matter of choice for the acting employee." *Id.* (citing *Berkovitz* 486 U.S. at 536). Second, it held, even if the action is a matter of choice, "we also ask whether the relevant choice or exercise of discretion 'is of the kind that the discretionary function exception was designed to shield.'" *Id.* (quoting *Gaubert*, 499 U.S. at 322-23). In *Abbott*, the court of appeals reversed the district court and remanded with instructions to properly apply the *Berkovitz* test. But it nevertheless directed the district court to look to *Berkovitz*, with no mention of *Rayonier*.

III. The Question Presented is exceptionally important because the holding of *Rayonier* controls in the wildland fire suppression context and the rulings from the four Courts of Appeals effectively thwart Congress's intention, at great cost to innumerable tort victims from across four Federal Circuits with fire-prone environments.

A. *An American Crisis.* The erroneous departure from *Rayonier*, as reflected in the decisions of the Sixth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals, governs 20 forested and fire-prone states. These include Kentucky, Michigan, Ohio, and Tennessee (Sixth Circuit); Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington (Ninth Circuit); New Mexico, Colorado, Wyoming, and Utah (Tenth Circuit); and Alabama, Georgia, and Florida (Eleventh Circuit). In these regions, there are millions of acres of federal forests, including over 20 million in the Southeast, some 90 million in the Intermountain West, and over 110 million in the Pacific Coast region. Congressional Research Service, U.S. Forest Ownership and Management, Figure 3 (December 16, 2021).

These states also include millions of acres of "wildland-urban interface" (WUI), which the Forest Service defines as "the area where houses and wildland vegetation coincide." Dept. of Agriculture, Forest Service, S. McCaffrey, et al., The Public and Wildland Fire Management: Social Science Findings for Managers, p. 197 (2006). Millions of Americans live in the WUI in the states of these four Circuits. In California alone, almost 3.5 million homes are located in the WUI. *Id.*, p. 199. In Wyoming, 62% of all homes are situated in the WUI. *Id.* The number in New Mexico is 41%, and in both Montana and Utah, it is 40%. *Id.* The Forest Service estimates that between 1990 and 2000, 60% of new homes were built in the WUI. *Id.*, p. 200.

Meanwhile, a "crisis" is upon the land. U.S.D.A. Forest Service, Confronting the Wildfire Crisis, A Strategy for Protecting Communities and Improving Resilience in America's Forests, FS-1187a (2022). This is no exaggeration. "The running 5-year average annual number of structures destroyed by wildfires rose from 2,873 in 2014 to 12,255 in 2020, *a fourfold increase in just 6 years*." *Id.*, p. 18 (emphasis added). Over 18,000 wildland fires have burned nearly 25 million acres of land in the United States in the last three years. NOAA National Centers for Environmental Information, Monthly Wildfires Report for Annual 2022, published online January 2023.[1] So, whether the United States can be held liable for negligence due to mistakes that occasionally but inevitably must be made in wildland fire management is a vital concern. Millions of Americans depend on

1. retrieved on August 27, 2023 from https://www.ncei.noaa.gov/access/monitoring/monthly-report/fire/202213

competent—and accountable—federal fire management for their personal safety, the security of their homes, and their very way of life. Tort liability to protect them is of singular importance.

This Court has held that Congress intended the FTCA to provide a remedy when government wildland fire managers are negligent. *Rayonier*, 352 U.S at 320-321. The reservation of sovereign immunity represented by the discretionary function exception just does not apply to this context. The erroneous holdings of the four Circuits strip millions of Americans of a statutory remedy in the face of federal fire manager negligence—despite what this Court has held to be Congressional intent to the contrary. *Id.* at 320-21. The question presented is, therefore, of vital and timely significance.

B. *Rayonier Elucidates and Serves Congressional Intent.* As outlined above, *Rayonier* holds that Congress intended to waive sovereign immunity for negligence in managing wildland fires. In *Rayonier*, the government argued vigorously that Congress never intended to expose the United States to such vast potential liability. But this Court was unimpressed by the risk to the federal fisc the government invoked. *Id.* at 319. The Court noted warnings that if government was held responsible for the negligence of wildfire managers, the burden could fall heavily on the public treasury. The government feared that wildfire could destroy "hundreds of square miles of forests and even burn entire communities." *Id.*, 352 U.S at 319. The Court understood that Congress imposed liability, nonetheless.

The Court recognized that Congress had closely considered the issues and made the public policy decision

to waive sovereign immunity in the interest of the entire nation. *Id.* at 320-321. The Court pointed out that Congress was aware of its decision and intended that losses from government negligence should be "charged against the public treasury" to spread the cost among all taxpayers. *Id.* at 321. It reasoned the Congressional purpose was to diffuse the losses across society and ensure "the resulting burden on each individual would be relatively slight." *Id.* "*But when the entire burden falls on the injured party it may leave him destitute or grievously harmed.* Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees." *Id.* (emphasis added). The Court instructed: "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress." *Id.* at 320. It concluded: "If the Act is to be altered that is a function for the same body that adopted it." *Id.*

Rayonier is dispositive because it overruled the lower court's decision to deny subject matter jurisdiction in cases of wildland firefighter negligence. The courts below, basing their rulings on *Dalehite*, had held that the discretionary function exception applied. *See, Rayonier*, 352 U.S. at 317 (discussing the lower court decisions). *Rayonier* clarified that none of the FTCA exceptions were "not relevant" to claims against wildland firefighters. *Id.* at 318. Regarding negligence claims against government wildland fire managers, the exceptions to subject matter jurisdiction do not apply. *Id.*

C. *Rayonier Remains Undisturbed.* It is acknowledged that the U.S. Supreme Court has since *Rayonier* developed an FTCA framework for applying the discretionary

function test in matters not involving firefighters performing wildland fire suppression. *See, Gaubert*, 499 U.S. 315 (1991) (savings and loan regulators); the U.S. Supreme Court with this Court (aviation regulators). These cases all involved alleged negligence by agencies regulating private actors in industries under their jurisdiction.

None of these cases involved negligence in the context of wildfire suppression—and none of them overruled, much less questioned, the holding in *Rayonier*. They are, therefore, distinguishable and do not control here. For example, *Varig Airlines* arose from two separate FTCA cases, one involving an airline disaster in which 124 passengers died and the second from a small air taxi crash. *Varig Airlines*, 467 U.S. at 800-805. The Ninth Circuit Court of Appeals decided the appellate decisions in those cases on the same day. Both ruled that negligent airworthiness inspections by federal aircraft regulators did not involve discretion and were therefore not subject to the discretionary function exception of 28 U.S.C. § 2680(a). This Court granted certiorari on both and reversed. *Id.*

In its analysis, the *Varig Airlines* decision carefully reviewed the holding in *Dalehite*—starting with "highlights" from the legislative history of the discretionary function exception. *Varig Airlines*, 467 U.S. at 809–10. The Court then observed, "[t]he nature and scope of § 2680(a) were carefully examined in *Dalehite v. United States*, supra." *Id.*, 467 U.S. at 810. After describing the holding of *Dalehite*, the Court ruled that in applying 28 U.S.C. § 2680(a), "[f]irst, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."

Varig Airlines, 467 U.S. at 813. "Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability." *Id.* The Court continued, "[s]econd, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government *acting in its role as a regulator of the conduct of private individuals*." *Id.* at 813–14 (emphasis added). As the Court outlined the legislative history:

> Time and again the legislative history refers to the acts of regulatory agencies as examples of those covered by the exception, and it is significant that the early tort claims bills considered by Congress specifically exempted two major regulatory agencies by name. See supra, at 2762–2763. This emphasis upon *protection for regulatory activities* suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, *including regulatory activities*, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations."

Id. at 814 (quoting *United States v. Muniz*, 374 U.S. 150, 163 (1963) (emphasis added)).

Notably, the Court saw no need to reexamine its decision in *Rayonier* to reach its holding in *Varig Airlines*. The Court addressed *Rayonier* only in a footnote, stating, "Respondents' reliance upon [*Rayonier*], is equally misplaced. In *Rayonier,* the Court revisited an issue considered briefly in *Dalehite*: whether the United States may be held liable for the alleged negligence of its employees in fighting a fire." *Varig Airlines*, 467 U.S. at 813, fn. 10. "The *Rayonier* Court rejected the reasoning of *Dalehite* on the ground that the liability of the United States under the Act is not restricted to that of a municipal corporation or other public body." *Id.* Thus, the portion of *Rayonier* overruling *Dalehite* on whether federal firefighters could be held liable under the FTCA was unaffected by the ruling in *Varig Airlines*. *Rayonier*, therefore, remains good law.

Similarly, the holding of *Berkovitz,* which is factually distinguishable from *Rayonier* and this case, affirmed *Dalehite's* application of 28 U.S.C. § 2680(a) to regulatory functions without undermining the analysis of wildland fire negligence in *Rayonier*. The question in *Berkovitz* was whether the discretionary function exception bars a suit based on the government's regulation of the polio vaccine. *Berkovitz* 486 U.S. at 533. Berkovitz, then a two–month–old infant, contracted polio from an oral vaccine. *Id.* Berkovitz filed suit against the United States, alleging it was liable for his injuries under the FTCA. *Id.* He claimed an agency of the National Institutes of Health had acted wrongfully in licensing the vaccine and that the Food and Drug Administration had acted wrongfully in approving the release to the public of the particular lot of vaccine containing Berkovitz's dose. *Id.* According to petitioners, these actions violated federal law and policy regarding the inspection and approval of polio vaccines. *Id.*

After granting certiorari, the Court left in place a court of appeals ruling that the discretionary function exception barred subject matter jurisdiction. This Court reasoned that under *Varig Airlines*, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Berkovitz*, 486 U.S. at 536. The Court stated, "In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice." *Id.* (citing *Dalehite*, 346 U.S. at 34). "Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* "In this event, the employee has no rightful option but to adhere to the directive." It concluded, "[a]nd if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect." *Id.* Thus, even though the Court relied on *Dalehite* for this analysis, it again did not disturb the holding in *Rayonier,* which overruled the *Dalehite* holding on firefighter negligence.

In *Gaubert*, the Court had yet another opportunity to narrow or overrule its holding in *Rayonier.* But it did not do so. *Gaubert* involved an action alleging negligence in the supervision by federal regulators of Independent American Savings Association (I.A.S.A.), a Texas-chartered and federally insured savings and loan. *Gaubert*, 499 U.S. at 318. Respondent Gaubert was I.A.S.A.'s chairman of the board and largest shareholder. *Id.* Federal regulators sought to have I.A.S.A. merge with a failing Texas thrift. *Id.* The regulators requested that Mr. Gaubert "sign an

agreement" that effectively removed him from I.A.S.A.'s management and asked him to post a $25 million interest in real property as security. Mr. Gaubert agreed to both. Federal officials then provided regulatory and financial advice to enable I.A.S.A. to consummate the merger. The regulators relied on I.A.S.A. and Mr. Gaubert, following their suggestions and guidance throughout this period. *Id.*

Although I.A.S.A. was thought to be financially sound while Gaubert managed the thrift, new directors soon announced that I.A.S.A. had a substantial negative net worth. Gaubert later filed an administrative tort claim with the federal regulators seeking $75 million in damages for the lost value of his shares and $25 million for the property he had forfeited under his personal guarantee. *Id.* After Gaubert's administrative claim was denied six months later, he filed an FTCA action against the regulators. He claimed damages for the alleged negligence of federal officials in selecting the new officers and directors and in participating in the day-to-day management of I.A.S.A. The Court relied on *Dalehite* to explain that "[i]f the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." *Gaubert*, 499 U.S. at 324. But, if a statute, regulation, or policy allows for employee discretion, "the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Id.*

Meanwhile, the case does not mention *Rayonier*, which overruled the portions of *Dalehite* holding that the FTCA waives sovereign immunity in favor of the victims of wildland firefighting negligence. It did not do

so because this aspect of *Dalehite*, overruled in *Rayonier*, was not at issue in *Gaubert*. Thus, the Court carefully considered the *Dalehite* ruling for the third time but left the holding in *Rayonier* undisturbed. This Court has made no subsequent consideration of either *Dalehite* or *Rayonier*. Again, the central proposition of *Rayonier*, that the FTCA waives sovereign immunity to negligence claims against federal wildland fire managers remains good law.

D. *The Berkovitz Test Need Not Be Revisited*. Federal firefighters are not regulators, and their fire suppression activities do not involve regulatory oversight of private parties—as did the agencies in *Varig Airlines, Gaubert,* and *Berkovitz*. Thus, *Rayonier*'s central holding—that the discretionary function exception does not waive sovereign immunity for claims of wildland fire management negligence—was not revisited, much less disturbed, by the Court's subsequent FTCA case law. *Rayonier*, therefore, controls the fact-specific subject matter jurisdiction question in this case.

Finally, the Court need not reconsider the *Berkovitz* test to clarify the law. *Rayonier* was fact-specific. The *Rayonier* decision focused on and directed subject matter jurisdiction over claims of negligent wildland fire management. The *Rayonier* Court's holding as to Congressional intent took into specific account the policy behind the FTCA when fire management negligence leaves victims impoverished, catastrophically injured, or dead. According to the Court's ruling in *Rayonier*, Congress intended to shift the this heavy burden of wildland fire manager negligence to the government, intending to spread it across a society that benefits from the great good fire managers generally do. To reiterate: "But when the entire burden falls on the injured party it may leave

him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees." *Rayonier*, 352 U.S at 320. Yet, as it stands now, the government nearly always escapes liability for bungled fire management decisions regardless of the level of harm.

The Ninth Circuit Court of Appeal's decision affirming the district court's dismissal of this action for lack of subject matter jurisdiction is wrong. It should be reversed, and the case should be remanded for disposition on the merits. This Court can and should clarify the state of crucial federal law by accepting this case for certiorari. The principle adopted in this Court's *Rayonier* decision should be reiterated for the instruction of district and appellate courts.

IV. This case is a particularly well-suited vehicle to clarify FTCA subject matter jurisdiction in cases of wildland fire management negligence.

For two reasons, this case presents an excellent vehicle for correcting the Circuit Courts' erroneous construction of the discretionary function exception to the FTCA in civil actions alleging wildland fire management negligence. The legal issue is the same in all relevant cases, and the factual background and alleged errors are all highly similar.

A. *Common Legal Issue.* This case involves a well-defined threshold legal issue characteristic in cases of wildland fire manager negligence. In these cases, federal fire managers are allegedly negligent in response to

wildland fires, whether naturally occurring, human-caused, or escaped prescribed burns. Universally, the government invokes *Berkovitz* and defends under the discretionary function exception, arguing a lack of subject matter jurisdiction. Universally, the appellate courts have ruled that wildland fire management amounts to "legislative and administrative decisions grounded in social, economic and political policy," following the first step in the *Berkovitz* analysis. Universally, pursuing the second step in the *Berkovitz* test, the appellate courts have ruled that fire manager discretion "involves the type of judgment that the exception is designed to shield." And, universally, the government prevails—despite the precedent of *Rayonier*. This case is no different in its threshold jurisdictional issue from any of the others in which the Courts of Appeals have ruled there is no subject matter jurisdiction. The Court of Appeal's legal reasoning here exemplifies the other equally erroneous holdings in the Sixth, Ninth, Tenth, and Eleventh Circuits referred to herein.[2]

B. *Characteristic Factual Background.* The alleged facts in this case mirror the fundamental outlines of *Rayonier* and the erroneous decisions by the courts of appeal. In all of these cases, allegedly negligent fire management decisions destroyed private property. For example, in *Rayonier*, the government fire managers did not extinguish spot fires or the smoldering remains of the main fire after it was contained on federal lands at 1,600

2. District Courts have followed suit. *E.g. Knezovich v. United States*, 598 F. Supp. 3d 1331, 1340 (D. Wyo. 2022); *Evans v. United States*, 598 F. Supp. 3d 907, 915 (E.D. Cal. 2022); *Ruffino v. United States*, 374 F. Supp. 3d 961, 973 (E.D. Cal. 2019); *McDougal v. U.S. Forest Service*, 195 F.Supp.2d 1229 (2002).

acres. *Rayonier*, 352 U.S. at 316. In *Miller*, fire managers left a lightning-caused fire unsuppressed, which allowed it to grow and eventually burn private lands. *Miller*, 163 F.3d at 592–93. In *Hardscrabble Ranch*, federal fire managers decided not to extinguish a lightning-caused fire but to pursue a partial suppression strategy instead, due to its geographic situation and perceived "resource benefits" from the fire. *Hardscrabble Ranch*, 840 F.3d at 1217–18. The fire escaped the partial suppression effort—and damaged private land. *Id.* In *Foster Logging*, federal fire managers allegedly did not adequately monitor a controlled burn they initiated, allowing it to escape containment and destroy private equipment and harvested trees. *Foster Logging*, 973 F.3d at 1155–56. Finally, in *Abbott*, fire managers lost control of a fire within a national park and negligently failed to warn neighboring landowners when it escaped the park. *Abbott*, 2023 WL 5286966, at *2. In all these cases, the causes of action were founded on federal fire management failures on federal lands, which allowed fire to escape and destroy private property. O'Grady's case is similar to these in that he alleges negligence by wildland fire managers in their failure to communicate with him about their intention to manage the Fire with large-scale firing operations on his property.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 28, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELLE SCHURG; DANIEL SCHURG; CHAD MILLER; BECCIE MILLER; JACKIE LOWE; LARRY A. ERNST; MAUREEN A. ERNST; RONNIE HARVIE; JOLEEN HARVIE; MARK STERMITZ; MICHELLE STERMITZ; BRIAN O'GRADY,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 22-35193

D.C. Nos.
9:20-cv-00061-DWM,
9:20-cv-00062-DWM,
9:20-cv-00063-DWM,
9:20-cv-00064-DWM,
9:20-cv-00065-DWM,
9:20-cv-00066-DWM,
9:20-cv-00067-DWM,
9:20-cv-00090-DWM.

Appendix A

Appeal from the United States District Court
for the District of Montana.
Donald W. Molloy, District Judge, Presiding.

December 5, 2022, Argued
and Submitted, Seattle, Washington;

March 28, 2023, Filed

Before: M. Margaret McKeown, Eric D. Miller,
and Holly A. Thomas, Circuit Judges

Opinion by Judge McKeown

SUMMARY[*]

Federal Tort Claims Act

The panel affirmed the district court's summary judgment in favor of the United States in an action brought by landowners alleging that the U.S. Forest Service is liable under the Federal Tort Claims Act ("FTCA") for failing to comply with its duty to consult with them about fire-suppression activities on or near their properties.

The FTCA's discretionary function exception preserves sovereign immunity as to claims regarding a government employee's "act or omission . . . based upon the exercise or performance or the failure to exercise or

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

perform a discretionary function or duty on the part of a federal agency." 28 U.S.C. § 2680(a).

The panel applied the requisite two-step test to determine whether the discretionary function exception applied. First, the panel examined whether there was a federal statute, regulation, or policy that prescribed the Forest Service's course of action regarding the agency's communications with the landowners during the Lolo Peak fire in the Bitterroot Mountains in Montana in July 2017. The published incident decision in place for the Lolo Peak fire contained an instruction, included in the "objectives" section of the incident decision, directing the Forest Service to "[c]onsult with private landowners and local fire district authorities if suppression activities have a high probability of occurring on private lands." The objective did not dictate when or how the Forest Service was to consult with private landowners and did not require the Forest Service to consult with landowners individually. The panel held that the Forest Service's specific communications with the landowners exceeded the incident decision's instruction and involved an element of judgment or choice sufficient to satisfy the first step of the discretionary function exception.

Second, the panel examined whether the Forest Service's decisions related to consulting with landowners about fire-suppression activities on and near their land were based on social, economic, and political policy. The panel held that the Forest Service's decisions about notifying the landowners about fire-suppression activities likely to occur on and near their properties

were susceptible to a policy analysis. The panel concluded that determining how to consult with private landowners while the Lolo Peak fire raged was precisely the type of decision the discretionary function exception was designed to shield, and the landowners' claims were thus barred by the discretionary function exception. Accordingly, the district court properly granted summary judgment for the Forest Service on all of the landowners' claims.

OPINION

McKEOWN, Circuit Judge:

The Lolo Peak fire tore through western Montana in the summer of 2017. From July to September, the fire destroyed multiple homes and buildings and required over 750 households to evacuate. The United States Forest Service, together with the Montana Department of Natural Resources and Conservation, managed the rapidly changing fire conditions and actively communicated with the public about the fire. After the fire, various affected landowners sued the federal government. They claim that the Forest Service is liable under the Federal Tort Claims Act ("FTCA") for failing to comply with its duty to consult with them about fire-suppression activities on and near their properties. Specifically, they argue that the Forest Service was required to consult with landowners through individualized—rather than public—communication channels.

This case calls on us to consider the bounds of the discretionary function exception to the FTCA. The

district court granted summary judgment for the Forest Service, holding that it lacked subject matter jurisdiction because the property owners' claims were barred by the discretionary function exception. We affirm.

I. Background

In July 2017, a lightning strike in the Bitterroot Mountains near Lolo, Montana ignited the Lolo Peak fire. Hot, dry weather in western Montana throughout the summer created dangerous fire conditions, posing an extreme risk to firefighters and residents. The fire, fueled initially by steep, heavily timbered terrain that prevented firefighters from engaging safely, burned for nearly three months. Appellants are landowners with homes in the Macintosh Manor subdivision plus one individual, Brian O'Grady, who owns undeveloped land, collectively "the landowners." Their property was damaged during the Lolo Peak fire.

Shortly after the fire started, the Lolo National Forest Supervisor requested the help of a fire team capable of handling Type 1 incidents. Type 1 incidents are highly complex, difficult to stabilize, consume significant resources, pose a danger to neighboring populations, and demand a high level of public communication. The Forest Service and Montana Department of Natural Resources and Conservation delegated the Type 1 incident management team "full authority and responsibility for fire management activities." The primary duty of the team was to manage and direct resources for "safe, efficient and effective management of the fire," with additional

responsibility to communicate internally and with the public about the fire.

The team used the Wildland Fire Decision Support System—an online program that allows fire teams to monitor weather, model possible fire behavior, access fire-related information technology, view applicable fire-management plans, and more—to make strategic and tactical fire-related decisions. The team prepared and published incident decision reports on the Wildland Fire Decision Support System platform. The first incident decision was published in late July 2017 and updated in early August 2017 after the fire spread significantly. The decision included contingencies to help the team act quickly if the fire reached certain geographic locations and provided general guidelines for public communication. In particular, the updated decision stated that the team was required to "[c]onsult with private landowners and local fire district authorities if suppression activities have a high probability of occurring on private lands."

As part of its public-information function, the team developed a multi-faceted communication strategy for the fire designed to reach as many members of the public as possible. For example, the team held in-person meetings at local schools and churches and visited high-traffic areas such as supermarkets, gas stations, and post offices daily to disseminate print information and answer questions. On a Facebook page developed specifically for the Lolo Peak fire, the team posted updates and livestreamed public meetings. The team posted daily about the fire on InciWeb, a public, online platform for sharing incident-

related information. Community members could receive fire updates by visiting the team's information trailer, sending questions to a fire-specific email account, and following the daily press releases the team provided to print, television, and radio outlets. The team decided to favor technology-based communication methods over slower, more individualized methods given the number of residents in proximity to the fire, the community's sophistication, and the "widespread availability of internet access."

By early August, the fire had spread substantially and spanned over 5,000 acres. Daily posts on InciWeb, as well as other communication methods, informed the public about the direction of fire growth and about the fire retardant, aerial ignition, and fire-control lines the team was using for mitigation and containment. Despite the team's numerous efforts, the fire reached O'Grady's undeveloped, forested land in mid-August. Based on the fire's rampant spread and strong wind conditions, the team decided to conduct firing operations, which involved burning fuels to stop the fire's growth and "limit impacts to fire severity to vegetation," on O'Grady's property on August 14. On InciWeb, the team explained that firefighters were executing firing operations and "carefully introducing fire in unburned areas," or "fighting fire with fire[] to slow the advance of the fire front." O'Grady learned that the fire had reached his property by checking InciWeb, which he did "most days."

In the days that followed, low humidity and strong winds increased the fire's intensity as it spread rapidly

toward the Macintosh Manor subdivision, where the remainder of the landowners owned homes. On August 16, the fire burned 4,000 acres and crossed a geographic location listed in the published incident decision, triggering evacuation orders and signaling danger to Macintosh Manor. The team determined that conducting firing operations to slow the spread of the fire, although hazardous to residents in the area, presented the best opportunity for containment. During the morning of August 17, the team updated InciWeb to report the raging fire conditions, explain that the team dropped retardant from aircraft to slow the fire's spread, and notify the public of the team's plan to conduct firing operations by the afternoon. The team also held a public meeting on August 17, staffed an information trailer in the community, and used other technology-based communication methods to disseminate information. The burnout operations began that day, but the fire nonetheless reached Macintosh Manor that evening. Despite the team's mitigation attempts, the fire destroyed two homes and several accessory structures.

In the aftermath, O'Grady and several Macintosh Manor residents brought negligence and intentional tort claims against the Department of Agriculture and the Forest Service. They argued that, based on the published incident decision, the Forest Service was required to consult them personally about the fire-suppression activities that occurred on their properties but that it failed to do so. They further claimed that the Forest Service intended the suppression activities to cause fire damage on their properties. The district court held that

the discretionary function exception to the FTCA barred the claims and granted summary judgment for the Forest Service.

II. Analysis

Under the FTCA, district courts have jurisdiction over claims against the United States for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of any government employee "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). The United States has waived its sovereign immunity for certain tort claims under the FTCA, and parties can sue the government only where sovereign immunity is waived. *Esquivel v. United States*, 21 F.4th 565, 572-73 (9th Cir. 2021). We review *de novo* the district court's determination that it lacks subject matter jurisdiction under the FTCA. *Id.* at 572.

The FTCA's discretionary function exception preserves sovereign immunity as to claims regarding a government employee's "act or omission . . . 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 government employee. *Id.* at 573 (quoting 28 U.S.C. § 2680(a)). The Supreme Court has crafted a "two-step test to determine whether the discretionary function exception" applies. *Id.* Courts must

determine whether (1) "the challenged actions involve an 'element of judgment or choice'" and, if so, whether (2) the "judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 573-74 (first quoting *United States v. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991); and then quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988)). The federal government is immune from suit if the challenged action satisfies both steps. *Id.* at 574. If so, "federal courts lack subject matter jurisdiction" over the dispute, "even if the court thinks the government abused its discretion." *Id.*

At the first step, we must "determine whether a federal statute, regulation, or policy mandated a specific course of action, or whether the government actor retained an element of judgment or choice with respect to carrying out the challenged action." *Green v. United States*, 630 F.3d 1245, 1249 (9th Cir. 2011). We focus on the "nature of the conduct, rather than the status of the actor," and a government employee's action is nondiscretionary where it is specifically prescribed by "a federal statute, regulation, or policy." *Esquivel*, 21 F.4th at 573 (quoting *Berkovitz*, 486 U.S. at 536). If there is an "element of judgment or choice," we proceed to the second step and ask whether the government actor's action or inaction was "based on considerations of public policy," which are "the kind that the discretionary function exception was designed to shield." *Green*, 630 F.3d at 1249 (quoting *Terbush v. United States*, 516 F.3d 1125, 1129 (9th Cir. 2008)). The landowners bear the "burden of showing there are genuine issues of material fact as to whether the exception should

apply, but the government bears the ultimate burden of establishing that the exception applies." *Esquivel*, 21 F.4th at 574 (quoting *Green*, 630 F.3d at 1248-49).

This is not the first time we have addressed the discretionary function exception in the context of forest fires. Most recently, in *Esquivel v. United States*, we held that the Forest Service's actions fell within the discretionary function exception when a wildfire threatened private property and a fire crew obtained a resident's verbal consent before starting suppression activities, but the crew's fire-suppression activities damaged the property. *Id.* at 570-72. At the first step, the Forest Service's communication with the landowners involved an element of choice because no statute, regulation, or policy contained mandatory language regarding landowner communication, and the governing Forest Service manual provided that "reasonable discretion in decision-making may be required" because of the "dynamic, chaotic, and unpredictable" nature of wildfire. *Id.* at 574-75. At the second step, the landowner communication was part of the Forest Service's choice of "how to organize and conduct fire suppression operations, which undisputedly requires the exercise of judgment grounded in social, economic, or political policy." *Id.* at 577.

We reached a similar conclusion in *Miller v. United States*, holding that the presence of mandatory language in Forest Service documentation, such as a directive to "apply aggressive suppression action to wildfires that threaten assets," did not "eliminate discretion" because it did not tell the Forest Service "how to fight the fire." 163

F.3d 591, 594-95 (9th Cir. 1998). Additionally, the Forest Service's decision-making related to managing multiple fires was susceptible to a policy analysis because it required the agency to "balance competing concerns" such as public safety, environmental protection, and resource management. *Id.* at 596.

After *Miller* but before *Esquivel*, in *Green v. United States*, we held that the discretionary function exception did not apply in one circumstance where the Forest Service performed fire-suppression activities near landowners' property, "did not take any action to protect" the property, and did not inform the landowners about its suppression efforts. *See* 630 F.3d at 1247-48. Although the applicable Forest Service manual directed the agency to ensure the public was informed about fire-suppression efforts, the Forest Service's communication decision—or lack thereof—involved an element of choice because the manual did not "prescribe a mandatory course of action." *Id.* at 1250. The Forest Service's actions were not susceptible to a policy analysis, however, because there was no evidence that the agency had to determine how to allocate resources between firefighting and public communications. *See Green*, 630 F.3d at 1250-52. We explained that without evidence that the Forest Service had to make a policy decision about landowner communication "during firefighting operations," such as a choice between community distribution methods and "direct contact with private citizens," the Forest Service could not meet the second step of the discretionary function exception. *Id.* at 1252.

As in *Esquivel* and *Green*, the landowners here challenge the Forest Service's communications with them regarding its fire-suppression activities. Because the Forest Service's communication involved an element of judgment or choice and was susceptible to a policy analysis, the discretionary function exception to the FTCA applies and bars their claims.

A. Element of Judgment or Choice

The first step of the discretionary function exception test asks "whether there was a federal statute, regulation, or policy in place that specifically prescribed a particular course of action by the Forest Service" regarding the agency's communication with the landowners during the Lolo Peak fire. *See Miller*, 163 F.3d at 594. "An agency must exercise judgment or choice where no statute or agency policy dictates the precise manner in which the agency is to complete the challenged task." *Green*, 630 F.3d at 1250. If a statute or policy directs "mandatory and specific action," however, there can be no element of choice. *Terbush*, 516 F.3d at 1129.

The published incident decision in place for the Lolo Peak fire directed the Forest Service to "[c]onsult with private landowners and local fire district authorities if suppression activities have a high probability of occurring on private lands." The instruction to consult with private landowners appeared in the "objectives" section of the incident decision alongside directives to avoid using aerial fire retardant in areas with endangered species and to ensure "media messages are accurate." Additionally, a

letter from the team leadership specified that the team could not deviate from the published incident decision without issuing a new decision.

Neither the objective to consult with private landowners nor the team letter is a "federal statute, regulation, or policy in place that specifically prescribed a particular course of action by the Forest Service." *See Miller*, 163 F.3d at 594. The objective did not dictate when or how the Forest Service was to consult with private landowners and did not require the Forest Service to consult with landowners individually. *See Green*, 630 F.3d at 1251 (holding that a plan requiring the Forest Service to develop a map of private land and record landowners' contact information was a mere "objective" involving an element of choice because it did not "dictate[] the precise manner in which the agency [was] to complete the challenged task"). In the absence of such directives, the Forest Service necessarily had to choose the best way to publicize information about the fire. Its decision to do so mainly through technology-based methods like InciWeb posts was central to its responsibility to manage the fire and ensure public safety. That the incident decision does not define "suppression activities" or "high probability," allowing the Forest Service discretion to determine when the likelihood of fire-suppression activities on private land warranted landowner consultation, further supports that the "consult with private landowners" instruction involved an element of judgment or choice. *See Miller*, 163 F.3d at 594-95.

The Forest Service's actions more than rose to the level of consulting with private landowners. The Forest Service's numerous communications with the public included InciWeb and Facebook posts, in-person and broadcast community meetings, daily press releases to media outlets, information distribution in high-traffic areas, and more. The specific communication with the landowners, including InciWeb posts regarding fire-suppression activities on and near Macintosh Manor and O'Grady's undeveloped land, exceeded the incident decision's instruction and involved an element of judgment or choice sufficient to satisfy the first step of the discretionary function exception.

B. Considerations of Public Policy

The pertinent question at the second step of the discretionary function exception test is whether the Forest Service's decisions related to consulting with landowners about fire-suppression activities on and near their land were based on "social, economic, and political policy." *See Esquivel*, 21 F.4th at 574 (citing *Berkovitz*, 486 U.S. at 537). "The challenged decision need not be actually grounded in policy considerations, but must be, by its nature, susceptible to a policy analysis." *Green*, 630 F.3d at 1251 (quoting *Miller*, 163 F.3d at 593).

The Forest Service's decisions about notifying the landowners about fire-suppression activities likely to occur on and near their properties are susceptible to a policy analysis. To begin, the choice to post on InciWeb about fire-suppression activities on and near Macintosh

Manor and O'Grady's undeveloped land instead of talking directly with the landowners "involved a balancing of considerations." *Miller*, 163 F.3d at 595. The Forest Service had to balance the team's safety during a time of worsening fire conditions in mid-August 2017 with the time-intensive nature of reaching members of the public on a personalized basis. Its decision was informed by "the widespread availability of internet access and the public's sophistication" in the areas surrounding the fire. As we have previously held, "[t]hese considerations reflect the type of economic, social and political concerns that the discretionary function exception is designed to protect." *Id.*

The Forest Service's communications about its fire-suppression activities "were part of the decision to set, and the subsequent conduct of, the burnout—which is undisputedly a policy-based decision covered by the discretionary function exception." *See Esquivel*, 21 F.4th at 576. We explained in *Esquivel* that "communication between fire crews and property owners is . . . covered by the discretionary function exception" where the communication is "based upon the performance of fire suppression operations." *Id.* The in-person conversation between the fire crew and the resident in *Esquivel* was susceptible to a policy analysis because the conversation "concerned how to organize and conduct suppression operations." *Id.* The same reasoning applies here. For example, the Forest Service's decision to post on InciWeb and use other technology-based methods to notify landowners about the fire-suppression activities on and near their properties instead of talking with them directly

was related to its decision about "whether, where, and how to set and manage" the fire-suppression activities. *See id.* The team decided to conduct firing operations, used technology to communicate with the landowners about the firing operations, and focused its resources on engaging the fire. As in *Esquivel*, the communication about the fire-suppression activities was not "separate and apart" from the fire-suppression activities themselves. *Id.* at 577.

The landowners' efforts to invoke *Green* to argue that the Forest Service's communication was not susceptible to a policy analysis fall short. There, we found no evidence that the Forest Service had to choose how to allocate resources between fire management and public communication. *Green*, 630 F.3d at 1252. We explained that an example of the kind of resource allocation susceptible to a policy analysis—deciding "between community-wide distribution (such as newspapers and radio stations) and direct contact with private citizens (such as phone calls or door-to-door contacts)"—was absent. *Id.* Here, in contrast, the Forest Service made policy and resource choices based on the sophisticated nature of the community and the need to focus resources on fire management. Regrettably, the Forest Service in *Green* made no effort to communicate with landowners about its fire-suppression activities. *See id.* at 1248. The policy decisions missing in *Green* are present here.

The Forest Service's communication with the landowners about fire-suppression activity that had a high probability of occurring on or near their land satisfies both steps of the discretionary function exception. Determining

how to consult with private landowners while the Lolo Peak fire raged is precisely the type of decision the discretionary function exception was designed to shield, and the landowners' claims are thus barred. Accordingly, the district court properly granted summary judgment for the Forest Service on all of the landowners' claims.

AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION, FILED FEBRUARY 8, 2022

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MONTANA,
MISSOULA DIVISION

MICHELLE SCHURG AND DANIEL SCHURG,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Lead Case No.
CV 20-61-M-DWM

Member Case Nos.
CV 20-62-M-DWM;
CV 20-63-M-DWM;
CV 20-64-M-DWM;
CV 20-65-M-DWM;
CV 20-66-M-DWM;
CV 20-67-M-DWM;
CV 20-90-M-DWM

February 8, 2022, Decided;
February 8, 2022, Filed

Appendix B

OPINION and ORDER

This action involves many consolidated cases arising out of the Lolo Fire ("the Fire"), which took place during July and August 2017. The concerned plaintiffs are Michelle and Daniel Schurg, Beccie and Chad Miller, Jackie Lowe, Maureen and Larry Ernst, Joleen and Ronnie Harvie, Mark Stermitz, Michelle Stermitz, and Brian O'Grady (collectively, "Plaintiffs"). Here, Plaintiffs whose property included a house are referred to as "the Residential Plaintiffs." This designation includes all Plaintiffs except O'Grady. As stated in the previous order, (Doc. 57), Plaintiffs make claims sounding in intentional tort and negligence against the United States Department of Agriculture and the United States Forest Service, collectively referred to as "the Government." It is worth noting that the law Plaintiffs relied on when the case was filed was subsequently clarified in a way that undermines their cases. *See Esquivel v. United States*, 21 F.4th 565, 573 (9th Cir. 2021).

Both the Government and the Plaintiffs filed multiple motions for summary judgment, (Docs. 17, 20, 29),[1] and an argument at a motion hearing was held on January 26, 2022. Following the hearing, the Government's motions for summary judgment were granted, while Plaintiffs' motion for summary judgment was denied. (Doc. 57.) Consistent with that order, the Government's motions were granted for the reasons set forth below, and judgment is entered in its favor.

1. All citations are to the lead case, 9:20-cv-61-M-DWM, unless otherwise noted.

Appendix B

Background

The following facts are undisputed unless otherwise noted. (*See* Docs. 19, 22, 24, 31, 34); *Tolan v. Cotton*, 572 U.S. 650, 657, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (per curiam).

I. Development of the Fire

On July 15, 2017, lightning struck 10 miles southwest of Lobo and 6 miles up the South Fork Lobo Creek drainage area and ignited the Fire. (Doc. 34 at ¶ 1.) Because of the terrain, the Lobo National Forest Supervisor determined that the safest way to manage the Fire was through an "indirect strategy," meaning that firefighters wait and prepare for the fire to reach safer terrain before actively fighting it. (*Id.* ¶¶ 3-4.) The Supervisor placed an order for a Type 1 Incident Management Team ("the Team"), indicating that the fire represented the most complex type of incident. (*Id.* ¶¶ 5-6.) The Team was ordered because such teams "excel at long-term planning and public communication." (*Id.* ¶¶ 9.) Plaintiffs do not dispute that such teams generally excel at these activities, but they dispute that the Team here lived up to this expectation. (*Id.*)

On July 21, the Northern Rockies Coordination Center assigned Incident Commander Greg Poncin's Team to the Fire, and Poncin accepted delegated authority to manage the Fire from the Lobo National Forest Supervisor. (*Id.* ¶¶ 11-12.) On July 29, the Bitterroot National Forest and Montana Department of Natural Resources delegated

authority to Poncin. (*Id.* ¶ 13.) Also on July 29, the Team internally circulated a "Structure Protection Plan for Macintosh Manor" that was prepared with the help of the Forest Service. (*Id.* ¶ 29.) The Plan included assessments for 900 properties, including Plaintiffs', and labeled each property as one of four categories: Defensible, Standalone; Defensible, Prep and Leave; Defensible, Prep and Hold; or Non-Defensible, Prep and Leave. (*Id.* ¶¶ 29-30; *see also* Doc. 21-1 at 6-121.) While Plaintiffs note that the information in the assessments "would have been valuable" to them before fire reached their properties, they do not dispute that the purpose of the assessments was to assist firefighters in the event the fire eventually threatened residential areas. (Doc. 34 at ¶ 32.) In fact, such assessments are not public documents and are not provided to homeowners unless specifically requested. (*Id.* ¶¶ 33.)

By August 1, the Fire had increased in size while growing northward so that it encompassed over 5,000 acres. (*Id.* ¶ 35.) The Team described the growth of Fire in daily website posts available to the public on the Forest Service's website, "InciWeb." (*Id.* ¶ 36.) On August 3, Noel Livingston took over as the Incident Commander of the Team due to federal work/rest guidelines. (*Id.* ¶ 38.) On August 4, Lobo National Forest staff provided a decision document that considered current fire conditions and included updates to the Management Action Points established in previous decisions. (*Id.* ¶¶ 41-42.) Between August 4 and August 10, the Fire continued to grow northward, in the general direction of Plaintiffs' properties. (*Id.* ¶ 44.)

II. Damage to Plaintiffs' Properties

Between August 13 and August 17, the Fire developed and damaged Plaintiffs' properties. While the facts for each individual Plaintiff are outlined separately below, a few facts are common to all Plaintiffs. First, at 10:00 p.m. on August 16, the Missoula County Sheriffs Office issued an evacuation order to residents in the area that included Plaintiffs' properties. (*Id.* ¶ 77.) Second, during this general period, the Team utilized "firing operations," or backburns, which is "the controlled application of fire between established containment lines and an active fire front." (Doc. 18 at 7.) Finally, the Government does not generally dispute that Plaintiffs were injured and that their properties were damaged; rather, the Government disputes the severity and extent of Plaintiffs' damages and denies any liability for those damages.

A. O'Grady (Case No. 9:20-cv-90-M-DWM)

Plaintiff Brian O'Grady is a Colorado resident, and he was residing in Colorado during the Fire. (Doc. 34 at ¶ 52.) He purchased the property at issue in 2013 and visited it two or three times a year. (Doc. 31-23 at 7.) On the evening of August 13, the Fire spread onto the easternmost section of his land. (Doc. 34 at ¶ 47.) The parties dispute the depth of O'Grady's knowledge, but they do not dispute that he had knowledge of the Fire from its inception. (*Id* ¶ 53.) In fact, O'Grady was driving to Montana when he found out about the Fire, (Doc. 31-23 at 7), and between mid-July and August 17, O'Grady checked InciWeb "most days" for updates, (Doc. 34 at ¶ 131).

Additionally, "[t]he United States identified [O'Grady] as a landowner likely to be impacted by the Fire and possessed Mr. O'Grady's telephone number on the [Incident Management Team]'s contact list." (*See* Doc. 21 at 3; *see also* Doc. 21-2.) But O'Grady contends that the Forest Service "began aerial and ground firing operations on [his] property without notifying or informing him at any time." (*See O'Grady v. United States*, 9:20-cv-90-M-DMW (Doc. 1 at ¶ 21).) The Government admits that, on August 14, it made the decision to conduct firing operations, (Doc. 32 at ¶ 20)), but the Government asserts that firing operations did not actually occur on O'Grady's land until August 17, (*id.* ¶ 32). While the Government disputes whether it had a duty to contact O'Grady, it does not dispute that it did not contact him before conducting the firing operations. (Doc. 32 at ¶ 21.) And, unlike the other Plaintiffs, the Government acknowledges that it conducted firing operations directly on O'Grady's property. (*See* Doc. 19 at ¶¶ 18, 21.) O'Grady argues that these operations "destroyed [his] forested lands, roads, culverts, and real property." (*O'Grady*, Doc. 1 at ¶ 23.)

B. Schurg Property (Case No. 9:20-cv-61-M-DWM)

At all the times relevant, Michelle and Daniel Schurg resided at 16252 Folsom Road. (Doc. 1 at ¶ 1.) Unbeknownst to the Schurgs, their home had been designated as "Defensible, Stand Alone" at the time of the Fire. (*Id.* ¶¶ 11, 13.) On August 17, the Schurgs disregarded the evacuation order and did not evacuate, despite the encroaching fire, and instead remained on

their property and defended their home. (Doc. 18-1 at 9.) The Schurgs allege that, as they fought the Fire,[2] firefighters with the Forest Service observed their efforts but did nothing to help. (Doc. 31-37 at 34.) The Schurgs saved their home, but portions of their property burned and they "discovered burn holes in their deck." (Doc. 1 at ¶ 65.)

C. Miller Property (Case No. 9:20-cv-62-M-DWM)

At the times relevant, Chad and Beccie Miller resided at 16485 Folsom Road. (*See Miller v. United States*, 9:20-cv-62-M-DWM (Doc. 1 at ¶ 1).) Unbeknownst to the Millers, their home was designated as "Defensible, Stand Alone" during the time of the Fire. (*Id.* ¶¶ 11, 14.) On the night of August 16, 2017, the Millers received notice that they had to evacuate. (Doc. 34 at ¶ 142.) However, Mrs. Miller did not receive notice from the Forest Service, but from her daughter, who was apparently informed by the Millers' neighbors. (Doc. 31-30 at 8.) At the time of the evacuation notice, Mr. Miller was away, so Mrs. Miller called him to tell him about the evacuation order. (*Id.*) Mrs. Miller and her daughter evacuated from their home and allegedly experienced significant difficulty evacuating the Millers' animals, which included pigs, chickens, dogs, horses, and goats. (Doc. 31-30 at 15-16.) Although the Millers' home did not completely burn, it sustained smoke and heat damage, and parts of the property and fencing were destroyed. (*See Miller*, Doc. 1 at ¶¶ 37, 39.)

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2. Both Schurgs have wildland firefighting experience. (*See* Doc. 1 at ¶ 79; Doc. 31-37 at 5.)

D. 16595 Folsom Road: Stermitz and Lowe Property

Three Plaintiffs are tied to this case by the property at 16595 Folsom Road: Jackie Lowe (*Lowe v. United States*, 9:20-cv-63-M-DWM); Mark Stermitz, (*Stermitz v. United States*, 9:20-cv-66-M-DWM ("*Stermitz I*"); and Michelle Stermitz, (*Stermitz v. United States*, 9:20-cv-67-M-DWM ("*Stermitz II*")). Lowe and Mark Stermitz were married but separated in the summer of 2017, and Michelle Stermitz is their daughter. (*See Schurg*, Doc. 31-33 at 4.) Unbeknownst to any of these Plaintiffs, the property at 16595 Folsom Road was designated as "Non-Defensible, Prep and Leave" during the time of the Fire. (*See Stermitz I* (Doc. 1 at ¶¶ 11, 13).)

Lowe received notice of the evacuation order on the evening of August 16, 2017, apparently from Mrs. Miller. (Doc. 31-32 at 15.) Michelle Stermitz drove to the residence and helped her mother evacuate as the fire approached. (Doc. 31-34 at 9.) Mark Stermitz was not in Missoula at the time, and he first learned about the threat when Michelle Stermitz called him. (Doc. 31-33 at 15.) Ultimately, fire destroyed the home, the shop, and real and personal property. (*Id.* at 20.)

E. Ernst Property (Case No. 9:21-cv-64-M-DWM)

At all times relevant, Larry and Maureen Ernst resided at 16575 Folsom Road. (*Ernst v. United States*, 9:21-cv-64-M-DWM (Doc. 1 at ¶ 1).) Unbeknownst to them,

their home was designated as "Non-Defensible, Prep and Leave" during the time of the Fire. (*Id.* ¶¶ 16-17.) The Ernsts attended three or four in-person, public meetings between the end of July 2017 and August 17, 2017, and regularly visited the fire information station. (Doc. 34 at ¶¶ 137-38.) Mrs. Ernst also monitored InciWeb daily. (Doc. 31-40 at 12.) Late on August 16, Mrs. Ernst received a call notifying her of the evacuation order. (*Id.* at 10.) The Ernsts packed some possessions and loaded their pets into vehicles, and around 11:30 p.m. a sheriff arrived at their property, advising Mr. Ernst that the road to the Ernst's property would close around 3:00 a.m. (Doc. 31-39 at 11.) The Ernsts evacuated in the early hours of August 17, but Mr. Ernst returned in defiance of the evacuation order to photograph the property. (Doc. 34 at ¶ 85.) Ultimately, the fire destroyed the Emsts' home, (*Ernst* (Doc. 1 at ¶ 34)), their metalworking shop, woodworking shop, and personal and real property, (Doc. 31-39 at 6).

F. Harvie Property (Case No. 9:20-cv-65-M-DWM)

At all times relevant, Ronnie and Joleen Harvie resided at 16490 Folsom Road. (*Harvie v. United States*, 9:20-cv-65-M-DWM (Doc. 1 at ¶ 1).) Unbeknownst to the Harvies, the Forest Service designated their home as "Defensible, Stand Alone" at the time of the Fire. (*Id.* ¶¶ 11-12.) The Harvies received the evacuation order late on August 16 and left their home around 2:00 a.m. on August 17. (Doc. 31-35 at 9.) Their home survived, but their real property was significantly damaged, and they lost personal property. (Doc. 23-16 at 3-4.)

Appendix B

Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On cross-motions for summary judgment, it is the court's "independent duty to review each cross-motion and its supporting evidence . . . to determine whether the evidence demonstrates a genuine issue of material fact." *Fair Housing Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1137 (9th Cir. 2001). Each motion is therefore evaluated separately, "giving the nonmoving party in each instance the benefit of all reasonable inferences." *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1150 (9th Cir. 2016).

Analysis

Plaintiffs' claims nestle into one of two categories: intentional torts or negligence. From a bird's eye view, the intentional tort claims are grounded in the allegation that the Forest Service intended fire to be on or travel onto Plaintiffs' properties as a result of the August 17 firing operations. By contrast, the negligence claims are largely based on the allegation that the Forest Service failed to provide notice or warnings to Plaintiffs informing them that their properties and/or homes were at risk because of the Fire, despite the Forest Service allegedly possessing the knowledge of the risk and the ability to communicate it.

Summary judgment is granted for the Government across the board, primarily because the Government's

communication methods are immunized by the discretionary function exception. Moreover, the undisputed facts show that the Government had the legal right to conduct firing operations on O'Grady's property; the Government did not intend for fire to travel or remain on the Residential Plaintiffs' properties; and the record shows that any emotional distress Plaintiffs suffered does not rise to the "serious or severe" threshold.

I. Negligence

"An action can be brought by a party against the United States only to the extent that the Federal Government waives its sovereign immunity" *Blackburn v. United States*, 100 F.3d 1426, 1429 (9th Cir. 1996). Under the Federal Tort Claims Act ("FTCA"), "[t]he United States and its agents can . . . be held liable with respect to tort claims 'in the same manner and to the same extent as a private individual under like circumstances.'" *Esquivel*, 21 F.4th at 573 (quoting 28 U.S.C. § 2674). But the discretionary function exception to the FTCA maintains the Government's immunity from suit for any claim based on a government employee's action or inaction related to "a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved [was] abused." 28 U.S.C. § 2680(a).

Plaintiffs believe the discretionary function of the FTCA does not apply and that because there are no material disputes of fact on the Plaintiffs' negligence claims, they are entitled to judgment as a matter of *law. (See generally* Doc. 21.) Instead of basing their

claims in the Government's methods for conducting firing operations or fire suppression efforts, Plaintiffs' negligence claims focus on the Government's failure to provide notice or otherwise communicate with Plaintiffs about fire management. (*See id.* at 2-3)[3] The Government agrees that there are no material disputes of fact, but it argues that the discretionary function applies, and so summary judgment in the Government's favor is appropriate because this Court lacks jurisdiction. (*See generally* Doc. 30.)

While the applicability of the discretionary function exception was a more open question at the time this case was filed—and even when summary judgment briefing was underway—the Ninth Circuit's recent decision in *Esquivel v. United States*, 21 F.4th 565 (9th Cir. 2021), together with the Ninth Circuit's decision in *Green v. United States*, 630 F.3d 1245 (9th Cir. 2011), establish parameters within which Plaintiffs' claims fall. A two-step process determines whether the discretionary function exception applies: "[f]irst, courts must determine whether the challenged actions involve an element of judgment or choice." *Esquivel*, 21 F.4th at 573 (quotation marks omitted). If the element of judgment or choice is present, "the court moves to the second step and must determine

3. To the extent Plaintiffs' negligence claims are grounded in "negligent firefighting" or the allegation that the Forest Service should be liable for conducting firing operations because a private person would be liable for such conduct, (*see* Doc. 21 at 6-9), the claims fail because it is well-settled that fire suppression methods fall within the discretionary function exception. *See Esquivel v. United States*, 21 F.4th 565,574 (9th Cir. 2021) (collecting cases).

whether that judgment is of the kind that the discretionary function exception was designed to shield. Namely, the exception protects only governmental actions and decisions based on social, economic, and political policy." *Id.* at 574 (quotation marks and citation omitted). If the action involves either judgment or choice, and it sounds in policy, the "action is immune from suit—and federal courts lack subject matter jurisdiction—even if the court thinks the government abused its discretion or made the wrong choice." *Id.* (quotation marks omitted). "The plaintiff has the burden of showing there are genuine issues of fact as to whether the exception should apply, but the government bears the ultimate burden of establishing the exception applies." *Id.* (quotation marks omitted).

"[C]laims involving how the government conducts fire suppression operations are generally barred by the discretionary function." *Id.* (collecting cases). But until the Ninth Circuit's recent decision in *Esquivel—and* at the time the parties' briefed the issue—it was unclear to what extent communications surrounding fire suppression efforts were also immunized. *Esquivel* clarified that "[a] communication between fire crews and property owners is . . . covered by the discretionary function exception under 28 U.S.C. § 2680(a) if such communication was based upon the performance of fire suppression operations." *Id.* at 576. Thus, determining whether the discretionary function applies to Plaintiffs' claims that the Forest Service was negligent in failing to issue an evacuation warning before the evacuation order involves the familiar two-step inquiry, as informed by *Esquivel*: (1) did the decision not to notify Plaintiffs of the possibility

of evacuation involve an element of judgment or choice, and (2) if so, whether that decision was based upon the performance of fire suppression operations. *See id.*

A. Element of Judgment or Choice

The first inquiry is whether the communication between the Government and Plaintiffs involved an element of judgment or choice. "An agency must exercise judgment or choice where no statute or agency policy dictates the precise manner in which the agency is to complete the challenged task." *Green*, 630 F.3d at 1250. Here, Plaintiffs point to the Forest Service's "Deliberate Risk Management Analysis Worksheets," which state the Forest Service is to "use established [Management Action Points] to anticipate and order evacuations proactively, continue good relationships with public. . . [and] use modeling and broadcast forecasts insuring positive communication." (Doc. 22 at ¶ 37.) In light of this direction, Plaintiffs argue that the Forest Service's decision to issue an evacuation order—but not an evacuation notice that provided Plaintiffs more time to prepare—directly contradicted binding, thus nondiscretionary, instructions.

The Government, by contrast, argues that the type of information Plaintiffs insist they should have received—namely, that their properties might be threatened by the Fire—was readily available to them, and Plaintiffs' claim really takes issue with the method of communication. (Doc. 30 at 38-39.) In addition, the Government points to evidence in the record related to the Forest Service's communication initiatives. (*See* Doc. 31 at ¶¶ 27-28.)

For example, in the earliest stages of the Team's involvement with the Fire, the Team issued the "Lobo Peak Incident Decision," which articulated objectives for the Forest Service in attacking the Fire. (*See* Doc. 31-7.) "Communications" objectives, as stated in that decision, include the "commmunicat[ion] [of] appropriate information with the appropriate . . . landowners." (*Id.* at 19.) In addition, the decision states an objective to

> [a]ssure that relationships are maintained and enhanced with private land owners in the Florence and Lolo community, Bitterroot and Lolo NF personnel, elected officials, and other agencies involved in the fire effort. Place emphasis on ensuring media messages are accurate, timely and positive and facilitate information in response to local concerns regarding impacts from the fire to the residents.

(*Id.* at 20.) Subsequently, the Team issued another Incident Decision on August 4, 2017. This decision reiterates the same communication objective noted above, (*see* Doc. 34-8 at 22), and also states that "[t]he location, timing, and behavior of the fire will dictate the location and priority of the zone evacuation," (*id.* at 37).

The record memorializes how the Team's firefighting strategy and communication about that strategy evolved. The Worksheets to which Plaintiffs cite state that the Forest Service should "anticipate and order evacuations proactively." (Doc. 22 at ¶ 37.) This direction says nothing about "warning" of evacuations, nor does it set a timeline

for what it means to be "proactive." Thus, adhering to this directive necessarily involves judgment in deciding when to "order evacuations" in a "proactive way." Similarly, the Incident Decisions state that the Forest Service will maintain and enhance communication efforts with landowners and emphasize "accurate, timely and positive" information. Again, there are no parameters on what form this communication is to take. *Cf. Green*, 630 F.3d at 1252 (noting that Forest Service's communication was discretionary but failed to find root in policy). For these reasons, the Government's communication, or lack thereof, with Plaintiffs was discretionary.

B. Policy Decision

Because the decision not to contact Plaintiffs in advance of issuing an evacuation warning involved an element of choice, the next question is whether that conduct "reflects the exercise of judgment grounded in social, economic, or political policy." *Esquivel*, 21 F.4th at 575. The Ninth Circuit's decisions in *Green* and *Esquivel* establish guideposts for the scope of the discretionary function in the context of claims based on the government's communications—or lack thereof—related to firefighting.

In *Green*, the plaintiffs owned land that was adjacent to an area in which a backburn was conducted, but the Forest Service did not inform them of the backburn or warn of the risk the backburn posed to their properties. 630 F.3d at 1248. The lower court dismissed the *Green* plaintiffs' claims based on the application of the discretionary function but the Ninth Circuit reversed,

concluding that there was no evidence in the record that policy analysis was needed when making the decision of whether to notify landowners of a nearby backburn and the associated risk. *Id.* at 1252. *Green* nonetheless left open the possibility that a communication decision could involve firefighting operations, *see id.* (providing example of deciding how to allocate personnel), creating the perfect springboard for *Esquivel*.

In *Esquivel*, the Forest Service communicated with a plaintiff and obtained his consent before igniting a burnout[4] on his property and implementing other defensive measures. 21 F.4th at 571. The fire crew left the site and returned the next day to discover the burnout fire had damaged 15 acres of the plaintiff's property. *Id.* at 572. The plaintiff sued, challenging the crew chiefs "statements regarding the precautionary measures that the fire crew would take while conducting the burnout." *Id.* at 574, 575. As mentioned above, *Esquivel* clarified that because "decisions regarding whether and how to perform fire suppression operations are discretionary functions rooted in policy, the discretionary function exception extends to all other conduct 'based upon the exercise or performance' of these operations." *Id.* at 576. Thus, under *Esquivel*, "[a] communication between fire crews and property owners is . . . covered by the discretionary function exception under 28 U.S.C. § 2680(a) if such communication was based on the performance of fire suppression operations." *Id.* The relevant inquiry is whether the communication is "part

4. "A burnout fire . . . is a controlled, low-intensity fire that is designed to burn only the most flammable fuel sources (i.e., vegetation) near the fire line." *Esquivel*, 21 F.4th at 570 n.4.

of the decision to set, and the subsequent conduct of, the [backburn]—which is undisputedly a policy-based decision covered by the discretionary function exception." *Id.* In *Esquivel*, unlike *Green*, there was a fleshed out record.

Concerning the Residential Plaintiffs, the record shows that the decision to issue an evacuation warning was tied to the performance of fire suppression operations—so closely tied, in fact, that the evacuation order was issued seemingly as promptly as it could have been. On August 16 at 9:00 p.m., the Team "held a meeting to discuss the day's observed fire behavior and what could be expected with the coming cold front." (Doc. 34 at ¶ 66.) Given information that, in the absence of firing operations the Fire would continue to expand toward residential areas, "[o]perations staff . . . recommended conducting firing operations along the established containment line" around O'Grady's property. (*Id.* ¶ 73.) The Team discussed the potential pros and cons of such operations, which included "the need for immediate evacuations of citizens in the area." (*Id.* ¶ 75.) One hour later, the Missoula County Sheriff's Office issued an evacuation order to the area that included the Residential Plaintiffs' residences, (*id.* ¶ 77), and InciWeb was updated to reflect the warning, (Doc. 31-27).

These events demonstrate that the evacuation warning was issued within one hour of the decision to conduct firing operations along the containment line, which necessarily means the issuance of the warning was based on the firing operations. The decision not to issue an evacuation warning, therefore, was also based in the exercise of these operations because such an insignificant amount of time

elapsed between the Team meeting deciding on a course of action and the issuance of the evacuation order that, as a practical matter,[5] there was no time for both a warning and an order to issue. (*See* Doc. 34 at ¶¶ 66, 77.)

Furthermore, Plaintiffs here received some form of communication (i.e., the evacuation order), which distinguishes them from *Green* and moves them closer to the plaintiffs in *Esquivel*. Like in *Esquivel*, the issuance of the evacuation order "was not an action separate and apart from the burnout itself." 21 F.4th at 577. Rather, while Plaintiffs desired communication that would have provided them with more time to evacuate, the Forest Service did communicate the need for an evacuation based on the Team's August 16 discussion of what fire suppression operations should be implemented. Ultimately, the August 16 meeting illustrates that the Team considered "how to allocate its communications resources between community-wide distribution . . . and direct contact with private citizens," *Green*, 630 F.3d at 1252, and discussions concerning evacuations flowed directly from conversations about conducting firing operations, (Doc. 31-25 at 1-2). The record here demonstrates that both prongs of the two-prong discretionary function inquiry are met for the Team's decision not to notify the Residential Plaintiffs significantly in advance of the evacuation order.

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5. The Forest Service's Manual recognizes the practical difficulties posed by wildland firefighting: "the nature of the wildland fire environment is often dynamic, chaotic, and unpredictable. In such an environment, reasonable discretion in decision-making may be required." (Doc. 31-8 at 2 (quoting FSM § 5107)); *see also Esquivel*, 21 F4th at 575 (quoting same).

Plaintiff O'Grady presents a slightly different inquiry, but ultimately the discretionary function applies to his claims as well. O'Grady argues that "[t]he [Forest Service] failed to inform or notify him" of the planned firing operations to be conducted on his property. (*O'Grady*, Doc. 1 at ¶ 26.) The Government admits that it did not contact O'Grady personally, but "communicated the plan to private landowners near the proposed firing operation and continued to communicate with the public through the established communications strategy, including via InciWeb." (Doc. 34 at ¶ 51.) The Government offers no explanation for why O'Grady was not contacted, aside from plainly stating that O'Grady is a resident of Colorado and was residing there. (*Id.* ¶ 21.) Nonetheless, the Forest Service's decision not to notify O'Grady before conducting firing operations on his land was also rooted in policy because, unlike the situation in *Green*, the record shows the Forest Service's conduct was tied directly to broader fire suppression efforts. Moreover, it is not clear what notice would have achieved as O'Grady did not have any structures or improvements and Montana law authorizes firefighting on private land to suppress wildfires. Mont. Code Ann. § 76-13-104(1)(a). This statute is also silent as to whether any notice or warning is required to the private landowners. In any event, because such notice or warning would be "based upon" fire suppression efforts, that communication falls within the discretionary function. *See Esquivel*, 21 F.4th at 576.

C. Conclusion

The discretionary function applies to the Forest Service's communication (or lack thereof) because the communication decisions were based on policy-rooted fire suppression activities. As a result, summary judgment is granted in the Government's favor as to all of Plaintiffs' negligence and intentional tort claims.

II. Intentional Torts

Beyond the application of the discretionary function, Plaintiffs' intentional tort claims suffer from other problems that warrant summary judgment in the Government's favor. Plaintiffs generally allege three categories of intentional torts—trespass, conversion and emotional distress. All Plaintiffs allege intentional and negligent trespass, while all Residential Plaintiffs allege conversion. Additionally, all Plaintiffs allege negligent infliction of emotional distress, but only Mrs. Schurg, Mrs. Miller, Lowe, and Michelle Stermitz continue to allege intentional infliction of emotional distress. (Doc. 23 at 29.)

A. Intentional Trespass

Underlying Plaintiffs' claims for intentional trespass is the allegation that the Forest Service lit the fires that entered Plaintiff's land. (*See* Doc. 23 at 17.) "Modern common law trespass is an intentional tort claim for damages caused by an unauthorized entry or holdover upon real property of another." *Davis v. Westphal*, 2017 MT 276, 389 Mont. 251, 405 P.3d 73, 81 (Mont. 2017). The

essential elements of an intentional trespass claim are: "(1) an intentional entry or holdover (2) by the defendant or a thing; (3) without consent or legal right." *Id.* The party asserting a claim for intentional trespass need not establish any sort of specific intent on the part of the tortfeasor and need only prove "that the tortfeasor intentionally entered or remained, or caused a third party or thing to enter or remain, upon the property of another regardless of the tortfeasor's knowledge, lack of knowledge, or good faith mistake." *Id.* at 82. Here, Plaintiffs have failed to meet their burden of showing that an intentional trespass occurred because they do not establish any intent, nor do they establish the Forest Service lacked the legal right to enter the properties.

1. O'Grady

O'Grady's intentional trespass claim fails because he cannot demonstrate that the Government lacked permission to enter his property. The Government acknowledges that the first and second elements of intentional trespass are met because the Team knew it was entering private property, and it then conducted firing operations on that property. (Doc. 18 at 15; *see also* Doc. 19 at ¶ 21.) Thus, given that O'Grady did not consent to the government's presence on his land, the only issue is whether the Forest Service had a legal right to enter O'Grady's property. It did.

Under § 76-13-104(1)(a), the Montana Department of Natural Resources and Conservation "has the duty to ensure the protection of land under state and private

ownership and to suppress wildfires on land under state and private ownership." Additionally, the statute states that "[t]he department may engage in wildfire initial attack on all lands if the fire threatens to move onto state or private land." § 76-13-104(1)(b). Plaintiffs argue that the evidence shows that the Forest Service was intentionally setting fires to O'Grady's land, which is inconsistent with the "duty . . . to suppress wildfires," and so the Forest Service's presence was unauthorized under § 76-13-104(1)(a). (Doc. 23 at 11.) Similarly, according to Plaintiffs, § 76-13-104(1)(b) did not authorize Plaintiffs' presence on O'Grady's land because the Forest Service's firing operations were well beyond the window of "initial attack." (*Id.*)

As an initial matter, § 76-13-104 is relevant even though the Montana Department is not a party because it extended firefighting authorization to the Team that was on O'Grady's land via a delegation of authority on August 3,2017, (Doc. 18-15), and August 16,2017, (Doc. 18-16). The Government and Plaintiffs agree that the Team was present on O'Grady's land between August 14 and August 17,2017. (*See* Doc. 32 at ¶¶ 20, 27.) Thus, the Forest Service's presence on O'Grady's property was authorized by statute so long as the Forest was acting pursuant to its duty to suppress wildfires or was engaging in wildfire initial attack consistent with § 76-13-104(1)(a) or (b). Contrary to Plaintiffs' assertion otherwise, the Forest Service was engaged in fire suppression.

In an Incident Status Summary dated August 11 and 12, the Team described current and predicted weather

conditions and the probable effect of those conditions on the Fire in the area around O'Grady's property. (*See generally* Doc. 21-12.) The summary stated, "With potential for active to extreme fire behavior due to a forecasted critical fire weather pattern and cold frontal passage, the need to strategically introduce fire in a limited fashion will be necessary to reduce the probability of high intensity fire impacting residences and other high value resources." (*Id.* at 6-7.) Accordingly, on August 14, the Team decided to conduct aerial and hand firing operations along a section of O'Grady's property. (Doc. 32 at ¶ 20.) The Incident Status Summary dated for August 14 and 15 authorized the Team to "[u]tilize Ariel [sic] and hand lighting techniques w[h]ere feasible to manage growth." (Doc. 21-14 at 7.) However, no firing operations actually occurred on August 14 or 15. (*See* Doc. 32 at ¶¶ 24-29.)

The parties agree that firing operations began on O'Grady's property on August 17. (*Id.* at ¶ 33.) As evidenced by the Incident Status Summaries, these operations were undertaken in an attempt to control the spread of the Fire—i.e., consistent with the statutory duty to suppress wildfire under § 76-13-104(1)(a). Given that the Team's presence was authorized by the Montana Department's delegation and that the Team was engaged in firefighting activities, the Team had a legal right to be on O'Grady's property. Additionally, though O'Grady argues that the Team had his contact information and should have contacted him for his consent to utilize firing operations, the elements of intentional trespass require a lack of consent *or* lack of legal right to be on the property at issue. Here, the Team had a legal right to be present

on O'Grady's property and so his lack of consent is not dispositive.

2. Residential Plaintiffs

Residential Plaintiffs' claims fail because they cannot show intent. The facts show that the Forest Service conducted firing operations near the Residential Plaintiffs' properties, but that the weather conditions moved the fire onto the properties. Additionally, Plaintiffs' argument that the Forest Service is liable for a failure to remove the fire is unpersuasive because the authority on which Plaintiffs rely is inapposite.

As a preliminary matter, Plaintiffs are correct that their subjective beliefs are irrelevant to the inquiry. (Doc. 23 at 18); *cf. Davis*, 405 P.3d at 82. While many of the Residential Plaintiffs testified that they did not believe the Forest Service intended the fire to enter or damage their property, (*see, e.g.*, Doc. 31-38 at 31; Doc. 31-37 at 32; Doc. 31-35 at 16), this testimony does not fatally undermine the Residential Plaintiffs' claims because it does not bear on what the alleged tortfeasor—the Forest Service—intended. Plaintiffs' intentional trespass claims fail because there are no facts to show that the Forest Service intended to either light a fire on the Residential Plaintiffs' properties or intended the fire to travel onto those properties.

To support their arguments about intent and causation, Plaintiffs rely on reports from Poncin that note firing operations began in the afternoon of August

17 near the properties, and by later in the evening, the fire had "spotted across the containment line into [Plaintiffs'] subdivision." (Doc. 22 at ¶ 33.) However, this report merely shows that the Forest Service started a fire through firing operations on August 17, and it does not show that the Forest Service started that fire on Plaintiffs' properties or that it intended the fire to travel onto Plaintiffs' properties. Rather, the evidence shows the Forest Service was actively trying to keep the fire away from Plaintiffs' properties. Testimony from Morgan Dale, a special agent with the Forest Service, (Doc. 21-38 at 5), describes that the fire "spotted across the mechanical, or dozer, line" into Plaintiffs' subdivision, (Doc. 18-11 at 3). Plaintiffs themselves characterize the fire's movement this way. (*See* Doc. 22 at ¶ 33.) Dale explained that this process means the fire crossed a manmade fire line via embers traveling through the air. (Doc. 18-11 at 3.) This kind of environmentally driven movement does not satisfy the element of intent, which requires "that the tortfeasor intentionally entered or remained, or caused a third party or thing to enter or remain, upon the property of another." *Davis*, 405 P.3d at 82. The facts—and Plaintiffs' own characterization—describe the fire as having "spotted" onto the Residential Plaintiffs' properties. That movement means the weather conditions, not the Forest Service, caused the fire to enter onto the properties.

Plaintiffs also argue that the Forest Service's failure to take action to remove the fire from the properties creates liability. (*See* Doc. 23 at 16-17.) Plaintiffs rely on *Guenther v. Finley*, 236 Mont. 422, 769 P.2d 717, 719 (Mont. 1989) for support. Under *Guenther*, a person is

liable for trespass "if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." *Id.* According to Plaintiffs, the Forest Service had a duty to remove the fire from the properties because it allowed the fire to travel onto those properties. However, as discussed above, the facts show that the Forest Service was actively trying to prevent the fire from traveling onto Plaintiffs' properties. (*See* Doc. 21 38 at 5.) Furthermore, given the character of this Fire and the weather, it is difficult to see how the fire could have been removed.

Additionally, *Guenther* embraced a definition of "intent" requiring proof that "the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." 769 P.2d at 719 (quotation marks omitted).[6] The evidence shows that the Forest Service was trying to contain the fire, not expand it onto Plaintiffs' properties. Consequently, the Residential Plaintiffs' intentional trespass claims fail.

B. Negligent Trespass

To prove negligent trespass, a plaintiff must show: (1) the tortfeasor recklessly or negligently (2) entered or caused a thing or third person to enter the land of another and (3) the presence of the tortfeasor, thing, or third person caused harm to the land, the possessor, or to

6. In any event, the applicability of *Guenther* is questionable because no specific intent is required for intentional trespass. *See Davis*, 405 P.3d at 82

a thing or third person in whose security the plaintiff has a legally protectable interest. *See Olsen v. Milner*, 2012 MT 88, 364 Mont. 523, 276 P.3d 934, 940 (Mont. 2012). Here, the record includes several Plaintiffs' administrative claim statements that cite the elements of negligent trespass. (*See* Doc. 23-11 at 7; Doc. 23-15 at 4; Doc. 23-16 at 4; Doc. 23-17 at 4.) However, these statements are excerpted, and none of the portions included in the record provide any facts related to the claims. In each Complaint, the claims are grounded in the allegation that "[t]he [Forest Service] recklessly or negligently, and as a result of abnormally dangerous activity, lit fires that entered Plaintiff's land." (*See, e.g.*, Doc. 1 at ¶ 60.) Nonetheless, the briefing on other claims with overlapping elements indicates that it is undisputed that Plaintiffs owned the properties at issue and those properties were damaged by fire. (*See* Doc. 19 at 1121; *see also See* Doc. 23 at 19.) Thus, the only remaining elements at issue are whether the Forest Service acted negligently or recklessly and whether that conduct caused the fire to enter Plaintiffs' land.

It is a given that the Forest Service conducted firing operations on O'Grady's land. (*See* Doc. 18 at 15; Doc. 19 at ¶ 21.) Thus, for Plaintiff O'Grady, the second element of negligent trespass is satisfied. However, O'Grady's negligent trespass claim fails because the discretionary function applies, which means he cannot pursue a claim rooted in the Forest Service's allegedly negligent or reckless actions. Where the discretionary function retains the government's sovereign immunity, that immunity applies to claims that arise out of the immunized conduct, and a plaintiff cannot circumvent immunity through

creative pleading. *Cf. Saint-Fleur v. Barretto*, 2019 U.S. Dist. LEXIS 86416, 2019 WL 2207670, at *5 (E.D. Cal. May 22, 2019) (citing *Safford Aviation Serv., Inc. v. United States*, 14 F. App'x 945, 946 (9th Cir. 2001)); *Adams v. United States*, 188 F. App'x 571 (9th Cir. 2006). Because the Forest Service's decision to conduct firing operations is immunized, O'Grady cannot use that decision to satisfy the first element of negligent trespass.

In addition to similar problems with the first element, the Residential Plaintiffs' negligent trespass claims fail because they cannot show that the Forest Service caused the fire to enter onto their land. As explained above, the record indicates that the fire progressed onto the Residential Plaintiffs' properties due to spotting. (*See* Doc. 18-11 at 3; Doc. 22 at ¶ 33; Doc. 18-11 at 3.)

C. Conversion

O'Grady does not bring a conversion claim, and the Residential Plaintiffs' claims for conversion fail for much of the same reason their intentional trespass claims fail. To prove a claim for conversion, the party asserting the claim must prove: "(1) a claimant's right of possession or control over the subject personal property; (2) the intentional exercise of possession or control over the property by another inconsistent with the right of the owner and without right or consent; and (3) resulting damages to the claimant." *Associated Mgmt. Servs., Inc. v. Ruff*, 2018 MT 182, 392 Mont. 139, 424 P.3d 571, 591 (Mont. 2018). While it is undisputed that the Residential Plaintiffs owned the property at issue or that they

sustained property damage, (*see* Doc. 23 at 19), conversion is concerned with personal—rather than real—property, *see Associated Mgmt. Servs.*, 424 P.3d at 591. Thus, in addition to questions concerning whether all Residential Plaintiffs sustained injury to their personal property, it remains that these Plaintiffs cannot show the requisite intent to support their conversion claims.

In support of intent, Plaintiffs argue that the Forest Service knew "the fire was on and damaging Plaintiffs' land as firefighters were present and able to see it with their own eyes" and "the [Forest Service] had a duty to remove the fire it had lit." (Doc. 23 at 20.) These arguments are based in part on Mont. Code Ann. §§ 50-63-103 and 27-1-701, under which Plaintiffs argue that the Forest Service, if it were "a private individual," "would be under a duty to remove the fire that they allowed to travel onto Plaintiffs' land." (*Id.* at 17.) In addition to the infirmity that these arguments focus on real, rather than personal, property, these arguments also fail for the reasons the Government identifies.

First, as discussed above, there is no evidence that the Forest Service either lit the fire on the Residential Plaintiffs' properties or that it allowed the fire to travel onto those properties. The record shows that the Forest Service was actively trying to prevent the spread of the fire onto Plaintiffs' properties. (*See, e.g.*, Doc. 12-18 at 3-6 (describing containment and management objectives for Macintosh Manor area); Doc. 32 at ¶ 33 (describing documentation of firefighting efforts on August 17).) Accordingly, liability under § 50-63-103 does not attach

because that statute imposes liability on "a person who sets or leaves a fire that spreads and damages or destroys property."

Second, while the allegation that firefighters did nothing to help certain Plaintiffs—particularly, the Schurgs—is troubling, Plaintiffs fail to establish how this alleged ambivalence gives rise to liability under conversion. Even under § 27-1-701, which imposes liability for "the results of the person's willful acts [and] also for an injury occasioned to another by the person's want of ordinary care or skill in the management of the person's property or person," any inaction by the Forest Service does not demonstrate that the Forest Service "intentionally exercised possession or control" over Plaintiffs' personal property. At most, the alleged inaction may demonstrate negligence, but as the Government points out, intentional torts by their very nature cannot be supported by conduct that is merely negligent. As a result, the conversion claims fail.

D. Intentional Infliction of Emotional Distress

Only four plaintiffs continue to allege intentional infliction of emotional distress: Mrs. Schurg, Mrs. Miller, Jackie Lowe, and Michelle Stermitz. (Doc. 23 at 29.) These Plaintiffs allege claims for intentional infliction of emotional distress as standalone causes of action. (*See* Doc. 1 at ¶¶ 71-84; (*Miller*, Doc. 1 at ¶¶ 48-55); (*Lowe*, Doc. 1 at ¶¶ 39-48); (*Stermitz II*, Doc. 1 at ¶¶ 45-54).)

Appendix B

1. Legal Standard

The parties expressed disagreement about the proper legal standard for assessing emotional distress claims under Montana law, (*see* Doc. 23 at 20; Doc. 28 at 14-15), and both are somewhat correct. Since *Sacco v. High Country Independent Press*, 271 Mont. 209, 896 P.2d 411, 427 (Mont. 1995), and consistent with the Plaintiffs' framing of the issue, the Montana Supreme Court has stated that an independent action for intentional infliction of emotional distress "arises when a plaintiff suffers serious and severe emotional distress as a reasonably foreseeable consequence of a defendant's intentional act or omission." *Czajkowski v. Meyers*, 2007 MT 292, 339 Mont. 503, 172 P.3d 94, 101 (Mont. 2007). And, consistent with the Government's arguments, *Czajkowski* clarified that the "extreme and outrageous" nature of a tortfeasor's conduct is a measure by which the severity of the emotional distress may be proved. *Id.* Thus, while "extreme and outrageous conduct" is not a prima facie element of an intentional infliction of emotional distress claim, such conduct must be the root cause of the requisite severe emotional distress. *See id.* Under this standard, these Plaintiffs' claims fail.

2. Extreme and Outrageous Conduct

"Extreme and outrageous conduct" is conduct that goes "beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community." *Czajkowski*, 172 P.3d at 101 (quotation marks omitted). The Government is correct that the record does

not establish any extreme or outrageous conduct for three of the four remaining Plaintiffs' claims of serious or severe emotional distress, and the other remaining Plaintiff's claim—that of Michelle Schurg—fail on the "serious or severe" inquiry.

First, three of the remaining Plaintiffs, Mrs. Miller, Jackie Lowe, and Michelle Stermitz, do not allege extreme or outrageous conduct in support of their allegedly severe or serious emotional distress, and the record does not support that such conduct exists. The questioned conduct underlying these Plaintiffs' emotional distress claims is the Forest Service's firing operations and evacuation order. (*See* Doc. 23 at 23-26.) Miller's administrative claim statement describes her anxiety, frustration, and devastation of having to evacuate herself and her animals in the middle of the night, return to a radically altered landscape, and ultimately rehome her animals because they could not live on the burned property. (Doc. 23-12 at 3-4.) At her deposition, Miller stated the cause of her emotional distress was "specifically[,] the evacuation process itself and just the emotions that were involved in going through that, being woken in the way that we were in a state of panic and dealing with evacuating the animals." (Doc. 31-30 at 16; *see also id.* at 17.)

Similarly, Lowe and Michelle Stermitz's allegedly serious or severe emotional distress is based on the loss of their respective homes as a result of the Forest Service's actions. (Doc. 23 at 23-24, 26.) In her administrative claim statement, Michelle Stermitz identified the Forest Service's firing operations as the basis of her emotional

distress. (Doc. 23-13 at 7.) At her deposition, Michelle Stermitz stated that the frenzied nature of the evacuation contributed significantly to the emotional distress she felt. (Doc. 31-34 at 20, 21.) In her administrative claim statement, Lowe, too, described the Forest Service's firing operations as the basis for her emotional distress. (Doc. 23-14 at 3-4.) At her deposition, Lowe spoke at length about the emotional distress she has felt over the fact that her house burned down, (Doc. 31-32 at 30, 31), and she stated she felt the Forest Service was "lying by omission" by not notifying her of her home's designation and not providing earlier evacuation notice, (*id.* at 9).

Assuming *arguendo* the evacuation and subsequent rehoming of animals underlying the three remaining Plaintiffs' alleged distress stemmed from the Forest Service's conduct related to the Fire, such conduct prompting the evacuation and rehoming is not "extreme or outrageous." While these Plaintiffs claim to have been deeply upset by the Forest Service's failure to notify them of their homes' designations as a result of the structural assessments, they admit that such assessments are created for the purpose of assisting firefighters in residential areas and such assessments are not public documents. (Doc. 34 at ¶¶ 32-33.) Because these designations are not required to be made public, Plaintiffs cannot claim that their non-receipt of such designations is "utterly intolerable in a civilized community." *Cf. Czajkowski*, 172 P.3d at 101. Additionally, while the evacuation notice may have left these Plaintiffs with very little time to leave the premises, there is nothing in the record to suggest that the timing of the Forest Service's notice was "beyond all possible

bounds of decency" given Plaintiffs' own description of the threat to Plaintiffs' properties as emerging the same day the evacuation order issued. (*See* Doc. 34 at ¶ 77.) Thus, because Miller, Michelle Stermitz, and Lowe fail to show that extreme or outrageous conduct occurred, they necessarily cannot show that their emotional distress was serious or severe. *See Czajkowski*, 172 P.3d at 101. The Montana Supreme Court holds that it is the function of the trial court to determine if the claimed extreme emotional distress is viable. *See Sacco*, 896 P.2d at 425.

Mrs. Schurg's claim for intentional infliction of emotional distress is slightly different. Schurg points to different conduct underlying her allegedly severe or serious emotional distress: that she fought the fire on her own property, apparently while firefighters looked on and did nothing to help. (Doc. 24 at ¶ 43.) The Government does not argue that such inaction could or could not constitute extreme and outrageous conduct, but rather states that the record shows the "firefighters simply doing their level best to control and contain a wildly variable and volatile forest fire." (Doc. 28 at 16.) But there are facts in the record that contradict the Government's narrative, at least as to the Schurgs' property.

In her administrative claim statement, Schurg described that while she and her husband fought the fire, "three fire trucks full of fire personnel lined the road directly below their home. The personnel did not have the fire hoses out or pumps running, instead they looked on." (Doc. 23-11 at 5.) "At one point, Mr. Schurg ran down and pleaded for their assistance. The Forest Service did

nothing." (*Id.*) In her deposition, Mrs. Schurg described "minimal firefighting efforts," (Doc. 31-38 at 39), and how some of her emotional distress was grounded in "the fact that the three of us saved our house, and then to look down below our house on the road and see all these firefighters standing next to their trucks watching, watching everything we did to save our house," (*id.* at 26). In its reply brief, the Government implicitly concedes some degree of truth to Schurg's description of events by describing the events as "fire professionals [] already using a commercial pump and firehose to eliminate fire wherever it approached the Schurg property." (Doc. 28 at 10.) The "fire professionals" to whom the Government refers are, apparently, Mr. and Mrs. Schurg.

While there is no authority directly addressing whether firefighters' failure to combat fire is "extreme and outrageous," other authority suggests it could meet that definition. For example, the codification of a firefighting duty in § 76-13-104(1)(a) suggests that the public could find it "utterly intolerable" that a firefighting unit would not aid civilians fighting a fire on their property. Additionally, the Montana Supreme Court recognized the important public policy of fighting fires, equating the suppression of fire with a furtherance of the public good. *See Stocking v. Johnson Flying Serv.*, 143 Mont. 61, 387 P.2d 312,317 (Mont. 1963). Ultimately, the alleged failure of a firefighting unit to fight a fire could be viewed as extreme and outrageous conduct. Given this factual discrepancy, the seriousness or severity of Schurg's alleged emotional distress is considered.

3. Serious or Severe

An independent cause of action for intentional infliction of emotional distress "arises when a plaintiff suffers serious and severe emotional distress as a reasonably foreseeable consequence of a defendant's intentional act or omission." *Czajkowski*, 172 P.3d at 101. But to reach the foreseeability question, it must be established that the emotional distress is "serious or severe," which requires an examination of the intensity and duration of the distress. *See id* A court may grant summary judgment if there is no evidence to support severe or serious emotional distress. *See Renville v. Fredrickson*, 2004 MT 324, 324 Mont. 86, 101 P.3d 773, 777 (Mont. 2004).

"In cases where there is a physical manifestation of bodily harm resulting from emotional distress, such as PTSD, this bodily harm is sufficient evidence that the emotional distress suffered by the plaintiff is genuine and severe." *Henricksen v. State*, 2004 MT 20, 319 Mont. 307, 84 P.3d 38, 55 (Mont. 2004). Schurg argues that her diagnosis of PTSD is independently sufficient to, at the very least, preclude summary judgment at this stage. (Doc. 23 at 23; *see also* Doc. 23-19.) However, the Government distinguishes *Henricksen* on the basis that there is no expert testimony or other evidence in the record that Schurg's PTSD involved "physical components" that would make it analogous to the PTSD at issue in *Henricksen*. (Doc. 28 at 11.) The note from Schurg's therapist supports this distinction. The note indicates that Schurg was seen three times in September 2017, and "[a]t the conclusion of these sessions her symptoms appeared to be relieved,

and she was discharged at that time." (Doc. 23-19.) Thus, the medical evidence shows that Schurg's PTSD did not last for a significant duration. And the other symptoms to which Schurg points to as evidence of the severity of her emotional distress—loss of relationships, lack of sleep, anxiety, and employment difficulties—are not so severe or serious that no reasonable person could be expected to endure them. *Cf. Renville*, 101 P.3d at 776-77 (concluding that Plaintiffs' loss of child was not so serious or severe that no reasonable person could be expected to endure it). As a result, Schurg's claim of intentional infliction of emotional distress fails as well.

E. Negligent Infliction of Emotional Distress

"An independent cause of action for negligent infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's act or omission." *Sacco*, 896 P.2d at 425. The Montana Supreme Court emphasized that "[t]he requirement that the emotional distress suffered as a result of the defendant's conduct be 'serious' or 'severe' ensures that only genuine claims will be compensated." *Id.* On the standard articulated in *Sacco, a* plaintiff pursuing an independent negligent infliction of emotional distress claim must show (1) the emotional distress he suffered was serious or severe and (2) the reasonably foreseeable consequence of (3) the defendant's act or omission. *See id.* Here, Plaintiffs do not explicitly address the negligent infliction of emotional distress claims, but argue that "Plaintiffs['] emotional distress was caused by the [Forest

Service's] actions in lighting the fires that ultimately destroyed Plaintiffs' property without providing notice to the Plaintiffs." (Doc. 23 at 20-21.) Plaintiffs state this emotional distress was the "reasonably foreseeable consequence of [the Forest Service's] actions." (*Id.* at 21.) The Forest Service does not address negligent infliction of emotional distress but disputes the seriousness and severity of Plaintiffs' alleged emotional distress, as noted above.

Summary judgment for the Government is appropriate for two reasons. First, the record shows that the claimed emotional distress of the four Plaintiffs discussed above does not meet the requirements for "serious" or "severe." For this reason alone, the negligent infliction of emotional distress claims advanced by Mrs. Schurg, Mrs. Miller, Lowe, and Michelle Stermitz are insufficient. Additionally, the evidence in the record does not provide any support to the remaining Plaintiffs' claims that their emotional distress is serious or severe. Even giving these Plaintiffs the "benefit of all reasonable inferences," the dearth of record evidence demonstrating the seriousness or severity of these Plaintiffs claims indicates summary judgment in the Government's favor is appropriate.

Second, and more broadly, Plaintiffs' negligent infliction of emotional distress claims fail to the extent they are rooted in the Forest Service's lack of notice of planned firing operations. (Doc. 23 at 20-21.) The decision to provide or not provide notice is discretionary; consequently, that decision is immunized by the discretionary function. As a result, the negligent infliction of emotional distress claims

fail because they attempt to impose liability for conduct that the discretionary function has insulated from suit.

Conclusion

The discretionary function applies, and the Government is entitled to summary judgment. Accordingly, IT IS ORDERED that the Clerk is directed to enter judgment consistent with this Order and the Court's January 26, 2022 Order, (*see* Doc. 57), and close the case.

DATED this 8th day of February, 2022.

/s/ Donald W. Molloy
Donald W. Molloy, District Judge
United States District Court

APPENDIX C — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELLE SCHURG; DANIEL SCHURG; CHAD MILLER; BECCIE MILLER; JACKIE LOWE; LARRY A. ERNST; MAUREEN A. ERNST; RONNIE HARVIE; JOLEEN HARVIE; MARK STERMITZ; MICHELLE STERMITZ; BRIAN O'GRADY,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

Filed June 7, 2023

No. 22-35193

D.C. Nos.
9:20-cv-00061-DWM
9:20-cv-00062-DWM
9:20-cv-00063-DWM
9:20-cv-00064-DWM
9:20-cv-00065-DWM
9:20-cv-00066-DWM
9:20-cv-00067-DWM
9:20-cv-00090-DWM

Appendix C

District of Montana, Missoula

ORDER

Before: McKEOWN, MILLER, and H.A. THOMAS, Circuit Judges.

Judges Miller and Thomas have voted to deny the petition for rehearing en banc and Judge McKeown so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for rehearing en banc, Dkt. No. 30, is **DENIED**.