No. 23-

IN THE

Supreme Court of the United States

STEVEN DAKOTA KNEZOVICH; STEVEN L. KNEZOVICH; DEBORA M. KNEZOVICH, HUSBAND AND WIFE; RICHARD D. WRIGHT; DEONE R. WRIGHT, HUSBAND AND WIFE; HOBACK RANCHES PROPERTY OWNERS IMPROVEMENT AND SERVICE DISTRICT, COUNTY OF SUBLETTE, STATE OF WYOMING,

Petitioners,

v.

UNITED STATES OF AMERICA; ANDREW M. TAYLOR; DENA DEA BAKER, HUSBAND AND WIFE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Rayonier, infra,* this Court held that the Federal Tort Claim 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 wildland fire managers?

PARTIES TO THE PROCEEDING

The Petitioners, district court plaintiffs, and Tenth Circuit Court of Appeals appellants are Steven Dakota Knezovich, Steven L. Knezovich, Debora M. Knezovich, Richard D. Wright, Deone R. Wright, and Hoback Ranch Property Owners Improvement and Service District.

The Respondent, the United States of America, was the defendant in the district court and appellee in the court of appeals. The following individuals were also plaintiffs in the district court and appellants in the court of appeals: Andrew M. Taylor and Dena Dea Baker. Those plaintiffs are respondents herein.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Hoback Ranch Property Owners Improvement and Service District (HRSID) discloses the following. HRSID is a not for profit entity and no parent or publicly held company owns 10% or more of HRSID's stock.

RELATED CASES

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

Knezovich v. United States, Case No.: 21-cv-00180-ABJ, United States District Court for the District of Wyoming. Judgment entered: April 13, 2022.

Knezovich v. United States., Case No.: 22-8023, United States Court of Appeals for the Tenth Circuit. Judgment entered: September 15, 2023.

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The opinion of the Tenth Circuit (Pet. App. 1a-18a) is published at 82 F.4th 931. The relevant order of the district court (Pet. App. 19a-58a) is published at 598 F.Supp.3d 1331.

JURISDICTION

The court of appeals entered its judgment on September 15, 2023, and an order denying the Petitioner's petition for rehearing *en banc* on December 4, 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

The Roosevelt Fire victims filed this action with a Complaint and Request for Advisory Jury Trial on September 23, 2021. (App. Vol. I at 12-44.) The action's introduction states:

> 1.This is a civil action brought under 28 U.S.C. § 2671, et seq., the Federal Tort Claims Act (FTCA), to obtain a money judgment in compensation for negligence claims arising from Defendant United States of America's response to the Roosevelt Fire on the Bridger-Teton National Forest in Lincoln and Sublette Counties, State of Wyoming in mid-September of 2018. In this case, Defendant United States of America, acting through its agency, the United States Department of Agriculture

Forest Service (Forest Service) chose not to suppress the Roosevelt Fire. Instead, it decided to use it as a restoration fire to achieve resource benefits, resulting in substantial personal injury, property damage, and special and general damages to Plaintiffs.

2. This Forest Service decision to use the Roosevelt Fire to achieve resource benefits violated federal policy, both the then applicable Interagency Standards for Fire and Fire Aviation Operations (Interagency Standards (January 2017) and the Forest Service Manual (August 2018), which specifically prescribed a different course of action for the Forest Service than was the course of action actually followed. The policy required that all human-caused fires must be suppressed "and must not be managed for resource benefits." The Forest Service had no rightful option but to adhere to this directive. It enjoyed no discretion in whether to adhere to the federal policy of suppressing human-caused fire. The Forest Service decision to use the Roosevelt Fire to achieve natural resource benefits directly violated its own non-discretionary policy.

* * *

6. For these reasons, the discretionary function exception to the waiver of immunity set forth in the FTCA does not apply and does not immunize the Forest Service's wrongful acts and omissions. Therefore, the Forest

> Service is liable to compensate Plaintiffs for the personal injuries and property damage they suffered due to the Forest Service's negligent fire management decisions.

(App. Vol. I at 13-15.)

The United States filed a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). (App. Vol. I at 44-45.) The motion was supported by a principal brief, affidavits, and exhibits. (App. Vol. I at 46-255.) The testimony included a legal opinion by an expert witness that denied the United States Department of Agriculture Forest Service (Forest Service) had any rules against using human-caused fires for resource benefits in general. (App. Vol. I at 71-75, 80-81.) The expert also opined that, as an issue of fact, the Roosevelt Fire had not been used by local Forest Service officials to achieve resource management objectives. (App. Vol. I at 76-79.)

Tellingly, however, the Forest Service decision-makers who participated in the actual management decisions were not offered as affiants or tendered for depositions. The United States did not offer a single first-hand witness—although all were available. The United States instead brought in opinion evidence to establish the decision-makers' true intent.

The Roosevelt Fire victims rejoined the United States' arguments on subject matter jurisdiction in two ways. First, they filed a Fed. R. Civ. P. 56(d) motion to allow additional discovery, with a principal brief and supporting affidavit. (App. Vol. I at 256-275.) They implored the district court to allow them to depose the witnesses the

United States refused to simply offer – which included the fire managers who made the decisions, and the first-hand witnesses to those decisions – instead of simply relying on the United States' expert witness opinion for the facts. They also responded with an opposition brief in support of subject matter jurisdiction and resorted to their experts' affidavits to establish facts. (App. Vol. II at 280-408.) The victims' expert affidavits included substantial evidence that the Roosevelt Fire had been used for resource benefits.

After briefing of the competing motions was complete, the district court held a hearing on March 16, 2022, to consider oral arguments. At the close of the hearing, it took the matter under advisement and issued a written ruling on April 14, 2022. (App. Vol. II at 441-456.) In the order, the court converted the United States' motion to dismiss to one for summary judgment. (App. Vol. II at 449.) It then denied the victims' motion for depositions, granted the United States' motion for summary judgment, and entered final judgment the same day, dismissing the action with prejudice. (App. Vol. I at 10.)

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* 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 Litig.,* 197 F.2d 771 (5th Cir. 1952)*, aff'd sub nom. Dalehite v. United States.,* 346 U.S. 15 (1953), 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 on these claims, but did not base their decision on the discretionary function exception—which neither the government, the appellate court, nor this Court, by the implication of their 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.* at 43.

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 Forest Service negligence in suppressing a wildland fire. 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 only 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, including 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 Forest Service fire managers should not be held to account for the damage they cause when the are negligent.

Despite the clarity of this Court's holding in *Rayonier*, all four Courts of Appeals to have considered the issue have ruled that FTCA does not waive sovereign immunity on claims for negligent wildland firefighting and wildland fire management. *Abbott v. United States,* 78 F.4th 887, 894 (6th Cir. 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 four have ruled that this Court's two-step regulatory discretion test, first promulgated in *Berkovitz by Berkovitz v. United States,* 486 U.S. 531, 536 (1988), 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. In *Abbott,* the court of appeals reversed the district court and remanded with instructions to properly apply the *Berkovitz* test.

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). "The choice requirement is not satisfied where a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow' because '[i]n this event, the employee has no rightful option but to adhere to the directive.'" *Id.*

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 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* 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,* 78 F.4th at 900 . 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 900. 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' intention, at great cost to innumerable tort victims from across three 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 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.

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

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. However, this Court was unimpressed by the risk to the federal fisc the government invoked. *Id.* at 319. The Court warns that if it 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 among all taxpayers. *Id.* at 321.

It reasoned the Congressional purpose was to spread 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, "[t]here is no justification for this Court to read exemptions into the Act beyond those provided by Congress." *Id.* at 320. It concluded, "[i]f 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*, held that the discretionary function exception applied. *See, Rayonier*, 352 U.S. at 317 (discussing the lower court decisions). *Rayonier* clarified that the FTCA exceptions were "not relevant" to claims against wildland firefighters. *Id.* at 318. Regarding negligence claims against Forest Service wildland fire managers, the exceptions to subject matter jurisdiction do not apply. *Id.*

C. *Rayonier Remains Undisturbed.* It is acknowledged that the United States Supreme Court has since 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); *Berkovitz,* 486 U.S. 531 (1988) (vaccine regulators); *Varig Airlines,* 467 U.S. 797 (1984) (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. 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. 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). Here's how 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. 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. 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 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 Tenth Circuit Court of Appeals' 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 case of wildland fire management negligence.

For two reasons, this case presents an excellent vehicle for correcting the 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 Appeals' 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 Appeals. In all of these cases, allegedly negligent fire management decisions destroyed private property. For example, in *Rayonier*, the government fire managers did

2. District Courts have followed suit. *E.g. 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).

not extinguish spot fires or the smoldering remains of the main fire after it was contained on federal lands at 1,600 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.* Finally, 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. 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—and killed 14 people. *Abbott*, 78 F.4th at 892-893. In all these cases, the causes of action are founded on federal fire management failures on federal lands, which allowed fire to kill and injure neighbors and damage and destroy private property. This case is to these other decisions in that Forest Service negligence caused the Roosevelt Fire to injure people and destroyed homes. The Forest Service also failed to warn people about their intention to manage the fire for resource benefits—despite the fact its own policy forbid such a choice. The system is broken in regards to negligence by federal actors in managing fire. Without any accountability, the errors will continue to compound, property neighboring federal land will continue to be destroyed, and neighbors will continue to be maimed and killed. It is high time for this Court to resolve these errors by enforcing the ruling it made in *Rayonier*.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED SEPTEMBER 15, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-8023

STEVEN DAKOTA KNEZOVICH; STEVEN L. KNEZOVICH; DEBORA M. KNEZOVICH, HUSBAND AND WIFE; ANDREW M. TAYLOR; DENA DEA BAKER, HUSBAND AND WIFE; RICHARD D. WRIGHT; DEONE R. WRIGHT, HUSBAND AND WIFE; HOBACK RANCHES PROPERTY OWNERS IMPROVEMENT AND SERVICE DISTRICT, COUNTY OF SUBLETTE, STATE OF WYOMING,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the District of Wyoming (D.C. No. 2:21-CV-00180-ABJ)

Before **TYMKOVICH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Appendix A

After the Roosevelt Fire burned 61,511 acres in southwestern Wyoming in 2018, victims of that fire sued the United States Forest Service, alleging it negligently delayed its suppression response. The Forest Service moved to dismiss the complaint on the grounds that it was not liable for the way it handled the response to the fire. Under the Federal Tort Claims Act, a government actor cannot be sued for conducting a so-called "discretionary function," where the official must employ an element of judgment or choice in responding to a situation. The government contends that responding to a wildfire requires judgment or choice, and its decisions in fighting the fire at issue here meets the discretionary function exception to the Act.

The district court agreed and dismissed the suit. We also conclude the Forest Service is entitled to the discretionary function exception to suit, and the district court lacked jurisdiction to hear the complaint. We therefore AFFIRM.

I. Background

A. The Roosevelt Fire

Western Wyoming endured at least seven forest fires during the summer of 2018. Several of the fires were manmade; the rest were ignited from natural causes like lightning strikes.

On September 15, 2018, at mid-day, an onlooker spotted another wildfire in the Bridger-Teton National Forest. He reported what became known as the Roosevelt

Fire to the United States Forest Service. At the same time, plaintiff Steven Knezovich and his son, alongside a handful of others, were hunting in the surrounding area. The hunting party eventually spotted the same fire and reported it to the Forest Service. The Service thanked them for the information but did not offer any warning or guidance. The rest of that day, the Forest Service monitored the fire.

The next afternoon, the Forest Service issued its "Roosevelt Incident Decision" for tackling the Roosevelt Fire (published in its Wildland Fire Decision Support System (WFDSS)). The plan broadly outlined the various considerations animating the Service's assessment of the fire. At that time, the fire was approximately 25 acres of unknown origin. The plan assessed the weather forecast, the risk profile of the fire to grow and spread, the potential length of the fire, nearby trails and structures, and so on. It placed a premium on firefighter safety, providing notice to affected visitors and property owners. It identified no "benefits" to the fire. The Forest Service recommended a "Course of Action" that would "[m]onitor and inform the public"; "[m]onitor the fire by patrolling, hiking, air patrol, and IR flights"; and "[i]dentify and inventory impacts to critical values at risk." App. 165.

In conclusion, the "Roosevelt Fire Decision Rationale" was to monitor its progression and secure public safety:

> [The fire manager's] [d]ecision is to manage the Roosevelt Fire with an initial emphasis on monitoring fire progression and visitor safety. The fire has a high probability of remaining

> manageable with a smaller organization due to few values at risk. The primary values are hunters that have been removed and evacuated from the area. The Forest service has been the primary decision makers in the decision process. Sublette County Fire and Sublette County Sherriff has been notified of the intended course or action. Additionally, the outfitters located in the area have been notified of the evolving situation. We have implemented a trail closure . . . on the Upper Hoback Trail. Currently no area closure has been implemented. Additionally,[] signs are being posted at multiple potential entry points that provide access to the area. The Fire is burning in steep timbered terrain largely surrounded by rocky steep slopes. Monitoring fire progression and providing for visitor safety is the emphasis. MAP's [Management Action Points] will guide future actions.

App. 170.

The Forest Service also issued a press release warning the public of the fire. It explained that "[f]irefighters are monitoring the fire and assessing options for long-term management strategy" while "ground and aerial resources . . . monitor[] the fire" and "personnel . . . contact[] hunters in backcountry camps." App. 253. The press release warned that "[v]isitors and hunter [sic] to the area should remain alert and be prepared to modify their plans if fire behavior changes." *Id.*

Appendix A

Two Forest Service backcountry rangers delivered the news to the Knezovich hunting party around midday. They explained that the Service was, for the time being, monitoring the fire, but recommended that the hunting party return to the trailhead. Steven Knezovich set off on foot while the other hunters prepared their horses. Mr. Knezovich happened upon one of the rangers, who then warned that the Roosevelt Fire was spreading. He urged that the hunting party had only a "short window" to escape the fire. The hunters ultimately escaped the fire, but not without suffering serious injuries.

By the next day, September 18, the fire had grown out of control. In response, the Forest Service issued another WFDSS. This "Incident Decision" documented that the fire "may have reached private lands and is currently threatening structures including multiple residences and subdivisions," such that the fire would "require closures to trails/roads/areas to protect forest visitors in the short term." App. 179. The Decision again listed no benefits from the fire. It listed the Forest Service's "Course of Action" as developing an "appropriate response to protect values at risk with cooperators," and explained that the Service could utilize the "full spectrum of suppression strategies available":

> The fire is burning [in] steep, rugged inaccessible terrain in the upper hoback river drainage. The Bridger-Teton NF has defined the incident objectives and you have the full spectrum of suppression strategies available, including confine and contain and point protection where

> values are at risk. Utilize topography and natural barriers to reduce fire spread along the top of the Wyoming Range to the west. Full suppression should be utilized on the south east and northside of the fire to protect private lands.

App. 194.

The Roosevelt Fire ultimately forced the evacuation of around 230 residential homes, compromised around 130 structures, and spread over tens of thousands of acres, damaging the real and personal property of other parties now joined in this suit.

B. District Court Proceedings

The Roosevelt Fire victims sued the United States Forest Service under the Federal Tort Claims Act. The fire victims alleged various negligence claims arising from the Forest Service's response to the fire.

While the United States' sovereign immunity ordinarily renders it immune to tort liability, the FTCA acts as a limited waiver of that immunity. It permits plaintiffs to sue the United States for compensation for injuries caused by negligent acts of government employees. The United States thus makes itself liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

But where the waiver does not apply, courts lack jurisdiction to entertain such claims. Accordingly, the United States moved to dismiss the suit for lack of jurisdiction

under Federal Rule of Civil Procedure 12(b)(1). It claimed that the FTCA's "discretionary function exception," which acts as a carve-out to the FTCA's waiver of sovereign immunity, barred the district court from adjudicating the claims. The exception precludes plaintiffs from seeking damages from the United States for conduct "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). According to the United States, the Forest Service was vested with discretion to manage the fire which triggered the exception.

The district court agreed, concluding that the government's conduct triggered the discretionary function exception, which stripped it of jurisdiction to adjudicate the fire victims' claims. The court accordingly granted the Forest Service's motion to dismiss for lack of subject matter jurisdiction with prejudice.

II. Analysis

The fire victims contend the discretionary function exception does not strip the district court of jurisdiction to hear the FTCA claims. We conclude that it does.

A. The Discretionary Function Exception

The Federal Tort Claims Act waives aspects of the government's sovereign immunity for certain classes of torts. But rather than a blanket waiver, it excludes certain types of decisions, including decisions covered by the so-called discretionary function exception. The discretionary

function exception removes from the waiver any "claim . . . based upon the exercise of performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency." 28 U.S.C. § 2680(a). The exception reflects "Congress' desire to prevent the judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Ball v. United States*, 967 F.3d 1072, 1076 (10th Cir. 2020) (internal quotation marks omitted). It represents the "boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Redmon v. United States*, 934 F.2d 1151, 1153 (10th Cir. 1991) (internal quotation marks omitted).

The Supreme Court in *Berkovitz v. United States* established a two-step test for evaluating discretionary function claims: a court must "first consider whether the action is a matter of choice for the acting employee," and then "must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

The first step requires a court "to determine whether the challenged conduct 'involves an element of judgment or choice,' in which case it is discretionary and falls within the language of the exception." *Kiehn v. United States*, 984 F.2d 1100, 1102 (10th Cir. 1993) (quoting *Berkovitz*, 486 U.S. at 536). If a policy "specifically prescribes a course of action" where an agency would have no choice but to

follow that policy, the exception would not apply. *Id.* If the plaintiff fails to show that the conduct was mandatory rather than discretionary, the exception typically applies.

But even if the challenged conduct was discretionary, jurisdiction can still be established at step two. Under step two, "plaintiffs may still overcome the discretionary function exception by demonstrating . . . that the nature of the actions taken does not implicate public policy concerns, or is not susceptible to policy analysis." *Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008) (internal quotation marks and alterations omitted). After all, the discretionary function exception works to shield "those discretionary actions or decisions which are *based on considerations of public policy*." *Kiehn*, 984 F.2d at 1103 (emphasis added) (internal quotations marks omitted). We therefore consider whether the plaintiffs challenge "legislative and administrative decisions grounded in social, economic, and political policy." *Id.* (quoting *Berkovitz*, 486 U.S. at 537). If the challenged decision implicates these types of policy concerns, the discretionary function exception applies, and the district court lacks jurisdiction to consider the claim.

Application of the discretionary function exception "presents a threshold jurisdictional determination which we review de novo." *Tippett v. United States*, 108 F.3d 1194, 1196-97 (10th Cir. 1997) (citing *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1537 (10th Cir. 1992)).

B. Judgment or Choice

We first consider whether the fire victims have demonstrated "that the challenged decision involved no element of judgment or choice." *Elder v. United States*, 312 F.3d 1172, 1176 (10th Cir. 2002) (internal quotation marks omitted). For this inquiry, we focus on "the particular nature of the regulatory conduct at issue," *Berkovitz*, 486 U.S. at 539, and examine "the challenged decision," *Elder*, 312 F.3d at 1176-77. Our lodestar is "the nature and quality of the harm-producing conduct, not . . . the plaintiffs' characterization of that conduct." *Fothergill v. United States*, 566 F.3d 248, 253 (1st Cir. 2009).

The fire victims must show that the Forest Service's initial incident decision "violated a federal statute, regulation, or policy that is both specific and mandatory." *Elder*, 312 F.3d at 1177 (internal quotation marks omitted). Language that meets this standard will leave little room for judgment calls.

Our most recent case in the context of firefighting is instructive. In *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216 (10th Cir. 2016), plaintiffs sued the Forest Service for mishandling a fire—specifically, for implementing a partial-suppression response to the fire rather than a full-suppression response. To overcome the discretionary function exception, the plaintiffs pointed to the Forest Service's assumedly mandatory "Design Checklist," a document the Service created to guide firefighting. The Forest Service failed to fill out the Checklist, which featured a series of questions like, "[i]s there other proximate fire activity that limits or precludes

successful management of this fire?" *Hardscrabble Ranch*, 840 F.3d at 1219. If the Service answered "yes" to any of the questions, the Checklist required it to implement a suppression-oriented fire response.

We applied the discretionary function exception despite the Forest Service's failure to follow the above prescription. We did not characterize the Forest Service's "challenged decision" as failing to abide by the mandatory procedures. Instead, we considered whether the Forest Service had discretion in "how to respond to the [fire]," *id.* at 1220, or, alternatively, "how to fight the fire," *id.* at 1221

We then observed that "neither the Checklist nor other procedures identified by Hardscrabble explicitly told the Forest Service to suppress the fire in a specific manner and within a specific period of time." *Id.* at 1222 (internal quotation marks omitted). Put differently, it did not suffice to point to a handful of policy mandates in an endeavor fundamentally defined by discretion. Filling out the Checklist, for example, may have been mandatory; but "the Checklist itself conferred discretion on the USFS decisionmakers" because each consideration amounted to a judgment call. *Id.* at 1221. We concluded that "[t]he existence of some mandatory language does not eliminate discretion when the broader goals sought to be achieved necessarily involve an element of discretion." *Id.* at 1222 (internal quotation marks omitted); *cf. Sabow v. United States*, 93 F.3d 1445, 1453 (9th Cir. 1996) ("[T]he presence of a few, isolated provisions cast in mandatory language does not transform an otherwise suggestive set of guidelines into binding agency regulations."). And even if the Forest Service violated the Checklist procedures, at

worse that would be an "abuse of discretion" protected by the FTCA. *Hardscrabble Ranch*, 840 F.3d at 1221.

As in *Hardscrabble Ranch*, the Forest Service's challenged decision is its initial decision to monitor the fire at the outset. The Incident Decision lays out the myriad considerations that led to that decision, including safety, terrain, weather, and risk. Other factors included the difficult terrain where the fire started, and the competing draw of firefighting resources to other nearby fires. Those considerations are quintessentially discretionary.

The fire victims resist this conclusion, arguing that the Forest Service's initial decision violated its mandatory duty to deploy full resources to the fire at the outset. They point to language in the Forest Service Manual—a policy document that, in part, instructs the Service on firefighting.[1] One of the many provisions in the Manual states:

> *Human-caused fires and trespass will be managed to achieve the lowest cost and fewest negative consequences with primary consideration given to firefighter and public safety and without consideration to achieving resource benefits.*[2]

---

1. The Forest Service Manual sets out Forest Service policy and response guidelines on issues ranging from road maintenance to land management. Chapter 5130 is titled "Wildfire Response" and describes how the Service should respond to fires. *See* App. 103.

2. When the Forest Service manages a fire for "resource benefits," it allows the fire to play its natural role in thinning forests.

FSM § 5130.3(8) (emphasis added). According to the fire victims, for this fire the Forest Service *did* consider resource benefits, which contributed to its decision to monitor the fire. They claim that the Forest Service had no discretion to monitor the fire since it was human-caused or of unknown origin at the time it was first reported.[3]

As evidence for this they point to a Forest Service press release issued after the Initial Decision was filed on September 16. The press release stated that while the cause of the fire was unknown, "firefighters are monitoring the fire and assessing options for long-term management strategy." App. 253. It also included boilerplate language stating "[w]ildfires burning under the right weather conditions and in appropriate locations can break-up forest fuels and create landscapes that are more resistant to large high severity fires" and that "a combination of tools, including the use of restoration wildfire, can help managers reduce the risk of future

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This offers various ecological benefits, like ensuring the forest is not conducive to particularly big fires. *See* App. 254.

3. The plaintiffs emphasize that when the cause of a fire is unknown, the Forest Service must treat it as human caused, and therefore cannot utilize it for resource benefits. *See* App. 74. And here, the cause of the Roosevelt Fire was unknown during the time of the Forest Service's initial decision. *See* App. 206. (Several weeks after the fire, it was determined to originate in a campfire pit.) But while delaying a full-suppression response is consistent with using a fire for resource benefits, it is also consistent with managing a fire without consideration of resource benefits. The Forest Service had to balance the distribution of firefighting resources when the fire was confined to "steep timbered terrain . . . surrounded by rocky steep slopes" that harbored the fire. App. 170.

mega-fires." App. 253-54. The fire victims suggest that the language in the release gives rise to an inference that the Forest Service considered forbidden resource benefits. But even if the press release's "canned" language gives rise to that inference, the overall discretionary nature of the guidelines prevents the victims from overcoming the exception. App. 395 (expert witness for the fire victims describing the statement as "canned"). And apart from the press release, no language exists in the official operative decision documents that suggest anything different; in fact, the WFDSS publications expressly identify no "benefits" to the fire.

Hardscrabble Ranch's approach compels our conclusion that the Forest Service Manual provision does not defeat the discretionary function exception. As an initial matter, the cited provision does not "specify the precise manner" in which the Forest Service must respond to a human-caused fire. *Domme*, 61 F.3d at 791. It lists some considerations—firefighter safety and public safety—alongside a prohibition on considering resource benefits. But it does not mandate a partial or full suppression response from the get-go—nor does it prohibit waiting the fire out until more information is available. The fire victims acknowledge as much. *See* Reply Br. at 7 ("The United States argues that fire managers have the discretion to refrain from suppressing human-caused wildfires if firefighter or public safety dictates. Of course they do."). In addition to the provision the fire victims focus on, the Manual explains the multiple values that inform any response to a wildfire. In particular, human-caused (or unknown-caused) fires will be managed

"to suppress the fire at the lowest cost with the fewest negative consequences with response to firefighter safety." § 5130.3(8); App. 334.[4]

More importantly, while the fire victims point to one provision of many, the Manual as a whole contains competing considerations that bear on a wildfire response. These include:

> 1. Protecting human life is the preeminent objective in every wildfire response. Assessing the potential threat to firefighter and public safety will be a continuous process on every wildfire. Every wildfire response will establish protection objectives that seek to mitigate these threats when they are identified.
>
> . . .

4. The fire victims try to distinguish *Hardscrabble Ranch* by emphasizing that the Forest Service there was not precluded from considering resource benefits. Knezovich Br. at 27. But we look to *Hardscrabble Ranch* not because it dealt with resource benefits, but because it set out a standard for assessing the presence of mandatory language in a largely discretionary regulatory environment. The fire victims also claim that *Hardscrabble Ranch* did not concern "rules at all, but mere guidance for the exercise of discretion." Reply Br. at 6. But *Hardscrabble Ranch* explicitly assumed for the sake of argument that the Checklist was mandatory, not optional. *See* 840 F.3d at 1221. And claiming that *Hardscrabble Ranch* does not apply because the court found that the Checklist required considerations that implicated discretion ignores the fact that the Forest Service was obliged to use the Checklist to guide its actions.

5. Initial response actions are based on policy and Land and Resource Management Plan objectives, with consideration for prevailing and anticipated environmental conditions that can affect the ability to accomplish those objectives.

6. Threats to property and natural resources will be identified and every wildfire will establish objectives that seek to mitigate these threats when time, resources, and prevailing conditions allow for action without undue risk to human life.

7. All or a portion of a wildfire originating from a natural ignition may be managed to achieve Land and Resource Management Plan objectives when initial and long-term risk is within acceptable limits as described in the risk assessment.

8. Human-caused fires and trespass will be managed to achieve the lowest cost and fewest negative consequences with primary consideration given to firefighter and public safety and without consideration to achieving resource benefits.

9. A wildland fire may be concurrently managed for one or more objectives and objectives can change as the fire spreads across the landscape. Objectives are affected by changes in fuels, weather, topography; varying social

> understanding and tolerance; and involvement of other government jurisdictions having different missions and objectives.
>
> 10. The Wildland Fire Decision Support System (WFDSS) will be used to inform and document decisions related to actions, resource allocations, and risk management for all wildfire responses. Periodic assessments throughout the duration of the fire incident must be completed and documented in WFDSS.

§ 5130.3(1), (5)-(10); App. 103-04.

Considered in context, the Forest Service Manual does not prevent the Service from making a judgment call in its initial response to a fire of human or unknown origin. To conclude otherwise would strip the Forest Service of its ability to balance the safety, conditions, weather, and resource requirements that go into any fire response.

This conclusion is supported by other caselaw. In *Gonzalez v. United States*, for example, the Ninth Circuit evaluated a policy that guided the FBI's disclosure of information to local law enforcement. It required that a local field office "*shall* promptly transmit [credible information of serious criminal activity or refer the complainant] to a law enforcement agency having jurisdiction." *Gonzalez v. United States*, 814 F.3d 1022, 1029 (9th Cir. 2016) (emphasis added). The Court concluded that the guidelines' mandate that agents "shall promptly transmit the information or refer the complainant" under particular conditions did

not overcome the discretionary function exception. Like in this case, given the guidelines' policy goals, "[v]iewed in context, mandatory-sounding language such as 'shall' does not overcome the discretionary character of the Guidelines." *Id.* at 1030; *see also Clark v. United States*, 695 F. App'x 378, 385-86 (10th Cir. 2017) ("Where the regulatory language 'mandates' the consideration of alternatives, the weighing of factors, or the application of policy priorities bounded by practical concerns, the language leaves to the decisionmaker's discretion how best to fulfill such 'mandatory' priorities.").

The fire victims point to a few cases to rebut this conclusion, but none is persuasive. They first highlight *Tinkler v. United States*, 982 F.2d 1465 (10th Cir. 1992), where a plaintiff sued the Federal Aviation Administration for negligently failing to furnish weather information to the pilot of an aircraft that crashed with her on board. The government argued that the FAA Specialist who could have provided the information was protected by the discretionary function exception. We disagreed, finding that answering the pilot "would not have been conduct that can be said to be grounded in the policy of the regulatory regime" and did not "involve an element of judgment or choice," as the Flight Services Manual required him to respond to the pilot. *Id.* at 1464 (internal quotation marks omitted). By contrast, the conduct the fire victims challenge *was* grounded in the policy of the regulatory regime, and, as outlined above, was fundamentally discretionary.

The fire victims also point to *Florida Department of Agriculture & Consumer Services v. United States*,

2010 U.S. Dist. LEXIS 89200, 2010 WL 3469353, No. 4:09-cv-386/RS-MD, (N.D. Fla. Aug. 30, 2010). There, the government ignited a controlled burn in Osceola National Forest, which spread to the plaintiff's land and inflicted physical injury and property damage. The district court found the discretionary function exception inapplicable because the government "demonstrate[d] a clear disobedience to mandates that are not discretionary." 2010 U.S. Dist. LEXIS 89200, [WL] at *4. Once again, because the fire victims fail to cite language that rendered the Forest Service's conduct non-discretionary, this case differs in kind.

Finally, in *Bell v. United States*, 127 F.3d 1226 (10th Cir. 1997), the plaintiff dove into a reservoir and hit his head on a submerged dirt embankment covering a pipeline. He sued the Department of Interior's Bureau of Reclamation for negligence under the FTCA. We recounted that the Bureau was obliged to administer a contract between its contractor and the New Mexico Interstate Stream Commission during construction around the reservoir. And in particular, its contractor had to strictly abide by the Bureau's specifications while the Bureau ensured compliance. The contract required the contractor to relocate the pipeline, but it failed to do so—and that led to plaintiff's injury. We found that the discretionary function exception did not apply because the government conduct at issue—leaving the pipeline—was not a "matter of choice" under the contract. *Id.* at 1229 (quoting *Berkovitz*, 486 U.S. at 536). *Bell* does not unsettle our conclusion here. The choice and judgment in how to respond to the Roosevelt Fire required significant discretion.

In sum, the fire victims have failed to demonstrate that the Forest Service's delayed full-suppression response "involved no element of judgment or choice." *Elder*, 1177 (internal quotation marks omitted). "[T]he broader goal[] . . . to be achieved"—fire management—"necessarily involve[s] an element of discretion," and the Manual's language did not foreclose the Forest Service from delaying a full-suppression strategy as it assessed the fire. *Hardscrabble Ranch*, 840 F.3d at 1222.

C. Policy Judgment

Even though we conclude the Forest Service's initial decision was discretionary, we still must consider the second step of the discretionary function exception: whether the judgment the Forest Service exercised was "susceptible to policy judgment" and "involve[d] an exercise of political, social, or economic judgment." *Duke v. Dep't of Agric.*, 131 F.3d 1407, 1410 (10th Cir. 1997) (internal quotation marks omitted). The "focus of the inquiry . . . is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Hardscrabble Ranch*, 840 F.3d at 1222 (quoting *United States v. Gaubert*, 499 U.S. 315, 325, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991)).

Of course, "nearly every governmental action is, to some extent, subject to policy analysis—to some argument that it was influenced by economics or the like." *Duke*, 131 F.3d at 1410. As a result, we look for more than just a trace of policy concerns when determining whether "the

decision or nondecision implicates the exercise of a policy judgment of a social, economic or political nature." *Id.* at 1411. Furthermore, "we presume that a government agency's acts are grounded in policy [where]," as here, "no statute, regulation, or policy sets forth a required course of conduct." *Ball*, 967 F.3d at 1079. The plaintiffs bear the burden of proving otherwise.

We have little trouble concluding that the "nature of the actions" taken by the Forest Service involved the exercise of policy judgment of the sort the exception is meant to protect. *Hardscrabble Ranch*, 840 F.3d at 1222 (quoting *Gaubert*, 499 U.S. at 325). As in *Hardscrabble Ranch*, the Forest Service's fire management had to "balanc[e]" the competing interests in "protect[ing] private property" and "ensur[ing] firefighter safety" while prioritizing the wellbeing of nearby inhabitants.[5] *Id.; Ohlsen v. United States*, 998 F.3d 1143, 1163 (10th Cir. 2021) ("Decisions about whether and when to distribute limited resources—namely a fire guard or water truck—are informed by policy considerations such as public and firefighter safety, suppression costs, environmental risks, and the availability of resources."). This is especially

5. The fire victims object that they do not ask us to second guess policy considerations; rather, the policy prohibition against considering resource benefits has *already* been established. But this misapprehends our inquiry. We ask whether the "nature of the . . . action[]" taken by the Forest Service is inflected with policy considerations. *Hardscrabble Ranch*, 840 F.3d at 1222 (quoting *Gaubert*, 499 U.S. at 325). And, as explained above, the relevant action is the Forest Service's delay of its full-suppression response—not the consideration of resource benefits. Properly framed, the Forest Service exercised relevant policy judgment.

so given the fact that another fire—the Lead Creek Fire—was burning nearby simultaneously and demanded deployment of scarce resources. App. 76.

The task of balancing these interests is best lodged with officials and experts on the ground than with judges aided by the benefit of hindsight. *See Miller v. United States*, 163 F.3d 591, 596 (9th Cir. 1998) ("Our task is not to determine whether the Forest Service made the correct decision in its allocation of resources. Where the government is forced, as it was here, to balance competing concerns, immunity shields the decision."). Fire management necessarily "involves balancing practical considerations of funding and safety as well as concerns of a fire's impact on wildlife, vegetation, and human life." *Ohlsen*, 998 F.3d at 1163 (analyzing the discretionary function exception in the context of a wildfire). It is no wonder that, time and again, the courts have declined to manage the firefighting role.[6] *See, e.g., Esquivel v. United States*, 21 F.4th 565 (9th Cir. 2021) (applying the discretionary function exception in the context of a controlled burnout); *Green v. United States*, 630 F.3d 1245, 1251-52 (9th Cir. 2011) (distinguishing Forest Service decisions regarding attacking a fire and allocating suppression resources from duties not susceptible to a policy analysis); *see also Foster Logging, Inc. v. United*

6. The fire victims point to *Rayonier Inc. v. United States*, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354 (1957) as evidence to the contrary. There, the Supreme Court permitted a negligence suit against the government for its handling of a fire. But as the fire victims concede, that case did not concern the discretionary function exception and does not control here.

States, 973 F.3d 1152, 1164-65 (11th Cir. 2020) (discussing policy concerns inherent in monitoring a controlled burn); *cf. Abbott v. United States*, __ F.4th __, 2023 U.S. App. LEXIS 21535, 2023 WL 5286966 (6th Cir. Aug. 17, 2023) (remanding for potential consideration of policy behind fire warnings).

The Roosevelt Fire victims have failed to demonstrate that the Forest Service's judgment was not based on considerations of public policy. The district court properly determined that the discretionary function exception stripped it of jurisdiction to hear the case.[7]

III. Conclusion

We **AFFIRM** the district court.

7. Because the discretionary function exception stripped the court of jurisdiction to hear the fire victims' claims, we also affirm the court's denial of the fire victims' motion for additional discovery. Additional discovery favorable to the fire victims would not change our jurisdictional conclusion.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, FILED APRIL 14, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Case No. 21-cv-00180-ABJ

STEVEN DAKOTA KNEZOVICH, an individual, STEVEN L. KNEZOVICH and DEBORA M. KNEZOVICH, husband and wife, ANDREW M. TAYLOR and DENA DEA BAKER, husband and wife, RICHARD D. WRIGHT and DEONE R. WRIGHT, husband and wife, and THE HOBACK RANCHES PROPERTY OWNERS IMPROVEMENT AND SERVICE DISTRICT, COUNTY OF SUBLETTE, STATE OF WYOMING,

Plaintiffs,

VS.

UNITED STATES OF AMERICA,

Defendant.

ORDER ON MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND RULE 56(D) MOTION TO ALLOW FOR ADDITIONAL DISCOVERY

THIS MATTER comes before the Court on Defendant United States of America's *Motion to Dismiss for Lack of Subject Matter Jurisdiction*, ECF Nos. 14 & 15, and Plaintiffs' *Rule 56(d) Motion to Allow for Additional*

Discovery, ECF Nos. 20 & 21. Plaintiffs responded to Government's motion to dismiss on January 7, 2022—same day they filed their Rule 56(d) motion. ECF Nos. 20-22. Defendant Government replied in support of their motion to dismiss and responded to Plaintiffs' Rule 56(d) motion on January 24, 2022. ECF Nos. 29 & 30. Plaintiffs replied in support of their Rule 56(d) motion on February 2, 2022. ECF No. 36. This Court heard parties' oral arguments on March 16, 2022. ECF No. 37. Having considered the filings, applicable law, and being otherwise fully advised, the Court finds Plaintiffs' *Rule 56(d) Motion to Allow for Additional Discovery* should be **DENIED**. ECF Nos. 20 & 21. The Court further finds Defendant Government's *Motion to Dismiss for Lack of Subject Matter Jurisdiction* should be **GRANTED**. ECF Nos. 14 & 15.

BACKGROUND

This case arises out of a forest fire that occurred in Lincoln and Sublette Counties in September of 2018 ("Roosevelt Fire") and the injuries and damages caused by it. *See* ECF No. 1 at ¶1. Plaintiffs contend the Government inappropriately responded to the Roosevelt Fire and failed to warn them. *See id. at* ¶¶1-3. Plaintiffs are Hoback Ranches Property Owners Improvement and Service District as well as residents and/or landowners in Wyoming who suffered injuries and damages from the Roosevelt Fire. *See id.* at ¶¶7-11. Defendant is the United States of America as it acted through its agency, the United States Department of Agriculture Forest Service ("Forest Service"). *See id.* at ¶12.

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The Roosevelt Fire was first reported on September 15, 2018. *See id.* at ¶18. Plaintiff Steven Knezovich, while at a hunting camp with Plaintiff Dakota Knezovich, saw the fire shortly after it started and called the Forest Service to report it. *Id.* at ¶19. When he reported it, the Forest Service was already aware of the fire. *Id.* at ¶20. On September 16, 2018, the Forest Service released its initial Wildfire Decision Support System ("WFDSS") documentation for the Roosevelt fire, listing its course of action. *Id.* at ¶25. The Forest Service also issued a news release, urging visitors and hunters to stay out of the area near the fire. *Id.* at ¶28. That day, the Knezovich hunting party encountered two Forest Service rangers who told them the Forest Service is letting the fire burn and they had several hours to make it back to their parked trucks. *Id.* at ¶29. Shortly thereafter, one of the parties encountered another ranger who told them the fire was moving fast. *Id.* at ¶30. The Knezovich party began rushing in an attempt to depart before the fire got there; their harrowing escape was successful, but they suffered serious burns all over their bodies as well as mental and emotional distress from the experience. *Id.* at ¶¶31-33. On September 17, 2018, the Roosevelt Fire had spread to trigger evacuations in residential areas northwest of Pinedale, Wyoming. *See id* at ¶35. On September 18, 2018, the spread of the Roosevelt Fire resulted in a further evacuation order, pursuant to which other Plaintiffs evacuated. *Id.* at ¶36. On September 20, 2018, the first home in the Hoback Subdivision burned down. *See id* at ¶38. From September 20 to September 23 of 2018, the Roosevelt Fire burned down property belonging to several Plaintiffs. *See id* at ¶¶39-40.

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Based on the events and the Forest Service's response to them, Plaintiffs filed a Complaint presenting ten claims, including negligence, trespass, and premises liability all allowed under the Federal Tort Claims Act ("FTCA"). *See* ECF No. 1. Subsequently, the Government moved to dismiss the case, arguing the Forest Service had discretion regarding how to act, excepting them from liability under the FTCA. *See* ECF No. 15 at 2-3.

STANDARD OF REVIEW

Rule 12(b)(1) Motion to Dismiss

A challenge to the Court's jurisdiction under the FTCA should be brought as a motion to dismiss under Rule 12(b)(1). *Zumwalt v. United States*, 928 F.2d 951, 952 (10th Cir. 1991). In a factual attack to subject matter jurisdiction, a party challenging jurisdiction under "Rule 12(b)(1) may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends," *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1295 (10th Cir. 2003) (internal citation and quotation marks omitted), and a "court may not presume the truthfulness of the complaint's factual allegations," *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). For this, a court "has wide discretion" and may look to affidavits and other documents and even hold a limited evidentiary hearing to resolve the jurisdictional question. *Davis*, 343 F.3d at 1296. Looking to evidence outside the pleadings would not automatically convert the motion to dismiss to a Rule 56 motion for summary judgment. *Id.*

However, if a court determines the subject matter jurisdiction question is "intertwined with the merits of the case," it must convert the motion to a Rule 56 motion for summary judgment or a 12(b)(6) motion to dismiss. *Franklin Say. Corp. v. United States*, 180 F.3d 1124, 1129 (10th Cir. 1999). "When deciding whether jurisdiction is intertwined with the merits of a particular dispute, 'the underlying issue is whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim.'" *Davis*, 343 F.3d at 1296 (quoting *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002)).

The party asserting jurisdiction has the burden of establishing that such jurisdiction is present. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

Rule 56 Motion for Summary Judgment

Summary judgment is appropriate where "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). A dispute of fact is genuine if a reasonable juror could resolve the disputed fact in favor of either side. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute of fact is material if under the substantive law it is essential to the proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). When the Court considers the evidence presented by the parties, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor." *Anderson*, 477 U.S. at 255.

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The party moving for summary judgment has the burden of establishing the nonexistence of a genuine dispute of material fact. *Lynch v. Barrett*, 703 F.3d 1153, 1158 (10th Cir. 2013). The moving party can satisfy this burden by either (1) offering affirmative evidence that negates an essential element of the nonmoving party's claim, or (2) demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *See* Fed. R. Civ. P. 56(c)(1)(A)-(B).

Once the moving party satisfies this initial burden, the nonmoving party must support its contention that a genuine dispute of material fact exists either by (1) citing to particular materials in the record, or (2) showing that the materials cited by the moving party do not establish the absence of a genuine dispute. *See id.* The nonmoving party must "do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Rather, to survive a summary judgment motion, the nonmoving party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Further, when opposing summary judgment, the nonmoving party cannot rest on allegations or denials in the pleadings but must set forth specific facts showing that there is a genuine dispute of material fact for trial. *See Travis v. Park City Mun. Corp.*, 565 F.3d 1252, 1258 (10th Cir. 2009).

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When considering a motion for summary judgment, the court's role is not to weigh the evidence and decide the truth of the matter, but rather to determine whether a genuine dispute of material fact exists for trial. *Anderson*, 477 U.S. at 249. Credibility determinations are the province of the fact-finder, not the court. *Id.* at 255.

ANALYSIS

The Government contends the Forest Service had discretion to act in response to the Roosevelt Fire and in fact acted within the boundaries of discretion afforded to it. *See* ECF No. 15 at 10. Plaintiffs first argue that the question whether the Government acted within its discretion is intertwined with Plaintiffs' substantive claims, thus Government's motion to dismiss should be converted to a motion for summary judgment. *See* ECF No. 22 at 13-15. Plaintiffs also argue the Forest Service in fact used the fire for resource benefits, exceeding the discretion afforded to it. *See id.* at 10-13. Plaintiffs then argue, under the summary judgment standard, that a genuine dispute as to a material fact exists regarding the Forest Service's actions as they related to guidelines and rules regarding fire suppression. *See id.* at 18,22-35. Finally, Plaintiffs argue subject matter jurisdiction exists over the Forest Service's failure to warn Plaintiffs and that generally the discretionary function exception does not apply to failure to warn claims. *See id.* at 35-37.

1. Conversion and Rule 56(d) Motion

Plaintiffs contend that the issue regarding subject matter jurisdiction is intertwined with their claims. *See*

ECF No. 22 at 13-17. Not only does the subject matter jurisdiction issue come from the FTCA—the same statute providing the framework for their substantive claims—but Plaintiffs also argue the Forest Service's actions, which relate to exercise of discretion, also relate to negligence and trespass. *See id.* at 13-15; ECF No. 39 at 4-5. According to Plaintiffs, if the Forest Service chose not to suppress the fire, it would be negligent and that choice of not suppressing the fire also related to the discretionary exception of the FTCA. *See* ECF No. 59 at 5. If the Forest Service chose to allow the fire to burn, it trespassed, and that decision also related to the discretionary exception of the FTCA. *See id.* The Government responds arguing Plaintiffs have not shown how the threshold jurisdictional question is intertwined with the merits of the case, because they have not even established a law, statute, rule, or policy which would require a specific response to the fire in this case. *See* ECF No. 29 at 4-6; ECF No. 30 at 10-12.

Conversion

Here the jurisdictional question is whether the discretionary function exception applies. To determine whether the exception applies in cases brought under the FTCA, we utilize the two-prong analysis of *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988). Under that scheme, we determine (1) whether the action at issue was one of choice for the government employee and, (2) if the conduct involved such an element of judgment, "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 536.

Plaintiffs rely on *Bell v. United States* to show a conversion to a motion for summary judgment is appropriate, but as the Government identified, in *Bell* the challenge did not rely on a violation of a statute, policy, rule, or other mandatory directive. *See Bell v. United States*, 127 F.3d 1126, 1229 (10th Cir. 1997). However, when the Tenth Circuit was presented with a case more reflective of the facts before this Court, it determined a conversion to a motion for summary judgment was nonetheless appropriate. *See Tippett v. United States*, 108 F.3d 1194, 1196-97 (10th Cir. 1997). In *Tippett*, a Yellowstone park ranger instructed visitors to pass a moose in a certain way, which resulted in the visitors being attacked by the moose. *See id.* at 1196. Plaintiffs in that case argued the National Park Service had a policy which the park ranger did not follow, and the policy removed any discretionary authority regarding the decision made. *See id.* at 1197. The jurisdictional disagreement was whether the policy required strict adherence and of course the negligence claim was based on the park ranger's decisions when instructing the visitors. *See id.* Here, we are presented with a very similar situation. Plaintiffs contend the Forest Service made decisions that resulted in their injuries, and they also contend it has policy guidance prescribing specific responses to wildfires. *See* ECF No. 39 at 3-5. In our case, just as in *Tippett*, the same conduct—an official's decision—is used to determine the jurisdictional as well as the substantive questions. Understandably, the Government argues we do not even reach the issues presented by Plaintiffs, because they have not presented this Court with a statute, rule, or policy which was mandatory and had been violated by the Forest Service.

However, the Tenth Circuit in *Tippett* was faced with the same argument as the policy in that case was found to not remove discretion from the park ranger. *See Tippett*, 108 F.3d at 1197.

Whether the policies were mandatory or not, our preliminary question is the standard of review—the lens through which this Court must assess the arguments. The Court is tasked with assessing factual issues relating to jurisdiction, but it must not overstep into the province of the fact finder. Because the factual issues and questions relating to subject matter jurisdiction are intertwined with Plaintiffs' substantive claims, this Court shall convert the motion to dismiss to a motion for summary judgment and will review it based on the appropriate standard of review.

Rule 56(d) Motion

"If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). "The party requesting additional discovery must present an affidavit that identifies 'the probable facts not available and what steps have been taken to obtain these facts. The nonmovant must also explain how additional time will enable him to rebut the movant's allegations of no genuine issue of material fact.'" *Fed. Deposit Ins. Corp. v. Arciero*, 741 F.3d 1111, 1116 (10th Cir. 2013) (citing

Trask v. Franco, 446 F.3d 1036, 1042 (10th Cir. 2006)). Decisions regarding Rule 56(d) motions are reviewed for an abuse of discretion and will not be reversed unless the District Court "exceed[ed] the bounds of the rationally available choices given the facts and the applicable law in the case at hand." *Id.* (internal citation and quotations marks omitted).

Two main issues are relevant in the resolution of this case: (1) whether there are regulations taking away relevant discretion from the Forest Service and (2) whether there are sufficient facts to show the Forest Service acted outside the sphere of discretion given to it. As far as the first issue goes, additional discovery will have no bearing on its resolution. The claim here is that the Forest Service violated a statute, regulation, policy, or rule which took away discretion and mandated a certain course of action. Rules, regulations, statutes, and other laws are all publically available or easily obtainable. As shown by the Plaintiffs' briefing and arguments, they have obtained rules and regulations which they argue prescribed a certain course of conduct. Additional discovery would provide little to no effect on Plaintiffs' ability to argue the first issue.

Regarding the second issue, Plaintiffs argue the Forest Service exceeded its discretion by pursuing wildfire management strategies geared for resource benefits. According to Plaintiffs, such a strategy exceeds discretion afforded, however, they have provided little to no evidence the Forest Service pursued resource benefits with the Roosevelt Fire. Aside from one news article, all

other information, including the database which outlines the Forest Service's official actions, points to the Forest Service not considering resource benefits in their decisions regarding the Roosevelt Fire. Plaintiffs request additional time for discovery to question people in the Forest Service who were in charge of making decisions and ask them whether resource benefits were considered, but it appears to have little likelihood of success, as the official decision regarding the fire specifically excludes resource benefits. *See* ECF No. 21 at 10-12. Furthermore, Plaintiffs have not pointed to any actual actions by the Forest Service which would put their management decisions outside of their discretion, simply asserting arguments which speak to negligence, having no bearing on the jurisdictional question.

Plaintiffs identify several potential witnesses and assert they would inquire about "management decisions and rationale relating to the Roosevelt Fire" but they do not explain how that would change the outcome when applying the discretionary function exception. *See id.* They also did not show what steps they have already taken to find the information they needed. *See id.*; ECF No. 21-1. The WFDSS, which is followed by the Forest Service and other agencies as their plan of operation, outlined the approach to the Roosevelt Fire—it did not include resource benefits as an objective and everything else is within the discretion of the Forest Service. Whatever the management decisions and rationale that lead to the Forest Service's adoption of the plan in the WFDSS, the actions were within the discretion of the Forest Service because the published plan was within its discretion—

Plaintiffs failed to explain how discovery would show otherwise. Their assertion that the Forest Service had to respond with full suppression and had many available resources goes against information provided by Plaintiffs themselves, such as other forest fires in the area, and shows why discretion is necessary when agencies respond to forest fires and have to weigh available resources on a larger scale, beyond a single forest fire. With no reasonable evidence to show otherwise, allowing Plaintiffs to conduct additional discovery on an unsubstantiated claim that the Forest Service published misrepresentations in the WFDSS would negate the whole discretionary function exception to subject matter jurisdiction.

Because additional discovery time would have little to no bearing on the resolution of relevant issues, Plaintiffs Rule 56(d) motion should be denied.

2. Discretionary Function Exception

To determine whether the discretionary function exception applies in cases brought under the FTCA, we utilize the two-prong analysis of *Berkovitz*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988). Under that scheme, we determine (1) whether the action at issue was one of choice for the government employee and, (2) if the conduct involved such an element of judgment, "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 536.

While Plaintiffs point to several policies and rules they claim bind the Forest Service and prescribe mandatory action, the Government correctly argues that all the

policies are merely guidance, leaving the action up to the Forest Service's discretion. *See* ECF No. 22 at 10-13. Plaintiffs cite the following language to show lack of discretion:

> • "**Human caused fires** and trespass fires **must be suppressed** safely and cost effectively **and must not be managed for resource benefits**." *Id.* at 11 (citing the Interagency Standards for Fire and Fire Aviation Operations ("the Red Book")).
>
> • "Human-caused fires and trespass [*sic*] will be managed to achieve the lowest cost and fewest negative consequences with primary consideration given to firefighter and public safety ***and without consideration to achieving resource benefits***." *Id.* at 12 (citing the Forest Service Manual ("FSM")).

First, the Government accurately argued that the Red Book merely provides guidance for the Forest Service and is not mandatory. *See* ECF No. 15 at 14. Second, the type of language presented in the sources cited by Plaintiffs is exactly the type of language that is meant to provide discretion. While the requirement to suppress sounds mandatory, the subsequent considerations for firefighter and public safety are specifically the type of assertions indicating discretion. *See Elder v. United States*, 312 F.3d 1172, 1176-77 (10th Cir. 2002) (holding language removing discretion must be specific and mandatory). The Tenth Circuit has held that policy language stating that "[t]he saving of human life will take precedence over all other

management actions" was not the type of specific and mandatory language that removed discretion. *Tippett*, 108 F.3d at 1197 (internal quotation marks omitted). Similarly here, the language is too general and provides a weighing of values which is clear discretionary language.

With little argument from the parties, the action here also meets the second prong of the *Berkovitz* test. The purpose of the second prong is 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." *Berkovitz*, 486 U.S. at 536-37 (citation omitted). This Court need not go beyond the Tenth Circuit's decision in *Ohlsen v. United States*, where it stated that "[d]ecisions about whether and when to distribute limited resources . . . are informed by policy considerations such as public and firefighter safety, suppression costs, environmental risks, and the availability of resources." *Ohlsen v. United States*, 998 F.3d 1143, 1163 (10th Cir. 2021). Multiple important factors come into play when deciding how to suppress a single or multiple forest fires in varied terrain and a diverse environment. Decisions regarding forest suppression are specifically the type of decisions dependent on discretion that the policy was meant to protect.

"Without Consideration to Achieving Resource Benefits."

Plaintiffs argue that at least part of the FSM provides specific mandatory language that the Forest Service had to follow. The Government disagrees, arguing the policy language must be taken as a whole and that some

mandatory language does not remove overall discretion to act.

"The existence of some mandatory language does not eliminate discretion when the broader goals sought to be achieved necessarily involve an element of discretion." *Hardscrabble Ranch LLC v. United States*, 840 F.3d 1216, 1222 (10th Cir. 2016) (internal citation and quotation marks omitted).

Overall, the purpose of the FSM is to outline considerations for the Forest Service but leave enough discretion for it to appropriately respond to forest fires of human-caused or unknown origin. However, even if Plaintiffs' argument was true and this was the type of mandatory language removing discretion, they have not sufficiently asserted that the Forest Service considered resource benefits. As the Government argued, the WFDSS provides the Forest Service's official actions. Beyond a news article and expert opinions which simply restate Plaintiffs' unfounded assertions, Plaintiffs have not provided evidence and have not pursued open records to show the Forest Service considered resource benefits. Their argument that resource benefits were not mentioned as a mistake is simply a mischaracterization of the evidence, which clearly shows the Forest Service's official actions, which are followed by the Forest Service. The Government does not dispute Plaintiffs' evidence but simply counters it with the official actions of the Forest Service. Even when believed, with all *reasonable* inferences drawn, Plaintiffs' evidence does not establish the existence of subject matter jurisdiction.

Appendix B

Failure to Warn

Plaintiffs argue the Forest Service failed to warn residents about the Roosevelt Fire and had no discretion not to warn. *See* ECF No. 22 at 35-37. The Government argues the discretionary function exception applies to failure to warn cases, stripping the claims of subject matter jurisdiction. *See* ECF No. 30 at 12-14.

Undisputed facts show the Forest Service issued warnings about the Roosevelt Fire by various means, including a press release and personnel contact with people in the area. *See* ECF No. 1 at ¶¶28-33; ECF No. 30 at 12.

The jurisdictional question is not whether the Forest Service was negligent but whether it had mandatory policies it had to follow yet did not. *See Berkovitz*, 486 U.S. at 536. "Where the United States has provided some warnings, it is more appropriate to view the failure to provide additional warnings as a policy-based decision than in cases where the government has failed to provide any warning at all." *Clark v. United States*, 695 Fed. Appx. 378,388 (10th Cir. 2017).

Plaintiffs do not provide evidence they were not aware of the fire or that the Forest Service did not provide any warnings to the public. They do not even contend the Forest Service provided the most minimal warnings. The Forest Service did not simply provide a news release and rest there—they used manpower to warn people in the area. Looking at Plaintiffs' evidence, the discretionary

function exception applies here as the Forest Service took significant steps to warn the public, fitting their actions within the public policy type decisions excluded from judicial scrutiny by the discretionary function exception.

Because actions by the Forest Service fall within the discretionary function exception, as some mandatory language does not remove discretion in an overall discretionary policy, the Government's motion to dismiss for lack of subject matter jurisdiction should be granted.

CONCLUSION

For these reasons, it is **ORDERED** Plaintiffs' *Rule 56(d) Motion to Allow for Additional Discovery* is **DENIED**, ECF Nos. 20 & 21, and Defendant Government's *Motion to Dismiss for Lack of Subject Matter Jurisdiction* is **GRANTED**, ECF Nos. 14 & 15.

It is further **ORDERED** that Defendant United States of America and the claims against it are **DISMISSED WITH PREJUDICE**.

Dated this 13th day of April, 2022.

/s/ Alan B. Johnson
Alan B. Johnson
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED DECEMBER 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-8023
(D.C. No. 2:21-CV-00180-ABJ)
(D. Wyo.)

STEVEN DAKOTA KNEZOVICH, *et al.*,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

Before **TYMKOVICH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

Appellants' petition for rehearing is denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk