

No. 22-6014  
No. 23-5439

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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AMERICAN RELIABLE INSURANCE COMPANY, et al.,

*Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

On Appeal from the United States District Court  
For the Eastern District of Tennessee

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**CONSOLIDATED INITIAL BRIEF OF PLAINTIFFS-APPELLANTS**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, counsel for Plaintiffs certify that each Plaintiff has previously submitted their corporate disclosure statement to the Court. A copy of the previously submitted corporate disclosures are attached hereto as **Exhibit A**.

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**STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Pursuant to Federal Rule of Appellate Procedure 34(1) and Sixth Circuit Rule 34(a), Plaintiffs-Appellants hereby respectfully request oral argument due to the national significance and complexity of the issues raised. This appeal raises questions regarding the proper interpretation of the discretionary function exception to the Federal Tort Claims Act, and its application to the Great Smoky Mountains National Park fire safety protocols. Many of these protocols have been developed through decades of fire-safety research and have been implemented throughout the National Park Service, not as suggestions, but as mandatory minimum safety requirements to protect the people and property of the United States. Furthermore, the record from the District Court is complex and spread across numerous actions; all of which were consolidated before Judge Greer prior to this appeal. Therefore, oral argument will substantially aid the court as a supplement to the appellate record.

### **STATEMENT OF JURISDICTION**

This appeal arises from five lawsuits filed in the United States District Court for the Eastern District of Tennessee against the United States of America under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2401, 2671–80, and 28 C.F.R. § 14.3 (“FTCA”). Original jurisdiction over this action exists pursuant to 28 U.S.C. §§ 1331 and 1346(b). Under 28 C.F.R. § 14.3, a subrogated insurer may present a claim under the FTCA. Plaintiffs incurred damages as a direct and proximate result of the negligent acts or omissions of National Park employees while acting within the scope of their employment, under circumstances where a private person would be liable to Plaintiffs under Tennessee law. 28 U.S.C. §§ 1346(b), 2674.

**CITATION FORMS**

Am. Reliable RE#	Record Entry Number from Am. Reliable Ins. V. US, District Court Docket No. 3:19-cv-469
State Farm RE#	Record Entry Number from State Farm v. US, District Court Docket No. 3:19-cv-470
USAA RE#	Record Entry Number from United Services Auto Ass'n v. US, District Court Docket No. 3:19-cv-472
Allstate RE#	Record Entry Number from Allstate v. US, District Court Docket No. 3:19-cv-474
Auto-Owners RE#	Record Entry Number from Auto-Owners v. US, District Court Docket No. 3:19-cv-478

**STATEMENT OF ISSUES**

1. Whether the discretionary function exception to the Federal Tort Claims Act bars Plaintiffs Fire Management claims against the Defendant. *See American Reliable Ins. Co. v. United States*, 502 F. Supp. 3d 1266, 1270 (E.D. Tenn. November 24, 2020).

## STATEMENT OF THE CASE

### **I. THE 2016 CHIMNEY TOPS FIRE RAVAGES GATLINBURG AND SURROUNDING AREAS—KILLING MANY AND DESTROYING HUNDREDS OF MILLIONS OF DOLLARS IN PROPERTY**

In the fall of 2016, the Great Smoky Mountains National Park (“Park”) was suffering from a severe drought. Years of dead vegetation layered the forest floor.<sup>1</sup> Just before the Thanksgiving holiday, on November 23, 2016, the Chimney Tops 2 Fire (the “Fire”) started 5.5 miles south of Gatlinburg, a city that sits astride the Park’s northern border.<sup>2</sup> The Park permitted the Fire to burn within a containment area.<sup>3</sup>

On Sunday morning, November 27, 2016, the Government realized the Fire (having already grown continuously since November 23) had grown overnight, and the Government could not simply allow it to keep burning.<sup>4</sup> To try and suppress the Fire, the Park utilized additional resources, including air support.<sup>5</sup> Despite those actions the Fire expanded to 35 acres by Sunday afternoon.<sup>6</sup> The Government was losing control. On Monday morning, November 28, 2016, previously forecasted extreme winds<sup>7</sup> picked up in the direction of Gatlinburg: blowing hot embers

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<sup>1</sup> Complaint, Auto-Owners RE# 32, Page ID # 1937-1938, ¶¶ 50–57.

<sup>2</sup> *Id.*, Page ID # 1945, ¶ 92.

<sup>3</sup> *Id.*, Page ID # 1938-1942, ¶¶ 58–59, 68, 74–75.

<sup>4</sup> *Id.*, Page ID# 1947, ¶ 97.

<sup>5</sup> *Id.*, ¶ 100.

<sup>6</sup> *Id.*, Page ID# 1948, ¶ 105.

<sup>7</sup> *Id.*, Page ID# 1943-1944, ¶¶ 80–84.

towards the city.<sup>8</sup> Fueled by the prevailing winds, the Fire spread to 500 acres; with dramatically increased intensity and speed.<sup>9</sup> High winds drove the Fire from ridge to ridge, as the fire sprinted north to Gatlinburg. By 3:00 p.m., the Fire had spread to 2,000 acres; at 4:00 p.m., 4,000 acres.<sup>10</sup>

Just after 6:00 p.m. on Monday, November 28, 2016, the Fire entered Gatlinburg.<sup>11</sup> The Fire engulfed parts of the city: reportedly igniting an additional structure every 18 seconds.<sup>12</sup> By midnight on November 28–29, 2016, the Fire covered a shockingly massive area: 16,000 acres.<sup>13</sup> By 2:00 a.m. on November 29, 2016, 17,000 acres were burning.<sup>14</sup> The Fire killed three people in the city and 11 people in adjacent Sevier County. It destroyed or damaged 2,501 structures.<sup>15</sup> Gatlinburg officials evacuated the city.<sup>16</sup> Power lines were down.<sup>17</sup> The Fire destroyed hundreds of millions of dollars in property, ultimately resulting in Plaintiffs paying hundreds of millions in insurance claims for property losses.<sup>18</sup>

## II. THE GOVERNMENT DISOBEYED ITS OWN FIRE-MANAGEMENT MANDATES, NEGLIGENTLY CAUSING THIS CATASTROPHE

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<sup>8</sup> *Id.*, Page ID# 1949-1950, ¶¶ 113–14, 116.

<sup>9</sup> *Id.*, Page ID# 1950, ¶¶ 115, 117.

<sup>10</sup> *Id.*, Page ID# 1952-1954, ¶¶ 127, 131–35.

<sup>11</sup> *Id.*, Page ID# 1954-1955, ¶ 137.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, Page ID# 1956, ¶ 142.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, ¶ 146.

<sup>16</sup> *Id.*, Page ID# 1955, ¶¶ 138–39.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, Page ID# 1956, ¶ 148.

The Government’s negligence caused this catastrophe.<sup>19</sup> The Government violated its life—and property—saving mandates for managing and fighting fires.<sup>20</sup> Protecting the public from deadly wildfires originating in national parks is not a “discretionary” matter — like decorating government offices or issuing research grants — that the Government may do, or not do, as it pleases. The Government itself recognizes that certain basic firefighting activities are mandatory because “[f]irefighter and public safety is the first priority” of the Park Service. Reed v. United States, No. 3:18-CV-201, 2019 WL 6719667, at \*4 (E.D. Tenn. Dec. 9, 2019) (emphasis added). To that end the Park Service requires each national park to develop an approved fire management plan.<sup>21</sup> “All Fire Management Plans and activities must reflect this commitment” to “public safety.” Reed, 2019 WL 6719667, at \*4. Consistent with these requirements, the Park instituted a mandatory fire management plan (“Safety Plan”) that was in effect at the time of the Chimney Tops Fire.<sup>22</sup> That Safety Plan imposed several mandatory sets of commands; each of which served the overriding purpose of public safety.

**A. The Government Ignored Its Own Mandates Prescribing a Specific Wildfire-Management Command Structure**

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<sup>19</sup> See, e.g., Complaint, RE# 32, Page ID # 1957-1980, ¶¶ 150–269.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, Page #ID 1930, ¶ 22.

<sup>22</sup> GSMNP FMP, RE# 32-6 *passim*.

Plaintiffs alleged that the Government violated mandatory policies prohibiting a single park official from assuming multiple leadership roles during any wildland fire event. Specifically, Plaintiffs allege that, in violation of National Park Service (“NPS”) policy, the roles of Incident Commander, Zone Fire Management Officer, Park Fire Management Officer, Safety Officer, and Fire Duty Officer were all assumed by a lone park official during the Fire.<sup>23</sup> Plaintiffs further alleged that NPS admitted to multiple violations of its mandatory command structure policy in its official investigative report following the incident: Chimney Tops 2 Fire Review – *Individual Fire Review Report*. (“NPS Report”).<sup>24</sup> Throughout the report, the NPS investigators detail the actions of Greg Salansky (“Mr. Salansky”), a park official, concluding that Mr. Salansky violated numerous NPS policies relating to command structure, beginning almost immediately upon the Fire’s discovery.

According to the NPS Report, Mr. Salansky assumed the role of both the Fire Management Officer and Incident Commander on November 23, 2016, the day the fire was discovered.<sup>25</sup> By the next day, November 24, 2016, the NPS found that Mr. Salansky was also operating as the Duty Officer for the fire.<sup>26</sup> The NPS Report found that Mr. Salansky continued functioning in each of these roles until long after the

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<sup>23</sup> *Id.*, Page ID # 1932-1939, ¶¶ 32-64.

<sup>24</sup> See, National Park Service (“NPS”) Report, RE #32-9, Page ID# 3397-3517.

<sup>25</sup> *Id.*, Page ID# 3399. (“The FMO, who is now the incident commander, hiked out of the fire area with the other firefighter.”)

<sup>26</sup> *Id.*, Page ID# 3406.

wildfire had left the park, finding “[t]he FMO was also acting in the roles of IC [“Incident Commander”] and duty officer for the duration of the Chimney Tops 2 Fire, until the Type 1 incident management team assumed command on November 29.”<sup>27</sup> The Government concedes, in the NPS report, both that its command structure guidelines were non-discretionary and that Mr. Salansky violated them:

The 2016 Interagency Standards for Fire and Aviation Operations (Redbook) policy *requires* that a duty officer and an incident commander do not hold concurrent positions. A duty officer cannot hold an ICS position and an Incident Commander cannot hold concurrent management duties such as FMO. On this incident, the FMO at Great Smoky Mountains National Park was operating in three roles as the duty officer, incident commander, and fire management officer, *which is contrary to 2016 Redbook policies.*<sup>28</sup>

(emphasis added). Further, the NPS report specifically found that Mr. Salansky’s failure to designate a DO was also a violation of NPS and Redbook policy.<sup>29</sup> Under Director’s Order #18 of the National Park Service and the GSMNP FMP, compliance

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<sup>27</sup> *Id.*, Page ID# 3450.

<sup>28</sup> *Id.*, Page ID# 3433.

<sup>29</sup> *Id.*, Page ID# 3450. (“The FMO decided to function (and continued) as ICT4 and then ICT3 with no duty officer, and while maintaining FMO duties, which is counter to NPS and Red book policy.”)

with the “Redbook” is mandatory.<sup>30</sup> The NPS Report also concludes that that the Park violated GSMNP’s own Fire Management Plan,<sup>31</sup> stating:

On the Chimney Tops 2 Fire, the park's fire management officer did not follow the direction of the fire management plan to staff with duty officers and additional support functions. ***The park's leadership did not ensure that the fire management plan was followed.***<sup>32</sup>

(emphasis added). The GSMNP Fire Management Plan strictly prohibits a Fire Duty Officer from performing ICS functions, stating “The Fire Duty Officer ***shall not*** fill any ICS incident command function connected to ***any incident.***”<sup>33</sup> (emphasis added). The Park’s FMP requires an IC to be assigned for every wildfire, regardless of the response level,<sup>34</sup> and requires the IC to formulate and relay a strategic plan to the FMO or the DO.<sup>35</sup>

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<sup>30</sup> See NPS Director’s Order 18, Auto-Owners RE# 32-4; Page ID ## 2178-2187. “Management of all wildland fire incidents will comply with the current version of the Interagency Standards for Fire and Fire Aviation Operations.” *Id.*, Page ID# 2185. “All actions defined in this Fire Management Plan will conform to safety policies defined in agency and departmental policy, including, but not limited to:

a. Interagency Standards for Fire and Fire Aviation Operations (NFES 2724).” Great Smoky Mountains National Park Fire Management Plan (“GSMNP FMP”), RE# 32-6, Page ID# 2589.

<sup>31</sup> See GSMNP FMP, RE# 32-6, Page ID# 2561-2646.

<sup>32</sup> NPS Report, RE# 32-9, Page ID# 3428.

<sup>33</sup> GSMNP FMP, RE# 32-6, Page ID # 2600. (The Redbook contains the same requirement: “DOs ***will not*** fill any ICS incident command functions connected to any incident.” See Interagency Standards for Fire and Aviation Operations (“Redbook”), RE# 32-7, Page ID# 2753. (*emphasis added*).

<sup>34</sup> See GSMNP FMP, RE# 32-6, Page ID # 2604.

<sup>35</sup> *Id.*, Page ID# 2605.

Pursuant to the NPS Report’s findings, Salansky’s failure to appoint a DO was also a violation of the Park’s “Step-up plan,”<sup>36</sup> which required a daily “Duty Officer” to be appointed during periods of elevated fire danger—even in the absence of any wildland fire incident.<sup>37</sup> The Park’s Step-up plan was determined by reference to a “Burning Index”<sup>38</sup> (“BI”) reading each day. According to NPS findings, based solely upon the elevated BI measurements prior to, and during the Fire, the Park’s Step-Up plan required the appointment of a daily DO officer.<sup>39</sup> Similarly, the GSMNP Step-up plan also states that a “separate incident commander is *required*” whenever the BI merited a DO.<sup>40</sup> (emphasis added).

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<sup>36</sup> Step-up plans are mandatory throughout the NPS in order to comply with the Redbook requirement that “All Fire Management Officers are responsible to provide DO coverage during any period of predicted incident activities.” See Redbook, RE# 32-7, Page ID# 2753. As explained by the NPS Report, “The Step-Up Plan is best described as a wild land fire preparedness plan, which specifies when fire danger increases. (See Appendix 3 for a detailed Step-Up Plan description.) The park identifies additional measures and staffing needs that *must be taken* to provide appropriate response to wild land fires.” See NPS Report, RE#32-9, Page ID# 3428. (emphasis added).

<sup>37</sup> *Id.*, Page ID # 3428-3430, 3467.

<sup>38</sup> GSMNP FMP, RE#32-6, Page ID# 2593. Within the GSMNP, “Short term fire danger is tracked using 1988 NFDRS Burning Index (BI) which represents the difficulty suppression forces will have in controlling a fire should one start on that day.” *Id.*, Page ID# 2592. The FMP defines “Burning Index” as “A numerical index related to the contribution of fire behavior to the effort of containing a fire. BI divided by 10 roughly equates to anticipated flame length at the head of a fire.” *Id.*, Page ID ## 2621, 2592-2593.

<sup>39</sup> NPS Report, RE# 32-9, Page ID # 3407, 3429-3431, 3468.

<sup>40</sup> GSMNP FMP, RE# 32-6, Page ID# 2594. (The GSMNP FMP required a separate incident commander to be assigned at SC3 (Staffing Class 3), SC4, and SC5, whereas a daily DO was required at SC4 and SC5.)

As alleged in the Complaint and substantiated by the NPS Report, Mr. Salansky's violations of NPS command structure policy resulted in a dangerous domino effect of consequences including: (1) failing to follow mandatory warning protocols; (2) failing to monitor the wildfire; and (3) "leaving little time to concentrate on" the Wildland Fire Decision Support System ("WFDSS") – one of the critical checks and balances which was never observed.<sup>41</sup> Accordingly, Plaintiffs allege that Mr. Salansky's clear violations of the applicable NPS command structure requirements, during the Fire, was a proximate cause of Plaintiffs' negligent fire spread cause of action.<sup>42</sup>

**B. The Government Failed to Employ the Mandatory Wildland Fire Decision Support System**

Finally, Plaintiffs have alleged that, throughout the Chimney Tops 2 Fire event, the Government failed to utilize the Wildland Fire Decision Support System; despite its own mandatory policy that the WFDSS system must be used for decision making in every wildland fire.<sup>43</sup> The NPS Report explains that the WFDSS system is "a web-based decision support system [...] for use beginning at the time of the fire's discovery and concluding when the fire is declared out."<sup>44</sup> The WFDSS process requires all fire response strategies to assess and incorporate objective data,

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<sup>41</sup> NPS Report, RE#32-9, Page ID# 3451.

<sup>42</sup> Complaint, RE# 32, Page ID #1975, 1980, ¶¶ 236, 267.

<sup>43</sup> *Id.*, Page ID# 1933-1936, ¶¶ 37-45, 63-64.

<sup>44</sup> NPS Report, RE# 32-9, Page ID# 3433.

including current and predicted weather, current and potential fire behavior and effects, and the cumulative effects of fire.<sup>45</sup> The WFDSS system (1) describes and analyzes the fire situation, (2) develops incident objectives and requirements, (3) develops a course of action, (4) evaluates relative risk, (5) completes an organization assessment, (6) documents rationale, and (7) publishes a decision.<sup>46</sup>

The NPS Report outlines multiple mandatory directives requiring the GSMNP to utilize the WFDSS during the Chimney Tops 2 Fire, which were not followed.<sup>47</sup>

As stated in the NPS Report, the highest-level mandatory requirement within the NPS to utilize the WFDSS system is contained in Reference Manual 18 (“RM-18”):

Parks *will use*<sup>48</sup> the current decision support process (e.g. Wild/and Fire Decision Support System, WFDSS) to guide and document wildfire management decisions. The process will provide situational assessment, analyze hazards and risk, define implementation actions, and document decisions and rationale for those decisions.<sup>49</sup>

Similarly, the GSMNP FMP contains the same unconditional requirement:

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<sup>45</sup> *Id.*, Page ID# 3438.

<sup>46</sup> *Id.*, Page ID# 3433.

<sup>47</sup> *Id.*, Page ID # 3434.

<sup>48</sup> Use of the word “will” in a Government regulation has been interpreted as mandatory by the Sixth Circuit. *Wilburn v. United States*, 616 Fed. Appx. 848, 860 (6th Cir. 2015).

<sup>49</sup> NPS Report, RE# 32-9, Page ID# 3434 (quoting National Park Service Reference Manual 18 (“RM-18”), RE# 32-5, Page ID# 2215).

Wildfire Decision Support System (WFDSS, or equivalent) **will be used** on each wildland fire to document the decision making process and outline strategy and tactics employed.<sup>50</sup>

The same requirement also appears in the Redbook:

The park superintendent and the fire management officer, per the 2016 Redbook policy, are **required** to ensure the development of Published Decisions within WFDSS with local unit staff specialists for all fires that exceed initial attack or are being managed for multiple objectives-within the objectives and requirements contained in the park's fire management plan.<sup>51</sup>

Not only does the WFDSS system ensure that a fire incident is managed using the latest science, relative risk assessments, and fire model data, the WFDSS system also serves the critical function of ensuring that all fire response plans were subject to oversight.<sup>52</sup> RM-18 requires that any decision by the IC to manage a wildfire be subject to the **oversight and approval** of the park superintendent:

Approval of the decision to manage a wildfire and the resulting course of actions to be taken to achieve management goals is the responsibility

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<sup>50</sup> GSMNP FMP, RE# 32-6, Page ID #2590; NPS Report, RE# 32-9, Page ID# 3434.

<sup>51</sup> Redbook, RE# 32-7, Page ID# 2744, "Performance Required" column, #24 for Superintendent; Page ID# 2748, "Performance Required" column, #17 for Fire Management Officer. The Redbook requirement to utilize WFDSS cited in the NPS report was also specifically incorporated by reference in the GSMNP FMP, which stated "[t]he Park Superintendent will meet the required elements outlined in the Management Performance Requirements for Fire Operations found in Chapter 3 of the Interagency Standards for Fire and Fire Aviation Operations (Redbook)." GSMNP FMP, RE# 32-6, Page ID# 2590. The FMP also contains the same requirement for the FMO as it does for the Superintendent. *Id.*, Page ID# 2591.

<sup>52</sup> State Farm Complaint, RE# 1, Page ID# 15, ¶ 77.

of the park superintendent and will be published in a decision support document.<sup>53</sup>

The NPS Report explains that the “superintendent approval” requirement of RM-18 was implemented in the GSMNP by the FMP requirement that all IC decisions be entered into the WFDSS system, and in turn, required the WFDSS documents to be specifically approved by the superintendent. According to the NPS Report:

In the Great Smoky Mountains National Park FMP, direction is given that after the fire's size-up and planned strategy and tactics are determined by the Incident Commander, that information will be relayed to the fire management officer (FMO) or fire duty officer (FDO) who will initiate the WFDSS documentation process and notify the Fire Management Committee. **The Fire Management Committee shall review the WFDSS documents for recommendation to the agency administrator (park superintendent or acting) for approval.**<sup>54</sup>

In addition to ensuring oversight and approval from the Park superintendent, the NPS Report also explains that a WFDSS decision also serves as a necessary authorization for a “Delegation of Authority” to the Incident Commander.<sup>55</sup> The NPS Report found that, not only was the WFDSS procedure never utilized during the fire, but also that “[n]o one in the agency administrator role had any training in

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<sup>53</sup> NPS Report, RE# 32-9, Page ID# 3434 (quoting RM-18, RE# 32-5, Page ID# 2215.

<sup>54</sup> *Id.*, RE# 32-9, Page ID# 3434 (emphasis added).

<sup>55</sup> “A Published Decision [in WFDSS] documents: [...] That agency administrator(s) has reviewed and approved the decision and the framework for the actions to be performed under the Delegation of Authority, which authorizes an incident commander to operate on a specific unit(s).” *Id.*, Page ID# 3433; GSMNP FMP, RE# 32-6, Page ID## 2561-2646.

WFDSS.”<sup>56</sup> Because Park officials’ failed to follow the mandatory WFDSS procedure, the fire management strategies implemented by Mr. Salansky were never approved by the Park Superintendent or any Fire Management Committee.<sup>57</sup>

After an extensive investigation, the Government’s own interagency fire review team concluded that the “WFDSS was never utilized for decision support.”<sup>58</sup> The NPS Report specifically found that Park leadership were simply unaware of the requirement, stating “[t]he park leadership was unaware of 2016 Redbook requirements that WFDSS be applied to *all fires* within park boundaries.”<sup>59</sup> The NPS Report found that the Park’s leadership mistakenly believed that WFDSS was only required for “Type 1” incidents—the highest possible escalation level for wildland fire events in the Park.<sup>60</sup> Unfortunately, a “Type 1” incident management team did not assume command until *after* the fire had left the park on November 29, and still, “[t]he first WFDSS decision was not published until December 5.”<sup>61</sup> Accordingly, Plaintiffs allege that by failing to utilize WFDSS in a timely manner, the GSMNP neglected to perform situational assessments, failed to analyze hazards

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<sup>56</sup> NPS Report, RE# 32-9, Page ID# 3435.

<sup>57</sup> When asked if he ever shared his fire management strategy with the Park Superintendent, Mr. Salansky stated “Much later, maybe the 29<sup>th</sup> or 30<sup>th</sup>. I can’t remember the exact date/time.” *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*, Page ID## 3435, 3450.

<sup>61</sup> *Id.*, Page ID# 3449.

and risks, and failed to ensure the Park's decisions were subject to the appropriate oversight, checks and balances, and agency requirements.<sup>62</sup> Plaintiffs further allege that these failures substantially contributed to the Government's inability to suppress or contain the Fire before it left the Park.<sup>63</sup>

### C. The Government Failed to Monitor the Fire as Required by Its Fire Management Plan

Plaintiffs' Complaints detail fire monitoring duties which were non-discretionary and binding on the Government during the Fire.<sup>64</sup> The controlling NPS standards and regulations cited by the Plaintiffs include the Fire Monitoring Handbook<sup>65</sup> and National Park Service Reference Manual 18,<sup>66</sup> both of which require monitoring of *all* wildland fires. The "requirements" of RM-18 are enabled and enacted by Director's Order 18: Wildland Fire Management<sup>67</sup> ("DO-18"). In turn, DO-18 is issued under authority of 16 U.S.C. § 1 through 4 and Delegations of

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<sup>62</sup> Complaint, RE# 32, Page ID# 1974, ¶ 229.

<sup>63</sup> *Id.*, ¶ 230.

<sup>64</sup> *Id.*, Page ID## 1931-1932, ¶¶ 29-31, 155-159. (Plaintiffs have not alleged that the Government's monitoring was inadequate or performed improperly during the time periods in question. Rather, Plaintiffs' allegations state that the Government failed to monitor the Chimney Tops 2 fire *at all* for five consecutive nights, though multiple mandatory NPS policies required monitoring. *Id.*, Page ID# 1959-1960, ¶¶ 160-166.

<sup>65</sup> Fire Monitoring Handbook ("FMH"), RE# 32-8, Page ID## 3111-3395.

<sup>66</sup> NPS-18, RE# 32-5, Page ID## 2189-2559.

<sup>67</sup> NPS Director's Order 18, Wildland Fire Management ("DO-18"), RE# 32-4, Page ID## 2178, 2180, 2184.

Authority in Part 245 of the Department of the Interior, Departmental Manual.<sup>68</sup> Pursuant to DO-18, the purpose and function of RM-18 is, in part, to issue standardized “agency requirements” to the NPS.<sup>69</sup> RM-18 is also expressly recognized as an “authority” by the GSMNP’s own Fire Management Plan<sup>70</sup> and the GSMNP FMP requires that “[a]ll actions defined in this Fire Management Plan will conform to safety policies defined in agency and departmental policy, including, but not limited to: [...] Reference Manual 18.”<sup>71</sup>

Within Ch. 2, § 4, entitled “**Operational Requirements**,” RM-18 states unambiguously: “All wildland fire events **must be** monitored.”<sup>72</sup> Although RM-18 does not specify the “how” or “when” of fire monitoring, it requires that a monitoring plan be implemented<sup>73</sup> and delineates numerous compulsory “**required**” components of each national park’s fire monitoring plan, including that “staff roles

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<sup>68</sup> DO-18, RE# 32-4, Page ID# 2180. A copy of the “Delegations of Authority” in Part 245 of the Department of the Interior, Departmental Manual, are available at: [https://www.doi.gov/sites/doi.gov/files/elips/documents/chapter\\_1\\_general\\_program\\_delegation-director\\_national\\_park\\_service.doc](https://www.doi.gov/sites/doi.gov/files/elips/documents/chapter_1_general_program_delegation-director_national_park_service.doc) (last visited March 26, 2020).

<sup>69</sup> *Id.* (DO-18 states, “Reference Manual 18 (RM-18) is issued by the Associate Director, Visitor and Resource Protection, and is a technical expression of background information, standardized definitions, *agency requirements*, standards, and procedures for implementing Director’s Order #18.”) RE# 32-4, Page ID# 2180.

<sup>70</sup> GSMNP FMP, RE# 32-4, Page ID# 2570.

<sup>71</sup> *Id.*, Page ID# 2589.

<sup>72</sup> NPS Reference Manual 18, RE# 32-5, Page ID# 2213 (emphasis added)

<sup>73</sup> *Id.*, Page ID## 2279, 2363-2364.

and responsibilities” for monitoring be established and that a “monitoring schedule” be established:<sup>74</sup>

NATIONAL PARK SERVICE  
REFERENCE MANUAL 18  
WILDLAND FIRE MANAGEMENT

Chapter 8  
Fire Ecology and Monitoring  
Page 1

Exhibit 1

#### **FIRE MONITORING PLAN ELEMENTS**

Monitoring plans should include the following elements:

R – Indicates a required element

S – Indicates a strongly suggested element

O – Indicates an optional element

Element	Park	Community	Project
Table of Contents	R	S	O
Introduction	R	R	R
Fire and fuels management	S	S	O
Ecology and landscape management	R	S	S
Management goals and objectives			
Resource & fire mgt, fire ecology	R	R	S
Treatment & monitoring objectives	R	R	R
Desired conditions	R	R	R
Monitoring design	R	R	R
Data management and analysis			
Data management, quality control	R	R	R
Data analysis	R	R	R
Reporting and adaptive management	R	R	R
Roles and responsibilities			
Staff roles and responsibilities	R	S	S
Work plans and prioritization	R	S	S
Consultation, collaboration, and review			
Plan input	R	R	R
Agency/interagency collaboration	R	S	S
Review	R	R	R
References	R	R	R
Appendices			
Data collection tools	S	S	S
Plant list and voucher collection	R	S	O
(Custom) data sheet examples	R	R	O
Acronyms and abbreviations	S	S	S
Maps	S	S	S
Monitoring schedule	R	S	S
Job hazard analysis	S	O	O

The Fire Monitoring Handbook (“FMH”), a companion publication to RM-18, details those standardized monitoring methods which comply with RM-18’s requirements, and are used throughout the NPS for monitoring fires inside national parks.<sup>75</sup> RM-18 does allow for individual parks to enact certain protocols which

<sup>74</sup> *Id.*, Page ID# 2370.

<sup>75</sup> FMH, RE# 32-8, Page ID# 3123. (The FMH also expressly acknowledges the NPS’ statutory duties to institute such a fire monitoring program under applicable

deviate from the FMH. However, RM-18 requires any Park which deviates from the FMH standard protocols to submit a “written protocol proposal” to the regional fire ecologist and subsequently receive approval.<sup>76</sup> Despite the availability of this written protocol proposal procedure, the GSMNP FMP contains no deviations from the FMH standards. In fact, the GSMNP FMP expressly adopts the FMH in its entirety, stating:

### 5.1.1 The Fire Monitoring Handbook

This handbook, developed by the National Park Service, outlines protocols for monitoring fire weather, behavior and effects, and describes in detail all aspects of a comprehensive, state-of-the-art monitoring program. *These protocols have been adopted at Great Smoky Mountains National Park.*<sup>77</sup>

Thus, the fire monitoring plan contained within the FMH was binding on the GSMNP during the Chimney Tops 2 Fire. RM-18 required the Park to adopt a

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federal regulations. 40 CFR § 1505.2(cl) (“A monitoring and enforcement program shall be adopted and summarized when applicable for any mitigation.”)

<sup>76</sup> “A written protocol proposal is required as outlined below and must be submitted to the regional fire ecologist for approval.” RM-18, RE# 32-5, Page ID## 2361-2362.

<sup>77</sup> GSMNP FMP, RE# 32-6, Page ID# 2618. (*emphasis added*). The FMP also states: “*All wildland fires* and prescribed fires will be monitored for their effects on the eco-system. Information gathered during fire monitoring is needed to keep fires within predetermined criteria, know when to take suppression action, and protect human life and/or property. A fire monitoring team will observe the fire, assess its potential and provide a historical record. *Monitoring will include* documenting the fire environment (weather, fuels, topography), fire behavior (manner and rate of spread, flame length, etc.), and fire effects (percent of fuels consumed, changes in plant and animal community composition and structure, etc.)” *Id.*

monitoring plan, and the GSMNP's plan expressly adopted the specific terms of the FMH.<sup>78</sup>

The FMH's express terms are plainly non-discretionary in nature. The FMH distinguishes between four "levels" of fire monitoring, the second of which is applicable to the Chimney Tops 2 Fire; entitled "Level 2" or "Fire Observation Monitoring."<sup>79</sup> The FMH states that some standard monitoring techniques are "recommended" for certain "Levels," but clarifies that "[t]hese standard techniques *are mandatory* for [...] Fire Observation (level 2) monitoring."<sup>80</sup> *Id.* RM-18 also contains the same requirement, mandating FMH Level 2 Monitoring throughout NPS, regardless of whether the FMH is specifically adopted by a park:<sup>81</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> FMH, RE# 32-8, Page ID# 3126.

<sup>80</sup> *Id.*, Page ID ## 3130-3139 (emphasis added). (In describing Level 2 Fire Observation procedures, the FMH distinguishes further between "Reconnaissance Monitoring" and "Fire Conditions Monitoring," with the former describing "initial fire assessment" procedures and the latter describing on-going monitoring procedures for active wildland fires, including a monitoring frequency schedule.

<sup>81</sup> NPS RM-18, RE# 32-5, Page ID# 2358.

#### 4.4 Fire Monitoring Requirements by Fire Management Activity

The following section describes the specific monitoring requirements for all fire management activities. Table 1 outlines the minimum required monitoring level for each fire management activity.

TABLE 1. Minimum required monitoring level for each fire management activity.

Management Activity	Minimum Required Monitoring Level and Activities
Wildfire	Levels 1, 2 Request burn severity assessments for fires > 500 acres
Prescribed Fire	Levels 1, 2, 3, 4 <sup>1</sup> Request burn severity assessments for fires > 500 acres
Non-Fire Treatments	Documentation of treatment prescription, location, objectives, and evaluation of results (see section 4.4.3)

<sup>1</sup> Long-term monitoring is required if monitoring addresses prescribed fire programmatic objectives.

The FMH’s Level 2 monitoring frequency schedule, the only frequency schedule adopted by the GSMNP FMP in compliance with RM-18's mandatory requirement, establishes numerous monitoring frequencies for the collection of objective variables, including:

- Visual visibility estimates – Every 30 minutes.
- Duration of Impairment by distance – Every 2 hours.
- Mixing Height – Every 1 hour.
- Transport Wind Speeds – Every 1 hour.
- Ground Wind Speeds – Every 1 to 6 hours.<sup>82</sup>

The GSMNP FMP also states that Level 2 monitoring will be conducted by a “fire monitoring team,” and highlights a non-exclusive list of Level 2 data points from the

<sup>82</sup> FMH, RE# 32-8, Page ID# 3138.

FMH, including weather, fuels, topography, manner and rate of spread, flame length, and percent of fuels consumed.<sup>83</sup>

RM-18 explains that “[i]nformation gathered during fire monitoring is essential for decision making” because it “provides a feedback loop for adaptive management that allows fire managers to improve prescriptions and fire plans based on the new knowledge gained from field measurements.”<sup>84</sup> Accordingly, RM-18 establishes that monitoring is needed to “[e]nsure protection of human life, property, and natural and cultural resources.”<sup>85</sup>

Despite those mandates, Plaintiffs allege that the Government performed no monitoring whatsoever for five consecutive nights. That failure violated the clear terms of fire monitoring schedule promulgated by the NPS and expressly adopted by the GSMNP in its FMP (ECF 3-2).<sup>86</sup> Plaintiffs allege that the GSMNP’s failure to monitor the Chimney Tops 2 Fire was a proximate cause of their damages.<sup>87</sup>

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<sup>83</sup> GSMNP FMP, RE# 32-6, Page ID# 2618; *see also* FN 80, *supra*.

<sup>84</sup> NPS RM-18, RE# 32-5, Page ID# 2354.

<sup>85</sup> *Id.*, Page ID# 2213.

<sup>86</sup> Complaint, RE# 32; Page ID## 1959-1960, ¶¶ 160-166.

<sup>87</sup> *Id.*

### **SUMMARY OF THE ARGUMENT**

The District Court’s decision must be reversed, American Reliable Ins. Co. v. United States, 502 F. Supp. 3d 1266, 1270 (E.D. Tenn. November 24, 2020), because the duties allegedly breached in the Complaint are not generalized “fire suppression” duties or discretionary “resource allocation” questions. Instead, the Government breached duties defined by failing to follow critical safety protocols mandated by the Park’s own Safety Plan. That plan, in turn, was mandated by the National Park Service and the Department of the Interior. The District Court’s conclusion that the specific Safety Plan requirements at issue were “discretionary” is not only contrary to the plain language of the protocols themselves, but also contrary to the unanimous interpretation of the Government’s national team of NPS fire policy contained within the “NPS Report.”

Plaintiffs’ Complaints cite the NPS Report extensively and repeatedly. The NPS Report is the work-product of the official Chimney Tops 2 Fire Review; which was created by the National Park Service, U.S. Department of the Interior, Department of Fire and Aviation. The NPS Report was expressly commissioned to “identify the facts leading up to and during the incident” and to make recommendations “to reduce the chances of a similar incident in the future.”<sup>88</sup> The NPS Report concludes that Park Officials were “required” to perform certain actions,

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<sup>88</sup> NPS Report, RE# 32-9, Page ID# 3461.

but failed to do so because they were simply untrained and unaware of the requirements. Plaintiffs' Complaints mirror the NPS Report's findings; alleging that breaches of NPS mandatory fire-safety protocol caused their damages. At the pleading stage of the litigation, the District Court should have accepted those allegations as true. If Plaintiffs' allegations, and the Government's own investigators, are evaluated under the appropriate legal standard, the Government violated multiple mandatory fire-safety protocols, which are not susceptible to a policy analysis, throughout its response to the Chimney Tops 2 Fire. On that basis, the District Court's decision must be reversed.

## STANDARD OF REVIEW

A Rule 12(b)(1) motion may attack jurisdiction facially or factually. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). In their Motion before the District Court, the Government limited its Motion to a “facial” challenge.<sup>89</sup> A facial challenge tests the pleading’s sufficiency, *not the veracity* of its allegations. *Id.*; *Wilburn v. United States*, 616 Fed. Appx. 848, 852 (6th Cir. 2015). The same assumption of veracity also applies to facts contained within exhibits attached to a plaintiff’s complaint and relied upon in the complaint. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 442 (6th Cir. 2012) (finding that plaintiff was free to draw facts from an agency report in its complaint and that defendant was prohibited from questioning the evidentiary foundation of those facts in a 12(b)(1) facial attack). Thus, “the court must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party.” *Ritchie*, 15 F.3d at 598. “The plaintiff need only demonstrate that the complaint alleges a ‘substantial’

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<sup>89</sup> The Government’s Motion represents that, “[f]or purposes of this motion, this Court may assume that the facts alleged by Plaintiffs in the Complaint are true,” Defendant United States of America’s Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction (“Government’s MTD”), RE# 36-1, Page ID# 3718, ¶ 3), and also that “[i]n this case, the United States *facially* challenges each of the legal claims of the Complaint.” *Id.*, Page ID# 3721, ¶ 2. In contrast, had the Government chosen to contest the facts alleged by Plaintiffs, the Sixth Circuit has cautioned that such a factual attack “requires a preliminary hearing or hearing at trial to determine any disputed facts upon which the motion or the opposition to it is predicated.” *Commodities Export Co. v. United States Customs Serv.*, 888 F.2d 431, 436 (6th Cir. 1989) (citations omitted).

federal claim, meaning that prior decisions do not inescapably render the claim frivolous. [...] [T]he plaintiff can survive the motion by showing *any arguable basis* in law for the claim made.” *Wilburn*, 616 Fed. Appx. at 852 (6th Cir. 2015).

The Sixth Circuit has established a “burden shifting” test applicable to tort claims made under the Federal Tort Claims Act, whereby the plaintiff meets its initial burden of establishing subject matter jurisdiction so long as its pleading does not “clearly fall within the exceptions of s. 2680.” *Carlyle v. U.S., Dep't of the Army*, 674 F.2d 554, 556 (6th Cir. 1982) (citing 28 U.S.C. § 2680). Once the “plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted by s 2680,” the burden of proof then shifts to “the government to prove the applicability of a specific provision of s 2680.”<sup>90</sup> *Id.*

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<sup>90</sup> See *St. Tammany Par., ex rel. Davis v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, n. 3 (5th Cir. 2009) (discussing FTCA burden shifting opinions among the federal circuits within the context of Rule 12 motion practice).

## ARGUMENT

### **I. PLAINTIFFS' COMPLAINT ESTABLISHES SUBJECT MATTER JURISDICTION UNDER THE FTCA'S GENERAL WAIVER OF IMMUNITY FOR FIRE MANAGEMENT CLAIMS AGAINST THE GOVERNMENT ON GOVERNMENT-CONTROLLED LAND**

Although it was unacknowledged by the District Court, Plaintiffs met their initial burden to establish subject matter jurisdiction under the FTCA's general waiver of immunity and under the Supreme Court's holding in *Rayonier v. United States*, 352 US 315 (1957). The Government has been quick to assert that *Rayonier* was not a “discretionary function” case, however, for the purpose of establishing Plaintiffs' *initial* burden of subject matter jurisdiction under the FTCA's general waiver of immunity, the *Rayonier* decision is unquestionably controlling. *Id.* The *Rayonier* Court held that the U.S. Government, bearing the same liability as a private person, was equally liable under the FTCA for the negligence of the United States Forest Service in allowing a fire on government-owned forest lands to spread to the plaintiffs' lands. *Id.* at 318-19. The U.S. Supreme Court was exceedingly clear that the negligence of Government fire-fighters was precisely the type of conduct contemplated by the FTCA:

The Government warns that if it is held responsible for the negligence of Forest Service firemen a heavy burden may be imposed on the public treasury. It points out the possibility that a fire may destroy hundreds of square miles of forests and even burn entire communities. But after long consideration, Congress, believing it to be in the best interest of

the nation, saw fit to impose such liability on the United States in the Tort Claims Act.

*Id.* at 319-20. Under the Supreme Court’s holding in *Rayonier*, therefore, subject matter jurisdiction has been generally established for the negligence of the Government in assuming exclusive control of firefighting efforts on government-owned forest lands and then allowing the fire to spread to plaintiff’s lands. *Id.*; *Myers v. United States*, 17 F.3d 890, 904 (6th Cir. 1994) (citing *Rayonier* as a proper application of government liability under FTCA and Restatement (Second) of Torts § 324A). Similarly, after *Rayonier*, the liability of the Government for its negligence in allowing the spread of fire from government-owned forest lands has been repeatedly affirmed wherever the discretionary function has been held inapplicable.

<sup>91</sup> Therefore, under the Supreme Court’s holding in *Rayonier*, Plaintiffs have established subject matter jurisdiction exists under the FTCA’s general waiver of immunity.

## **II. THE DISTRICT COURT ERRED IN APPLYING THE FIRST PRONG OF THE DISCRETIONARY FUNCTION EXCEPTION BECAUSE**

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<sup>91</sup> *Green v. United States*, 630 F.3d 1245, 1252 (9th Cir. 2011) (“Forest Service’s failure to notify Appellants before and after the Forest Service lit the backfire is not subject to the discretionary function exception.”); *Anderson v. United States*, 55 F.3d 1379, 1384 (9th Cir. 1995), as amended on denial of reh’g (June 14, 1995) (applying *Rayonier* and holding the government has waived sovereign immunity under FTCA for fire on government land which became uncontrollable and eventually charred a residential neighborhood); *Fla. Dep’t Agric. & Consumer Servs. v. United States*, No. 4:09-CV-00386, 2010 WL 3469353, at \*2-4 (N.D. Fla. Aug. 30, 2010) (copy attached) (“Defendant had no judgment or choice whether to complete a [Burn] Plan and then follow it once approved.”).

**THE GOVERNMENT’S NEGLIGENCE VIOLATED NON-DISCRETIONARY SAFETY MANDATES WHICH THE GOVERNMENT ITSELF PUT IN PLACE**

The District Court erred chiefly by failing to distinguish between mandatory and discretionary safety policies in the Park’s Safety Plan. At the pleading stage, where Plaintiffs’ well-pled allegations must be accepted as true, Plaintiffs established that their claims do not clearly fall within the “discretionary exception” to the Federal Tort Claims Act by alleging the violation of specific and mandatory procedures which proximately caused their damages. Plaintiffs have supported each of these violations with extensive citation to the factual findings of the Government’s own investigators.

The Supreme Court has established a two-part test for courts to apply when deciding whether the discretionary function exception applies to the actions of a governmental entity. *See United States v. Gaubert*, 499 U.S. 315 (1991); *Rosebush v. United States*, 119 F.3d 438 (6th Cir. 1997); *Mays v. Tennessee Valley Auth.*, 699 F. Supp. 2d 991 (E.D.Tenn. 2010). “The first part of the test requires a determination of whether the challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice.” *Gaubert*, 499 U.S. at 322-23. To make this determination, the Court looks to whether “a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow . . . .” *Id.* (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). Although the discretionary

function exception may apply to a decision to enact a mandatory policy or plan, “once a government agency makes a policy decision protected by the discretionary function doctrine, the agency must then proceed with care in the implementation of that decision.”<sup>92</sup> *Mays*, 699 F. Supp. 2d at 1019; *Caplan v. United States*, 877 F.2d 1314, 1316 (6th Cir.1989).<sup>93</sup> If the governmental entity is governed by a regulation or has a mandatory policy, then “the discretionary function exception does not apply because there was no element of judgment or choice in the complained of conduct.” *Mays*, 699 F. Supp. 2d at 1019 (citing *Gaubert*, 499 U.S. at 322).

**A. The Government Had No “Discretion” to Disregard and Override the Command Structure Required for Every Wildland Fire Spotted Within the Great Smokey Mountain National Park**

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<sup>92</sup> Unlike the case at bar, all of the cases cited by the Government regarding “firefighting activities” as discretionary acts relate to broad issues of strategy in dealing with a particular emergency—not the implementation of a mandatory fire protocol.

<sup>93</sup> See also *Kuhne v. United States*, 267 F. Supp. 649 (E.D. Tenn. 1967) (holding that once having completed a plan at Oak Ridge supporting national defense, the government is accountable for the negligent implementation of that plan); *Collins v. United States*, 783 F.2d 1225 (5th Cir.1986) (“holding that once the initial assessment had been made to classify the mine as “gassy” and close it until additional safety equipment had been installed, the MSHA officials had an absolute duty to reclassify the mine and their failure to do so was not a protected exercise of policy discretion.”); *Arizona Maint. Co. v. United States*, 864 F.2d 1497, 1503 (9th Cir. 1989) (distinguishing between government’s decision to blast (in connection with construction of Central Arizona Project), which it held was a discretionary decision, and manner in which government carried out that blasting, which was not).

The ruling of the District Court pertaining to the unauthorized command structure must be rejected because it contradicts the plain language of NPS policy. In the District Court, the Government conceded that Mr. Salansky was operating in multiple roles throughout the Park's response to the fire, including that Mr. Salansky was operating as FMO, IC, and DO during the Park's response. The Government addressed only the "appointment" process of a DO,<sup>94</sup> arguing that a lone official operating in every fire incident leadership role was not a violation of NPS policy because Mr. Salansky was free to exercise his discretion regarding "whether" or "when" a DO must be appointed. However, this argument must be summarily rejected because it contradicts the plain language of multiple mandatory park policies and is directly repudiated by the NPS report, as discussed *supra*.<sup>95</sup> Because Mr. Salansky was specifically prohibited from functioning as the FMO, IC, and DO during a wildland fire event, and because appointment of a DO was required by the Park's Step-Up plan, the ruling of the District Court must be reversed.

The Government also misrepresents Plaintiffs' allegations by arguing that the Complaint does not allege that the Government's numerous violations of mandatory

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<sup>94</sup> The Government offers no rationale as to why Mr. Salansky's assumption of the roles of IC and FMO was not a violation of mandatory park policy.

<sup>95</sup> The Government's quotation at p. 40 of the GSMNP FMP is misleading. Government's MTD, RE# 36-1, Page ID# 3729. The quoted text is from the roles and responsibilities of the DO—not the FMO. Furthermore, this section of the FMP does not discuss the criteria by which an FMO is to determine the "need" for a DO.

NPS command structure “*in and of itself*” caused injury. Yet, the Complaint makes this very allegation, stating “Salansky directly violated the mandated directives set forth in the NPS and FMP. As a result, Salansky was unable to manage all the tasks required of each separate role, resulting in a complete failure to contain the fire within the GSMNP.”<sup>96</sup>

**B. The Government Had No “Discretion” to Disregard the WFDSS System, the Decision Support System Required for Developing and Authorizing a Fire Management Response Plan for Every Wildland Fire**

The Government’s position that the GSMNP FMP required use of the WFDSS system *only* during an “extended attack” is inaccurate simply because the Government has analyzed only a single section of the FMP. In so far as § 4.1.3 of the FMP is concerned, the Government is correct; it is beyond dispute that the GSMNP requires utilization of the WFDSS system in an “extended attack.” Yet, the FMP repeatedly states that the WFDSS system is required to be utilized in *every* wildfire.<sup>97</sup> The NPS also highlights the same in its post-fire Report, finding that:

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<sup>96</sup> State Farm Complaint, RE# 1, Page ID # 14, ¶ 71, Auto-Owners Complaint, RE# 32, Page ID## 1962-1963, ¶¶176-179.

<sup>97</sup> GSMNP FMP, RE# 32-6, Page ID## 2587-2588. “FMU1 Fires” (“*Every* wildfire will be assessed following a decision support process that examines the full range of responses. [...] Documentation of the decision process will be accomplished using the WFDSS program.”); *Id.*, Page ID# 2584. “FMU2 Fires” (“A strategic fire response with supporting decision documentation will be initiated on *each wildfire occurrence*. [...] Documentation of the decision process will be accomplished using the WFDSS program.”); *Id.*, Page ID# 2590. (“Wildfire Decision Support System

In the Great Smoky Mountains National Park Fire Management Plan (FMP) direction is given that WFDSS, or equivalent, will be used on *each wildland fire* to document the decision-making process and outline the strategy and tactics employed.<sup>98</sup>

Therefore, although the Government argues that officials could have exercised discretion in distinguishing between an “extended attack”<sup>99</sup> fire and a fire which requires only an “initial response,” the distinction is irrelevant because the GSMNP FMP also requires the WFDSS to be utilized in the Park’s initial response. Immediately before the protocol for “Extended Attack” is outlined, the FMP establishes the protocol for the Park’s “**Initial Action**” which details the procedure to be followed “upon report of a possible wildfire.”<sup>100</sup> Prior to initiating any “initial response” the FMP requires the Incident Commander to “initiate the Wildland Fire

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(WFDSS, or equivalent) will be used on *each wildland fire* to document the decision making process and outline strategy and tactics employed.”); *Id.*, Page ID# 2624. (defining the term “strategic fire response” used throughout the FMP to mean “The evaluation *must* also include an analysis of the context of the specific fire within the overall local, geographic area, or national wildland fire situation. This evaluation process uses the WFDSS decision support system.”).

<sup>98</sup> NPS Report, RE# 32-9, Page ID# 3434.

<sup>99</sup> “Extended Attack” is a technical term which is defined throughout the NPS fire management procedures as: “Actions taken on a wildfire that has exceeded the initial response.” And “initial response” is defined as “The initial decisions and actions taken in reaction to a reported incident.” Redbook, RE# 32-7, Page ID# 2678. The Plaintiffs have also alleged that the fire escaped initial attack, in that Mr. Salansky’s initial attempts to extinguish failed (State Farm Complaint, RE# 1, Page ID# 7, ¶ 30, Auto-Owners Complaint, RE# 32, Page ID# 1939, ¶ 59), and later, his plan to contain the fire also failed (State Farm Complaint, RE# 1, Page ID # 8, ¶ 37, Auto-Owners Complaint, RE# 32, Page ID# 1950, ¶ 114).

<sup>100</sup> GSMNP FMP, RE# 32-6, Page ID## 2604-2606.

Decision Support documentation process and notify the Fire Management Committee.”<sup>101</sup>

The Government’s final attack on the WFDSS system raises innumerable questions of fact and attempts to improperly litigate proximate cause at the pleading stage. The Government’s argument is essentially that non-compliance with the WFDSS requirements cannot be considered a proximate cause of the fire because the WFDSS system did not “mandate particular action.”<sup>102</sup> Such a sweeping unsupported allegation is entirely unsubstantiated with evidence<sup>103</sup> and is wholly improper at this stage of the litigation because it stands in direct contradiction to the proximate cause allegations of Plaintiffs’ Complaint.<sup>104</sup> *Gentek Bldg. Products, Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330–31 (6th Cir. 2007) (“If [...] an attack on subject-matter jurisdiction also implicates an element of the cause of action, then the district court should *find that jurisdiction exists* and deal with the objection as a direct attack on the merits of the plaintiff’s claim.”) (emphasis in original). Further, the Government’s citation to *In re Katrina Canal Breaches Litig.*, highlights why its argument is premature. In that case, involving claims against the Army Corps of

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<sup>101</sup> *Id.*, Page ID# 2605.

<sup>102</sup> Government’s MTD, RE# 36-1, Page ID# 3732.

<sup>103</sup> In fact, the NPS Report directly contradicts the Government’s position, highlighting “Management Requirements” which appear in the WFDSS system. NPS Report, RE# 32-9, Page ID# 3422.

<sup>104</sup> Complaint, RE# 32, Page ID# 1974, ¶¶ 229-230.

Engineers for Damage caused by Hurricane Katrina, the court considered “ample record evidence” indicating the character of the Army Corps of Engineers' decisions before finding the Corps immune under the FTCA. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 451 (5th Cir. 2012). In contrast, no record has been established and no discovery has been conducted into why the Government’s own investigators cited the GSMNP’s non-compliance with the WFDSS as one of the gravest errors made by the Park during its response to the Chimney Tops 2 Fire<sup>105</sup>. Plaintiff’s allegations must be accepted as true at the pleading stage.

**C. The Government’s Failure to Authorize or Approve Its Plan for the Chimney Tops 2 Fire Rendered Its Fire Management Activities *Ultra Vires* and Not Subject to the Discretionary Function Exception**

The WFDSS system did not merely create mandatory parameters for the decision-making process which ensured a baseline compliance with mandatory NPS safety policies, it also instituted a critical check and balance by requiring approval by a fire management committee and the Superintendent—something that was never done in the Chimney Tops 2 Fire until after the fire had left the park.<sup>106</sup> As outlined in Section I.C. *supra*, the NPS investigators found that the fire management strategies implemented by Mr. Salansky were never approved by the Park

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<sup>105</sup> NPS Report, RE# 32-9, Page ID## 3433-3435, 3449-3450.

<sup>106</sup> Complaint, RE# 32, Page ID# 1974, ¶ 229.

Superintendent or any Fire Management Committee, as required.<sup>107</sup> Therefore, the Government's Motion must be denied on the basis that Mr. Salansky's fire response plan and decisions to manage the fire were never authorized, and thus, his exercise of authority was entirely *ultra vires*. *Stanford v. United States*, 992 F. Supp. 2d 764, 776 (E.D. Ky. 2014) (discretionary exception inapplicable where Government had no authority to construct obstacle in the first place); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C.Cir.1986) ("An employee of the government acting beyond his authority is not exercising the sort of discretion the discretionary function exception was enacted to protect."). Because Mr. Salansky did not have the requisite authority to perform any of the fire management actions in question, the discretionary function exception does not apply. *Id.*

**D. The Government Had No "Discretion" to Discontinue Overnight Monitoring of the Chimney Tops 2 Fire in Violation of Its Own Fire Monitoring Plan**

The District Court erred in finding that compliance with the FMH was not mandatory during the Chimney Tops 2 Fire, mistakenly relying upon a statement in the FMH which postures the manual as a "recommended" standard.<sup>108</sup> By interpreting certain prefatory language within the manual over and against other conflicting language, the District Court ignored the regulatory scheme enacted by

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<sup>107</sup> *Id.*

<sup>108</sup> Government's MTD, RE# 36-1, Page ID# 3728.

the NPS. Under the scheme, all parks were required to adopt standard fire monitoring protocols under RM-18,<sup>109</sup> and although the FMH monitoring protocols were “recommended” by the NPS, the FMH was the only standard for fire monitoring approved by the NPS for compliance with RM-18.<sup>110</sup> Although it is true that the GSMNP could have sought written approval to deviate from the FMH protocols in some manner,<sup>111</sup> the GSMNP did in fact adopt the FMH protocol to comply with the requirements of RM-18.<sup>112</sup> Once adopted, it cannot be disputed that certain components of the FMH’s model plan were mandatory within the GSMNP. There is no doubt that Level 2 monitoring is “*mandatory*” for all wildland fires, because both the FMH and RM-18 describe it as a plan requirement.<sup>113</sup> There is also no ambiguity as to which Level 2 monitoring protocols are “mandatory” because, as a “standard” protocol written for wholesale adoption by national parks, the FMH expressly distinguishes between those Level 2 protocols which are “optional” and the “mandatory” Level 2 protocols to be adopted throughout the NPS.<sup>114</sup>

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<sup>109</sup> NPS RM-18, RE# 32-5, Page ID# 2370.

<sup>110</sup> *Id.*, Page ID## 2363-2364.

<sup>111</sup> *Id.*

<sup>112</sup> GSMNP FMP, RE# 32-6, Page ID# 2618.

<sup>113</sup> FMH, RE# 32-8, Page ID##, 3122, 3129-3138; NPS RM-18, RE# 32-5, Page ID# 2358.

<sup>114</sup> FMH, RE#32-8, Page ID## 3129-3138, and *see e.g.*, Page ID# 3135, specific objective monitoring variables identified as “(optional)” in headings.

In its Brief, the Government appeared to concede<sup>115</sup> that all monitoring of the Chimney Tops 2 Fire stopped during the night-time hours, arguing instead that monitoring was not required during this time.<sup>116</sup> Although there is no rationale offered as to why monitoring of a raging wildfire would cease for approximately 14 hours of every day, this position may be summarily rejected as it is contradicted by the FMH monitoring frequency schedule<sup>117</sup> which was *required* by RM-18,<sup>118</sup> and which was expressly adopted by the GSMNP FMP.<sup>119</sup> The monitoring frequency schedule contains monitoring requirements in as little as 30-minute frequencies, while also expressly referencing alternate thresholds for “Ground Winds” during night-time monitoring.<sup>120</sup> Further, the NPS Report also found that some required monitoring was never performed, day or night, expressly concluding that the lack of this data “reduces a manager’s understanding of current conditions and may not allow

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<sup>115</sup> Government’s MTD, RE# 36-1, Page ID# 3728.

<sup>116</sup> Although no discovery has occurred to identify *any* monitoring that the Government performed during the day or night in compliance with its own mandatory Level 2 monitoring protocol, the Government responds only to Plaintiffs’ specific allegations that all monitoring ceased during the nighttime hours.

<sup>117</sup> FMH, RE# 32-8, Page ID# 3138.

<sup>118</sup> NPS RM-18, RE# 32-5, Page ID# 2370.

<sup>119</sup> GSMNP FMP, RE# 32-6, Page ID# 2618.

<sup>120</sup> FMH, RE# 32-8, Page ID # 3137. This monitoring frequency schedule adopted by the GSMNP specifies only a single objective monitoring “variable” which was not mandatory, “Particulates,” while noting that it would be mandatory if a “critical target exists within park boundaries or within 5 miles of a park boundary.” *Id.* at n. 1.

a full picture when determining strategies and possible outcomes.”<sup>121</sup> Because the Government failed to comply with the requirements of the fire monitoring plan it had adopted, the ruling of the District Court must be reversed.

**E. The Admissions Contained Within the NPS Report That the Government Violated Its Own Fire Safety Protocols Is Admissible Evidence Against the Government Which Must Defeat the First Prong of the Discretionary Function Test at the Pleading Stage**

The District Court erred in refusing to consider the Government’s admissions within the NPS report as evidence of both the existence of, and the violation of, mandatory fire safety protocols. The Government, through the NPS Report, has admitted to multiple violations of mandatory regulations, including but not limited to, the failure to adhere to mandatory command structure,<sup>122</sup> the failure to follow the park’s own step-up plan and appoint a DO,<sup>123</sup> the failure to use the WFDSS or gain required agency administrator approval of the WFDSS plan,<sup>124</sup> and a failure of the individual in the agency administrator role to undergo required training.<sup>125</sup> In support of these findings, the NPS Report contains countless findings of fact made by the Fire Review Team throughout the course of their investigation which flow into these

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<sup>121</sup> NPS Report, RE# 32-9, Page ID# 3448. (“The Park did not conduct any fuel moisture monitoring to have a baseline for recognizing the changing condition of wildland fuels.”).

<sup>122</sup> *Id.*, Page ID## 3428-3430, 3433, 3450, 3467.

<sup>123</sup> *Id.*, Page ID## 3406, 3425, 3428-3430, 3465-3469.

<sup>124</sup> *Id.*, Page ID## 3433-3435, 3437, 3449-3450.

<sup>125</sup> *Id.*, Page ID## 3435, 3451.

opinions and conclusions.<sup>126</sup> Pursuant to Supreme Court and Sixth Circuit precedent, this report, and all factual findings, opinions, conclusions, and admissions therein may be relied upon by the Plaintiffs at the pleading stage to defeat the first prong of the discretionary function exception.

The NPS Report<sup>127</sup> is an official investigative report of a government agency commissioned by, and created by, the Defendant pursuant to NPS regulations. The NPS Report contains the factual findings, opinions, and conclusions of the Government's own officials and fire-safety experts<sup>128</sup> ("Fire Review Team") following an extended investigation into the NPS' response to the Chimney Tops 2 Fire. According to the Report, the Fire Review Team was first mobilized to the fire scene in December 2016—immediately following the wildfire event it was investigating—and the official "Delegation of Authority" for the Report was issued by William Kaage, the NPS Chief of the Division of Fire and Aviation, to the Fire

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> According to the NPS Report, the Fire Review Team consisted of: Joe Stutler (Team Lead; Senior Advisor, Deschutes County, Oregon); Tim Reid (Superintendent, Devils Tower National Monument; National Park Service); Shane Greer (Assistant Fire Director of Risk Management, Region 2; U.S. Forest Service); Miranda Stuart (Fire Management Specialist, National Interagency Fire Center; National Park Service); William Grauel (Fire Ecologist, National Interagency Fire Center; Bureau of Indian Affairs); Jimmy Isaacs (Fire Chief; Town of Boone, North Carolina); Mike Lewelling (Fire Management Officer, Rocky Mountain National Park; National Park Service); Paul Keller (Technical Writer-Editor, Wild land Fire Lessons Learned Center). *Id.*, Page ID# 3404.

Review Team on February 5, 2017.<sup>129</sup> The Delegation of Authority states that it was issued pursuant to RM-18 and the Redbook, and it specifically requests a “National Level Review” pursuant to Ch. 17 § 3.5 of RM-18.<sup>130</sup> Pursuant to RM-18, such an investigation and review is required for “[a]ll wildland fire incidents which result in human entrapment, fatalities, or serious injuries...”<sup>131</sup> The Fire Review Team’s responsibilities in connection with the report were dictated by RM-18 and the Redbook,<sup>132</sup> including organization, management, and conducting the review, questions to ask witnesses, as well as the topics and formatting of the report.<sup>133</sup>

The Fire Review Team was specifically tasked by the NPS Fire Chief with identifying “the facts leading up to and during the incident,” as well as to make recommendations to the NPS in order to “reduce the chances of a similar incident in the future.”<sup>134</sup> RM-18 tasks the Fire Review team with the responsibility to examine the NPS’ response and to “correct deficiencies,” “determine cause(s), contributing

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<sup>129</sup> *Id.*, Page ID## 3402, 3461-3462

<sup>130</sup> NPS-18, RE# 32-5, Page ID# 2444. (The “requirements” of RM-18 (“Reference Manual 18”) are enabled and enacted by Director’s Order 18: Wildland Fire Management (“DO-18”), which in turn is issued under authority of 16 U.S.C. § 1 through 4. Therefore, the NPS Report is the result of a legally authorized investigation pursuant to Fed. R. Evid. 803(8)(A)(iii)).

<sup>131</sup> *Id.*, Page ID# 2442.

<sup>132</sup> “Interagency Standards for Fire and Fire Aviation Operations” aka the “Redbook,” RE#32-7, Page ID## 2468-3109.

<sup>133</sup> NPS-18, RE# 32-5, Page ID## 2441-2464, NPS Report, RE# 32-9, Page ID# 3461-3462.

<sup>134</sup> NPS Report, RE# 32-5, Page ID# 3461.

factors,” and “recommend corrective actions” to the NPS, as well as responsibility to analyze the NPS’s fire management programs themselves.<sup>135</sup> Notably, the NPS Report expressly states that a “key area” of its investigation was “[t]he park’s adherence to NPS fire management policy.”<sup>136</sup>

The NPS Report, as an exhibit to the pleadings, must be treated as a pleading and accepted as true at this stage of the proceeding. Because the Government has limited its 12(b)(1) Motion to a “facial” challenge, this Court must accept the material allegations of Plaintiffs’ Complaints, and those facts relied upon within exhibits attached to the Complaints, as true. A 12(b)(1) “facial” challenge tests only the pleading’s sufficiency, not the veracity of its allegations, and thus, “*all of the allegations* in the complaint must be taken as true.” *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440, 2012 WL 678151 (6th Cir. 2012); *Wilburn v. United States*, 616 Fed. Appx. 848, 852 (6th Cir. 2015). “A facial attack goes to the question of whether the plaintiff has *alleged* a basis for subject matter jurisdiction....” *Cartwright v. Garner*, 751 F.3d 752, 759, 2014 WL 1978242 (6th Cir. 2014). The same assumption of veracity also applies to facts contained within exhibits attached to a plaintiff’s complaint and relied upon in the complaint. *See Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 442 (6th Cir. 2012) (finding that plaintiff was free to

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<sup>135</sup> *Id.*, Page ID# 3403; NPS-18, RE# 32-5, Page ID# 2441.

<sup>136</sup> NPS Report, RE#32-9, Page ID# 3404.

draw facts from an agency report in its complaint and that defendant was prohibited from questioning the evidentiary foundation of those facts in a 12(b)(1) facial attack). Therefore, because the NPS Report was accurately referenced in, and attached to, the Plaintiffs' Complaints, this Court must apply the same assumption of veracity to those portions of the NPS Report relied upon by the Plaintiffs. *Id.*

Although Plaintiffs may rely upon inadmissible allegations when defending against a Rule 12 motion, the NPS Report, as an investigative report of a government agency, also constitutes admissible evidence which may be relied upon for any purpose. Federal Rule of Evidence 803(8) provides that such reports have been specifically excluded under the hearsay rule: "A record or statement of a public office if: (A) it sets out ... (iii) in a civil case ... factual findings from a legally authorized investigation; and (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." FED. R. EVID. 803(8)(A)(iii) and (B) (formerly Rule 803(8)(C)); *Chavez v. Carranza*, 559 F.3d 486, 496 (6th Cir. 2009). Such reports are presumed to be admissible, and "the party opposing the admission of the report must prove that the report is not trustworthy." *Bank of Lexington & Tr. Co. v. Vining-Sparks Sec., Inc.*, 959 F.2d 606, 616 (6th Cir. 1992). The Sixth Circuit has held that such reports are admissible even if the person who prepares the report does not have first-hand knowledge of the facts recorded.

*Combs v. Wilkinson*, 315 F.3d 548, 555–56 (6th Cir. 2002).<sup>137</sup> Further, under the Supreme Court’s opinion in *Beech Aircraft Corp. v. Rainey*, even those portions of the report consisting of conclusions or opinions formed as a result of a factual investigation are admissible under Rule 803(8). 488 U.S. 153, 170 (1988).

Furthermore, within the context of litigation against a government entity, information contained within government reports are also admissible for all purposes as admissions by a party opponent under Fed. R. Evid. 801(d)(2)(A) and (D). *Jones v. Sandusky Cty., Ohio*, 652 Fed. Appx. 348, 356 (6th Cir. 2016) (finding the district court’s exclusion of a Sheriff’s report was error because “the district court overlooked the fact that the statements incorporated from interviews with the defendants themselves and other employees or agents of the Sheriff’s Office would not be hearsay under FRE 801(d)(2)(A) and (D)”).

Other federal courts have also held that the first prong of the discretionary exception test is not satisfied when the government has *admitted* to a violation of agency-mandated regulations. *Fla. Dept. of Agric. & Consumer Servs. v. United*

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<sup>137</sup> In *Combs*, a case involving several inmates' claims that prison guards used excessive force in quelling a riot, the Sixth Circuit held that a Use of Force Committee Report, based on staff and inmate interviews and numerous documents, was admissible under Rule 803(8). *Combs*, 315 F.3d 548. In so holding, the court noted that if the Rule required the investigator to have personal knowledge of the matter then “an investigative report would never be admissible as such reports typically are not prepared by persons directly involved in the matter under investigation.” *Id.*

*States*, No. 4:09-cv-00386, 2010 WL 3469353 (N.D. Fla. Aug. 30, 2010). In *Fla. Dept. of Agric. & Consumer Servs.*, the Florida District Court held that the U.S. Government was required, *inter alia*, to prepare a “Prescribed Fire Burn Plan” for the disposal of unwanted fuel subject to approval. *Id.* at \*4. In reaching its holding, the Court specifically found that the Government admitted to not creating a sufficient Burn Plan and, further, acted contrary to the Burn Plan by using aerial ignition. *Id.* at \*4. In finding the violation of government policy admitted, the Court cited, *inter alia*, an “Escaped Fire Review” report, containing a comprehensive analysis of the events surrounding the fire in question. *Id.* The Court found that:

Defendant's *admissions* demonstrate a clear disobedience to mandates that are not discretionary. While Defendant may have had discretion as to the analysis conducted within the Burn Plan, Defendant had no judgment or choice whether to complete a Plan and then follow it once approved.

*Id.* (emphasis added). Therefore, the Court held that the first prong of the two-step discretionary exception analysis was unmet by the Government. *Id.*

In its support brief for its motion to dismiss, the Government attempted to distinguish *Fla. Dept. of Agric. & Consumer Servs.* by claiming that the decision there relied on a fire burn plan which is not present in the case at bar. Although the origination of the fires in each case differs, in both, agency-mandated fire-safety regulations necessitating the development of a comprehensive fire management plan were violated. Moreover, these violations were admitted to by defendants in both

cases in a formal “after-action” report.<sup>138</sup> In *Fla. Dept. of Agric. & Consumer Servs.*, defendant’s admissions resulted in failure of the first prong of the two-step discretionary exception test. The same reasoning applies in the case at bar. The Government, through the NPS Report, has admitted to multiple violations of mandatory regulations, including the failure to adhere to mandatory command structure from the earliest stages of its response<sup>139</sup> and then failing to develop any fire management plan, or to obtain approval for how it proceeded by utilization of the WFDSS system.<sup>140</sup> Therefore, based upon the admissions contained within the NPS Report, the Government’s 12(b)(1) “facial attack” fails to meet the first prong of the *Gaubert* test and must be rejected.

The NPS Report, as an admission by a party opponent, may also stand on its own as a fact-based finding that—in practice and as applied—the NPS did have mandatory requirements which the GSMNP failed to follow in its response to the Chimney Tops 2 fire. Under the Supreme Court’s precedent in *Gaubert*, courts construing the discretionary function exception are not constrained to analyze only

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<sup>138</sup> The *Fla. Dept. of Agric. & Consumer Servs.* opinion refers to the after-action report as the “Escaped Fire Review,” which was “a comprehensive analysis of the events surrounding the fire in question,” and which is cited by the Court as forming part of the basis for the Government’s admission that it failed to develop a burn plan in accordance with its own mandatory procedures. *State of Florida Dep’t of Agric. & Consumer Servs. v. United States*, No. 4:09-CV-386/RS-MD, 2010 WL 3469353, at \*4 (N.D. Fla. Aug. 30, 2010).

<sup>139</sup> NPS Report, RE# 32-9, Page ID## 3428-3430, 3433, 3450, 3467.

<sup>140</sup> *Id.*, RE# 32-9, Page ID## 3433-3435, 3437, 3449-3450.

rules or policies which have been adopted in a predetermined or formalized manner. *United States v. Gaubert*, 499 U.S. 315, 324 (1991) (recognizing that "Not all agencies issue comprehensive regulations" and that "Some establish policy on a case-by-case basis... Others promulgate regulations on some topics, but not on others. In addition, an agency may rely on internal guidelines rather than on published regulations."). Thus, courts construing the discretionary function exception must recognize the reality that rules, policies, or guidelines may be—or may become—mandatory within an agency or department without any requirement to compile all mandatory directives into a particular code or rulebook.<sup>141</sup> *Carpenter Estate of Carpenter v. City of Cincinnati*, No. C-1-99-227, 2003 WL 23415143, at \*6 (S.D. Ohio Apr. 17, 2003) (refusing to strike police department report in a discretionary function case because it was relevant evidence "[t]o the extent that it sheds light on the policies and customs of the Cincinnati Police Department").

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<sup>141</sup> See also *Irving v. United States*, 162 F.3d 154, 164 (1st Cir. 1998) (recognizing that "informal agency rules and similar pronouncements may at times bind agency personnel for the purposes of discretionary function exception analysis" and acknowledging at least two appropriate circumstances for such an inquiry: (1) "when an agency's legislative rules define the conduct of some employees, but not others" and (2) "when legislative rules create ambiguity (e.g., when the regulations interweave precatory with quasi-mandatory language"); *McMichael v. United States*, 856 F.2d 1026, 1033–34 (8th Cir. 1988) (holding that, even though applicable regulations granted broad discretion, because the Defense Departments internal agency checklist directed government inspectors to follow a prescribed course of action in the event of an electrical storm, the discretionary function exception did not apply); *Sakal v. United States*, No. 09-21933-CIV, 2010 WL 3782138, at \*3 (S.D. Fla. Sept. 28, 2010) (accepting an unwritten policy as mandatory).

Accordingly, all of the bases for the NPS Report conclusions that GSMNP officials failed to comply with required policies must be the subject of discovery prior to any ruling which contradicts the NPS Report. *Snyder & Associates Acquisitions LLC v. United States*, 859 F.3d 1152, 1162 (9th Cir. 2017), *opinion amended on reh'g sub nom.*, 868 F.3d 1048 (9th Cir. 2017) (holding that “the Federal Rules of Civil Procedure require that [plaintiffs] have a chance to conduct discovery on what statutes, regulations, or policies govern” the IRS agent’s conduct under the circumstances). Because of the fact-dependent nature of these inquiries, the vast majority of cases adjudicating the discretionary function exception are decided following the completion of related discovery and an evidentiary hearing. *See Commodities Exp. Co. v. U.S. Customs Serv.*, 888 F.2d 431, 436–37 (6th Cir. 1989) (“Only where the facts are relatively simple, and substantially uncontroverted, and the law is not complex, is a district court justified in ruling on a motion under Fed. R. Civ. P. 12(b)(1) without pausing to make findings on disputed questions of fact.”). Accordingly, the District Court’s ruling must be reversed for failing to accept as true the admissions contained within the NPS Report and prematurely rejecting well-pled evidence of both the existence of, and the violation of, mandatory fire safety protocols.

**III. THE DISTRICT COURT ERRED IN APPLYING THE SECOND PRONG OF THE DISCRETIONARY FUNCTION EXCEPTION BECAUSE PLAINTIFFS’ CLAIMS FOR THE VIOLATION OF**

## **MANDATORY FIRE SAFETY PROTOCOLS ARE NOT SUSCEPTIBLE TO A POLICY ANALYSIS**

The District Court also erred in finding that the second prong of the discretionary function exception to the FTCA applied, which constitutes an independent basis to reverse its decision. If the challenged conduct involved an element of judgment, the second part of the test looks to see “whether that judgment is of the kind that the discretionary function exception was designed to shield.” *Mays*, 699 F. Supp. 2d at 1010 (citing *Gaubert*, 499 U.S. at 322-23). The exception, properly construed, protects only governmental actions grounded in social, economic, and political policy. *Gaubert*, 499 U.S. at 323. The focus of the inquiry “is [...] on the nature of the actions taken and on whether they are susceptible to policy analysis.” *Gaubert*, 499 U.S. at 325; *Rosebush*, 119 F.3d at 443.

The mandatory directives alleged to have been violated by Park officials during the Chimney Tops 2 Fire have been enacted nationally by NPS and/or throughout the GSMNP, as part of a comprehensive scheme expressly designed to preserve the United States’ National Parks, as well as the life and property of visitors and neighbors. Although discretion may be exercised within specific parameters when allocating Government resources to fight fires, the Government’s position that no mandatory protocols exist during fire management activities must be rejected. By way of a comprehensive regulatory scheme of mandatory protocols, the NPS has recognized the obvious dangers of unlimited discretion by drawing clear boundaries

around the choices which may be made by Park officials for the safety of both firefighters and the public. These baseline requirements represent the results of decades of research into fire science and human behavior and have been enacted as the consensus of the NPS.

Neither the District Court nor the Government cite any case which grants the Government authority to violate safety-related policies, and in fact, the Sixth Circuit has adopted the opposite position. *Myers*, 17 F.3d 890.<sup>142</sup> In *Myers*, the Court held

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<sup>142</sup> See also, *Young v. United States*, 769 F.3d 1047, 1058 (9th Cir. 2014) (holding that “NPS's decision not to place a warning sign at the location of the buried transformer, even though the NPS knew that the transformer emitted heat, knew that it was buried under twelve feet of snow, and knew that it was located right across the road from the Park's most popular visitor area” was not susceptible to considerations of any social, economic, or political policy); *Green v. United States*, 630 F.3d 1245, 1252 (9th Cir. 2011) (holding that “Forest Service's failure to notify Appellants before and after the Forest Service lit the backfire is not subject to the discretionary function exception.”); *Hayes v. United States*, 539 F. Supp.2d 393 (D. D.C. 2008) (holding that the NPS failed to demonstrate how the nature of sign placement decisions related to trail closures implicates and is grounded in public policy concerns); *Whisnant v. United States*, 400 F.3d 1177, 1183–84 (9th Cir. 2005) (“Cleaning up [toxic] mold involves professional and scientific judgment, not decisions of social, economic, or political policy”); *Marlys Bear Med. v. United States*, 241 F.3d 1208, 1213-14 (9th Cir. 2001) (distinguishing between government’s decision to authorize logging contract (which was protected by discretionary function exception) and government’s failure to, supervise and manage safety aspects of contract (which was not protected)); *Andrulonis v. United States*, 952 F.2d 652 (2d Cir. 1991) (holding actionable the medical judgment of a government doctor in failing to warn of hazards of research experiment); *Summers v. United States*, 905 F.2d 1212,1216 (9th Cir. 1990) (holding that the discretionary function exception did not protect the Park Service’s failure to warn visitors of hot coals on a beach where fires were permitted, because it “resemble[d] more a departure from the safety considerations established in Service policies” than a

that the discretionary function exception did not shield the Mine Safety and Health Administration from an action by survivors of a mine explosion because the safety

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public policy-based decision); *Boyd v. United States ex rel. United States Army Corps of Eng'rs*, 881 F.2d 895, 898 (10th Cir. 1989) (holding that the Corps of Engineers' decision not to warn swimmers in a popular swimming area when it had knowledge of dangerous conditions "does not implicate any social, economic, or political policy judgments."); *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986) ("where the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the United States will be held responsible for the negligence of its employees"); *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974) (holding actionable the professional, scientific judgment exercised in approving live polio vaccine); *Hendry v. United States*, 418 F.2d 774 (2d Cir. 1969) (holding actionable the medical judgment of government psychiatrist and psychologist in diagnosis of patient); *Burgess v. United States*, 375 F. Supp. 3d 796, 815 (E.D. Mich. 2019), motion to certify appeal denied, No. CV 17-11218, 2019 WL 4734686 (E.D. Mich. Sept. 27, 2019) ("determining whether Flint's water system complied with EPA regulations and, when it did not, whether the State's response was sufficient to rectify the violations involved only the performance of professional and scientific analysis and reasoning"); *Adkisson v. Jacobs Eng'g Grp., Inc.*, 370 F. Supp. 3d 826 (E.D. Tenn. 2019) (holding discretionary exception inapplicable where defendant's conduct in failing to warn workers of dangers of exposure to fly ash, failing to supply gas masks, and failing to implement other safety measures was actively detrimental to a purported policy aim of safety); *Mays v. Tennessee Valley Auth.*, 699 F. Supp. 2d 991, 1021-22, (E.D. Tenn. 2010) (holding that policies governing coal ash disposal "are not discretionary decisions involving the permissible exercise of policy judgment and consideration of public policy."); *Brown v. United States*, 547 F. Supp. 2d 759, 764-65 (W.D. Ky. 2008) (finding subject matter jurisdiction and reasoning that "[t]he failure to provide the warning sign was not the product of a broad-based policy decision not to warn visitors of the dangers of flash floods on the upper pools trail); *In re Yosemite Nat'l Park Hantavirus Litig.*, No. 14-2532, 2016 WL 758671, at \*22 (N.D. Cal. Feb. 26, 2016) (copy attached) (finding that the United States failed to explain how considerations of access, conservation, and resources played into National Park Services' decision to delay notification to visitors of park of possible risk of exposure to a disease during their visit).

inspectors were not authorized to conduct their inspections on the basis of social, economic or political policy. The Court explained that the balancing of the interests of the miners and mine owners and effective use of limited resources *had already been done* by the Congress and the Secretary of the Dep't of Labor. The inspectors were not to re-weigh those interests but to determine compliance with safety. Their decisions were not based on “policy decisions” but on their “own observations, informed by professional judgment and knowledge of the industry.” *Id.* at 898.<sup>143</sup>

Here, the conduct of the Park Service at issue—*e.g.*, failing to monitor, failing to utilize WFDSS, failing to establish command structure—involved safety measures which had been instituted nationwide by the NPS and adopted locally by the GSMNP. Accordingly, any “balancing” had already been completed prior to the Chimney Tops 2 Fire when the NSP and GSMNP established these mandatory fire-safety protocols. Ignoring public safety is not a policy objective supported by the discretionary function exception. Because the Park Service’s acts and omissions were in direct contravention of professional and fire-safety protocols, therefore, the ruling of the District Court must be reversed.

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<sup>143</sup> *State Farm Fire & Cas. Co., Inc. v. United States*, No. CIVA.06CV01135WYDMJW, 2008 WL 2798178, at \*5 (D. Colo. July 18, 2008) (copy attached) (“A determination whether the decisions and judgments made by [...] firefighters were based on social, economic, or political concerns is generally a factual issue and therefore summary judgment is not appropriate.”).

## CONCLUSION

Based upon the foregoing, the ruling of the District Court, which granted the Government's Motion to Dismiss as to Plaintiffs' "fire management claims" based on the discretionary function exception to the FTCA, must be reversed.

Respectfully submitted this 2<sup>nd</sup> day of June, 2023.

*/s/ Matthew Evans*

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I do hereby certify that a copy of the foregoing was submitted electronically through the Court's Electronic Filing System ("ECF") on June 2, 2023. Notice of this filing will be sent by operation of the Court's ECF to all parties indicated on the electronic filing receipt.

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**DESIGNATION OF RELEVANT DOCUMENTS***Auto-Owners Insurance v. U.S., 3:19-cv-478*

<b><i>Record Entry</i></b>	<b><i>Page ID#</i></b>	<b><i>Description</i></b>
32	1926	Amended Complaint for Damages Under the Federal Tort Claims Act
32-4	2177	National Park Service Director's Order 18 (DO-18)
32-5	2188	National Park Service Wildland Fire Management Reference Manual 18 (RM-18)
32-6	2560	Great Smoky Mountains National Park Fire Management Plan ("GSMNP FMP")
32-7	2647	Interagency Standards for Fire and Fire Aviation Operations 2016 ("Redbook")
32-8	3110	National Park Service Fire Monitoring Handbook ("FMH")
32-9	3396	National Park Service Chimney Tops 2 Fire Review, Individual Fire Review Report ("NPS Report")
32-10	3514	After Action Review of the November 28, 2016 Firestorm
36-1	3717	Defendant United States of America's Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction by
39	3755	Plaintiffs' Response to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction
42	3867	Reply to Response to Motion to Dismiss for Lack of Jurisdiction filed by United States of America
51	3938	Memorandum Opinion and Order granting in part and denying in part Motion to Dismiss for Lack of Jurisdiction
147	4890	Plaintiffs' Amended Joint Notice of Appeal

*State Farm Fire & Casualty Company v. U.S., 3:19-cv-470**(excluding documents in duplicate of those identified above)*

<b><i>Record Entry</i></b>	<b><i>Page ID#</i></b>	<b><i>Description</i></b>
1	1	Complaint
41-1	1459	Defendant United States of America's Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction
45	1496	Plaintiff's Response in Opposition to Defendant United States of America's Motion to Dismiss for Lack of Subject Matter Jurisdiction
46	1565	Defendant United States of America's Reply in Support of Its Motion to Dismiss for Lack of Subject Matter Jurisdiction
50	1598	Plaintiffs' Supplemental Brief Re: Admissions Contained Within the NPS Report, In Opposition to Defendant United States of America's Motion to Dismiss for Lack of Subject Matter Jurisdiction
51	1613	Defendant United States of America's Memorandum of Law Regarding the Chimney Tops 2 Fire Review Report
52	1622	Defendant United States of America's Response to Plaintiffs' Supplemental Briefs Regarding Chimney Tops 2 Fire Review Report
53	1635	Plaintiffs' Response Brief in Opposition to Defendant United States of America's Memorandum of Law Regarding the Chimney Tops 2 Fire Review Report

*American Reliable Insurance v. U.S. 3-19-cv-469*

***(Duplicate filings only)***

*United Services Auto Ass'n v. U.S., 3:19-cv-472*

***(Duplicate filings only)***

*Allstate v. U.S., 3:19-cv-474*

***(Duplicate filings only)***