No. _____

In The
Supreme Court of the United States

SUSAN M. CHADD, as Personal Representative of the ESTATE OF ROBERT H. BOARDMAN, deceased, and for herself,

Petitioner,

v.

UNITED STATES OF AMERICA, NATIONAL PARK SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991), this Court established a two-part inquiry for determining whether the discretionary function exception ("DFE") to the Federal Tort Claims Act ("FTCA") shields government conduct from suit. The first inquiry is whether the challenged conduct is discretionary; that is, whether it involved an element of judgment or choice. If the challenged conduct is discretionary, then the second inquiry is whether it is the type of discretion that Congress intended to protect; that is, whether the conduct is susceptible to social, economic, or political policy analysis. This two-part inquiry, and particularly *Gaubert*'s "susceptibility" approach, have created significant and widespread conflict in the courts of appeals. This Court has not substantively revisited the DFE in the roughly 25 years since *Gaubert*.

The questions presented are:

(1) Should this Court hold that under *Gaubert*, the DFE immunizes only governmental conduct actually based on public policy considerations, not conduct excused by hypothetical considerations or *ex post facto* rationalizations?

(2) Should this Court hold that under *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) and *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S 797 (1984), the DFE does not apply

QUESTIONS PRESENTED – Continued

where the government is not regulating private individuals under complex regulatory schemes, but rather is managing its own employees who fail to carry out its own safety measures?

PARTIES

The parties to this proceeding are set forth in the caption.

RULE 29.6 STATEMENT

The petitioner is not a nongovernmental corporation and does not have a parent corporation or shares held by a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

Susan M. Chadd, as Personal Representative of the Estate of Robert H. Boardman, deceased, and for herself, respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

From 2006 on, government employees at Olympic National Park ("ONP") knew that a 370 lb. male mountain goat was aggressively harassing hikers. By 2008 at the latest, ONP began managing this habituated goat under its ten-step Nuisance and Hazardous Animal Management Plan (the "Plan"), posting warning signs (Level 3), and "hazing" the goat by throwing rocks at it, or shooting it with bean bags (Level 7). In 2009, ONP decided to haze the goat on a consistent and daily basis. It never did so. Later that summer, ONP admitted that its minimal hazing efforts were failing and that it was only a matter of time before someone was injured. Despite ongoing reports of aggressive behavior, ONP failed to move up its Plan, never implementing levels 8 (removal), 9 (translocation), or 10 (destruction). More than 15 months (and many more reports) passed without a single hazing. In October 2010, the dangerous goat killed Robert Boardman.

Chadd sought compensation under the FTCA, 28 U.S.C. Chapter 171. The Federal District Court for the Western District of Washington dismissed the case under the DFE, 28 U.S.C. § 2680(a). A Ninth Circuit Court of Appeals panel majority affirmed, holding that under *Gaubert*, the government need not show that it made a policy-based decision, but only that it hypothetically could have considered a single policy when failing to protect park visitors from a known danger. App. at 18, 21.

The concurrence agreed that Ninth Circuit precedent mandates such a result, but opined that the Ninth Circuit's jurisprudence in this area has "gone off the rails," badly misconstruing this Court's decision in *Gaubert*. App. at 21-22.

The dissent opined that neither the Ninth Circuit's jurisprudence, nor this Court's jurisprudence, compelled the majority's holding. App. at 23-24. The dissent stated that ONP's failure to carry out the Hazardous Animal Plan, or to consistently haze the goat as it undertook to do, is not the type of inaction Congress intended to immunize under the DFE. App. at 26-27.

The Circuits are severely conflicted on how to interpret *Gaubert*. After nearly 25 years, it is time for this Court to address the DFE, and to clarify that Congress did not intend to immunize the government when its employees fail to carry out safety measures within the scope of their employment. The Court should also clarify that the DFE does not allow the

government to immunize itself with *ex post facto* rationalizations for government inaction, absent any evidence that the inaction was actually based on protected policy considerations. If the Court declines to intervene, the DFE – a narrowly construed exception – will quickly swallow what is left of Congress' waiver of sovereign immunity.

OPINIONS AND JUDGMENTS BELOW

On August 20, 2012, the United States District Court for the Western District of Washington entered an Order Granting, in Part, a Motion to Dismiss. (App. 69).

On October 10, 2012, the United States District Court for the Western District of Washington entered an Order Granting Defendant's Motion to Dismiss Remaining Claim. (App. 66).

On October 16, 2012, the United States District Court for the Western District of Washington entered an Order on Plaintiff's Motion for Reconsideration. (App. 59). The Judgment was entered on October 17, 2012. (App. 58).

On July 27, 2015, the United States Court of Appeals for the Ninth Circuit issued a published Opinion. (App. 1).

On October 6, 2015, the United States Court of Appeals for the Ninth Circuit denied the Petition for Rehearing *en banc* or Panel Rehearing. (App. 103).

JURISDICTION

The Ninth Circuit denied Petitioner Susan Chadd's Petition for Rehearing *en banc* or Panel Rehearing on October 6, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2680 (2006) – Exceptions appears at App. 105 of the appendix.

STATEMENT OF THE CASE

Legal Background

Although there are a great many appellate decisions addressing the DFE, only five decisions from this Court are typically considered to declare this Court's views on this important doctrine: *Dalehite v. United States*, 346 U.S. 15 (1953); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984); *Berkovitz v. United States*, 486 U.S. 531 (1988); and *United States v. Gaubert*, 499 U.S. 315 (1991). These

five decisions are cited in many appellate opinions addressing the DFE. Yet it has been roughly 25 years since this Court decided *Gaubert*, and the Circuits are in disarray.

Dalehite addressed a claim against the United States for damages, when ammonium nitrate fertilizer manufactured under its direction exploded during loading for export. 346 U.S. at 23-24. Four of the seven Justices participating held that the DFE applied. *Id.* at 35-42, 45, 47. The Court examined the FTCA's legislative history:

> [W]hile Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.

Id. at 27-28 (citing 28 U.S.C. § 2680(a)). As an Assistant Attorney General testified to Congress, the DFE was

> intended to preclude any possibility that the [FTCA] might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious. . . .

Id. at 30. The Court held that the entire program, from the cabinet-level decision to institute the fertilizer program, down to the detailed specifications regarding fertilizer bagging, was the product of judgments exercised by administrators, which are not the kinds of decisions "the courts, under the Act, are empowered to cite as 'negligence.'" *Id*. at 40-41. Rather, the decisions "were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program." *Id*. at 42.

In *Indian Towing*, the tugboat *Navajo* ran aground when the Coast Guard failed for three weeks to discover and repair a bad connection in its lighthouse. 350 U.S. at 62. The government did not expressly raise the DFE, unsuccessfully arguing that the FTCA impliedly excepted from liability "uniquely governmental functions." *Id*. at 64. Referring to *Dalehite*, the Court held the government liable, not because the negligence occurred at the "operational level," but because the government "was obligated to use due care" after it exercised the discretion to maintain the lighthouse. *Id*. at 64, 69.

Varig involved two tort suits alleging that the Federal Aviation Administration (FAA) had negligently certified two airplanes before they caught fire. 467 U.S. at 799-800, 803. Congress gave the Secretary of Transportation broad authority to establish and implement a compliance program for airplane safety standards. *Id.* at 804. The Secretary delegated this

duty to the FAA, which devised a "spot-check" system. *Id*. at 804-05, 815. This Court held that establishing such a system was a policy decision as to how best to "accommodat[e] the goal of air transportation safety and the reality of finite agency resources," so it was immunized. *Id*. at 820. The Court also held that the DFE protected "the acts of FAA employees in executing the 'spot-check' program," where the employees "were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." *Id*.

The *Varig* Court found it "impossible" to precisely define "every contour" of the DFE, but isolated some useful principles: "First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Id*. at 813. "Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Id*. at 813-14. Third, "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814.

In *Berkovitz*, an infant contracted polio from a vaccination. 486 U.S. at 533. His parents alleged that the government wrongfully licensed the drug manufacturer, and wrongfully approved the particular lot's

release. *Id*. Analyzing its earlier decisions, this Court identified several established principles underpinning the DFE. *Id.* at 536-37.

As a first principle, the DFE "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id*. at 536. This is based on a broader principle that immunity is necessary only if the threat of liability may adversely affect policymaking. *Id*. (citing "*Cf. Westfall v. Erwin*, 484 U.S. 292, 296-297, 98 L. Ed. 2d 619, 108 S. Ct. 580 (1988) (recognizing that conduct that is not the product of independent judgment will be unaffected by threat of liability)").

As a second principle, "assuming the challenged conduct involves an element of judgment," the DFE will apply only when the "judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 536. This springs from separation of powers (*id*. at 536-37):

> The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Varig Airlines*, *supra*, at 814. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. *See Dalehite v. United States*, *supra*, at 36.

The Court first held that the DFE did not protect the government from licensing the vaccine manufacturer "without first receiving data that the manufacturer must submit," holding that the government lacked discretion not to obtain the data. *Id*. at 542. The Court next addressed the claim that the government licensed the manufacturer "even though the vaccine did not comply with certain regulatory safety standards." *Id*. at 543. The Court could not discern whether this claim was that (a) the government issued a license without determining compliance, (b) the government issued a license despite noncompliance, or (c) the government's compliance determination was incorrect. *Id*. The DFE did not protect the first two claims, where the regulations required a compliance determination before issuing a license. *Id*. at 544.

The third possible claim hinged on whether government officials determining compliance "permissibly exercise[d] policy choice." *Id*. at 545. This Court could not answer that question in light of the "abstruse" regulations and "scanty" record. *Id*. The Court therefore remanded to the district court. *Id*. The Court summarized its holdings as follows (*id*. at 546-47, paragraphing altered, citations omitted):

> Given this regulatory context, the discretionary function exception bars any claims that challenge the Bureau's formulation of policy as to the appropriate way in which to regulate the release of vaccine lots. . . . In

> addition, if the policies and programs formulated by the Bureau allow room for implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion. . . .
>
> The discretionary function exception, however, does not apply if the acts complained of do not involve the permissible exercise of policy discretion. Thus, if the Bureau's policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful.

Gaubert involved a complex regulatory scheme under which the Dallas branch of the Federal Home Loan Bank Board took over key operational aspects of a thrift. 499 U.S. at 318-19. Among other things, the government replaced officers and directors, made hiring recommendations, and recommended conversion to a federal charter. *Id*. at 319-20. A former director and major stockholder sued after stocks plummeted. *Id*. at 320.

Analyzing its precedents, the Court discerned the following rules: (1) if a regulation mandates particular conduct that the government obeys, then it is protected; (2) if a regulation mandates particular conduct that the government violates, then the DFE does not apply, as no discretion was permitted; (3) if a regulation "allows a Government agent to exercise

discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion"; (4) to survive a motion to dismiss, the complaint must allege facts that would support a finding that the conduct challenged is not the type "that can be said to be grounded in the policy of the regulatory regime"; and (5) the focus "is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id*. at 324-35.

Applying these principles, the Court first rejected the planning vs. operational distinction adopted by the Fifth Circuit. *Id*. at 325. The Court held that the complex regulatory scheme at issue did not bind federal regulators "to act in a particular way; the exercise of their authority involved a great 'element of judgment or choice.'" *Id*. at 329 (quoting *Berkovitz*, *supra*, at 536). The Court then held that Congress intended to protect the challenged conduct, where government regulators "had two discrete purposes in mind": (1) protecting the solvency of the savings and loan industry, while maintaining public confidence in that industry; and (2) preserving assets for the benefit of depositors and shareholders. *Id*. at 332. The Court found no allegations "that the regulators gave anything other than the kind of advice that was within the purview of the policies behind the statutes." *Id*. at 333.

To synthesize these five cases, the DFE applies when the government, acting in its role as a regulator

of private individuals under a complex regulatory regime, permissibly exercises discretion based on public policy considerations. *See Varig*, *Berkovitz*, and *Gaubert*, *supra*. But the DFE does not apply when the government voluntarily assumes a duty, but fails to follow through, particularly where the government is simply managing its own employees to protect the public. *See Indian Towing* and *Berkovitz*, *supra*.

Factual Background

On October 16, 2010, a 370 lb. male mountain goat attacked Robert Boardman while he was hiking with his wife, Susan Chadd, and a friend on the Klahhane Ridge trail in ONP in Washington State. The huge goat circled the three hikers, pawing the ground menacingly. They quickly retreated, Mr. Boardman using his walking poles to hold off the goat. After closely following the hikers for over one mile, the goat gored Mr. Boardman, severing his femoral artery. It then stood over Mr. Boardman as he bled to death, holding help at bay.

Four years earlier, during the 2006 season (typically June to mid-October) ONP received at least 12 reports that a goat was behaving aggressively, harassing and closely approaching visitors, head lowered. These behaviors are "[a]ggressive" or "[n]ear-[a]ttack[s]" under ONP's Hazardous Animal Plan. In 2007, ONP received at least 15 similar reports, including one

that the goat "chased" and "cornered" a ranger brandishing an ice axe. ONP knew by then that it was dealing with a specific aggressive goat.

In 2008, ONP received at least nine reports that the 370 lb. goat was chasing visitors, unafraid, and refusing to back off. ONP decided to "step up" hazing, level 7 of the Plan. When lower levels prove "ineffective," ONP must "escalate" through the levels to removal (8), translocation (9), and destruction (10).

By June 2009, ONP had received five reports that the goat was harassing visitors, including one that it blocked the trail, pawed the ground, and followed the retreating hikers for over one mile. Another hiker reported his concern that the goat would attack. On June 23, ONP Wildlife Branch Chief Patti Happe emailed her superiors and colleagues with an "update" on the "aggressive billy goat situation." Acknowledging that "this goat has been a problem for several years now" and that park visitors felt at risk, Happe concluded, "it may only be [a] matter of time until someone is hurt." Later that day, Chief of Natural Resource Division Cat Hoffman instructed Happe to meet with others, including Ranger Sanny Lustig, to "develop a plan for aversive conditioning (who, how, when, and monitoring)." Hoffman directed them to provide a recommendation "for a specific approach/plan" to Superintendent Karen Gustin.

On June 25, Hoffman decided that ONP would pursue "'intensive' aversive conditioning," directing the rangers to "develop the details and schedules." By

"intensive," ONP meant hazing the goat "on a very consistent and daily basis." This conditioning should include "more presence, more consistency, more frequency of staff." "To work at all, aversive conditioning has to be sustained."

But ONP made no "specific" approach or plan. It asserted no "more" presence, consistency, or staffing. And Ranger Lustig – tasked with implementing "very consistent" hazing – hazed the goat on only two days, June 29 and July 6, 2009. The aggressive goat returned to the trail within 15 minutes.

ONP received two July 6, 2009 reports stating that the goat followed three adults and "actively charged" a family twice. That day, Lustig told her colleagues that hazing was ineffective and that "further strategizing and plans" were needed. Lustig meant planning how "to be consistent with hazing, doing it often enough and reliably enough. . . ." But ONP did not "further strategiz[e]," or haze the goat again, despite receiving at least five more disturbing reports in 2009.

ONP received at least ten similar reports in 2010. On July 5, Lustig told her colleagues that the goat was "menacing" the trail, pestering visitors, looking mean and unwary. ONP again decided to "work on" hazing, but never did. On July 30, Happe briefly "explore[d]" relocating the goat (level 8), admitting that the goat was "very habituated," "increasingly aggressive," and "not responding to hazing." ONP did

not remove the goat, and never hazed the goat in 2010. The goat killed Mr. Boardman that October.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT REGARDING WHETHER *GAUBERT* EXTENDS THE DFE TO GOVERNMENT CONDUCT THAT IS NOT BASED ON PUBLIC POLICY CONSIDERATIONS, BUT ONLY HYPOTHETICALLY COULD HAVE BEEN.

Nearly 25 years after *Gaubert* announced that the DFE applies where challenged conduct is "susceptible to policy analysis," the appellate courts are sharply divided, often within circuits, regarding how to apply this approach. Some courts hold that susceptibility protects challenged conduct that is not based on policy considerations, but hypothetically could have been. Others reject that approach as inviting *ex post* rationalizations that unjustly broaden the DFE. Others treat *Gaubert* as imposing a presumption that can be rebutted by showing that the challenged conduct was not actually based on policy.

These divergent interpretations of *Gaubert* have resulted in inequitable decisions, allowing the government to administratively immunize itself with *ex post* rationalizations when it never engaged in the type of policy balancing that Congress intended to protect. As a result, the DFE is rapidly swallowing

Congress' waiver of sovereign immunity. This presents a question of significant importance.

A. The First, Fourth, Fifth, Tenth, Eleventh, and D.C. Circuits hold that *Gaubert* extends the DFE to conduct that is not actually based on public policy considerations.

First Circuit

The First Circuit holds that under *Gaubert*'s "susceptibility" approach, the DFE immunizes challenged conduct that does not result from "a policy-driven analysis":

> Conduct is susceptible to policy analysis if "some plausible policy justification could have undergirded the challenged conduct;" it is not relevant whether the conduct was "the end product of a policy-driven analysis."

Sánchez v. United States, 671 F.3d 86, 93 (1st Cir. 2012) (quoting *Shansky v. United States*, 164 F.3d 688, 692 (1st Cir. 1999)). But at odds with that interpretation of *Gaubert*, the *Sánchez* court considered that the government had actually balanced competing policies. 671 F.3d at 102-03. More recently, the First Circuit considered "affirmative evidence" that the challenged government decisions "implicated policy judgments," also at odds with its prior interpretation of *Gaubert*. *Mahon v. United States*, 742 F.3d 11, 16 (1st Cir. 2014).

Fourth Circuit

The Fourth Circuit holds that *Gaubert*'s susceptibility approach "clarifie[s]" that courts need not inquire into the circumstances surrounding the challenged conduct. *Baum v. United States*, 986 F.2d 716, 720-21 (4th Cir. 1993). Rather, the court held that it is "largely irrelevant" whether "government agents did or did not engage in a deliberative process before exercising their judgment." *Id*. at 721.

Fifth Circuit

The Fifth Circuit holds that under *Gaubert*, the "'proper inquiry' is not whether the decisionmaker 'in fact engaged in a policy analysis when reaching his decision but instead whether his decision was susceptible to policy analysis.'" *Robinson v. United States*, 696 F.3d 436, 449 (5th Cir. 2012) (quoting *Spotts v. United States*, 613 F.3d 559, 572 (5th Cir. 2010)). Despite holding that the DFE does not require actual policy analysis, the court noted that "[e]vidence of the actual decision may be helpful in understanding whether the 'nature' of the decision implicated policy judgments. . . ." 696 F.3d at 451 (quoting *Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995)). The court went on to consider "ample record evidence indicating the public-policy character" of the challenged conduct. *Id*. at 451.

Tenth Circuit

The Tenth Circuit holds that under *Gaubert*'s susceptibility approach, "it is unnecessary for government employees to make an actual 'conscious decision' regarding policy factors." *Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993); *see also Lopez v. United States*, 376 F.3d 1055, 1057 (10th Cir. 2004). Going a step further, the court stated that it is "irrelevant" whether the challenged conduct "'was a matter of "deliberate choice," or a mere oversight.'" *Kiehn*, 984 F.2d at 1105 (quoting *Allen v. United States*, 816 F.2d 1417, 1422 n.5 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988)). In short, the Tenth Circuit apparently interprets *Gaubert* to protect "mere oversight," which by its nature cannot be "based on considerations of public policy." *Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 486 U.S. at 537).

Eleventh Circuit

The Eleventh Circuit holds that under *Gaubert*'s susceptibility approach, the court does not "inquire whether the [government] employee actually weighed social, economic, and political policy considerations before acting." *Cohen v. United States*, 151 F.3d 1338, 1341 (11th Cir. 1998).

D.C. Circuit

The D.C. Circuit holds that under *Gaubert*, "[w]hat matters is not what the decisionmaker was thinking, but whether the type of decision being

challenged is grounded in social, economic, or political policy." *Cope*, 45 F.3d at 449. But like many Circuits similarly interpreting *Gaubert*, the court noted that "[e]vidence of the actual decision may be helpful." *Id*. The court held that the DFE did not immunize the government's failure to post adequate warnings, where the government could not "articulate" how its inaction implicated policy considerations. *Id*. at 451-52.

B. The Third, Eighth, and Ninth Circuits have refused to read *Gaubert* so broadly as to extend the DFE to conduct that is not actually based on public policy considerations.

Third Circuit

The Third Circuit has repeatedly held that *Gaubert*'s susceptibility approach requires the government to prove a rational nexus between the challenged conduct and policy concerns. *S.R.P. v. United States*, 676 F.3d 329, 336 (3d Cir. 2012) (quoting *Cestonaro v. United States*, 211 F.3d 749, 759 (3d Cir. 2000)); *see also Baer v. United States*, 722 F.3d 168 (3d Cir. 2013). The government must establish that its conduct is grounded in policies underlying the regulations, and based on the purposes of the regulations:

> We begin by noting that "[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's

> acts are grounded in policy when exercising that discretion." [*Gaubert*, 499 U.S. at 324]. That presumption, however, can be rebutted. [*Cestonaro*, 211 F.3d at 755 n.4]. In fact, we have made clear that "susceptibility analysis is not a toothless standard that the [G]overnment can satisfy merely by associating a decision with a regulatory concern." *Id*. at 755 (internal marks and citation omitted). Rather, the Government must establish that the challenged conduct is "grounded in the policy of the regulatory regime," and "based on the purposes that the . . . regime seeks to accomplish," *Gaubert*, [*supra*] at 325 & n.7. In other words, there must be a "rational nexus" between the Government's decision and "social, economic, and political concerns." *Cestonaro*, 211 F.3d at 759.

S.R.P., 676 F.3d at 336.

Eighth Circuit

The Eighth Circuit holds that under *Gaubert*'s susceptibility approach, whether the government actually balances policies remains relevant:

> Although a decision maker need not actually consider social, economic, or political policy to trigger the exception, it is nonetheless relevant when a decision maker actually does consider policy factors before making a decision. Indeed, the fact a decision maker actually takes policy factors into account is one

> way to demonstrate a decision is susceptible to policy analysis.

Herden v. United States, 726 F.3d 1042, 1050 n.5 (8th Cir. 2013). The court expressly rejected the dissent's argument that it is error to focus on the government's "actual and specific decision," stating "[w]e disagree to being limited to an abstract consideration of any particular decision." *Id*.

Without referencing *Herden*, the Eighth Circuit later held that under *Gaubert*, the government "need not have made a 'conscious decision regarding policy factors.'" *Metter v. United States*, 785 F.3d 1227, 1233 (8th Cir. 2015) (quoting *Kiehn*, *supra*, at 1105). Yet the court specifically addressed the government's actual policy considerations. 785 F.3d at 1233.

Ninth Circuit

In *Dichter-Mad Family Partners, LLP v. United States*, the Ninth Circuit collected cases holding that under *Gaubert*'s susceptibility approach, there need not be "actual evidence that policy-weighing was undertaken." 709 F.3d 749, 763 (9th Cir. 2013). But in *Bear Medicine v. United States*, the Ninth Circuit held that *Gaubert*'s susceptibility approach does not allow *ex post* rationalizations, or change precedent holding that the failure to carry out safety measures cannot be excused in the name of policy. 241 F.3d 1208, 1216-17 (9th Cir. 2001). Rather, the term "susceptible" "was used illustratively to draw a distinction between protected discretionary activities . . . and

unprotected discretionary activities . . . not to widen the scope of the discretionary rule." *Id*. at 1216. Thus, the *Bear Medicine* court rejected the government's claim that its failure to ensure worksite safety was based on two "possible" policy considerations, finding no record support for either. *Id*.; *see also Miller v. United States*, 163 F.3d 591, 593, 595 (9th Cir. 1998) (holding that the challenged conduct "need not be actually grounded in policy considerations," but also that the regulations at issue "demonstrate[d]" that the government balanced competing policy considerations).

C. Seven Circuits hold that *Gaubert* creates a rebuttable presumption.

The First, Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits hold that *Gaubert* creates a rebuttable presumption that the challenged conduct involves consideration of the same policies underlying the operative regulation. *Mahon*, 742 F.3d at 16 (1st Cir.); *S.R.P.*, 676 F.3d at 336 (3d Cir.); *Montez v. United States*, 359 F.3d 392, 397 (6th Cir. 2004); *Calderon v. United States*, 123 F.3d 947, 950 (7th Cir. 1997); *Metter*, 785 F.3d at 1231 (8th Cir.); *Dichter-Mad*, 709 F.3d at 771 (9th Cir.); *Kiehn*, 984 F.2d at 1108 n.12 (10th Cir.).

As the concurrence in the underlying matter explains, "nothing in *Gaubert* suggests that the presumption is not rebuttable, or switches the foundational question from whether the decision *was* 'based on considerations of public policy' to whether it

hypothetically could have been." App. at 22 (emphasis original). Rather, *Gaubert*'s susceptibility approach creates a strong presumption that the challenged conduct was based on policy considerations underlying the operative regulation, but the presumption is rebuttable by persuasive evidence to the contrary. *Id*. Any other conclusion directly contradicts this Court's holdings in *Gaubert* and *Berkovitz* that the DFE "'protects *only* governmental actions and decisions *based on* considerations of public policy.'" *Id*. (emphasis original) (quoting *Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 486 U.S. at 537)). Thus, interpreting *Gaubert* to hold that the DFE immunizes government conduct that is not actually grounded in policy considerations is simply incorrect. App. at 21-22.

D. This Court should accept review and hold that *Gaubert* does not extend the DFE to inaction absent actual policy balancing.

The Circuits are in disarray, some interpreting *Gaubert* to considerably broaden the DFE, and others continuing to read the DFE as an exception, not the rule. This Court should accept review to clarify that *Gaubert* does not immunize discretionary conduct absent actual policy balancing, or solely based on *ex post* rationalizations.

This case illustrates the need to clarify *Gaubert* in this manner. Fifteen months before the dangerous goat killed Mr. Boardman, ONP knew that hazing

was not working and that injury was only a matter of time. ONP did not decide to discontinue its plan to consistently haze the dangerous goat. It did not decide against moving to the next levels of the Hazard Animal Plan. It simply neglected to make what could have been lifesaving decisions. Holding ONP accountable for its wanton inaction does not frustrate separation of powers, or threaten the policies underlying the very Plan that, if followed, would have saved Mr. Boardman's life. This Court should accept review to so hold.

II. THERE IS A CONFLICT REGARDING WHETHER THE DFE IMMUNIZES THE GOVERNMENT'S FAILURE TO FOLLOW ITS OWN SAFETY MEASURES.

This case presents a conflict about the post-*Gaubert* application of this Court's decisions in *Indian Towing, Varig*, and *Berkovitz*. The courts of appeals are sharply divided regarding how to approach the government's failure to follow its own safety measures. While a number of Circuits distinguish between creating safety measures (a protected discretionary function) and following them (protected only if based on policy considerations) others immunize government inaction under the very safety measures the government failed to follow. Thus, the unfortunate state of the DFE is a question of significant importance. The Court should grant review.

A. The Ninth Circuit has amassed a significant body of law articulating that the DFE generally does not immunize the government's failure to follow its own safety measures.

The Ninth Circuit recognizes that the DFE generally does not immunize the government's failure to follow its own safety measures. In *Bear Medicine*, a member of the Blackfoot Indian Tribe was fatally injured when a tree fell on him during a private logging operation on the Reservation. 241 F.3d at 1211, 1212. The Bureau of Indian Affairs authorized the contract between the Tribe and a private operator, reserving the right to inspect the site and suspend operations. *Id.*

Asserting the DFE, the BIA claimed that its failure to ensure worksite safety was "a result of two possible balancing judgments": promoting tribal independence, and limited resources. *Id*. at 1216. The court disagreed, holding that "safety measures, once undertaken, cannot be shortchanged in the name of policy." *Id*. at 1216-17. Extending the DFE to "the decision to take safety measures" and the failure to follow them, would "allow the Government to 'administratively immunize itself from tort liability under applicable state law as a matter of "policy."'" *Id*. at 1215 (quoting *McGarry v. United States*, 549 F.2d 587, 591 (9th Cir. 1977)).

Repeating that "[s]afety measures, once undertaken, cannot be shortchanged in the name of policy,"

the Ninth Circuit held in *Whisnant v. United States* that the DFE did not immunize governmental failure to inspect a Navy commissary and remediate mold. 400 F.3d 1177, 1182-83 (9th Cir. 2005). There, the plaintiff became seriously ill after regularly encountering toxic mold in the meat department. *Id.* at 1179-80. The court held that distinguishing between designing a safety measure and failing to follow it focuses on the nature of the decision, not on the identity of the decisionmaker. *Id*. at 1181 & n.1 (distinguishing the operational/planning distinction rejected in *Gaubert*, 499 U.S. at 325). "[R]emoving an obvious health hazard is a matter of safety and not policy." *Id*. at 1183.

The *Whisnant* court aligned its decision with *Indian Towing*. *Id.* at 1182. And the court distinguished *Varig*, where the regulations specifically empowered FAA regulators "*to make policy judgments*," holding that *Varig* involved government oversight of private corporations to achieve maximum regulatory compliance, not the government's own "budget-driven shirking of safe maintenance." *Id*. at 1184 (emphasis original) (quoting *Varig*, 467 U.S. at 820).

Consistent with *Varig*, the Ninth Circuit has noted one exception: the DFE may immunize the government's implementation of an established regulation that requires government agents to balance competing policy considerations. *Id.* at 1182 n.3 (citing *Miller*, 163 F.3d at 595-96). For example, the DFE applied in *Miller*, where Forest Service manuals

outlining specific policies and objectives for fire suppression "demonstrated" that implementing those policies required the Forest Service to balance cost, public safety, firefighter safety, and resource damage. *Miller*, 163 F.3d at 592-93, 595; *accord Bailey v. United States*, 623 F.3d 855, 861 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 814 (2011).

But since *Gaubert*, the Ninth Circuit has consistently declined to extend the DFE to the government's failure to carry out its own safety measures:

- *Young v. United States*, 769 F.3d 1047, 1057, 1058 (9th Cir. 2014): the DFE did not immunize the failure to warn about a latent danger the government created, holding that "Because '[i]t is not sufficient for the government merely to [wave] the flag of policy as a cover for anything and everything it does that is discretionary,' we have demanded 'some support in the record' that the particular decision the NPS made was actually susceptible to analysis under the policies the government identified."
- *Oberson v. United States Dep't of Agric.*, 514 F.3d 989, 998 (9th Cir. 2008): the DFE did not immunize the Forest Service's failure to post a warning or remedy a hazard on a snowmobile trail;
- *Bolt v. United States*, 509 F.3d 1028, 1034 (9th Cir. 2007): the DFE did not immunize the Army's failure to remove snow and ice from a parking lot;

- *Soldano v. United States*, 453 F.3d 1140, 1147 (9th Cir. 2006): the DFE did not immunize the Park's negligence in setting a speed limit;
- *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002): the DFE did not immunize the government's failure to maintain an irrigation ditch on its own property, where the "danger that the discretionary function exception will swallow the FTCA is especially great where the government takes on the role of a private landowner";
- *Bei Lei Fang v. United States*, 140 F.3d 1238, 1243 (9th Cir. 1998): the DFE did not immunize an EMT's decision whether to stabilize the spine of a person who may have suffered a head or neck trauma;
- *Faber v. United States*, 56 F.3d 1122, 1123, 1127-28 (9th Cir. 1995): the DFE did not immunize the failure to post warnings near a known risk;
- *Sutton v. Earles*, 26 F.3d 903, 906, 910 (9th Cir. 1994): the DFE did not immunize the Navy's failure to post speed limit signs after placing buoys in navigable waterways;
- *Routh v. United States*, 941 F.2d 853, 856 (9th Cir. 1991): the DFE did not

> immunize the decision to allow a contractor to operate a backhoe without a safety device.

B. At least five Circuits have taken an approach similar to the Ninth Circuit.

The Second, Third, Fifth, Eighth, and D.C. Circuits hold that the DFE does not immunize the government when it fails to follow its own safety measures, unless doing so involves permissible policy-based decisionmaking. Aside from the Ninth Circuit, the Third has been the most prolific in this area.

Third Circuit

In *Gotha v. United States*, the Third Circuit held that the DFE did not immunize the Navy's failure to install a handrail or lighting on a steep pathway at a Navy facility in the U.S. Virgin Islands. 115 F.3d 176, 178 (3d Cir. 1997). There, the plaintiff fell and injured her ankle while walking on an unlit, unpaved path. *Id.* Finding it significant that the Navy knew the path presented a danger and had been asked to remedy it, the court rejected the Navy's contention that its inaction was based on the need to train in a "realistic warfare environment," and economic factors like "budgetary constraints, procurement regulations, and the anticipated service life of the facility." *Id*. at 180-81.

The Third Circuit reached the same conclusion in *Cestonaro*, where plaintiff's husband was shot and

killed in a parking lot controlled by the National Park Service, which knew the lot was dangerous. 211 F.3d at 751. The court held that the DFE did not protect the Service's failure to provide adequate lighting and warnings, rejecting the Service's assertion that its inaction was based on policies seeking to "safeguard the natural and historic integrity of national parks," while "minimally intrud[ing] upon the setting of such parks." *Id.* at 752. "That torts stemming from garden variety decisions fall outside the discretionary function exception is consistent with a primary motive behind the FTCA." *Id*. at 755-56 (citing *Dalehite*, 346 U.S. at 28 & n.19, "noting that 'uppermost in the collective mind of Congress were the ordinary common-law torts' and that 'congressional thought was centered on granting relief for the run-of-the-mine accidents'").

The Third Circuit reached a different result, but further elucidated its jurisprudence in this area, in *S.R.P.*: the DFE does not apply where the government is aware of a specific risk, and responding to that risk would require only a "garden-variety" remedial measure. 676 F.3d 329. There, a barracuda bit the plaintiff, who was sitting in the shallow waters off Buck Island, in the Virgin Islands. *Id.* at 330. Posting brochures and signs around the park, the National Park Service warned about dangerous wildlife, and instructed visitors to treat barracudas with caution. *Id.* at 331. Plaintiff argued that these warnings were inadequate to warn "shallow water bathers." *Id*. at 330.

The court held that the DFE immunized the Service's decisions regarding whether and how to warn, explaining that it considered, among other things, that too many warnings could "numb[ ]" visitors to dangers and detract from the natural setting. *Id*. at 331-37. But the court worried that an overly broad interpretation of the DFE "could easily swallow the FTCA's general waiver of sovereign immunity and frustrate the purpose of the statute." *Id*. at 338. Thus, the court articulated two new criteria for applying the DFE, stemming from *Gotha* and *Cestonaro*, *supra*: whether the government knew about a specific hazard, and whether responding to it would require "garden-variety action." *Id*. at 342. Under this analysis, plaintiff's claim failed because the Service had no knowledge that a shoreline barracuda attack was likely, and its decisions on where and how to warn involved significant policy considerations. *Id*.

Second Circuit

In *Coulthurst v. United States*, the Second Circuit held that whether the DFE immunized a failure to inspect gym equipment turned on the reason for the failure. 214 F.3d 106 (2d Cir. 2000). There, a federal prisoner was injured when a cable snapped on a machine in the prison weight room. *Id.* at 107. Bureau of Prisons Guidelines required prison officials to inspect the equipment, but left method and frequency up to them. *Id*. at 108. The court held that the DFE would apply if the failure to inspect resulted from a

poorly designed inspection plan, but would not apply if that failure resulted from laziness, haste, inattention, or distraction. *Id*. at 109. The court vacated and remanded for further proceedings. *Id*. at 111; *see also Andrulonis v. United States*, 952 F.2d 652, 653-55 (2d Cir. 1991) (holding that the DFE did not immunize a failure to warn about an "obvious [and] easily-correctable" dangerous condition in a laboratory).

Fifth Circuit

In *Aretz v. United States*, the Fifth Circuit held that the DFE did not immunize the Army's failure to notify its flare manufacturer, Thiokol Chemical, that the Army had raised the classification of an illuminant used in the flares from a fire hazard to an explosive hazard. 604 F.2d 417, 420, 430-31 (5th Cir. 1979). Three months after the reclassification, an explosion at Thiokel's plant injured 50 people, and killed 29. *Id.* at 420. The court rejected the Army's argument that the DFE broadly immunized all conduct connected with its Thiokol contract (*id*. at 430-31 n.18):

> [T]he fact that the negligence may have occurred in connection with a discretionary function does not make the negligent act a discretionary function. Nor does the discretionary character of the government's initial safety undertakings govern whether a duty can arise out of those undertakings.

The court reaffirmed the *Artez* rule in *Payton v. United States*, 679 F.2d 475, 480 (5th Cir. 1982); *see also Morales v. United States*, 371 Fed. Appx. 528, 531 n.2 (5th Cir. 2010) (citing *Payton* with approval). There, the court held that the DFE immunized a decision to release a prisoner on parole, but did not protect the government's failure to provide all psychiatric records to the parole board, or its failure to provide psychiatric treatment during incarceration. *Payton*, 679 F.2d at 480-83. After the Parole Board decided to release the prisoner mid-way through his sentence for assault with intent to murder, he raped and murdered three women. *Id*. at 477-78. The court rejected an argument that the discretionary nature of the ultimate parole decision immunized all related acts. *Id*. at 480, 482 n.6 (quoting *Artez*, *supra*).

Eighth Circuit

In *Aslakson v. United States*, the Eighth Circuit held that the DFE did not immunize the government's decision not to elevate certain electrical powerlines. 790 F.2d 688, 693 (8th Cir. 1986). There, a child was killed when the aluminum mast of his sailboat struck a powerline. *Id*. at 689. Under an established policy to raise powerlines that constituted a safety hazard, the government raised lines over the main area of the lake, but not over the area where the electrocution occurred. *Id*. at 690. The court held that the DFE does not immunize government employees' failure to follow an established safety plan:

> [The government's] policy clearly required it to elevate its power lines if safety considerations compelled such action. 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.

Id. at 692-93 (citations omitted).

In *Appley Bros. v. United States*, the Eighth Circuit held that the DFE did not immunize the U.S.D.A.'s decision to continue a grain warehouse's federal license despite numerous violations. 7 F.3d 720, 727 (8th Cir. 1993). When the U.S.D.A. finally suspended the license and liquidated the inventory, farmers sued to recover their losses. 7 F.3d at 722. They argued that their claim was not based on the U.S.D.A.'s failure to suspend the license (which would be protected), but on its failures to verify whether past violations were cured, and to discover obvious new violations. *Id*. at 727. Holding the DFE inapplicable, the court stated that "the failure was not one of policy choice; rather, it was 'a failure to effectuate policy choices already made.'" *Id*. (quoting *Camozzi v. Roland/Miller & Hope Consulting Group*, 866 F.2d 287, 290 (9th Cir. 1989)).

D.C. Circuit

The D.C. Circuit held that the DFE immunized the Park Service's decision to delay repairing one road in preference to other roads needing repairs, but it did not immunize its failure to post adequate warnings. *Cope*, 45 F.3d at 449-52. The court rejected "Cope's argument that the government's acts [were] not discretionary since they involve the 'implementation' of government policy," holding that this "analytical framework[ ]" was too similar to the planning/operational distinction *Gaubert* rejected. *Id*. at 449. Courts must instead focus "on whether the decision is 'fraught with' economic, political, or social judgments." *Id*. at 451-52. Thus, "having taken steps to warn users . . . the Park Service [could not] argue that its failure to ensure that those steps [were] effective involve[d] protected 'discretionary' decisions." *Id*. at 452.

C. At least one Circuit questions whether this approach conflicts with *Gaubert*.

Prior to *Gaubert*, the Eleventh Circuit held that the DFE immunized the Coast Guard's decision to temporarily place buoys, but not its failure to first establish whether their placement was safe. *Drake Towing Co. v. Meisner Marine Constr. Co.*, 765 F.2d 1060, 1063-64 (11th Cir. 1985). But after *Gaubert*, the Eleventh Circuit questioned whether *Drake Towing* remains good law, without expressly overruling it. *Cranford v. United States*, 466 F.3d 955, 958-59 (11th

Cir. 2006). The *Cranford* court reasoned that establishing a rule that the DFE does not apply to the failure to execute government policy simply restates the operational conduct distinction *Gaubert* rejected. 466 F.3d at 959.

D. This Court should accept review and hold that *Gaubert* does not immunize the government's failure to follow its own measures designed to protect the public from a known danger.

The Circuits have struggled to apply *Gaubert* when the challenged conduct does not involve complex regulatory schemes, but garden-variety safety measures. This is in no small part because *Gaubert* factually bears no resemblance to matters like this one. ONP was not regulating private individuals under a complex scheme, but was acting like a private landowner that failed to follow its own measures designed to protect the public from a known danger. Interpreting *Gaubert* to immunize the failure to follow safety measures allows the government to administratively immunize any discretionary act, and allows the DFE to swallow Congress' waiver of sovereign immunity. This Court should accept review to clarify *Gaubert*.

III. THE MAJORITY DECISION OF THE COURT OF APPEALS IS CLEARLY INCORRECT.

A. The DFE should not immunize the government's failure to follow its own safety measures.

Like many Circuits acknowledging great difficulty in applying the DFE, this Court noted in *Varig* that its FTCA jurisprudence "admittedly has not followed a straight line." 467 U.S. at 811; *see also O'Toole*, 295 F.3d at 1035; *Shansky*, 164 F.3d at 693. Declining to delineate the DFE's full reach, the Court held that "whatever else the [DFE] may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." 467 F.3d at 813-14. Indeed, each of this Court's decisions applying the DFE involve government regulation of private individuals under complex regulatory schemes.

But in *Indian Towing*, the government's inaction did not involve any permissible policy balancing, where it simply assumed a duty to maintain a lighthouse, but failed to exercise ordinary care. 350 U.S. at 69. Distinguishing between the government acting as a manager of its own employees (*Indian Towing*) and as a regulator of private individuals (*Varig et al.*) makes good sense under the two fundamental principles underpinning the DFE. First, exposing the government to potential liability for its own employees' negligent failures to follow measures designed to protect the public cannot negatively affect policy

making: potential tort liability simply encourages the government to exercise reasonable care in training and supervising its employees. Second, a tort suit based on government employees' failures to follow measures designed to protect the public does not require (or even permit) courts to "second-guess" policy making. Again, it just encourages compliance with appropriate safety measures.

The FTCA "provides that the United States shall be liable with respect to tort claims 'in the same manner and to the same extent as a private individual under like circumstances.'" *Varig*, 467 U.S. 808 (citing 28 U.S.C. § 2674). ONP thus should be subject to the same potential liability as a private employer in Washington State. 28 U.S.C. § 1346(b). Under Washington law, if an employee acting within the scope of employment fails to follow through on the employer's or landowner's safety measure, the employer or landowner may be liable for any resulting injury. *See generally, e.g.*, *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 149-50, 341 P.3d 261 (2014) (*respondeat superior* subjects hospital to potential liability for physician or nurse malpractice); *Afoa v. Port of Seattle*, 176 Wn.2d 460, 486, 296 P.3d 800 (2013) (entity controlling the worksite may be liable for injuries to workers of other employers); *Rahman v. State*, 170 Wn.2d 810, 816-17, 246 P.3d 182 (2011) (*respondeat superior* applies even when employee was violating employer's rule); *Blancher v. Bank of Cal.*, 47 Wn.2d 1, 8, 286 P.2d 92 (1955) ("the land occupier's duty of care to keep the premises

reasonably safe for invitees . . . may not be avoided by the employment of independent contractors"). And where, as here, one controls, keeps, or harbors a known dangerous animal that injures a visitor, one may be liable. *See generally, e.g.*, *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994) ("the owner, keeper, or harborer of a dangerous or vicious animal is liable") (citing *Clemmons v. Fidler*, 58 Wn. App. 32, 35-36, 791 P.2d 257, *review denied*, 115 Wn.2d 1019, 802 P.2d 125 (1990); *Markwood v. McBroom*, 110 Wash. 208, 211-12, 188 P. 521 (1920); *Shafer v. Beyers*, 26 Wn. App. 442, 446-47, 613 P.2d 554, *review denied*, 94 Wn.2d 1018 (1980)); *cf. Lander v. Shannon*, 148 Wash. 93, 102, 268 P. 145 (1928) ("if one knowingly keeps a vicious and dangerous animal, which is accustomed to attack and injure mankind, *he is prima facie liable for injuries done by it. . . .*" (emphasis original)).

Thus, this Court should hold that where, as here, government employees are not regulating private individuals, but rather are just failing to follow properly established safety measures, their inaction is not the type of conduct Congress intended to immunize.

B. The panel majority erred in many regards.

The majority misstates the challenged conduct as whether ONP negligently failed to destroy the goat, when the issue is actually ONP's failure to carry out

its plan to haze the goat consistently, or to move up its Hazardous Animal Plan upon admitting hazing had failed. App. 10-11. The majority ignored ONP's inaction: not a single hazing occurred in the 15 months preceding the attack. This contradicts the *Berkovitz* analysis, ascertaining the precise conduct challenged. 486 U.S. at 546-48.

How ONP is alleged to have been negligent is critical. This Court's DFE jurisprudence has never immunized the government when it is not regulating private individuals under a complex regulatory scheme, but is simply failing to follow its own safety measures, despite having assumed that duty. ONP employees admitted that when animal management fails, they must move up the Plan:

> ONP Superintendent: "[i]f the problem isn't going away or doesn't seem to be resolved, then we move to the next level or series of levels."
>
> Deputy Superintendent: if hazing is not working, ONP is supposed to "ramp it up and go on to the next viable action."
>
> Wildlife Chief Biologist: if hazing does not work, the intractable animal should be removed or shot.
>
> Retired ranger who helped draft the Plan: if hazing fails, the goat must be relocated or shot.

App. 52. As the dissent succinctly stated it, "what everyone agreed should have happened did not happen." *Id.* This Court should not protect such wanton inaction.

At minimum, the *Gaubert* presumption was rebutted. The majority incorrectly assumed that if it could imagine a hypothetical policy balancing, then the DFE analysis ended. App. 20-21. But the record demonstrates that ONP's inaction was not grounded in policy considerations. Having decided to haze the goat consistently – meaning daily – ONP hazed it only twice in more than 15 months before the attack. Despite knowing that hazing had failed, ONP failed to move up its Hazardous Animal Plan without any "decision or decision-making process." App. 33. "There never was a discretionary decision, so far as the record shows, to delay or decline to relocate or remove the goat." App. 56. And there is no evidence that ONP ever even considered destruction.

As interpreted by the majority, the DFE becomes untethered from its original purpose – separation of powers. *Varig*, 467 U.S. at 814; *Berkovitz*, 486 U.S. at 536-37. The judiciary does not second-guess a coordinate branch's policymaking by hearing a tort case alleging inaction that is not actually based on policy considerations, but perhaps "hypothetically could have been." App. 21-22. The majority's interpretation is also inconsistent with the related principle of preventing the judiciary from inhibiting vigorous policymaking. *Berkovitz*, 486 U.S. at 536. Holding the government accountable for failing to follow a safety

measure in no way jeopardizes the policymaking underlying the safety measure. The opposite is true – accountability for inaction only encourages action.

In sum, the majority decision is only one of many injustices resulting from the Circuits' mighty struggle to apply *Gaubert*. After nearly 25 years, it is time for this Court to intervene.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted this 4th day of January, 2016.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN H. CHADD, as personal representative of the Estate of Robert M. Boardman, deceased, and for herself, *Plaintiff-Appellant*, v. UNITED STATES OF AMERICA, NATIONAL PARK SERVICE, *Defendant-Appellee*.	No. 12-36023 D.C. No. 3:11-cv-05894-RJB OPINION

Appeal from the United States District Court
for the Western District of Washington,
Robert J. Bryan, Senior District Judge, Presiding

Argued and Submitted
May 16, 2014 – Seattle, Washington

Filed July 27, 2015

Before: Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge O'Scannlain;
Concurrence by Judge Berzon;
Dissent by Judge Kleinfeld

SUMMARY*

Federal Tort Claims Act

The panel affirmed the district court's dismissal for lack of subject matter jurisdiction of a Federal Tort Claims Act action brought against the United States alleging claims arising from a fatal mountain goat attack on an Olympic National Park visitor.

The plaintiff, the wife of the deceased Park visitor, alleged that Park officials breached their duty of reasonable care by failing to destroy the goat in the years leading up to her husband's death.

The FTCA's discretionary function exception retains the United States' sovereign immunity for any claim based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government."

The panel held that the discretionary function exception applied. At step one of the discretionary function analysis, the panel held that there was no extant statute, regulation, or policy directive that required Park officials to destroy the goat prior to the Park visitor's death, and Park officials had discretion in deciding how to manage the problematic goat. At

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

step two of the analysis, the panel held that the Park officials' decision to use non-lethal methods to manage the goat was susceptible to policy analysis, and the discretionary function exception applied.

Judge Berzon concurred with Judge O'Scannlain's opinion and its application of the discretionary function exception to the facts of the case, but she believes that *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998) (holding that the government decision at issue need not be actually grounded in policy considerations, but need only be susceptible to a policy analysis), should be reconsidered.

Judge Kleinfeld dissented because he would hold that the negligence in this case fell outside the discretionary function exception.

COUNSEL

Shelby R. Frost Lemmel, Masters Law Group, PLLC, Bainbridge Island, WA, argued the cause and filed the briefs for the plaintiff-appellant. With her on the briefs was Kenneth W. Masters, Masters Law Group, PLLC, Bainbridge Island, WA.

Teal Luthy Miller, Assistant United States Attorney, Seattle, WA, argued the cause and filed the brief for the defendant-appellee. With her on the brief were Stuart F. Delery, Acting Assistant Attorney General, U.S. Department of Justice Civil Division, Washington, DC; Jenny A. Durkan, United States Attorney, Seattle, WA; and Mark B. Stern, Appellate Staff, U.S.

Department of Justice Civil Division, Washington, DC.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the United States may be sued under the Federal Tort Claims Act for the actions of the National Park Service relating to a mountain goat that attacked and killed a Park visitor.

I

A

Established in 1938, Olympic National Park ("Olympic" or the "Park") spans 922,650 acres and hosts three million visitors each year. Among the many species of animal residing in Olympic is the mountain goat, which is not native to the area, having been introduced into the Park decades ago. Mountain goats possess dangerously sharp horns, and males typically weigh around 242 pounds. Prior to the incident in this case, there had been three reported, non-lethal attacks on people by mountain goats at other national parks, none of which were known to officials at Olympic.

Normally, mountain goats are reclusive animals, but the goats at Olympic frequently seek out areas visited by humans because of the salt humans leave behind. After repeated exposure to humans, goats can become habituated to their presence, which entails

the loss of the mountain goat's fear response. Around 2004, when the goat population at Olympic was near 300, officials at the Park began receiving reports that some goats were becoming habituated; by 2006, goats began displaying aggressive behavior, such as standing their ground, following or chasing humans, pawing the ground, and rearing up.

Park officials decided to investigate the situation personally. They hiked the trails and observed the mountain goats demonstrating progressively habituated and sometimes aggressive behavior. Officials placed collars on the goats with Global Positioning System devices in order to track their movements and to collect further data.

Based on these observations, the Park began warning visitors about the goats' behavior. Visitors were given verbal warnings, and warning signs were posted on trails. Officials began employing aversive conditioning techniques, such as shooting the goats with paint balls and bean-bags, in order to change the goats' behavior. Officials focused their efforts on a few areas, including Klahhane Ridge.

Nonetheless, officials continued to receive reports in 2009 and 2010 about a large male goat chasing visitors and displaying other signs of aggression. Officials began discussing other management options for the problematic goat, but, as stated by Park Ranger Sanny Lustig, the solution "was not clear-cut." Sometime before July 30, 2010, Olympic Superintendent Karen Gustin, Wildlife Branch Chief Dr.

Patti Happe, and Ranger Lustig met to discuss management options for the goat. They coordinated their reporting and hazing efforts and decided to intensify the aversive conditioning. Dr. Happe was to investigate the possibility of relocating the goat. On July 30, she emailed Washington State Department of Fish and Wildlife biologist Dr. Donny Martorello to ask whether they "had an option for translocation." She described the goat and stated that it was "not responding to [their] efforts to have him keep . . . a greater distance from people." Dr. Happe wrote that, because the goat had been "increasingly aggressive," Olympic wished to "explore other management options for [the goat], including relocation from the area."

Over the next two months, there were continued reports of goats pawing the ground, preventing hikers from passing, and acting aggressively. On October 16, 2010, Robert Boardman and his wife, Susan Chadd, were hiking on the Switchback trail to Klahhane Ridge with a friend, Pat Willits, when a large male goat attacked Boardman, goring his leg with its horns and severing his femoral artery. Boardman died of his wound. Park officials found and destroyed a 370-pound male goat with blood on its horns within hours of the attack.

B

Chadd, on her own behalf and as representative of Boardman's estate, filed suit against the United

States and the National Park Service (the "Service") under the Federal Tort Claims Act (FTCA), alleging that Park officials breached their duty of reasonable care by failing to destroy the goat in the years leading up to Boardman's death.[1] The government moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, simultaneously filing declarations and other evidence in support of the motion. The parties proceeded with discovery.

On August 20, 2012, the district court granted the government's motion to dismiss.[2] Chadd timely appealed.

II

As a sovereign, the United States is immune from suit unless it waives such immunity. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The United States has waived its sovereign immunity with regard to tort liability under the Federal Tort Claims Act

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[1] Jacob Haverfield, Boardman's stepson, was initially a plaintiff in this case, but he later moved the district court for voluntary dismissal of his claims. For this reason, the district court's order dismissing Chadd's suit for lack of subject matter jurisdiction did not list Haverfield as a plaintiff. He is, therefore, not a party to this appeal.

[2] In addition to her claim regarding the Park's management of the goat in the lead-up to Boardman's death, Chadd originally claimed that the Park's response to the goat attack was deficient. The district court dismissed that claim in a separate order, which Chadd has not appealed.

"under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). "The Act did not waive the sovereign immunity of the United States in all respects, however; Congress was careful to except from the Act's broad waiver of immunity several important classes of tort claims." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). Among these is the discretionary function exception contained in 28 U.S.C. § 2680(a). *Id.*

The discretionary function exception retains the United States's sovereign immunity for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). This exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Varig*, 467 U.S. at 808. It is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814. The government bears the burden of proving that the discretionary function exception applies. *Bailey v. United States*, 623 F.3d 855, 859 (9th Cir. 2010).

The Supreme Court has established a two-step process for evaluating whether a claim falls within the discretionary function exception. First, a court examines whether the government's actions are "discretionary in nature, acts that involv[e] an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (internal quotation marks omitted). In making this examination, it is "the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig*, 467 U.S. at 813. "If there is . . . a statute or policy directing mandatory and specific action, the inquiry comes to an end because there can be no element of discretion when an employee has no rightful option but to adhere to the directive." *Terbush v. United States*, 516 F.3d 1125, 1129 (9th Cir. 2008) (internal quotation marks omitted).

Second, "even assuming the challenged conduct involves an element of judgment, it remains to be decided whether that judgment is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23 (internal quotation marks omitted). "The exception protects only government actions and decisions based on social, economic, and political policy." *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998) (internal quotation marks omitted). However, the exception "is not confined to the policy or planning level" and extends to "the actions of Government agents." *Gaubert*, 499 U.S. at 325, 323.

It is also important to bear in mind that the decision giving rise to tort liability "need not be actually grounded in policy considerations, but must be, by its nature, susceptible to a policy analysis." *Miller*, 163 F.3d at 593. Thus, "if a regulation allows the [governmental] employee discretion," there is "a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Gaubert*, 499 U.S. at 324. In such cases, the plaintiff "must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Id.* at 324-25. In any event, "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325.[3]

III

A

Chadd's tort suit alleges that the Service should have destroyed the goat before it killed Boardman, and that the Service's failure to do so constituted

[3] Thus, the dissent's assertion that the discretionary function should be limited to an analysis of whether the government agent intended, subjectively, to exercise policy-based discretion, Dissent Slip Op. at 24, is incorrect.

negligence.[4] The first issue, then, is whether "a statute or policy directing mandatory and specific action" required the Service to destroy the goat before it attacked Boardman. *Terbush*, 516 F.3d at 1129. If none did, then the Service's management of the goat necessarily "involv[ed] an element of judgment or choice," and the first prong of the discretionary function exception is satisfied. *Gaubert*, 499 U.S. at 322 (internal quotation marks omitted).

The Service's Management Policies manual (the "manual") is "the basic Service-wide policy document of the National Park Service" and is "mandatory unless specifically waived or modified by the Secretary, the Assistant Secretary, or the Director." The government does not dispute that this manual governed the Service's actions in the lead-up to Boardman's

[4] At oral argument, counsel for Chadd argued that the Park Service's 2009 decision to begin intensive hazing of the mountain goat constituted a mandatory directive for purposes of the discretionary function exception and that the Service failed to implement its hazing policy properly. This argument was entirely new, never having been raised in the district court or in Chadd's opening brief. It is also a highly fact-dependent argument, which makes it difficult to evaluate without the benefit of district court findings and full briefing. We address "only issues which are argued specifically and distinctly in a party's opening brief." *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994). Moreover, "[i]t is well established that an appellate court will not reverse a district court on the basis of a theory that was not raised below." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546 n.15 (9th Cir. 1991). We therefore decline to consider Chadd's argument relating to the Service's implementation of its decision to haze the goat.

death. Section 8.2.5.1 of the Management Policies manual instructs, "The saving of human life will take precedence over all other management actions. . . ." However, the manual qualifies this obligation in the following manner: "The Service will do this within the constraints of the 1916 Organic Act. The primary – and very substantial – constraint imposed by the Organic Act is that discretionary management activities may be undertaken only to the extent that they will not impair park resources and values." Moreover, the obligation to "reduce or remove known hazards" is limited by what is "practicable and consistent with congressionally designated purposes and mandates."

These statements indicate that there are many factors the Service must consider while ensuring human safety in the national parks, such as "park resources and values," what is "practicable," and "congressionally designated purposes and mandates." Indeed, the manual explicitly provides, "[t]hese management policies do not impose park-specific visitor safety prescriptions. The means by which public safety concerns are to be addressed is left to the discretion of superintendents and other decision-makers at the park level. . . . " Such discretion includes "whether to . . . eliminate potentially dangerous animals."

The manual also contains guidance specific to exotic (that is, non-native) species, such as the mountain goats at Olympic. It declares that such species "will be managed – up to and including eradication – if (1) control is prudent and feasible, and (2) the

exotic species . . . creates a hazard to public safety." How exotic species are to be managed is not specified. The manual, then, imposes no particular, mandatory course of action for managing an exotic animal that is threatening public safety.

Nor does Olympic's park-specific Nuisance and Hazardous Management Animal Plan. That document outlines various "management objectives" and "management alternatives," but nowhere does it require Park officials to use a particular management technique when confronted with a dangerous, exotic species. In fact, the plan indicates that different species and contexts will require different management options, as when it notes, "For some species, such as black bears, a long history of management failures and successes exists. . . . For other species, such as cougars, few proven management techniques exist." Chadd points to Superintendent Gustin's statement that the Service "move[s] to the next level [of management techniques] or series of levels" if "the problem isn't going away or doesn't seem to be resolved," but Gustin's statement does not indicate that there is a general policy or directive *requiring* such action or prescribing the *timing* of it. As it is, nothing in the plan mandates an escalation of management techniques.

Finally, Olympic's Mountain Goat Action Plan lists three forms of hazing as appropriate incident management techniques, but it does not specify how or when they should be deployed. The Mountain Goat Action Plan does not even mention animal destruction,

in contrast with the Cougar Action Plan. There was, therefore, no extant statute, regulation, or policy directive that required Park officials to destroy the goat prior to Boardman's death.

Indeed, Chadd acknowledges as much. In her reply brief, Chadd states, "Contrary to the government's principal argument, Chadd does not argue that there is a mandatory directive prescribing a specific course of conduct." Instead, "[r]easonable care, not a 'mandatory directive,' required [Park officials] to shoot the goat." But whether reasonable care required such action goes to the merits of Chadd's negligence claim, not to the question of whether Park officials had discretion in deciding how to manage the problematic goat. Chadd might very well be correct that Park officials abused their discretion in a tortious manner, but, at step one of the discretionary-function-exception analysis, all that matters is that there was, in fact, discretion. *See Gaubert*, 499 U.S. at 322.

B

1

Chadd focuses her arguments almost exclusively on the second step of the discretionary function analysis. She begins by arguing that because the government is liable for a "garden-variety tort, not a high-level policy decision," applying the discretionary tort exception would "contradict[ ] the sovereign-immunity waiver at the heart of the FTCA." *Gaubert*,

however, forecloses that argument. In *Gaubert*, the Supreme Court made clear that the exception "is not confined to the policy or planning level" and extends to "the actions of Government agents." 499 U.S. at 325, 323. It does not matter, then, if the decision at issue was made by low-level government officials, rather than by high-level policymakers. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig*, 467 U.S. at 813; *see also Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (stating that "the applicability of the exception does not depend on whether the relevant decision was made by an individual at the 'operational' or 'planning' level").

2

Chadd also contends that Park officials "had only one choice: comply with their own policies requiring them to prioritize human life and kill the goat." As discussed above, Chadd's reply brief disclaims the argument that "there is a mandatory directive prescribing a specific course of conduct." Instead, her argument that Park officials had "only one choice" seems to be an echo of her claim that "[r]easonable care, not a 'mandatory directive,' required [Park officials] to shoot the goat." But whether there was only one reasonable course of action is not the relevant question for determining subject matter jurisdiction under § 2680(a). Rather, the question is whether the course of action chosen was "*susceptible* to a

policy analysis," *Miller*, 163 F.3d at 593 (emphasis added), even if the action constituted an abuse of policy discretion, *see Bailey*, 623 F.3d at 861 (noting that "the discretionary function exception provides immunity even to abuses of discretion"). With regard to the discretionary function exception, our analysis of subject matter jurisdiction is distinct from our analysis of the merits. Chadd's argument conflates these separate inquiries and must be rejected.

3

Chadd's principal argument relies on our decision in *Whisnant*, where we construed past precedent as holding that "the design of a course of governmental action is shielded by the discretionary function exception, whereas the implementation of that course of action is not." 400 F.3d at 1181 (emphasis omitted). This distinction between policy design and implementation is only relevant at the second step of the discretionary function analysis.

In *Whisnant*, the plaintiff delivered seafood products to a military commissary, causing him to come into contact with "toxic mold the government negligently allowed to colonize the commissary's meat department over a period of three years." *Id.* at 1179. This Court held that, although "[n]o statute, policy, or regulation prescribed the specific manner in which the commissary was to be inspected or a specific course of conduct for addressing mold," the decision to remove the mold was not one protected by the

discretionary function exception. *Id.* at 1181, 1183. As *Whisnant* stated, "Cleaning up mold involves professional and scientific judgment, not decisions of social, economic, or political policy." *Id.* at 1183. "Because removing an obvious health hazard is a matter of safety and not policy, the government's alleged failure to control the accumulation of toxic mold . . . cannot be protected under the discretionary function exception." *Id.*

Chadd believes the same is true of her case. In her view, Olympic's "failure to escalate up the levels of [the Nuisance and Hazardous Management Animal Plan]" was a failure to implement a safety measure, just as the failure to remove mold was in *Whisnant.* She points to the repeated acknowledgments by Park officials that the goat was dangerous and aggressive; the fact that the hazing techniques used by officials were known to have only a "temporary" effect; Gustin's statement that the usual practice is to "ramp up" management techniques when one is not working; and the history of incidents surrounding mountain goats in Olympic. Chadd believes the goat was an "obvious health hazard" that was "a matter of safety and not policy." *Whisnant*, 400 F.3d at 1183.

Although *Whisnant* drew the distinction between policy design and implementation, it also made clear that the "implementation of a government policy *is* shielded where the *implementation itself* implicates policy concerns, such as where government officials must consider competing fire-fighter safety and public safety considerations in deciding how to fight a

forest fire." *Id.* at 1182 n.3 (second emphasis added). Thus, this Court has subsequently stated that "so long as a decision involves *even two competing* [*policy*] *interests*, it is 'susceptible' to policy analysis and is thus protected by the discretionary function exception." *Bailey*, 623 F.3d at 863 (emphasis added). What distinguished the mold situation in *Whisnant* is that there was *no* legitimate reason for the commissary not to eliminate the toxic mold.[5] But, at step two of the discretionary-function-exception analysis, where there is even *one* policy reason why officials may decide not to take a particular course of action to address a safety concern, the exception applies. *Id.*; *see also Soldano v. United States*, 453 F.3d 1140, 1150 (9th Cir. 2006) (holding that the discretionary function exception did not apply because there was "no reason" justifying the government's failure to implement a safety measure); *Alfrey v. United States*, 276 F.3d 557, 565 (9th Cir. 2002) (citing only two competing policy considerations in holding that the discretionary function exception applied); *Miller*, 163 F.3d at 595-96 (describing the competing policy considerations involved in deciding how to address multiple forest fires).

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[5] The commissary cited budgetary concerns, but this Court has repeatedly held that budgetary considerations, standing alone, cannot form the basis for the application of the discretionary function exception. *Whisnant*, 400 F.3d at 1183-84; *ARA Leisure Servs. v. United States*, 831 F.2d 193, 195-96 (9th Cir. 1987).

As the district court noted, park officials evaluated multiple policy considerations in deciding how to manage the problematic goat. Although the goat, as an exotic species, was not entitled to the same level of protection or consideration as native species at Olympic, the public desired to see the goats. Both Dr. Happe and Olympic Deputy Superintendent Todd Suess submitted declarations stating, "The mountain goat is an appealing, iconic animal within Olympic . . . and is an attraction to park visitors. In the past, the park has encountered significant opposition to possible plans to remove some of the goats." In light of the public's interest in preserving Olympic's goats, Park officials implemented several non-lethal management options, such as hazing, and explored the possibility of relocating the goat.

Chadd counters that preservation of the goats is contrary to their status as an exotic species and violates the Service's policy of prioritizing human safety over all other considerations. But from the premise that the goats are not entitled to special protection as a matter of policy, it does not follow that Park officials ought to exterminate them. Native species in the Park have a default level of protection that mountain goats do not enjoy, but Chadd has pointed to nothing that forbids Park officials from protecting the goats to facilitate the public's enjoyment of the species.[6] There is no contradiction between

[6] The officials' interest in facilitating the public's enjoyment of the Park's wildlife also distinguishes this case from the

(Continued on following page)

the goat's status as an exotic species and Olympic's desire to implement safety measures short of destruction.

As for the policy of prioritizing human safety, it is clear that the means by which local officials ensure human safety "is left to the discretion of superintendents and other decision-makers at the park level." *See supra* Part III.A. Such discretion includes decisions about animal destruction. Moreover, the Service's policy manual lists several competing objectives that Park officials had to consider in assessing the goat situation, including "park resources and values."

Thus, in addition to the policy issues mentioned by Park officials, the Service's guidelines cite many competing considerations that Olympic should have taken into account when deciding how to deal with the problematic goat. Whether Park officials actually took into consideration the policy objectives listed in the Service's guidelines is irrelevant because the challenged decision "need not be *actually* grounded in policy considerations, but must be, by its nature, *susceptible* to a policy analysis." *Miller*, 163 F.3d at 593 (emphases added). Indeed, "if a regulation allows the [governmental] employee discretion," as it did

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"routine tort case" the dissent claims is analogous to this one – that of a homeowner and his dangerous dog. Whereas the homeowner can claim no legitimate interest in the public's enjoyment of his dangerous pet, Park officials engaged in wildlife management must consider the public's interest in enjoying the wildlife at the Park in its natural state.

here, there is "a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Gaubert*, 499 U.S. at 324. Park officials need only point to "some support in the record that the decisions taken [were] 'susceptible' to policy analysis for the discretionary function exception to apply," and that standard is more than met here. *Terbush*, 516 F.3d at 1134. The holding of *Whisnant* is thus inapplicable, as the implementation of the safety regulation was itself subject to competing policy concerns. *Bailey*, 623 F.3d at 863. Because the decision to use non-lethal methods to manage the goat was susceptible to policy analysis, the discretionary function exception applies.

IV

The district court's order dismissing this case for lack of subject matter jurisdiction is **AFFIRMED**.

BERZON, Circuit Judge, concurring:

I concur in Judge O'Scannlain's opinion, which I believe correctly applies our precedents regarding the discretionary function exception to the troubling facts of this case. I agree with Judge Kleinfeld, however, that our jurisprudence in this area has gone off the rails. In particular, in my view, *Miller v. United States* was wrong when it concluded that the decision at issue "need not be actually grounded in policy

considerations" but need only be, "by its nature, susceptible to a policy analysis." 163 F.3d 591, 593 (9th Cir. 1998); *see also GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174, 1178 (9th Cir. 2002).

Miller purported to derive that rule from *United States v. Gaubert*, 499 U.S. 315 (1991). But that is not what *Gaubert* says – it says the opposite, that "the exception protects *only* governmental actions and decisions *based on* considerations of public policy." *Id.* at 323 (emphasis added, internal quotation marks omitted).

Gaubert then went on to indicate that *susceptibility* to a policy analysis, which *Miller* elevated to the ultimate question, was *relevant* insofar as it established a strong *presumption* "that the agent's acts are [*in fact*] grounded in policy." *Id.* at 324. But nothing in *Gaubert* suggests that the presumption is not rebuttable, or switches the foundational question from whether the decision *was* "based on considerations of public policy" to whether it hypothetically could have been.

Were I considering the issue in the first instance, I would hold that the *Gaubert* presumption can be rebutted with a clear showing that a decision was not *actually* based on policy considerations, even if the decision was *susceptible* to a hypothetical policy analysis. In other words, in my view the proper rule is this: In *every* case, the relevant decision *does* need to be "actually grounded in policy considerations," but, as a practical and evidentiary matter, the fact that a decision is "susceptible to a policy analysis"

creates a strong presumption that it was actually made for policy reasons, rebuttable only by persuasive evidence to the contrary. *See Miller*, 163 F.3d at 593.

Miller is the law of our circuit, however, and contrary to Judge Kleinfeld's wishful thinking, has not been limited or undermined. *See GATX/Airlog Co.*, 286 F.3d at 1174, 1178. While I believe *Miller* should be reconsidered, we are bound to apply it. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). I therefore, with some reluctance, concur.

KLEINFELD, Senior Circuit Judge, dissenting:

I respectfully dissent.

A Supreme Court concurrence commented that the courts have had "difficulty in applying" the rule for deciding which government actions fall within the discretionary function exception.[1] Indeed. In this case, we have allowed the discretionary function exception to swallow the statutory rule that the federal government waives its sovereign immunity for torts for which an ordinary person would be liable. Under the Court's opinions in *United States v. Gaubert*[2] and *Berkovitz v. United States*,[3] the negligence in this case

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[1] *United States v. Gaubert*, 499 U.S. 315, 335 (1991) (Scalia, J., concurring in part and concurring in the judgment).

[2] 499 U.S. 315 (1991).

[3] 486 U.S. 531 (1988).

falls outside the discretionary function exception. The majority mistakenly expands the exception and contracts the rule, and thereby creates tension with our recent decision in *Young v. United States*[4] as well as *Whisnant v. United States*[5] and *Bear Medicine v. United States.*[6]

The Federal Tort Claims Act says that the government "shall be liable . . . [for torts] in the same manner and to the same extent as a private individual under like circumstances."[7] This broad waiver is subject to an exception for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused."[8] The language appears clear, but the application is not.

The fundamental problem the courts have had applying the exception is that all but strict liability torts involve the exercise of discretion. How much slower than the speed limit should I drive in rain and fog?[9] Should I trim this tree because a limb overhangs the sidewalk and could conceivably fall on

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[4] 769 F.3d 1047 (9th Cir. 2014).

[5] 400 F.3d 1177 (9th Cir. 2005).

[6] 241 F.3d 1208 (9th Cir. 2001).

[7] 28 U.S.C. § 2674.

[8] *Id.* § 2680(a).

[9] *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 16 cmt. e (2010) [hereinafter Restatement (Third) of Torts].

a pedestrian in a windstorm?[10] Or shall I leave it alone because of the aesthetic pleasure it gives to me and passersby? Must I have my dog put down because it may bite the child next door if he trespasses, or can I continue to enjoy my dog?[11] Shall I (a physician) get an expensive CT scan for this patient to rule out a highly unlikely diagnosis?[12] Shall we quit manufacturing our cheap ladders and triple the price to make ladders that do not collapse or tip even when people use them improperly?[13] Replace all the seats in our 747's with new, more fire-resistant seats? Shall we recall all our chain saws, or all our cars, because of very slight risks?

If those were the kinds of discretionary decisions the statutory exception meant to cover, then the statutory "private individual" rule would be nearly nullified, applying only to negligence per se, where a statute or regulation left no discretion in the matter. The Supreme Court has grappled with this verbal difficulty and narrowed the discretionary function exception to the kind of policy discretion that only the government exercises. Even this limitation is hard to apply, because the homeowner deciding whether to

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[10] *See id.* § 7 cmt. b, illus. 1.

[11] *See id.* § 23 cmt. i; Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 51 cmt. l (2012).

[12] *See* Restatement (Third) of Torts, *supra* note 9, § 26 cmt. n.

[13] *See* Restatement (Third) of Torts: Products Liability § 2 cmt. d, cmt. p, illus. 20 (1998).

cut the tree limbs herself balances the public interest in a pretty walk down the street against the public interest in avoidance of the risk from a falling branch. So policy choices, for the exception to be cabined at all, have to be limited to peculiarly governmental ones. This is difficult too, because the private interests that private individuals have often coincide with public interests, as in lower prices or greater aesthetic appeal, and government undertakes many tasks generally or previously performed privately.

The holding of the majority opinion appears to be that if no law or regulation mandates or prohibits the government's action or inaction, and even one "policy" reason can be adduced before or after to justify the government's action or inaction, then the exception applies. This limits the waiver of sovereign immunity to negligence per se and conduct that in no way can be rationalized after the fact. The majority fails to draw the distinction that the Supreme Court has struggled to formulate, between a "policy" reason and a mere after-the-fact rationalization or personal preference of a government employee or official.

There never was a park policy to leave dangerous animals alone because "the public desired to see the goats," the policy reason upon which the majority relies. This was a park, not a zoo with caged animals, and the express formal park policy was to protect the public from dangerous animals. Only after the goat killed Mr. Boardman did the Park come up with the rationalization for their inaction that "the public desired to see the goats." The park staffs shot and

killed the goat immediately after it killed Mr. Boardman. The discretionary function exception should be construed as limited to decisions where a government policy decision guided the exercise of discretion, and not expanded to situations where it did not, even when a policy judgment can subsequently be imagined and articulated. We rejected such an after-the-fact rationalization in *Bear Medicine v. United States:* "our inquiry into the nature of a decision is not meant to open the door to ex post rationalizations by the Government in an attempt to invoke the discretionary function shield."[14]

Letting an identified aggressive 370-pound goat threaten park visitors and rangers for years until it killed one amounted to a failure to implement the formally established park policy for managing dangerous animals. Written park policy provided a series of steps for dealing with animals dangerous to park visitors, from frightening the animal away to removing or killing it. The Park had used the earlier steps, including repeatedly shooting the goat with nonlethal loads such as beanbags, but they did not work. Yet the superintendent left the animal free to terrorize tourists for another summer season instead of following the next step of the written policy, removing or killing it. This was "ordinary garden-variety negligence,"[15] like keeping a dog that has already bitten a

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[14] 241 F.3d 1208, 1216 (9th Cir. 2001).

[15] *ARA Leisure Servs. v. United States*, 831 F.2d 193, 196 (9th Cir. 1987) (internal quotation marks omitted).

child, and subsequently bites another. Official park policy for Olympic National Park put protection of human life ahead of protection of animal life, and did not protect nonindigenous animals such as this goat. Failure to implement this policy was not another policy, just ordinary negligence.

FACTS

Like a lot of national park visitors, the Boardmans and their friend were aging tourists. Mr. Boardman, 63, was killed by a horned animal bigger than an NFL lineman, that had been the terror of the Park for four years. The 370-pound goat spotted them as they enjoyed a picnic, and approached, pawing the ground, and menacing them. It was too close to throw rocks at it, so Mr. Boardman tried to hold it off with his walking stick as they retreated. They walked away from it for about a mile, with Mr. Boardman in the rear protecting the ladies with his stick, but the goat would not go away. Then the goat attacked Mr. Boardman, gored him, and stood over him, keeping assistance away, as he bled to death. Too late for Mr. Boardman, park rangers finally carried out park policy for dangerous animals. A couple of hours after it had killed Mr. Boardman, park rangers easily found the goat about a half mile away, his horns stained with Mr. Boardman's blood, and shot it dead.

This was no random, unpredictable, animal attack. Park personnel knew this particular goat and

had been dealing with its unusual, aggressive behavior toward them and toward park visitors for four years. The park personnel had even named it, "Klahhane Billy," whom they well knew to be the terror of the heavily used Switchback Trail on Klahhane Ridge. A written report in 2006, four years before the goat killed Mr. Boardman, said that a goat aggressively followed hikers and retreated only after being beaten with a walking stick. The Park received four more reports of an aggressive goat the next year, 2007. These were not just reports from visitors of perhaps timorous temperaments. One was from a park ranger, who said that the goat blocked the trail, chased her for two miles, and tried to charge her.

Recognizing the danger, rangers began monitoring the goats and placed warning signs at trail heads. Three years before the goat killed Mr. Boardman, 2007, eleven goats were captured and collared with GPS units. That is when Klahhane Billy was identified as the "only . . . collared animal in this area that was recorded to have aggressive behavior." Two years before it killed Mr. Boardman, in 2008, when the park officials knew which goat was the problem, a hiker reported that the goat chased him at a "jogging pace." Since the park officials knew that Klahhane Billy threatened people and did not fear them, park personnel began using what they called "aversive conditioning techniques." That meant yelling and throwing rocks at Klahhane Billy to teach it to fear and avoid people. The "aversive conditioning" did not work.

Hikers continued to report aggressive goat incidents as the 2008 season drew to a close.

By the next summer, 2009, park personnel knew that Klahhane Billy was dangerous and that the "aversive conditioning techniques" had failed. The Park Superintendent, Karen Gustin, had been so advised. The Park's Wildlife Branch Chief and biologist, Dr. Patti Happe, sent her an email in June of 2009, a year before it killed Mr. Boardman, warning that Klahhane Billy was getting worse. She was getting reports of risk of injury even from her predecessor, and "it may be only an [sic] matter of time until someone is hurt":

> As you know, this goat has been a problem for several years now . . . and is behaving in an increasing[ly] aggressive manner. This year I am getting reports of people feeling that the[y] are at risk of injury (including my predecessor in this job who has a lot of experience working with goats).
>
> He is definitely negatively impacting the Park visitors ability to experience and enjoy the area trails, and *it may be only an* [*sic*] *matter of time until someone is hurt.* (Emphasis added).

Two days after the email, Gustin directed more aversive conditioning, and rangers began patrolling with paintball and bean-bag guns to shoot the goat.

During the 2009 season, the escalated aversive conditioning continued to fail. The next month, July

2009, Billy charged a family twice. Fortunately, the father was able to protect his wife and children by throwing rocks at it. Park rangers then shot the goat with paintballs and bean bags, but even having been shot with these weapons (which tourists visiting national parks would not have), Billy returned to the trail within fifteen minutes. Nor did the impacts from these weapons persuade the goat to avoid people. In October 2009, Billy chased another park visitor down the trail.

The next season, the summer of 2010, reports got worse. Klahhane Billy butted a hiker with its head but fortunately did not gore him. On July 5, 2010, another park ranger, Sanny Lustig, sent an email to park employees referencing multiple aggressive attacks by this identified animal. She wrote "his MO is to follow people to the trailhead, rear up and come in close proximity brandishing his hooves, and the latest was an actual report of a head butt. He's big, he's not wary, he pesters, he looks mean and as if he'll get aggressive."

In response to this escalating aggression, Dr. Patti Happe, the chief biologist, wrote "[i]f he has indeed made contact with someone via head-butting, it may be time to talk about taking the next step before someone gets hurt." The next steps under written policy, the Park's Nuisance and Hazardous Animal Management Plan, would have been capture and release, capture and translocation, and destruction of the animal. Two days later, another biologist reported that the goat chased her. She said "I am

skeptical that a bit of adverse conditioning will do much for him. He sees hundreds of harmless people every day. . . . I was shocked by how determined he was. I caught him 4 times with rocks to no effect. He could be really scary to many people."

In late July 2010, two and a half months before the goat killed Mr. Boardman, the Park, recognizing the failure of its "aversive conditioning techniques," finally decided to consider other management options including relocating the goat. Dr. Happe wrote an email to a biologist with Washington Department of Fish and Wildlife on July 30, 2010:

> As I mentioned on the phone, we have a mature billy on the [sic] at the hurricane ridge area of Olympic National Park that has become very habituated and not responding to our efforts to have him keep at a greater distance from people. Recently, he has been becoming increasingly aggressive and park management would like to explore other management options for him, including relocation from the area.

According to Dr. Happe's subsequent email to Superintendent Gustin and other park employees, the state's biologist "was very willing to help, is thinking about alternatives ranging from relocation . . . or to captivity, and will help with the capture." Gustin replied, "[t]his sounds like good news." But despite having explored the relocation option successfully, the Park Superintendent did not do it.

The record does not show that the Park did anything about the goat at all in the next two and a half months. Nor does the record show any decision or decision-making process by the Park Superintendent, Karen Gustin, about whether to accept the state's offer to have the goat relocated to state land or have the goat killed. In October, at the end of the summer season, nothing having been done to protect park visitors, Klahhane Billy killed Mr. Boardman.

ANALYSIS

The Federal Tort Claims Act makes the United States liable for tort claims to the same extent "as a private individual under like circumstances."[16] The Act intended to compensate those harmed by government negligence. We have held that "it should be construed liberally, and its exceptions should be read narrowly."[17] The exceptions are voluminous, for intentional torts such as assault, battery, malicious prosecution, libel, slander, deceit, and the like, as well as for various government functions such as tax collection and delivery of the mail,[18] and damages are limited to compensatory damages without interest.[19] The torts

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[16] 28 U.S.C. § 2674.

[17] *Terbush v. United States*, 516 F.3d 1125, 1135 (9th Cir. 2008) (internal quotation marks omitted).

[18] 28 U.S.C. § 2680.

[19] *Id.* § 2674.

for which sovereign immunity is waived are mainly traditional common-law negligence.

The exception at issue in this case, the "discretionary function" exception, excludes from this broad waiver of immunity "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[20] This limited exception protects only "political, social, and economic judgments that are the unique province of the Government."[21] It therefore does not shield government negligence from liability merely on the grounds that the action or inaction involved, as almost all negligence does, some element of discretion.

In determining whether this exception applies, "the question of *whether* the government was negligent is irrelevant."[22] The question of *how* the government was negligent remains "critical."[23] "[D]etermining the precise action the government took or failed to take (that is, how it is alleged to have been negligent) is a necessary predicate" to determining the applicability

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[20] *Id.* § 2680(a).

[21] *Bear Medicine v. United States*, 241 F.3d 1208, 1214 (9th Cir. 2001) (internal quotation marks omitted).

[22] *Whisnant v. United States*, 400 F.3d 1177, 1185 (9th Cir. 2005).

[23] *Young v. United States*, 769 F.3d 1047, 1054 (9th Cir. 2014).

of the discretionary function exception.[24] The majority mistakenly characterizes Chadd's allegation of wrongdoing as challenging only the Park's failure to kill the goat, omitting the available removal option. Chadd challenges "[f]ailing to remove or destroy" the goat, analogizing Superintendent Gustin's non-decision and inaction to that of a landowner who knows of and fails to exercise reasonable care to protect invitees from an unreasonable risk of harm that the landowner cannot reasonably expect them to discover and protect themselves against. The argument is that she knew aversive conditioning (yelling and throwing rocks at the goat and even shooting it with nonlethal weapons) had failed and the goat was getting more aggressive, yet did nothing more to protect park visitors from it.

Chadd concedes that there was no mandatory directive prescribing a specific course of conduct at a certain time. This is not a negligence-per-se case. In negligence per se, "[a]n actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect."[25] The kind of negligence alleged in *Berkovitz v. United States*, where a federal agency issued a license to a polio vaccines manufacturer without first receiving

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[24] *Id.*

[25] Restatement (Third) of Torts, *supra* note 9, § 14.

the product safety information required by the regulation, was of that sort; the violation of law amounted to negligence.[26] Compliance with statutes and rules, though, does not preclude a finding that the actor is negligent. "An actor's compliance with a pertinent statute, while evidence of nonnegligence, does not preclude a finding that the actor is negligent . . . for failing to adopt precautions in addition to those mandated by the statute."[27] If the speed limit is 55, but in the darkness, ice and snow prevailing at the time, a reasonable and prudent driver would go no faster than 35 or 40, then a speed of 50, though well within the speed limit, may be negligent. Likewise, the federal government is not shielded from liability because Superintendent Gustin did not violate a specific statutory or regulatory command. Plaintiff's case is indeed, as appellants argue, a garden-variety negligence of a land possessor case, controlled by the tort law of Washington.[28] The exceptions to the Federal Tort Claims Act do not purport to limit the government waiver of sovereign immunity to negligence-per-se cases.

The simplistic view that if no regulation prohibited or required different conduct, then the government actor had discretion, and if the government actor had discretion, then the discretionary function

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[26] 486 U.S. 531, 542-43 (1988).

[27] Restatement (Third) of Torts, *supra* note 9, § 16(a).

[28] *See Iwai v. State*, 915 P.2d 1089, 1093 (Wash. 1996).

exception shields the government, is bad law, rejected by the Supreme Court. The Park's management of the goat "involve[d] an element of judgement or choice."[29] That is indeed the first step of analysis for the discretionary function exception under *Berkovitz v. United States*. But just as the 55 speed limit does not immunize someone driving at 50 on ice, an element of discretion allowed to the government actor is only necessary and not sufficient to invoke the discretionary function exception.

The controlling question is whether the particular exercise of discretion was "of the kind that the discretionary function exception was designed to shield."[30] Many attempts, none entirely successful, have been made to provide a general statement of what sorts of exercises of discretion are of this kind. They are best sorted out and applied in light of the purposes of the waiver of sovereign immunity and the exception. The waiver is intended to make the government responsible for garden-variety torts such as mail truck collisions occasioned by their drivers' negligence. As the Supreme Court held in *Indian Towing Co. v. United States*, "[t]he broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable

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[29] *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

[30] *Id.*

and not to leave just treatment to the caprice and legislative burden of individual private laws."[31] The exception is intended to enable government to make and act upon policy determinations without court interference with the social judgments made by the political branches. As the Court held in *United States v. Varig Airlines*, "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[32]

To understand what constitutes the exercises of discretion "of the kind that the discretionary function exception was designed to shield,"[33] it is necessary to look at the cases that the exception applied.[34] The Supreme Court in *Dalehite v. United States* held that the discretionary function exception applied to the government's operation of a program for supplying fertilizer to countries at risk of famine after World War II, when the fertilizer exploded, killed many people, and leveled a town.[35] The *Dalehite* rule is that the discretionary function exception applies to "more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or

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[31] 350 U.S. 61, 68-69, (1955).

[32] 467 U.S. 797, 814 (1984).

[33] *Berkovitz*, 486 U.S. at 536.

[34] *See Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 946 (9th Cir. 1998).

[35] 346 U.S. 15, 42 (1953).

schedules of operations."[36] Superintendent Gustin's failure to do anything about the goat when nonlethal aversive conditioning had failed falls into none of these immunized categories.

The Court in *Indian Towing Co. v. United States* limited *Dalehite*. A tugboat had run aground because the Coast Guard failed for three weeks (not years, as in our case) to discover and repair a bad connection for the light in a lighthouse.[37] The Court held that despite operation of the lighthouse being uniquely governmental, once the government made a policy decision to operate a light at the location, it "was obligated to use due care" in operating and maintaining it.[38] Likewise, the government did not have to establish Olympic National Park, but once it made the policy decision to do so, it was obligated to exercise due care for the safety of the tourists it invited in.

The Supreme Court decisions applying the exception since *Indian Towing* have all involved high policy and complex regulatory regimes, not garden-variety torts committed in the course of day-to-day operations. All involved supervision by government of the conduct of private individuals, which this case does not. The park regulation prohibiting visitors from

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[36] *Id.* at 35-36.

[37] *Indian Towing Co. v. United States*, 350 U.S. 61, 62 (1955).

[38] *Id.* at 69.

carrying guns to protect themselves from dangerous animals is a policy decision regulating the conduct of private individuals,[39] but this case did not involve park policy regulating visitors such as Mr. Boardman, just park execution of its own programs. *United States v. Varig Airlines* shielded Federal Aviation Administration's "type certification" allowing Boeing to use its proposed design for its 707 passenger jet,[40] which we relied on in *GATX/Airlog Co. v. United States*, another type certification case.[41] The Court held that the discretionary function exception shields discretionary acts "of the Government acting in its role as a regulator of the conduct of private individuals."[42] Superintendent Gustin failing to deal with the Klahhane Billy's aggressiveness might be characterized as a regulator of a goat, but not as "a regulator of the conduct of private individuals." The reason for the "regulator" rule is that Congress, by means of the discretionary function exception, "wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[43]

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[39] *Cf.* 36 C.F.R. § 2.4.

[40] 467 U.S. 797, 815-16 (1984).

[41] 286 F.3d 1168, 1175, 1178 (9th Cir. 2002).

[42] *Varig Airlines*, 467 U.S. at 813-14.

[43] *Id.* at 814.

Likewise in *Berkovitz v. United States*, the government conduct involved was regulatory, licensing of polio vaccine.[44] The Court held that the exception shielded formulation of policy as to how to regulate release of vaccine, and policy judgments of officials exercising discretion in the application of these policies, but not negligent acts of officials carrying out those policy judgments rather than making them.[45] The Court's most recent explanation of the discretionary function exception, in *United States v. Gaubert*, like *Varig Airlines*, shields government discretion in how it regulates private firms and individuals.[46] The challenge was to how the Federal Home Loan Bank Board exercised its discretion in regulating the reorganization of a failed savings bank. The Court rejected the view that the government's liability turns on whether the individual making the decision was of a high enough status so that her official responsibilities included an assessment of social, economic, or political policy. "[I]t is the nature of the conduct, rather than the status of the actor that governs whether the exception applies."[47] And *Gaubert* rejected, as *Berkovitz* had, the proposition that if the action involved an element of judgment or discretion, it was shielded. For the exception to apply, the particular exercise of discretion must be "of the kind that the discretionary function exception

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[44] 486 U.S. 531, 533 (1988).

[45] *Id.* at 546-48.

[46] *United States v. Gaubert*, 499 U.S. 315 (1991).

[47] *Id.* at 322 (internal quotation marks omitted).

was designed to shield. . . . [W]hen properly construed, the exception protects only governmental actions and decisions based on considerations of public policy."[48] Though "[w]hen established governmental policy . . . allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion," the exception does not apply where "the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."[49] No regulatory regime was involved in our case, just the day-to-day business of protecting park visitors from unsafe conditions, like the land condition we deemed not to be immunized in *Young v. United States.*[50]

The majority holds that if no statute or regulation mandates a different conduct, the exception applies as long as one "policy" reason can be articulated to justify the government's acts. Relying on a statement in *Miller v. United States* that "[t]he decision need not be actually grounded in policy considerations, but must be, by its nature, susceptible to a policy analysis,"[51] the majority concludes that "[w]hether Park officials actually took into consideration the policy objectives listed in the Service's guidelines is irrelevant." That is, the majority deems it

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[48] *Id.* at 322-23 (internal quotation marks omitted).

[49] *Id.* at 324-25.

[50] *See* 769 F.3d 1047, 1059 (9th Cir. 2014).

[51] 163 F.3d 591, 593 (9th Cir. 1998).

"irrelevant" that Superintendent Gustin did not in fact decide against relocating or shooting the goat because park visitors liked to see the goats, or decide on a park policy to preserve all goats for this reason. The majority "misconstrues *Miller* in . . . fundamental ways."[52]

We clarified in *Bear Medicine v. United States* that the quoted language in *Miller* "was used illustratively to draw a distinction between protected discretionary activities (*e.g.*, selecting the method of supervising savings and loan associations) and unprotected discretionary activities (*e.g.*, driving a car), *not to widen the scope of the discretionary rule.*"[53] The language was merely "a paraphrase of a section of the Supreme Court's opinion in *United States v. Gaubert.*"[54] *Gaubert* did not hold that any decision, so long as it is made by a high-ranking official with policymaking responsibilities, is protected if a single "policy" reason can be adduced before or after to justify the decision. Quite the opposite. It held that "it is the nature of the conduct, rather than the status of the actor that governs whether the exception applies."[55] The majority's approach amounts to adopting the rule that Justice Scalia suggested in his

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[52] *Bear Medicine v. United States*, 241 F.3d 1208, 1216 (9th Cir. 2001).

[53] *Id.* (emphasis added).

[54] *Id.*

[55] *Gaubert*, 499 U.S. at 322 (internal quotation marks omitted).

concurring opinion of *Gaubert*, that the exception shields any choice "that ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations."[56] That is not the law articulated by the majority in *Gaubert*, nor was dealing with this goat exercise of regulatory authority, as *Gaubert* was.

To the extent we narrow the waiver of sovereign immunity, as we do in this case, we undermine the congressional decision that "[t]he United States shall be liable . . . [for torts] in the same manner and to the same extent as a private individual under like circumstances."[57] The existence of discretion is of little value for distinguishing private individuals' negligence liability from governmental liability. The basic principle of negligence is that one "acts negligently if the person does not exercise reasonable care under all the circumstances," considering such factors as the foreseeable likelihood of harm, the foreseeable severity of harm that may ensue, and the burden of precautions to eliminate or reduce the risk.[58] The exercise of discretion is the essence of most negligence. The Federal Tort Claims Act extends to the government liability for negligent exercise of discretion, except for the "political, social, and economic judgments that are

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[56] *Id.* at 335 (Scalia, J., concurring in part and concurring in the judgment).

[57] 28 U.S.C. § 2674.

[58] Restatement (Third) of Torts, *supra* note 9, § 3.

the unique province of the Government,"[59] generally involving government regulation of private conduct. Congress chose to abolish the federal government's sovereign immunity for garden-variety negligence, which necessarily includes such conduct involving the exercise of discretion.

We have developed two principles relevant to the determination whether a challenged government decision was policy-based or susceptible to policy analysis. First, "we have generally held that the *design* of a course of governmental action is shielded by the discretionary function exception, whereas the *implementation* of that course of action is not."[60] The exception does not shield a failure to implement a safety policy even when the policy does not mandate a specific action at a certain time.[61] This follows *Indian Towing Co. v. United States*, where once the Coast Guard decided to establish a lighthouse, failing to keep it in good working order is not immunized.[62] Second, we may protect a failure to implement a policy if the implementation "itself implicates policy concerns."[63] To apply this complex test, we ask whether

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[59] *Bear Medicine*, 241 F.3d at 1214 (internal quotation marks omitted).

[60] *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005).

[61] *ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir. 1987).

[62] 350 U.S. 61, 69 (1955).

[63] *Terbush v. United States*, 516 F.3d 1125, 1133 (9th Cir. 2008) (quoting *Whisnant*, 400 F.3d at 1182 n.3).

the implementation of an established policy requires objective determinations based on professional and scientific judgment or a weighing of competing public policy considerations.[64]

In this case, no decision was made based on competing public policy considerations to let the goat continue terrorizing the tourists. After the goat killed Mr. Boardman, Dr. Happe, the Park's chief biologist, wrote a declaration for this lawsuit saying that the goats in the Park were "iconic" and that visitors liked seeing them. But neither she nor any other park personnel submitted any evidence that they had decided, before the goat killed Mr. Boardman, to let the goat stay in the Park for this or any other reason.

We held that the implementation of safety measures itself implicated public policy concerns where the Forest Service in *Miller v. United States* balanced competing firefighter safety and public safety interests in deciding how to fight multiple forest fires,[65] and where the Army Corp of Engineers in *Bailey v. United States* balanced its workers' safety and the public safety interests in deciding when to replace the warning signs in a flooded river.[66] In these cases, protecting the general public would have entailed considerable risk to the lives of the federal

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[64] *Soldano v. United States*, 453 F.3d 1140, 1148 (9th Cir. 2006); *Whisnant*, 400 F.3d at 1181.

[65] 163 F.3d 591, 595-96 (9th Cir. 1998).

[66] 623 F.3d 855, 861-62 (9th Cir. 2010).

workers. And in both, a decision was made based upon deliberation about these considerations. They were not after-the-fact justifications for litigation purposes, like the "policy" claim made in this case.

In *Whisnant v. United States*, we held that the government's failure to inspect a grocery store on a naval base periodically and clean up mold was not protected.[67] Whisnant, an employee of government contractor, claimed that he became ill as a result of regular exposure to the toxic mold in the store's meat department.[68] We held that "the government's duty to maintain its grocery store as a safe and healthy environment for employees and customers is not a policy choice of the type the discretionary function exception shields. Cleaning up mold involves professional and scientific judgment, not decisions of social, economic, or political policy."[69]

In *ARA Leisure Services v. United States*, while the Park Service's decision to design the Denali Park Road without guardrails was protected because the Park had a policy that roads should "lie lightly upon the land," the Park's failure to maintain the road in a safe condition was not protected.[70] The road at Thoroughfare Pass in Denali National Park had eroded from an original width of twenty-eight feet to a width

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[67] 400 F.3d 1177, 1183 (9th Cir. 2005).

[68] *Id.* at 1179.

[69] *Id.* at 1183.

[70] 831 F.2d 193, 195 (9th Cir. 1987).

of 14.6 feet and had edges so soft to cause a tour bus to go off road and kill passengers.[71] In *Bear Medicine v. United States*, a member of a tribe was fatally injured when a tree cut by an employee fell and struck him during a private logging operation that the Bureau of Indian Affairs authorized.[72] The BIA was required to ensure that the logging operation complied with the safety regulations, but few employees were formally trained in basic safety procedures and none had been trained in first aid.[73] The government argued that it had a policy of promoting independence in the operation of the Indian Tribes and that its actions were taken due to limited resources. We held that even if the BIA had discretion in its monitoring of the logging operation, its actions in carrying out its responsibilities (i.e., failure to require safety measures or training) were not protected policy judgments.[74] "[S]afety measures, once undertaken, cannot be shortchanged in the name of policy. Indeed, the crux of our holdings on this issue is that a failure to adhere to accepted professional standards is not susceptible to a policy analysis."[75] Likewise here, failure to implement established park policy was not itself an immunized policy judgment.

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[71] *Id.*

[72] 241 F.3d 1208, 1215 (9th Cir. 2001).

[73] *Id.* at 1212.

[74] *Id.* at 1215.

[75] *Id.* at 1216-17 (internal quotation marks omitted).

Other cases have ruled similarly. In *Oberson v. United States Department of Agriculture*, the discretionary function exception did not protect the Forest Service's failure to post a warning or remedy a hazard on a snowmobile trail, because it did not involve considerations of public policy.[76] In *Soldano v. United States*, the exception barred a claim that the Park Service negligently designed a road without warning signs, but it did not immunize the Park's negligence in setting a speed limit for the road, because the speed limit decision involved "objective safety criteria" in a park road plan.[77] In *Summers v. United States*, the exception did not protect the Park Service's failure to warn visitors of hot coals on a beach where fires were permitted, because (as in the case before us) it "resemble[d] more a departure from the safety considerations established in Service policies" than a public policy-based decision.[78] In *Bolt v. United States*, the Army's failure to remove snow and ice from parking lot was not protected.[79] All these involved the exercise of discretion, as almost all negligence does. But as in this case, the particular exercise of discretion at issue did not require a weighing of public policy considerations.

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[76] 514 F.3d 989, 998 (9th Cir. 2008).

[77] 453 F.3d 1140, 1147 (9th Cir. 2006).

[78] 905 F.2d 1212, 1216 (9th Cir. 1990).

[79] 509 F.3d 1028, 1034 (9th Cir. 2007).

The policies actually enacted for Olympic National Park, before the goat killed Mr. Boardman, prioritized protecting visitors' lives over protecting killer goats, "iconic" or not, aesthetically pleasing to visitors or not. Under the National Park Service Management Policies, "[t]he saving of human life will take precedence over all other management actions as the Park Service strives to protect human life and provide for injury-free visits."[80] This policy could have been otherwise, as in *ARA Leisure Services v. Unites* [sic] *States*, a policy to let the road "lie lightly upon the land," effectively prioritizing aesthetics over human safety.[81] This written, established National Park Service policy prioritizing "human life" and "injury-free visits" "over all other management actions," applicable to this case, is the sort that has been immunized as "the kind that the discretionary function exception was designed to shield."[82] It cannot be reconciled with Superintendent Gustin's prioritizing of an identified single goat, "iconic" or not, over human safety. The National Park Service policy provides that "[t]he means by which public safety concerns are to be addressed is left to the discretion of superintendents and other decision-makers at the park level," but not whether to address them.[83]

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[80] Nat'l Park Serv., Management Policies 2006, § 8.2.5.1.

[81] *See* 831 F.2d 193, 195 (9th Cir. 1987).

[82] *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

[83] Nat'l Park Serv., Management Policies 2006, § 8.2.5.1.

In order to address this policy mandate "to protect human life and provide for injury-free visits," Olympic National Park adopted a "Nuisance and Hazardous Animal Management Plan." Superintendent Gustin described this plan as a "guiding document that directs [employees'] activities." The "Mountain Goat Action Plan" was included in the Animal Management Plan. The goat plan does not say one way or the other whether to kill aggressive and dangerous goats that do not respond to "aggressive hazing." Since the park staffs [sic] killed the goat within a couple of hours of when the goat had killed Mr. Boardman, they obviously did not think the Mountain Goat Action Plan prohibited killing dangerous goats, though it did not say one way or the other. Superintendent Gustin admitted that Klahhane Billy had been managed, and was eventually killed, pursuant to the Nuisance and Hazardous Animal Management Plan.

The Nuisance and Hazardous Animal Management Plan states that individual animals may be controlled or removed only for specific reasons, one of which is to protect human health and safety. It sets forth "a sequence of escalating management intervention and actions" for responding to dangerous animals: (1) public education and training of employees; (2) warnings and advisories; (3) monitoring and observation; (4) exclusion; (5) seasonal, non-emergency closures; (6) emergency closures; (7) aversion training; (8) capture and release; (9) capture and translocation; and (10) animal destruction.

The Park implemented some of the Plan but not all of it. Under step two, rangers verbally warned hikers and placed signs at trail heads. They also monitored the goats under step three. Next, they implemented aversive conditioning techniques under step seven, such as yelling and throwing rocks. They also used paintball and bean-bag guns for aversion training. Nothing worked. All of these techniques failed. The goat just got more aggressive. Yet the Park did not move on to the next steps, relocating or shooting the goat.

Superintendent Gustin testified that "[i]f the problem isn't going away or doesn't seem to be resolved, then we move to the next level or series of levels." Deputy Superintendent Todd Suess testified that when aversive conditioning is not working, park employees are supposed to "ramp it up and go on to the next viable action that can be taken." Dr. Patti Happe said that if aversion training is unsuccessful, her professional opinion is that the animal should be shot or removed. Finally, Richard Olson, a retired park ranger who drafted the Nuisance and Hazardous Animal Management Plan, stated that once aversive conditioning failed, the only logical next step was to shoot or relocate the problem animal. But what everyone agreed should have happened did not happen.

After two years and most of a third tourist season of unsuccessful aversive conditioning, there was nothing left to do, according to park policy, other than shoot or relocate the goat. Indeed, at the beginning

of the fatal season after Klahhane Billy butted (but fortunately did not gore) a hiker, Dr. Patti Happe, the Park's chief biologist, emailed park employees that "it may be time to talk about taking the next step before someone gets hurt." She emailed the state's biologist that the goat "has become very habituated and not responding to our efforts to have him keep at a greater distance from people. Recently, he has been becoming increasingly aggressive and park management would like to explore other management options for him, including relocation from the area." Dr. Happe emailed Superintendent Gustin that the state's biologist "was very willing to help, is thinking about alternatives ranging from relocation . . . or to captivity, and will help with the capture." Gustin replied, "[t]his sounds like good news." There was no policy to the contrary, and no policy decision not to kill or relocate the goat. Nothing was done, despite the expert advice by Superintendent Gustin's chief biologist that something needed to be done and the state's offer to help, for the rest of the season, until the goat killed Mr. Boardman.

The majority notes the broad purpose of the Organic Act to "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[84] We held in

[84] 16 U.S.C. § 1.

Young v. United States that this broad purpose does not eliminate the need for the Park Service under the more specific policy to give precedence to "saving of human life" and provide for "injury-free visits."[85] Following *Terbush v. United States*,[86] we held in *Young* that "it is not sufficient for the government merely to wave the flag of policy as a cover for anything and everything it does that is discretionary."[87] Though we noted that some failures to post warning signs at possible hazards were immunized policy decisions, we held in *Young* that the discretionary decision not to post a warning of a dangerous condition known to park officials but not to tourists who might encounter it was not immunized by the discretionary function exception.[88] Our case is not a failure-to-warn case, and warning tourists without weapons of the aggressive 370-pound goat would not have done them any good anyway, unless they decided to abandon their visit to the Park. What matters is that the Organic Act states a broad purpose not inconsistent with the more specific park policy of prioritizing the safety of human life.

As for goats such as Klahhane Billy, the Park Service had already decided that the Organic Act's goal of "preserving" had no application. The reason

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[85] 769 F.3d 1047, 1056, 1057 (9th Cir. 2014).

[86] 516 F.3d 1125, 1130 (9th Cir. 2008).

[87] 769 F.3d at 1057 (internal quotation marks omitted).

[88] *Id.* at 1057, 1058.

was that these goats were not indigenous to the Park. Mountain goats at Olympic National Park were classified as "exotic" species not entitled to protection. Under the National Park Service Management Policies, "[a]ll exotic plant and animal species that are not maintained to meet an identified park purpose will be managed – up to and including eradication – if (1) control is prudent and feasible, and (2) the exotic species . . . creates a hazard to public safety."[89] This policy, and not the broad purpose of conservation, spoke directly to the hazard posed by Klahhane Billy, yet this goat was not "managed up to and including eradication."

Applicability of the removal or eradication policy was not in doubt. Dr. Happe, the Park's chief biologist, testified that the Park has "taken a position that [goats] are exotic and they don't belong here." In the 1980s, the Park used helicopters to capture and remove over 400 goats, to protect native vegetation and degraded soils. Superintendent Gustin testified that the Park's goal would have been to eradicate all of the goats, but the capture program was terminated because of a change in the Park's rules for using helicopters. The government's catch-all argument about its discretion to conserve government resources, by which it evidently means money and personnel time, is a bit silly, since the failed aversive conditioning took a lot more time and money than the

[89] Nat'l Park Serv., Management Policies 2006, § 4.4.4.2.

couple of hours and cost of a bullet that the government expended to kill the goat after the goat killed Mr. Boardman. It verges on dark humor to suggest that protecting soil and vegetation from goats was worth using a fleet of helicopters, but protecting humans from one particular identified goat would have degraded the Park and cost too much money.

Though the government now argues, in litigation, that the Park weighed the public's desire to see goats against the safety risk from Klahhane Billy, that has no support in the record. The record is filled with reports from concerned visitors who had life-threatening encounters with the goat. They certainly did not want to see it again. In June of 2009, a year before the goat killed Mr. Boardman, Dr. Happe emailed Superintendent Gustin that the goat "is definitely negatively impacting the Park visitors ability to experience and enjoy the area trails." Another park biologist wrote that the goat "could be really scary to many people."

CONCLUSION

There never was a discretionary decision, so far as the record shows, to delay or decline to relocate or remove the goat. All we have is a few after-the-fact declarations submitted in litigation attempting to show why such a decision, had it been made, would have been justified by policy. The express, promulgated, applicable policies directed removal or destruction of the goat. Glorifying this run-of-the-mill negligence as a government policy decision

eviscerates the waiver of sovereign immunity that is the core of the Federal Tort Claims Act. This was not a policy decision like managing a failed bank, preparing fertilizer for shipment to countries ravaged by war, or approving an aircraft design. This was like not getting around to repairing the light in the lighthouse in *Indian Towing Co. v. United States*.[90] This case is analogous to the routine tort case, where a homeowner has a fierce dog that has attacked people and bitten one, but does not get rid of the dog until after it has torn some child's face off.[91] This was "ordinary garden-variety negligence" that the government must compensate,[92] not "decisions of social, economic, or political policy" for which the statute preserves its immunity.[93]

We should reverse.

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[90] *See* 350 U.S. 61, 69 (1955).

[91] *See, e.g.*, *King v. Breen*, 560 So. 2d [sic] 186 (Ala. 1990).

[92] *See ARA Leisure Servs. v. United States*, 831 F.2d 193, 196 (9th Cir. 1987) (internal quotation marks omitted).

[93] *See Whisnant v. United States*, 400 F.3d 1177, 1183 (9th Cir. 2005).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SUSAN H. CHADD, a personal, Representative of the ESTATE of ROBERT M. BOARDMAN, deceased, and for herself,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C11-5894RJB

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Plaintiff's Motion for Reconsideration (Dkt 64) IS DENIED. This case is DISMISSED.

October 17, 2012

WILLIAM M. McCOOL
CLERK

/s/ Dara L. Kaleel
By Dara L. Kaleel,
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SUSAN H. CHADD, as personal Representative of the ESTATE of ROBERT M. BOARDMAN, deceased, and for herself,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. 11-5894 RJB

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION

(Filed Oct. 16, 2012)

This matter comes before the Court on the Plaintiff's Motion for Reconsideration. Dkt. 64. The Court has considered the pleadings filed regarding the motion, and the remaining record.

Plaintiff filed this Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, case against the United States stemming from a fatal mountain goat attack which occurred in Olympic National Park ("Olympic" or "the park"). Dkt. 1. On August 20, 2012, this Court granted Defendant's Motion to Dismiss, finding the Court lacks subject matter jurisdiction over Plaintiff's claims related to management of the goat because of the discretionary function exception to FTCA liability, found at 28 U.S.C. § 2680(a). Dkt. 63. Plaintiff's claim that the park service failed to properly respond once the goat attack had been

reported, to the extent that she made such a claim, was dismissed on October 10, 2012. Dkt. 82.

I. FACTS

The facts and procedural history are in the August 20, 2012 order that granted Defendants' motion to dismiss (Dkt. 63, at 1-9), and are adopted here by reference.

Plaintiff now files a Motion for Reconsideration, arguing that the Court should reconsider its decision to dismiss her claim regarding the park service's decisions about "managing a lone hazardous animal under the [park's] Nuisance and Hazardous Animal Plan." Dkt. 64. Parties were permitted to file further briefing and submitted additional evidence.

In support of her Motion for Reconsideration, Plaintiff filed several emails, which were submitted in redacted form when the motion for summary judgment was considered. Dkt. 76-2. Plaintiff also submitted the depositions of Olympic Park Superintendent Karen Gustin and Olympic's Natural Resource Division Chief Cat Hawkins Hoffman. Dkt. 65-1 and 65-2. Both depositions had been taken but the transcripts were not completed before the decision on the summary judgment motion was issued. Dkt. 65-1. Plaintiff lastly filed additional declarations of park visitors. Dkts. 75 and 81.

The United States filed an opposition. Dkt. 80. The motion for reconsideration is now ripe for decision.

II. DISCUSSION

Under Western District of Washington Rule of Civ. P. 7(h)(1), "[m]otions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence."

The legal standard for whether the United States is immunized from suit under the discretionary function to the FTCA is in the prior order (Dkt. 63, at 10-11) and is adopted here. In short, whether the discretionary function applies requires the Court to determine: 1) "whether the challenged actions involved an element of judgment or choice" and, if they did, 2) "whether that judgment is of the kind that the discretionary function was intended to shield" – decisions based on "public policy." *Terbush v. United States*, 516 F.3d 1125, 1129-1130 (9th Cir. 2008) (*internal citation omitted*).

Plaintiff's motion for reconsideration (Dkt. 64) should be denied. Plaintiff has failed to show a "manifest error in the prior ruling." Plaintiff does point to new evidence and she makes a sufficient showing it "could not have been brought to [the Court's] attention earlier with reasonable diligence." A review of

this evidence does not provide a basis to alter the Court's prior ruling, however.

Plaintiff argues that the Court should reconsider dismissing her claim because the unredacted emails show that the park service "knew that the goat was a public danger and knew that it needed to take action under its policy." Dkt. 76. Plaintiff points to the July 5, 2010 email from Sanny Lustig to Patti Happe, and others: Dkt. 76, at 2. This email, including the fact that the park service was aware of a head butting incident, was discussed in the prior order. Dkt. 63, at 5-6 (*quoting* Dkt. 51-2, at 109). The only portion of the email the Court lacked was the line about the Ridge Interpreter having the "story on" the head butting. Dkt. 76-2, at 7. Patti Happe's response to Sanny Lustig's email was not in the record at the time of the decision at issue. Her email response, in relevant part, provided "if he has indeed made contact with someone via head butting, it may be time to talk about taking the next step before someone gets hurt." Dkt. 76-2, at 7. Plaintiff argues that this portion of Mr. [sic] Happe's email (which was withheld by the Defendant) confirms that the park service was required to progress through its Nuisance and Hazardous Animal Management Plan based upon triggering events such as an attack upon a visitor." Dkt. 76, at 3.

In opposition, Defendant points out that the park service investigated the "head butting" incident. Dkt. 80. Ranger Sanny Lustig testified that she discovered that this was not an "attack" on a visitor, but that the visitor had touched the goat while getting a picture

and it flung its head in "reaction to someone actually really getting into [the goat's] space and touching it." Dkt. 80-2, at 3-4.

Plaintiff argues that the Court should reconsider its decision because the unredacted emails from 2009 and testimony of Gustin and Hoffman confirmed that the park service was aware that there was a "legitimate safety issue" and that the repeated aversive conditioning of the goat had failed. Dkt. 76. Plaintiff points to portions of emails that had been redacted, including one email from Cat Hoffman to Bill Rohde, dated July 1, 2009, which provides, in part, "I also discussed the possibility of live capture and removal (to the Cascades). Karen [Gustin] is willing to consider that only after a concerted effort at hazing." Dkt. 76-2, at 11. Plaintiff points to an email dated July 25, 2009, from Superintendent Gustin, where she orders "aggressive adversive condition" of the goat and then writes, "[w]e will see how that works for a week and a half or so, meaning that any additional options can wait until after Barb gets back, from a PR standpoint." Dkt. 76-2, at 14. Plaintiff argues that this is evidence that the park service knew that if hazing was not successful within a short period of time that the policies in place required further action. Dkt. 76, at 5. Plaintiff argues that later emails demonstrate that hazing had not worked after that week and a half (starting in July of 2009). Dkt. 76, at 5.

As stated in the prior order, Plaintiff fails to show that the challenged actions here did not involve an

element of judgment or choice. *Terbush*, at 1129. At its core, Plaintiff's new evidence again focuses on the timing of when to move forward with additional management options, like removal or destruction of the goat. The new evidence does not point to any mandatory course of action on a particular time frame. This is true whether the [sic] considering the park service's actions (or decision not to take certain actions) in relation to a single goat or the whole goat population. Although Plaintiff asserts that Nuisance and Hazardous Animal Management Plan required the park to act after the "head butting" incident, she points to no language in that plan mandating such action.

Further, the Plaintiff's newly introduced evidence does not establish that the exercise of discretion here was not the type that the discretionary function was intended to shield. As stated in the prior order, "implementation of a government policy is shielded [by the discretionary function exception] where the implementation itself implicates policy concerns." *Whisnant v. United States*, 400 F.3d 1177 (9th Cir. 2005). The analysis of the prior order applies. The motion for reconsideration (Dkt. 64) should be denied. There being no remaining claims, this case should be dismissed.

III. ORDER

It is **ORDERED**:

- Plaintiff's Motion for Reconsideration (Dkt. 64) **IS DENIED**; and

- This case **IS DISMISSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 16th day of October, 2012.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SUSAN H. CHADD, as personal Representative of the ESTATE of ROBERT M. BOARDMAN, deceased, and for herself,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. 11-5894 RJB

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS REMAINING CLAIM

(Filed Oct. 10, 2012)

This matter comes before the Court on the Defendant's Motion to Dismiss Remaining Claim. Dkt. 68. The Court has considered the pleadings filed regarding the motion, and the remaining record.

Plaintiff filed this Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, case against the United States stemming from a fatal mountain goat attack which occurred in Olympic National Park ("Olympic" or "the park"). Dkt. 1. On August 20, 2012, this Court granted Defendant's Motion to Dismiss, finding the Court lacks subject matter jurisdiction over Plaintiff's claims related to management of the goat because of the discretionary function exception to FTCA liability, found at 28 U.S.C. § 2680(a). Dkt. 63. In that Order, it was noted that Plaintiff's claim that the park service failed to properly respond once the goat

attack had been reported remained pending and was not addressed by that motion. *Id.* At oral argument, Plaintiff confirmed that her claim that the park service failed to properly respond once the goat attack had been reported remained pending. Dkt. 78-1, at 2.

In the current motion, Defendant now seeks dismissal of the only remaining claim – the claim based on the park service's response to the goat attack. Dkt. 68. Defendant argues that: 1) Plaintiff failed to exhaust her administrative remedies in regard to this claim, 2) her claim is barred by the public duty doctrine, 3) Plaintiff cannot establish negligence – that there was a breach of a duty or that any such breach caused damages, and 4) the park service's decisions regarding the search and rescue were protected by the discretionary function exception to the FTCA. *Id.*

In response, Plaintiff indicates that she is now not asserting an independent FTCA claim based on the park service's response after the attack. Dkt. 74. Plaintiff argues that the park service's negligent acts after the attack was reported "constituted a cause of further emotional damage to the plaintiff resulting from her witnessing the death of her husband." *Id.* She states that "[i]n other words, the acts in failing to summon a rescue helicopter in a timely manner enhanced and continued the damages plaintiff suffered as a result of seeing her husband die, which supported the claims for negligent infliction of mental distress." Dkt. 74, at 3. Plaintiff concedes that the Court's August 20, 2012 order dismissing her FTCA claims because of the discretionary function exception

also dismissed her claim for negligent infliction of mental distress. *Id.* Plaintiff argues then that the motion should be denied as moot. *Id.*

Defendant's motion to dismiss the Plaintiff's claim regarding the park service's response after the attack was report [sic] (Dkt. 68) should be granted. Regardless of how Plaintiff now casts the claim, Plaintiff failed to substantively respond to the merits of the motion. To the extent that Plaintiff makes a claim based on the park service's post attack actions, the claim should be dismissed.

Accordingly, Defendant's Motion to Dismiss Remaining Claim (Dkt. 68) should be granted.

IT IS SO ORDERED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 10th day of October, 2012.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SUSAN M. CHADD, as Personal Representative of the ESTATE of ROBERT M. BOARDMAN, deceased, and for herself, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CASE NO. 11-5894 RJB ORDER GRANTING, IN PART, MOTION TO DISMISS (Filed Aug. 20, 2012)

This matter comes before the Court on the United States' Motion to Dismiss. Dkt. 12. The Court has considered the pleadings filed in support of and in opposition to the motion, oral argument on 9 August 2012, and the file herein.

Plaintiff filed this Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, case against the United States stemming from a fatal mountain goat attack which occurred in Olympic National Park ("Olympic" or "the park"). Dkt. 1. Now ripe is Defendant's Motion to Dismiss, where it asserts that this Court lacks subject matter jurisdiction over Plaintiffs' claims because of the discretionary function exception to FTCA liability, found at 28 U.S.C. § 2680(a). Dkt. 12. For the reasons set forth below, the discretionary

function exception applies and the Plaintiff's FTCA claims should be dismissed.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

A. BACKGROUND FACTS

Olympic, formed in 1938, is one of the largest national parks. Dkt. 13, at 2. It encompasses 922,650 acres and has over three million visitors per year. *Id.* Olympic has diverse ecosystems, and is home to thousands of plant and animal species. *Id.*

Several herds of mountain goats are included in the animal species found in the park. Dkt. 13, at 2. Mountain goats tend to be reclusive animals, and when alarmed or threatened will generally seek out steep rocky areas. Dkt. 14, at 2. The summer goat range in Olympic is approximately 147,000 square acres. *Id.* They favor habitat of steep mountain ridges and peaks. *Id.*

The mountain goats are not native to the park, but were introduced a few decades prior to the park's formation. Dkt. 13, at 2. They are considered by the National Park Service as "non-native" or "exotic" species. *Id.* Accordingly, pursuant to national and Olympic Park policies, they are not entitled to the same level of protection as native species. Dkts. 25-1, at 26-27; and 12-2, at 8.

Olympic National Park is a "salt deficient range." Dkt. 39-18, at 10. As a result, various mammals in

the park, including mountain goats, seek out salt from human sources, including antifreeze, urine (where the animal will lick up the vegetation and soil tainted with urine), and human food. Dkt. 39-18, at 10-11. Additionally, mountain goats were known "at backcountry campsites" to eat boots, pack straps, and sweatshirts for the salt content from sweating. Dkt. 39-18, at 11.

B. RECENT HUMAN-GOAT INTERACTION IN OLYMPIC

Around 2004, Olympic's Wildlife Branch Chief and biologist Dr. Patti Happe, and other park officials, became aware of increasing reports of habituated behavior of mountain goats in the Hurricane Ridge area of the park. Dkts. 14, at 3; and 39-18, at 9. (Habituation here was the loss of the mountain goat's fear response after repeated neutral or positive exposure to humans. *See Id.* and Dkt. 31, at 17-18). By 2006, the park began receiving reports of aggressive behavior by the mountain goats, including "standing their ground, following or chasing humans, pawing the ground, and rearing up." Dkts. 14, at 3; and 26.

Olympic had a "Nuisance and Hazardous Animal Management Plan" in effect at the time. Dkt. 12-2. Under this plan, aggressive behavior was defined as "[b]ehavior where an animal stalks, closely approaches, engages in threat displays, or chases a person." Dkt. 12-2, at 5. Mountain goats were listed as a

"species of concern." Dkt. 12-2, at 6. It was noted that they could become "quite tame," but are "unpredictable and possess dangerously sharp horns," although are "usually more pestiferous than dangerous." *Id.* The plan includes "Management Alternatives" to deal with "problem animals." *Id.* These alternatives included: 1) education of the public and training for staff, 2) warnings and advisories, 3) monitoring and observation, 4) exclusion (used primarily for small mammals), 5) seasonal, non-emergency closures, 6) emergency closures, 7) aversion training, 8) capture and release, 9) capture and translocation, and 10) animal destruction. *Id.* (*See* page 14, *supra.*)

Accordingly, after the park received further reports of increased habituation and possibly aggressive behavior from mountain goats, park rangers and field personnel hiked into the areas with high reported goat-human interactions to observe and monitor the goats. Dkt. 13, at 2. They found that the goats were "demonstrating progressively habituated and sometimes aggressive behavior." Dkt. 13, at 3. The park service decided to use radio collars with Global Positioning System units to collect data on the movement and habitat use patterns of the mountain goats. Dkt. 14, at 4.

In response to their observations and other reports from visitors, the park service began providing visitors written and verbal warnings about the goats' aggressive behavior. Dkts. 13, at 3; and 13-1, at 2-3. Warning signs were also posted at trailheads. Dkt. 13, at 3. Efforts on warning visitors were focused

on the Klahanne Ridge (where the attack eventually occurred) and nearby Hurricane Ridge. Dkt. 13, at 3. Park personnel also began using "adverse conditioning" techniques on the goats. Dkt. 13, at 4. "Aversive conditioning is the use of various noise or contact devices to frighten or haze animals and modify their behavior." Dkt. 13, at 4. The park service felt that this type of conditioning could "help maintain an animal's fear of humans, deter them from specific areas such as campsites or trials [sic], or discourage undesirable behavior or activity." Dkt. 13, at 4. The aversive conditioning that was used on the mountain goats included: 1) throwing rocks, 2) yelling, 3) clicking hiking poles, 4) clapping, 5) snapping plastic bags, 6) acting intrusively, 7) using sling shots, 8) shooting the goats with paint balls, and 9) shooting the goats with bean-bags. Dkt. 13, at 4. This conditioning was used at Hurricane Ridge, Klahanne Ridge, Seven Lakes Basin, Heart Lake and High Divide areas. Dkt. 13, at 4.

Despite the park service's efforts, in 2009 and 2010, visitors continued to report a large male goat chasing them and acting aggressively. Dkts. 26-4, at 3-5, 7-10, and 15-17; 26-5, at 2-5 and 8-11; 51-3, at 40; and 60. (In the years 2009-2010, there were around eight to eleven goats in the Hurricane Ridge/Klahanne Ridge area. Dkt. 51-1, at 22.)

According to Sanny Lustig, the park ranger assigned to the Hurricane and Klahanne Ridge areas, she and other park personnel had multiple conversations about how to manage the goat. Dkt. 51-1, at 34.

The conversations were "serious and really difficult." *Id.* She states that the right management option "was not clear-cut" to any of them. *Id.*

In June of 2009, the Wildlife Branch Chief Dr. Patti Happe, sent an email to Olympic's Superintendent, Karen Gustin, the ranger assigned to the Hurricane and Klahanne Ridge areas, Sanny Lustig, and others. Dkt. 51-2, at 112. Dr. Happe wrote to give an "update on the aggressive billy goat situation at Hurricane Ridge, and start the conversation about additional management options." *Id.* She noted that he has "been a problem for several years," that he is "behaving in an increasing aggressive manner," and she thinks he "now perceives himself as being the dominant critter." *Id.* Dr. Happe expressed concern that "it may only be an [sic] matter of time until someone is hurt." *Id.*

On July 6, 2009, Ranger Sanny Lustig, who was regularly patrolling the Switchback trial [sic] to Klahanne Ridge and nearby areas, sent an email to Dr. Happe and various other park officials about the "cranky goat." Dkt. 26-4, at 11. She notes that they had been hazing the relatively large goat for some time, but it still returned to the trial [sic] and followed visitors. *Id.* She related that one group of visitors reported that it followed them closely and made them nervous. *Id.* She indicated that she was interested in further strategizing and noted "that's definitely the type of encounter we want to immediately respond to." *Id.*

The following year, on July 5, 2010, Ranger Lustig sent another email to Dr. Happe and other park officials, stating that "[f]or the past two weeks or so reports of the big billy that sounds pretty surely to be the one that has menaced the Switchback trial [sic] has been menacing the Hurricane Hill trial [sic]." Dkt. 51-2, at 109. She states that "it seems his MO is to follow people to the trial [sic] head, rear up and come in close proximity brandishing his hooves, and the latest was an actual report of a head butt." *Id.* It is her impression that he is "big, he's not wary, he pesters, he looks mean and as if he'll get aggressive." Dkt. 51-2. She notes that last year when they shot him with bean bags he backed off. *Id.*

On July 7, 2010, Susan Griffin, a researcher and Ph.D. candidate, who had worked in the park, sent an email to Dr. Happe, regarding multiple encounters she had with "the goat" on Hurricane Ridge. Dkts. 39-15, at 2 and 39-18, at 6. The email was entitled "Goat Strategerizing" and Ms. Griffin related persistent contact by "the goat." Dkt. 39-15, at 2. Ms. Griffin commented that she was "skeptical that a bit of adverse conditioning will do much for him. He sees hundreds of harmless people every day . . . I was shocked by how determined he was. I caught him 4 times with rocks to no effect." *Id.*

At some time prior to July 30, 2010, but after Ms. Griffin's email, Olympic's superintendent, Karen Gustin, Ranger Lustig, and Dr. Happe had a management team meeting to share information and coordinate management activities regarding the

increasingly aggressive goat behavior. Dkt. 39-18, at 7. According to Dr. Happe, they "coordinated who was going to do what as far as hazing and reporting," and the rangers were going to intensify the aversive conditioning and report back to her about what they observed. Dkt. 39-18, at 8. Dr. Happe states that she was tasked to explore moving the goat elsewhere. Dkt. 39-18, at 6.

On July 30, 2010, Dr. Happe sent an email to Dr. Donny Martorello, the Washington State Department of Fish and Wildlife's biologist in charge of mountain goats. Dkt. 39-18, at 6. Dr. Happe testified that she was exploring whether they "had an option for translocation" with Dr. Martorello. Dkt. 39-18, at 7. In the email, Dr. Happe stated that Olympic has "a mature billy" in the Hurricane Ridge area that is "not responding to [their] efforts to have him keep at a greater distance from people." Dkt. 25-5, at 3. She noted that "[r]ecently he has been becoming increasingly aggressive and park management would like to explore other management options for him, including relocation from the area." Dkt. 25-5 at 3. Dr. Happe admitted that, at the time she had written the email, the aversive conditioning had not worked for that one goat. Dkt. 39-18, at 23.

In August and September of 2010, the park service continued to receive reports regarding the goats, including that goats were seen grazing on Klahanne Ridge (Dkt. 26-5, at 9), would not let hikers pass on the Klahanne Ridge trial [sic] (Dkt. 26-5, at 10-11), were seen pawing the ground (Dkt. 51-3, at 40),

were following hikers (Dkt. 51-3, at 40), and acting "aggressively" (Dkt. 26-5, at 11).

C. ROBERT BOARDMAN IS ATTACKED AND KILLED BY A 370 POUND MOUNTAIN GOAT

On October 16, 2010, 63 year old Robert Boardman, his wife, Susan Chadd, and a friend, Pat Willits, were hiking on the Switchback trial [sic] to Klahanne Ridge, near Hurricane Ridge. Dkt. 27. When they stopped for lunch, they were approached by a large male mountain goat. Dkt. 27, at 3. It stood broadside with its neck bowed, pawed the ground, and bleated. *Id.* As the goat became more "agitated," they felt threatened by it and decided to leave. *Id.* They walked down the trail single file, with Mr. Boardman walking in the rear of the group. *Id.* The goat followed them and kept crowding Mr. Boardman. *Id.* He used the points of his walking stick to try to keep it away. *Id.*, at 4. The goat finally attacked Mr. Boardman by dropping its head and goring him in the leg with its horns. *Id.* It hit Mr. Boardman's femoral artery, and then stood over Mr. Boardman, not allowing anyone to approach. *Id.* Eventually, hikers were able to scare it off with a space blanket. *Id.* Mr. Boardman died as a result of the attack. *Id.*

The park service destroyed the mountain goat within a few hours of the attack. Dkt. 51-1, at 34. It was found nearby, had blood on its horn, and weighed

370 pounds. *Id.* It was significantly larger than the average male mountain goat. *Id.*

Before these events, there were three other mountain goat attacks in other national parks, all non-fatal. Dkt. 13, at 5. Olympic staff members were not aware of the other attacks. Dkts. 13, at 5; and 14, at 7.

D. PROCEDURAL HISTORY

Plaintiff filed this FTCA case against the United States on November 1, 2011. Dkt. 1. Plaintiff contends that the National Park Service failed to act on numerous complaints regarding this particular animal, failed to follow its own policies and procedures regarding hazardous animals, failed to relocate or euthanize the goat, and failed to properly respond once the attack had been reported. Dkt. 1. Plaintiff seeks damages. *Id.*

E. PENDING MOTION

The United States now moves to dismiss Plaintiff's FTCA claims, arguing that it is immunized from suit under the discretionary function exception to the FTCA. Dkts. 12, 33, and 45. The United States here argues that there was no federal statute, regulation, or administrative policy that mandated that park officials manage the goat population in a particular manner or warn visitors in a specific manner, and so the challenged actions involved exercise of judgment.

Dkts. 12, 33, and 45. It further argues that the decisions related to management of the goats were susceptible to, and were based on, social, economic, and political policy considerations. *Id.* The United States argues, accordingly, that Plaintiff's claims should be dismissed. *Id.*

Plaintiff argues that there are several policies which mandated that the park service remove or destroy the mountain goat before it killed Mr. Boardman, and that, therefore, the park service had no discretion in the matter. Dkts. 24, 39, 41, 51 and 53. Plaintiff points to evidence that the park service knew that an aggressive, dangerous, and unusually large goat was menacing hikers for years before Mr. Boardman's death. *Id.* Plaintiff argues that the park service knew that aversion conditioning was not working, and therefore, policy dictated that it needed to remove the goat – either by relocating it or destroying it. *Id.* Plaintiff also argues that the discretionary function exception does not apply because, even if there was no policy in place mandating action, the failure to implement an existing safety procedure was not a decision that was based on social, economic or political considerations. *Id.*

II. DISCUSSION

A. STANDARD FOR MOTION TO DISMISS

A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if, considering the factual allegations in the light most favorable to the plaintiff, the action:

(1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v. Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal question jurisdiction) and § 1346 (United States as a defendant). When considering a motion to dismiss pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied,*489 U.S. 1052 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983).

B. FTCA AND THE DISCRETIONARY FUNCTION EXCEPTION

The United States, as sovereign, is immune from suit unless it consents to be sued. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995). The FTCA is a limited waiver of sovereign immunity, rendering the United States liable for certain torts of federal employees. *See* 28 U.S.C. § 1346(b). The FTCA provides,

> Subject to the provisions of chapter 171 of this title, the district courts, . . . , shall have

> exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

Among the exceptions to the FTCA waiver of sovereign immunity is the "discretionary function exception." It excludes:

> Any [§ 1346] claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). "The discretionary function exception insulates certain governmental decision-making from judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Myers v. U.S.*, 652 F.3d 1021, 1028

(9th Cir. 2011) (*internal citations omitted*). "The government bears the burden of proving that the discretionary function exception applies." *Id.* Additionally, "[t]he FTCA was created by Congress with the intent to compensate individuals harmed by government negligence, and as a remedial statute, it should be construed liberally, and its exceptions should be read narrowly." *Terbush v. United States*, 516 F.3d 1125, 1135 (9th Cir. 2008).

A two step test is used to determine whether the discretionary function applies. *Terbush*, at 1129 (*citing Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988)). In the first step, the court determines "whether challenged actions involve an element of judgment or choice." *Id.* (*quoting Berkovitz*, at 536). If the challenged actions do involve an element of judgment or choice, then the court turns to the second step in the test. *Id.* The second step requires the court to decide "'whether that judgment is of the kind that the discretionary function exception was designed to shield,' namely, 'only governmental actions and decisions based on considerations of public policy.'" *Terbush*, at 1130 (*quoting Berkovitz*, at 536-37). The exception applies even if the decision is an abuse of discretion. *Id.* Each of the steps will be examined below.

1. Whether Challenged Actions Involved an Element of Judgment?

In the first step, the court determines "whether challenged actions involve an element of judgment or choice." *Terbush*, at 1130 (*quoting Berkovitz*, at 536-37). Under this step, the "nature of the conduct, rather than the status of the actor" is examined. *Id.* "The discretionary element is not met where 'a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'" *Id.* (*quoting Berkovitz*, 486 U.S. at 536). The inquiry ends if there is such a statute or policy directing mandatory and specific action because there can be no element of discretion when an employee "has no rightful option but to adhere to the directive." *Id.*

On the outset, it is noteworthy that the Organic Act, 16 U.S.C. § 1, sets forth the broad policy considerations that govern the NPS's management of national parks. *Terbush*, at 1130. The NPS is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. "Much of the NPS's work is grounded in the Organic Act's broad mandate to balance conservation and access." *Terbush*, at 1130.

The Plaintiff here argues that certain park policies show that the park service's failure to remove the problem mountain goat before October of 2010

was not a discretionary decision. Dkt. 24. She points to the national parks' "Management Policies 2006," sections 8.2.5.1 and 4.4.4.2, and argues that these policies mandated that the goat be eliminated well before it killed Mr. Boardman, and so the park employees were not, in fact, acting with discretion. *Id.* The "Management Policies 2006" do provide that "NPS employees must follow [the policies set forth] unless specifically waived or modified in writing by the Secretary . . . " (Dkt. 12-1, at 13) and no waivers relevant to this case were made (Dkt. 25-3). Plaintiff also references Olympic's "Nuisance and Hazardous Animal Management Plan." Dkt. 24.

The "Management Policies 2006," Section 8.2.5.1, "Visitor Safety," provides:

> The saving of human life will take precedence over all other management actions as the Park Service strives to protect human life and provide for injury-free visits. The Service will do this within the constraints of the 1916 Organic Act. The primary-and very substantial-constraint imposed by the Organic Act is that discretionary management activities may be undertaken only to the extent that they will not impair park resources and values.
>
> While recognizing that there are limitations on its capability to totally eliminate all hazards, the Service . . . will seek to provide a safe and healthful environment for visitors and employees. The Service will work cooperatively with other federal, tribal, state, and

local agencies; organizations; and individuals to carry out this responsibility. The Service will strive to identify and prevent injuries from recognizable threats to the safety and health of persons and to the protection of property by applying nationally accepted codes, standards, engineering principles, and the guidance contained in Director's Orders #5OB, #5OC, #58, and #83 and their associated reference manuals. When practicable and consistent with congressionally designated purposes and mandates, the Service will reduce or remove known hazards and apply other appropriate measures, including closures, guarding, signing, or other forms of education. In doing so, the Service's preferred actions will be those that have the least impact on park resources and values.

The Service recognizes that the park resources it protects are not only visitor attractions, but that they may also be potentially hazardous. In addition, the recreational activities of some visitors may be of especially high-risk, high-adventure types, which pose a significant personal risk to participants and which the Service cannot totally control. Park visitors must assume a substantial degree of risk and responsibility for their own safety when visiting areas that are managed and maintained as natural, cultural, or recreational environments.

These management policies do not impose park-specific visitor safety prescriptions. The means by which public safety concerns are to

> be addressed is left to the discretion of superintendents and other decision-makers at the park level who must work within the limits of funding and staffing. Examples include decisions about whether to install warning signs or artificial lighting, distribute weather warnings or advisories, initiate search-and-rescue operations or render emergency aid, eliminate potentially dangerous animals, close roads and trails or install guardrails and fences, and grant or deny backcountry or climbing permits. Some forms of visitor safeguards typically found in other public venues-such as fences, railings, and paved walking surfaces-may not be appropriate or practicable in a national park setting.

Dkt. 25-1, at 29.

This portion of the park's Management Policies 2006 did not mandate that the park service remove or eliminate the mountain goat before October of 2012. The broad language in this policy does not eliminate the park employees' discretion in how to handle a problematic mountain goat. This policy language does not "specifically prescribes a course of action for an employee to follow." *Terbush*, at 1130. Nor does this policy provide a timeline that must be followed.

Plaintiff also points to section 4.4.4.2, "Removal of Exotic Species Already Present" of the park's Management Policies 2006, which provides, "[a]ll exotic plant and animal species that are not maintained to meet an identified park purpose will be managed – up to and including eradication – if (1) control is prudent

and feasible, and (2) the exotic species . . . creates a hazard to public safety." Dkt. 25-1, at 28.

Section 4.4.4.2 of the park's Management Policies 2006 are likewise not helpful to Plaintiff. There is significant evidence in the record that the park service was attempting to "manage" the mountain goat. After the park received further reports of increased habituation and possibly aggressive behavior from mountain goats, park rangers and field personnel hiked the areas with higher goat-human interactions to observe and monitor the goats. Dkt. 13, at 2. They provided visitors written and verbal warnings about the goats' aggressive behavior. Dkts. 13, at 3; and 13-1, at 2-3. Warning signs were also posted trailheads [sic]. Dkt. 13, at 3. Park personnel also began using "adverse conditioning" techniques on the goats. Dkt. 13, at 4. Further, a few months before the attack, Dr. Happe began exploring options to remove the goat. Dkt. 39-18, at 6. Section 4.4.4.2, "Removal of Exotic Species Already Present," does not contain a specific course of action applicable to this case.

As a further source of a claimed mandatory course of action, Plaintiff points to Olympic's Nuisance and Hazardous Animal Plan, which contains "Management Alternatives" for problem animals. Dkt. 12-2. In 2010 it provided:

> Many options are available to manage problem animals. These are discussed below, arranged in a sequence of escalating management intervention and actions. For some species, such as black bear, a long history of

management failures and successes exist. . . For other species, such as cougars, few proven management techniques exist.

Education and Training: Education of the public and training of employees is a priority activity. As mentioned previously, prevention measures may eliminate the need for other more intrusive measures.

Warnings and Advisories: An ongoing program to provide warnings and advisories for common or recurring wildlife problems should be a part of every District's operating practices. Routine warnings may be posted or distributed at all times. As appropriate for the location, and supplemented by specific advisories and cautionary signs as needed.

Monitoring and Observation: The best response to some types of incidents is to simply monitor the situation. . .

Exclusion: This is the primary technique in dealing with many problem species, particularly smaller mammals. Sealing-off or screening possible entry points into structures . . . will avoid nuisance problems from skunks, bats, and rodents. Except for a few elk exclosures maintained for research, it is not NPS policy to fence or control the movements of larger mammals. . .

Seasonal, Non-Emergency Closures: Seasonal closures are pre-planned actions, as opposed to unplanned emergency closures. Both planned and unplanned closures are

invoked under the Superintendent's discretionary authority contained in 36 C.F.R. 1.5. . . . Seasonal closures may entail various levels of restrictions. . . Such seasonal closures are highly recommended as a means to allow near-normal use of adjacent areas while protecting public safety and park wildlife. Though more difficult to impose in front country developed zones, such closures may be used where warranted. . .

Emergency Closures: This is a complete closure of a defined area to all entry and public use. The purpose is protect [sic] the public while trying to avoid imposing more intrusive measures on the problem animal. Such closures are implemented only in response to a serious incident or repeated encounters between people and hazardous animals in a fairly discrete, specific location.

Aversion Training: The use of various noise, contact, or chemical devices to frighten or haze animals and modify their behavior (such as attempts to beg) may occasionally be employed. These techniques must be precisely and consistently applied to be effective, and their use must be part of an approved plan and involve experienced, qualified personnel.

Capture and Release: Under this technique, a problem animal is captured using traps . . . and removed from the incident site and immediately released nearby. It is recommended for animals which are not likely

> to repeat the problem behavior or seriously threaten public safety. . .
>
> **Capture and Translocation:** This is the capture of an animal and moving it to another, more distant location or outside of the park. It is rarely effective, may be hazardous to the animal and personnel, and is not a suitable practice in most instances. . .
>
> **Animal Destruction:** Animals can be killed in several ways:
>
> – Shooting with firearms by trained and authorized personnel,
>
> – Chemical euthanasia by qualified and designated personnel,
>
> – Chemical immobilization followed by shooting.
>
> The method used will be that which is most humane and efficient while protecting the safety of employees and bystanders. In all cases, it will be one of the above listed techniques.

Dkt. 12-2, at 9-10. In non-emergency situations, the ultimate decision as to whether remove [sic] a problem animal, whether by relocation or destruction, rested with the Superintendent. Dkt. 39-18, at 24. The plan also includes a species specific "Mountain Goat Action Plan." Dkt. 12-2, at 35. It provides: "[m]ountain goats can be a nuisance around wilderness campsites where they will persistently seek salt and minerals from urine, packs, and clothing etc." *Id.* Under the heading

"Incident Management," the mountain goat plan states:

> 1. Aggressive hazing can mitigate this problem. Simply tossing a few rocks and yelling will not dissuade these animals. They must be struck with large rocks, chased, and pursued until they are some distance away from the area. . . This hazing is only a temporary measure, and the animals will inevitably return.
>
> 2. Another good hazing method is to use a wrist rocket (sling-shot) and rocks collected on site as ammo. . . .
>
> 3. More elaborate adverse conditioning may be authorized for this non-native species. If animals are causing significant problems in an area (particularly if there is severe, localized resource damage to vegetation and soils) the [Natural Resources Management] Division should be contacted for other adverse conditioning methods which can be used.

Dkt. 12-2, at 35.

Olympic's Nuisance and Hazardous Animal Plan does not provide a mandatory directive in regard to how to handle the situation facing the park officials here. As stated above, they were moving through the plan – they were educating the public, warning the public, using aversion conditioning, and were considering removal of the goat. Further, Ranger Lustig states that she hiked the Switchback trail almost

every working day, and encountered the goat less than about half the time and "generally it wasn't doing anything at that time that required any actual aversive conditioning." Dkt. 51-1, at 19. She states that she would, and did, aversive conditioning on the goat if "it is was the right thing to do on any particular day." Dkt. 51-1, at 19. Moreover, the Nuisance and Hazardous Animal Plan's "Management Alternatives" uses terms like "should" rather than "shall" and so leaves the park employees freedom to adapt to different species and situations. The Mountain Goat Plan, likewise, does not use any language requiring mandatory action in the circumstances presented here.

To the extent that Plaintiff argues that the **timing** of the decision to remove the goat was not discretionary under the above policies, she offers the testimony of Richard Olson, one of the drafters of the Nuisance and Hazardous Animal Plan, who stated that resolution of problem animals would normally be accomplished in one field season, and typically would take no longer than two seasons. Dkt. 28, at 3. He states that based on his experience (he was a ranger in Olympic for 34 years and retired in October of 2006), "few non-lethal techniques worked on intractable animals." Dkt. 28, at 3. Mr. Olson states that he personally encountered the goat and threw a large rock at it. *Id.*, at 3. He states that it was unfazed by the pain. *Id.* He states that "[b]ased on his experience and training, [he] consider[ed] it very unusual that despite reports of this mountain goat's aggressive and threatening behavior toward people, the behavior was

allowed to persist for four years." *Id.* He states that after efforts to haze the goat failed, the park service should have euthanized it. *Id.* He asserts that the decision to intervene with the animal involved discretion, but once the decision to intervene started, "following the process to the end does not involve discretion." *Id.*, at 5.

Plaintiff also offers the Declaration of Paul Crawford, an Olympic park ranger for over 27 years, now retired, who stated that he was familiar with the goat that he believes to be the same one that killed Mr. Boardman due to its large size, aggressive behavior, and general location. Dkt. 29, at 3. Mr. Crawford states that he believes that the goat should have been killed, or the animal should have been separated from visitors by closing the trail. *Id.*, at 4.

Plaintiff additionally points to the opinion of Valerius Geist, PhD. [sic], a zoologist with extensive experience with mountain goats, who states that, in his opinion, the staff at Olympic "failed to take appropriate and timely measures to remove the habituated goat." Dkt. 31, at 22. He opines that the park service should have removed it particularly "after failed hazing attempts lead to continued and repeated dominance displays during human encounters in 2009 and 2010." *Id.*

While considering the events in October of 2010, it is unlikely anyone would disagree with Plaintiff's experts – that further action should have been taken. However, the timing of that further action is not

mandated by any of the identified policies. Up until the attack, there was not an emergency situation, and so the decision on whether and when to destroy the goat was left up to the Superintendent. Clearly, further actions here involved an element of judgment and choice – the exercise of discretion. Accordingly, there being no statute or policy directing either mandatory and specific action, or specifying time for such action, the court must continue to the second step of the discretionary function exception analysis. *Myers*, at 1028.

2. Whether the Judgment is of the Kind that the Discretionary Function Exception was Designed to Shield – Decisions Based on Considerations of Public Policy?

The second step requires the court to decide "'whether that judgment is of the kind that the discretionary function exception was designed to shield,' namely, 'only governmental actions and decisions based on considerations of public policy.'" *Terbush*, at 1130 (*quoting Berkovitz*, at 536-37.) In this context, public policy has been understood to include decisions "grounded in social, economic, or political policy." *Terbush*, at 1130 (*quoting Varig*, at 814).

In general, much of the park service's work is based on the mandate of the Organic Act, 16 U.S.C. § 1, which is to balance conservation of the parks and public access to them. *Terbush*, at 1130. The park has provided evidence that the decisions of what to do about the habituated mountain goats and the

aggressive goat(s) prior to October of 2010, were, in part, grounded in social, economic and political policy.

The park argues that management of the goat population is susceptible to policy analysis because in deciding what to do and when to do it, they had to balance conservation of the goats and overall park with public access to the trails. Dkt. 12. While acknowledging that the goats are a non-native species and are entitled to less protection than native species, park service employees referenced political pressure to conserve the goat population in this park. Dkts. 13 and 14. The park service discussed a move in the 1980s to remove the goats from Olympic. Dkt. 4, at 3. They ultimately decided not to eliminate them entirely, and Deputy Superintendent Todd Suess acknowledged that in the "past, the park has encountered significant opposition to possible plans to remove some of the goats." Dkt. 13, at 5.

Moreover, Ranger Lustig testified that what the park should or should not do about the goats elicited a range of responses from the visitors, thus implicating social concerns. Dkt. 51-1, at 14. She stated that during "educational encounters" she would have with visitors while hiking the trail,

> The most frequent response from people on that trial [sic] was generally that the goats, that the park should not hurt the goats. So to explain that it was both for the animals' and peoples' safety that we were deliberately hurting them by way of hazing them on

> occasion, took a fair amount of explaining, that to maintain their natural wariness, which was healthier for them and better for people, we actually did inflict a pain stimulus. So most people would respond with sympathy to the goats that we'd be hurting them.
>
> There was, at the other end . . . people who felt very strongly that the goats, since they are not native to the Olympics, should not be there at all, and the park management should be hunting them to eliminate them.

Dkt. 51-1, at 14.

Economic considerations also played into their decision making process. The park service chose to spend resources on attempting to balance public safety with conservation of the goats, public access to the goats, and public access to the trails by increasing patrols, warning and educating the public, and engaging in aversion conditioning. Deputy Superintendent Todd Suess states that all these actions diverted resources away from other park priorities. Dkt. 13.

Plaintiff argues that "in light of the very aggressive behavior this well-known 370 lb goat was displaying for years" and the fact that the park's Mountain Goat Plan noted that aversion conditioning would be unsuccessful, and it was unsuccessful, the park service's failure to take the only rational and proper safety precaution was not the exercise of social, economic, or political policy considerations. Dkt. 24.

Plaintiff also cites *Francis v. United States*, 2:08CV244 DAK, (D.C. Utah Cent. Dist. 2011), an unpublished decision, in support of her position. Dkt. 24, at 21-22. The *Francis* court ruled that the discretionary exception decision did not apply where the park service failed to take the only rational and necessary step – to destroy a black bear, that had attacked a camper the day before it killed the Plaintiffs' eleven-year-old boy. *Id.* The court there held that no rational consideration of public policy was involved. *Id.*

This case is different in many respects. First, a bear is a known predator. The park service personnel here, while acknowledging that someone might get hurt, did not know of any mountain goat attacks, and later found out that there had been only three non-fatal goat attacks in all the national parks' history. The park service in *Francis* acknowledged that regulations in place at the time required them to investigate the incident and to remain on site (even though they did not). No such regulations were in place here. Unlike the situation in *Francis*, the park service killed the subject goat immediately after the first attack. Further, as discussed below, the park service was balancing competing policy concerns as it tried to manage the mountain goats.

Plaintiff argues that while the design of the park's Nuisance and Hazardous Animal Plan and other policies is protected by the discretionary function exception, the implementation of that plan and other policies on the goat in question was not protected.

Dkt. 24. Plaintiff cites *Whisnant v. United States*, 400 F.3d 1177 (9th Cir. 2005), in support of her position. *Id.*

In *Whisnant*, the plaintiff worked in the commissary at the U.S. Naval base in Bremerton, Washington. 400 F.3d at 1179. He brought suit against the United States for negligence under the FTCA for injuries he sustained as a result of the government's failure to clean up toxic mold which had accumulated at the commissary. *Id.* In rejecting the government's argument that the decision not to clean up the mold was grounded in social, economic or political considerations, the Ninth Circuit found, that "matters of scientific and professional judgment – particularly judgments concerning safety – are rarely considered to be susceptible to social, economic, or political policy," and that the failure to clean up mold there was a scientific and professional judgment. *Whisnant*, at 1181. It held that the "decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions is not. . . . [S]afety measures, once undertaken, cannot be shortchanged in the name of policy." *Id.*, at 1182 (*internal quotation omitted*).

In acknowledging that the difficulty in distinguishing between what governmental decisions regarding safety are based in social, economic, and political policy and those that are not, the *Whisnant* Court reviewed other FTCA cases where safety had been an issue. *Id.* "[I]n a suit alleging government negligence in the design and maintenance of a national

park road, we held that designing the road without guardrails was a choice grounded in policy considerations and was therefore shielded under the discretionary function exception, but maintaining the road was a safety responsibility not susceptible to policy analysis." *Id.*, at 1181-1182 (*citing ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir. 1987)). It reviewed three cases where injuries resulted from the government's failure to post warnings concerning hazards present in national parks. *Id.*, at 1182 (*citing Valdez v. United States*, 56 F.3d 1177, 1178, 1180 (9th Cir. 1995); *Childers v. United States*, 40 F.3d 973, 976 (9th Cir. 1994); and *Summers v. United States*, 905 F.2d 1212, 1215 (9th Cir. 1990)). It remarked that the Ninth Circuit "held that the government's decision not to post signs warning of obvious dangers such as venturing off marked trails to walk next to the face of a waterfall, and the government's decision to use brochures rather than posted signs to warn hikers of the dangers of unmaintained trails, involved the exercise of policy judgment of the type Congress meant to shield from liability." *Id.* (*citing Valdez* and *Childers*). It noted that in *Summers*, though, "that such policy judgment was absent when the government simply failed to warn of the danger to barefoot visitors of hot coals on a park beach." *Id.* (*citing Summers*). The *Whisnant* Court noted additionally that there was an exception to the design/implementation distinction which was not relevant to the toxic mold situation at issue there. *Id.*, n 3. It found that "implementation of a government policy is shielded where the implementation itself implicates

policy concerns." *Id.* For example, "where government officials must consider competing fire-fighter safety and public safety considerations in deciding how to fight a forest fire," *Id.* (*citing Miller v. United States*, 163 F.3d 591, 595-96 (9th Cir. 1998)), or "balance prison safety and inmate privacy considerations in deciding how to search a prisoner's cell in response to a reported threat of violence," *Id.* (*citing Alfrey v. United States*, 276 F.3d 557 (9th Cir [sic] 2002)), "or weigh various regulatory objectives in deciding whether to certify a new aircraft design" *Id.* (*citing GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1175-77 (9th Cir.2002 [sic])).

As in *Miller, Alfrey* and *GATX/Airlog Co.*, implementation of park policy regarding the management of the mountain goats implicated policy concerns. The park was forced to balance competing policy concerns of public safety (where there had been only three goat attacks in national park history – all of which were non-fatal) with the public's desire to see the goats, public access to the trials [sic], and preservation of the goats. Although in retrospect one can conclude that the mountain goat should have been removed earlier, "that is the sort of judicial second guessing of government decision-making that the discretionary function exception was designed to protect." *Bailey v. United States*, 623 F.3d 855, 863 (9th Cir. 2010).

3. Conclusion on Discretionary Function Exception Analysis

United States' motion to dismiss (Dkt. 12) should be granted, except as to the claim that the Defendant failed to properly respond after the attack was reported. (The remaining claim was not argued or addressed by the pending motion.) Defendant is immunized from Plaintiff's FTCA claims based on the discretionary function exception. Plaintiff's FTCA claims should be dismissed, with the exception mentioned.

While this Court recognizes Plaintiff's loss of her husband and her concern about the park service's handling of the goat, Congress has given the park service a safe harbor in the discretionary function exception to her FTCA claim, even if "the discretion involved be abused." 28 U.S.C. § 2680(a). Mr. Boardman appears to have died trying to protect his wife and their friend. Even in sad cases like this one, the Court is duty bound to uphold the law, however difficult or unjust the result appears.

III. ORDER

Therefore, it is hereby **ORDERED** that:

- The United States' Motion to Dismiss (Dkt.12) is **GRANTED**; and
- Plaintiff's FTCA claim regarding the park service's management of the goat is **DISMISSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 20th day of August, 2012.

/s/ Robert J. Bryan
ROBERT J BRYAN
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN H CHADD, as personal representative of the Estate of Robert M. Boardman, deceased, and for herself,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, NATIONAL PARK SERVICE,

Defendant-Appellee.

No. 12-36023

D.C. No. 3:11-cv-05894-RJB
Western District of Washington, Tacoma

ORDER

(Filed Oct. 6, 2015)

Before: O'SCANNLAIN, KLEINFELD, and BERZON, Circuit Judges.

The panel has voted to deny the petition for rehearing or rehearing en banc. Judge O'Scannlain and Judge Berzon have voted to deny the petition for rehearing. Judge Kleinfeld has voted to grant the petition for rehearing. Judge O'Scannlain has voted to deny the petition for rehearing en banc. Judge Berzon has voted to grant the petition for rehearing en banc, and Judge Kleinfeld has so recommended. The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing or rehearing en banc is DENIED.

28 USCS § 2680 (2006) – Exceptions

The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title [28 USCS § 1346(b)] shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title [28 USCS § 1346(b)] apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –

> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[.]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 [46 USCS §§ 30901 et seq. or 31101 et seq.] relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title [28 USCS § 1346(b)] shall apply to any claim arising, on

or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.