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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Baine Grantham, Margaret Grantham,
10 Walter Grantham, James Ptak, Carol
11 Ptak, Gryphon Ranch, Todd
12 Strawdinger, Tari Infante, Dave Dilli,
13 Suzanne Dilli, Neil Blindauer, Karen
14 Blindauer and Katelan Blindauer,

15 Plaintiffs,

16 v.

17 United States of America,

18 Defendant.

No. CV-24-00790-PHX-ROS

ORDER

19 Plaintiffs filed suit against the United States under the Federal Tort Claims Act
20 (“FTCA”) regarding the government’s actions allegedly taken in response to the June 2021
21 Telegraph Fire. The United States filed a motion to dismiss arguing the discretionary
22 function exception to the FTCA immunizes the government from suit. (Doc. 24, “Mot.”).
23 For what follows the United States’ motion will be granted and Plaintiffs will be given
24 leave to amend.

25 **I. Factual Background**

26 This case arises from the decisions the United States allegedly made in fighting the
27 Telegraph Fire, one of the largest wildfires in Arizona history, in June and July of 2021.
28 (Mot. at 5). The United States Department of Agriculture Forest Service (“Forest Service”)
strategically uses fire to manage natural resources. (Doc. 20, “FAC” at ¶ 3). Plaintiffs state
this is evidenced in the April 2014 National Cohesive Wildlife Fire Management Strategy

1 which has been incorporated in several which has been reiterated in various documents and
2 resources including (1) the USDA Forest Service Strategic Plan: FT 2015-2020, (2) letters
3 of intent and statements by USDA Forest Service Chiefs from 2018-2021, and (3) the 2023
4 National Cohesive Wildfire Management Strategy Addendum Update. (*Id.* at ¶ 15-24). The
5 vision statement of the April 2014 National Cohesive Wildlife Fire Management Strategy,
6 frequently reiterated in these sources, calls “[t]o safely and effectively extinguish fire when
7 needed; use fire where allowable; manage our natural resources; and as a nation, to live
8 with wildfire.” (*Id.* at ¶ 15).

9 During the events of the Telegraph Fire, Plaintiffs allege the Forest Service used the
10 Telegraph Fire and backfiring operations¹ to derive natural resource benefits at the expense
11 of Plaintiffs’ private property. (*Id.* at ¶ 24-25. Plaintiffs’ expert Franklin O. Carroll opines
12 the Telegraph Fire should have been contained on June 8-9, 2021 and June 10, 2021 at the
13 latest. (Doc. 27-1 at ¶ 11-13, 15). Plaintiffs allege on June 10, 2021, despite near
14 containment of the Telegraph Fire, “the Forest Service expanded the Fire to merge with
15 the Mescal Fire on the San Carlos Apache Reservation.” (*Id.* at ¶ 29). And June 13-14,
16 2021, “the Forest Service engaged in planned backfiring operations on the Telegraph Fire
17 that immolated some 30,600 acres of land, including Plaintiffs’ private property. (*Id.* at ¶
18 30; *see also* Doc. 27-5 at ¶ 6; Doc. 27-1 at ¶ 8). Plaintiffs’ signed affidavits declare these
19 backfire operations were made without their consent.² Plaintiffs’ expert Carroll opines it is
20 “more likely than not,” the Forest Service “used the Telegraph Fire as a natural resource
21 management tool to return Fire to the landscape to achieve fuel treatment and expanded
22 fire suppression objectives.” (Doc. 27-1 at ¶ 8). Plaintiffs filed suit against the United States
23 for negligence and trespass seeking monetary relief. (FAC at ¶ 34-49). The United States
24 has moved to dismiss for lack of jurisdiction arguing Plaintiffs’ claims are barred by the
25 discretionary function exception of the FTCA.

26 ¹ Backfiring is a firefighting strategy where a second fire is set on the inner edge of the first
27 fire to either consume the first fire’s fuel or change its direction. (FAC at fn. 2)

28 ² *See* Doc. 27-9 at ¶ 7; Doc. 27-10 at ¶ 10; Doc. 27-11 at ¶ 10; Doc. 27-12 at ¶ 21; Doc. 27-
13 at ¶ 4; Doc. 27-14 at ¶ 7; Doc. 27-15 at ¶ 21; Doc. 27-16 at ¶ 21; Doc. 27-17 at ¶ 21).

1 **II. Legal Standard**

2 Federal courts are courts of limited jurisdiction and are presumptively without
3 jurisdiction over civil actions. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,
4 377 (1994). The burden of establishing the contrary rests upon the party asserting
5 jurisdiction. *Id.* Federal Rule of Civil Procedure 12(b)(1) provides a party may move for
6 the dismissal of the case at any point during the litigation.

7 As sovereign, the United States “can be sued only to the extent that it has waived its
8 immunity” from suit. *United States v. Orleans*, 425 U.S. 807, 814 (1976). The FTCA
9 established Congress’ waiver of sovereign immunity “for claims arising out of torts
10 committed by federal employees.” *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 217-18
11 (2008) (citing 28 U.S.C. § 1346(b)(1)). The FTCA gives federal courts jurisdiction over
12 claims against the United States for money damages “for injury or loss of property, or
13 personal injury or death caused by the negligent or wrongful act or omission” of any
14 government employee “acting within the scope of his office or employment, under
15 circumstances where the United States, if a private person, would be liable to the claimant
16 in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. §
17 1346(b)(1).

18 Even if plausibly pled, “liability of the United States under the FTCA is subject to
19 the various exceptions contained in [28 U.S.C. § 2680].” *United States v. Gaubert*, 499
20 U.S. 315, 322 (1991). As to the FTCA’s exceptions, the “plaintiff has the burden of
21 showing there are genuine issues of material fact as to whether the exception should apply,
22 but the government bears the ultimate burden of establishing that the exception applies.”
23 *Green v. United States*, 630 F.3d 1245, 1248-49 (9th Cir. 2011).

24 Under the discretionary function exception to the FTCA, the United States preserves
25 its sovereign immunity from suit as to

26 [a]ny claim based upon an act or omission of an employee of the
27 Government...based upon the exercise or performance or the failure to exercise or
28 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.

1 § 2680(a).

2 The applicability of the discretionary function exception is determined by a two-
3 part test, sometimes referred to as the *Berkovitz* analysis. See *Berkovitz v. United States*,
4 486 U.S. 531, 536, (1995). Courts must determine whether (1) “the challenged actions
5 involve an ‘element of judgment or choice’” and, if so, whether (2) the “judgment is of the
6 kind that the discretionary function exception was designed to shield.” *Esquivel v. United*
7 *States*, 21 F.4th 565, 572-73 (9th Cir. 2021). at 573-574 (first quoting *United States v.*
8 *Gaubert*, 499 U.S. 315, 322 (1991); and then quoting *Berkovitz v. United States*, 486 U.S.
9 531, 536 (1988)). In considering the second step, “[t]he focus of the inquiry is not on the
10 agent’s subjective intent in exercising the discretion conferred by statute or regulation, but
11 on the nature of the action taken and on whether they are susceptible to policy analysis.”
12 *Gaubert*, 499 U.S. at 325. The federal government is immune from suit if the challenged
13 action satisfied both steps. *Esquivel*, 21 F.4th at 574. If so, “federal courts lack subject
14 matter jurisdiction” over the dispute, “even if the court thinks the government abused its
15 discretion.” *Id.*

16 The Ninth Circuit has reviewed several cases regarding the discretionary function
17 exception in the context of forest fires. In *Miller v. United States*, 163 F.3d 591 (9th Cir.
18 1998), the court held the discretionary function barred plaintiff’s suit against the Forest
19 Service where a forest fire spread from Ochoco National Forest onto the plaintiff’s
20 property. In *Esquivel v. United States*, 21 F.4th 565, 572-73 (9th Cir. 2021), the court
21 similarly found the discretionary function barred suit against the Forest Service’s actions
22 when a wildfire threatened private property and a fire crew obtained a resident’s verbal
23 consent before starting suppression activities, but the crew’s fire suppression activities
24 damaged plaintiff’s property. In *Woodward Stuckart LLC v. United States*, 650 F. App’x
25 380, 383 (9th Cir. 2016), the court also applied the discretionary function exception to the
26 Forest Service’s decisions as to whether and when to suppress a naturally caused wildfire.
27 In *Backfire 2000 v. United States*, 273 F. App’x 661, 662-63 (9th Cir. 2008), the court
28 explicitly found the Forest Service’s use of backfires to fight the Bitterroot wildfires was
subject to the discretionary function.

1 **III. Analysis**

2 The United States argues Congress has not waived sovereign immunity for
3 Plaintiffs' claims under the FTCA because the challenged United States actions fall within
4 the FTCA's discretionary function exception. Plaintiffs respond the Court should consider
5 a summary judgment standard of review and argue the discretionary function does not
6 apply because it could be found the Government violated Plaintiffs' procedural and
7 substantive due process rights. The Court will consider the standard of review first before
8 reviewing whether Plaintiffs' claims are subject to the FTCA's discretionary function
9 exception.

10 **A. Standard of Review**

11 Plaintiffs contend the summary judgment applies because factual issues go to the
12 merits. The United States argues a summary judgment standard is neither warranted nor
13 appropriate because the factual issues raised by Plaintiff are immaterial to resolving
14 jurisdiction.

15 There are two types of 12(b)(1) attacks: facial and factual. In a facial attack, the
16 challenger asserts that the allegations in the complaint are, on their face, insufficient to
17 invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.
18 2004). In a factual attack, the challenger disputes the truth of the allegations to invoke
19 federal jurisdiction by introducing affidavits or other evidence establishing the court lacks
20 subject-matter jurisdiction. *Id.* Once the challenging party has met its burden to convert the
21 motion to dismiss into a factual attack, the party opposing the motion must furnish
22 affidavits or evidence to overcome its burden of establishing subject-matter jurisdiction.
23 *Id.* In considering a factual motion, the court need not presume the truthfulness of the
24 plaintiff's allegations in the complaint, though it must resolve any factual disputes in the
25 plaintiff's favor. *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016).

26 A dismissal under 12(b)(1) is inappropriate if the motion is based on material
27 disputed facts and the jurisdictional and substantive issues are "so intertwined" that
28 resolution of the jurisdictional question requires the court to reach the merits of the
plaintiff's claims. *Safe Air*, 373 F.3d at 1039 (*quoting Sun Valley Gas, Inc. v. Ernst Enters.*,

1 711 F.2d 138, 139 (9th Cir. 1983)). If the jurisdictional motion involves disputed factual
2 issues that go to the merits of the claim, the court should instead apply a summary judgment
3 standard and not reach the jurisdictional question until a substantive motion is filed or the
4 case proceeds to trial. *Young v. United States*, 769 F.3d 1047, 1052 (9th Cir. 2014). In
5 resolving a factual attack on jurisdiction, “the existence of disputed material facts will not
6 preclude the trial court from evaluating for itself the merits of jurisdictional claims.”
7 *Thornhill Pub. Co v. Gen. Tel. & Elcs. Corp.*, 286 F.3d 1168, 1173 (9th Cir. 2002).

8 Both parties raise factual issues on the applicable question of the discretionary
9 function exception. However, the Court finds the factual disputes in this case are not so
10 intertwined with the jurisdictional question such that resolution of the factual disputes is
11 necessary to decide the motion.

12 **B. Berkovitz Test**

13 **a. Discretionary or Mandated Act**

14 The first step of the discretionary function inquiry asks whether the challenged
15 conduct involves an “an element of judgment or choice.” *Esquivel*, 21 F.4th at 573. If there
16 is no “federal statute, regulation, or policy [that] specifically prescribes a course of action,”
17 then this requirement is satisfied. *Id.*

18 The United States argues no statute, regulation, or policy directive prescribed a
19 course of action that fire personnel were required to follow in responding to the Telegraph
20 Fire. Plaintiffs’ complaint alleges several policies prescribed the Forest Service’s actions
21 including (1) the April 2014 National Cohesive Wildlife Fire Management Strategy, (2)
22 the USDA Forest Service Strategic Plan: FT 2015-2020, (3) statements and letters of intent
23 by USDA Chiefs of the Forest Service from 2018-2021, and (4) the 2023 National
24 Cohesive Wildfire Management Strategy Addendum Update (FAC at ¶ 15-24). Plaintiffs’
25 response to the motion does not argue the United States followed a specific policy, but
26 instead argues the United States has not met this prong because it could be found the Forest
27 Service’s actions violated the Due Process clause.

28 While circuits disagree on whether the discretionary exception of FTCA shields
tortious conduct that allegedly violates the U.S. Constitution, in the Ninth Circuit, the

1 discretionary function does not necessarily shield tortious conduct that violates the U.S.
2 Constitution.³ See *Nurse v. United States*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (“The
3 Constitution can limit the discretion of federal officials such that the FTCA’s discretionary
4 function exception will not apply.”). Courts in this District have followed *Nurse*, though
5 begrudgingly, urging its holding should be refined. See *J.P. v. United States*, 679 F. Supp.
6 3d 911 (D. Ariz. 2023); *B.A.D.J. v. United States*, 2022 WL 11631016 (D. Ariz. 2022).

7 Each of Plaintiff’s cited cases identifies a policy or federal requirement the United
8 States was required to follow. In *Nurse*, the plaintiff’s complaint alleged officials
9 “established, promulgated and enforced rules, regulations, policies, directives, guidelines,
10 and practices which they knew, or should have known, were unlawful and discriminatory
11 and would result in the false arrests and detentions and unlawful searches of persons,
12 particularly persons of color, traveling to and from the United States.” *Nurse*, 226 F.3d 966
13 at 1000. Plaintiff also cites cases brought after child separations pursuant to government
14 policy dictating the forcible separation of children by federal officers at Arizona
15 immigration holding centers. In *C.M. v. United States*, 2020 U.S. Dist. LEXIS 252691 (D.
16 Ariz. 2020), plaintiffs brought claims for intentional infliction of emotional distress and
17 negligence against the United States for forcible child separations. In finding the plaintiffs
18 plausibly alleged a constitutional violation, the court stated, “[p]laintiffs ... did more than
19 ‘simply label’ the government’s conduct as unconstitutional—they cited a court order
20 declaring this conduct so ‘egregious,’ ‘outrageous,’ ‘brutal,’ and ‘offensive’ that it
21 warranted immediate enjoyment.” *Id.* at *10-12. In *B.A.D.J.*, plaintiffs similarly brought
22 claims of intentional infliction of emotional distress, negligence, and loss of child’s
23 consortium against the United States for forcible child separation. *B.A.D.J.*, 2022 WL
24 11631016 at *3. The court found plaintiffs’ allegation the United States violated their
25 procedural due process by “coercing parents like [B.A.D.J.] to abandon their asylum claim”

26 ³ The Supreme Court recently granted certiorari in *Martin v. United States*, 2024 WL
27 1716235 (11th Cir. 2024), *cert. granted* 2025 U.S. LEXIS 529 (2025) as to “[w]hether the
28 Constitution’s Supremacy Clause bars claims under the Federal Tort Claims Act when the
negligent or wrongful acts of federal employees have some nexus with furthering federal
policy and can reasonably be characterized as complying with the full range of federal
law.”

1 was sufficient to satisfy *Nurse’s* holding. *Id.* at 8.

2 Plaintiffs’ First Amended Complaint offers several possible violations of
3 constitutional rights including,

4 Congress never intended the [discretionary function exemption] as a license to burn
5 private property for a vaguely defined greater good. Violating constitutional rights
6 or federal statutes is beyond Forest Service officials’ discretion. Under the Cohesive
7 Strategy, the Forest Service’s policy decision to use wildfire as a land management
8 tool was made and implemented in the full knowledge that individual landowners
9 who would inevitably suffer from wildfire use would receive neither prior due
10 process nor subsequent recourse against the United States. (FAC at ¶ 10).

11 Paragraph 11 continues,

12 In this context, sacrificing the private interests and civil rights of a few Forest
13 Service neighbors for bets made on behalf of the nation is unconstitutional. The
14 Forest Service enjoys no discretion in violating the constitutional and human rights
15 of a few unfortunate neighbors, like Plaintiffs, damaged through the execution of
16 the Cohesive Strategy, regardless of the national interest promoted by burning them
17 and their lands. Forest Service conduct cannot be ‘discretionary’ if it defenestrates
18 constitutional rights. (FAC at ¶ 11).

19 And paragraph 22,

20 In addition, the discretionary function exception to the FTCA does not apply
21 because the policy pursued by the Forest Service in its response to the Telegraph
22 Fire violates the procedural and substantive components of the Due Process Clause
23 of the United States Constitution, which protects against government interference
24 with private property rights. It is not within the discretion of federal actors, including
25 the Forest Service, to violate the Due Process clause ... Still, it violates due process
26 to negligently, recklessly, or intentionally destroy the neighbors’ private property-
27 including Plaintiffs’ as part of a wildfire use program to secure federal natural
28 resource benefits. (FAC at ¶ 22).

Ignoring Plaintiffs’ conclusory and oblique constitutional allegations such as
“[v]iolating constitutional rights or federal statutes is beyond Forest Service officials’
discretion” and “the policy pursued by the Forest Service in its response to the Telegraph
Fire violates the procedural and substantive components of the Due Process Clause of the
United States Constitution” leaves allegations the United States used wildfire pursuant to
the “Cohesive Strategy” as either a “land management tool,” “[to promote] national

1 interest,” or “to secure federal natural resource benefits” to the inevitable suffering of
2 Plaintiff’s property from wildfire use.⁴ (*Id.* at ¶¶ 10-11, 22).

3 Yet nothing in the “Cohesive Strategy” alleges any mandate the Forest Service was
4 required to follow in response to the Telegraph Fire. Plaintiffs repeatedly cite the vision
5 statement of the April 2014 National Cohesive Wildlife Fire Management Strategy, later
6 incorporated into the USDA Forest Service 2015-2020 Plan which merely calls “[t]o safely
7 and effectively extinguish fire when needed; use fire where allowable; manage our natural
8 resources; and as a nation, to live with wildfire.” (*Id.* at ¶ 15). The statements of former
9 USDA Forest Service chiefs similarly do not prescribe any required policy decisions. The
10 2018-2021 statements only “[s]ummariz[e] the achievements of the 2018 fire season,”
11 develop a “‘More Fire on the Landscape’ work group” and letters of intent merely express
12 intent to “remain committed” and “remain anchored” to the National Cohesive Wildland
13 Fire Management Strategy. (*Id.* at ¶¶ 17-21). Finally, the 2023 National Cohesive Wildfire
14 Management Strategy Addendum Update, while similarly lacking mandates the Forest
15 Service is required to follow, post-date the events of Telegraph Fire.

16 In the absence of identifying any required policy followed in combating the
17 Telegraph Fire, Plaintiffs still argue the United States was negligent in combating the
18 Telegraph Fire. But the Supreme Court has held a deprivation of property by the negligence
19 of a government official is categorically insufficient to allege a violation of constitutional
20 due process. *See Daniels v. Williams*, 474 U.S. 327 (1986) (“The Due Process Clause is
21 simply not implicated by a negligent act of an official causing unintended loss of or injury
22 to life, liberty or property.”); *Kingsley v Hendrickson*, 576 U.S. 389, 396 (2015) (“Liability
23 for negligently inflicted harm is categorically beneath the threshold of constitutional due
24 process.”). Thus, Plaintiffs have not plausibly alleged a constitutional violation sufficient

25
26 ⁴ The United States has also raised an alternative argument Plaintiffs’ trespass claim is
27 more properly characterized as a taking, which has exclusive jurisdiction of the Court of
28 Federal Claims for claims exceeding \$10,000 under the Tucker Act unless Congress has
granted federal courts other authority to hear such claims. 28 U.S.C. § 1491; *Blades v.*
Comm’r of SSA, 2024 U.S. Dist. WL 3818595 (D. Ariz. 2024) (citing *McGuire v. United*
States, 550 F.3d 903, 910-11 (9th Cir. 2008)). While the Court need not reach this argument
today, it notes Plaintiffs would be free to allege a taking in the Court of Federal Claims.

1 to make the discretionary function exception inapplicable here.

2 Plaintiffs have not pled a requirement or policy or mandate the Forest Service was
3 required to follow in responding to the Telegraph Fire nor plausible constitutional
4 violations. Accordingly, the United States has met the first prong of the *Berkovitz* test.

5 **b. Susceptible to Policy Analysis**

6 The Court must now consider whether the “judgment is of the kind that the
7 discretionary function exception was designed to shield” and “whether they are susceptible
8 to policy analysis.” (first quoting *Berkovitz*, 486 U.S. at 536; and then *Gaubert*, 499 U.S.
9 at 325). The United States cites several cases holding fire fighting operations are subject to
10 policy considerations including *Miller*, 163 F.3d at 598, *Esquivel*, 24 F.4th at 565, and
11 *Green*, 530 F.3d at 1251-52. The United States adds a list of policy considerations in this
12 specific case including (1) risks to first responder safety, (2) risks to nearby communities,
13 (3) risks to critical infrastructure, (4) risks to trails and cultural resources, (5) socio-political
14 considerations such as the reaction of the public, (6) availability of firefighting resources,
15 and (7) risks and resources demands posed by other wildfires in the area. (Mot. at 15-16).
16 Plaintiffs raise no arguments regarding the second prong of the discretionary function
17 exception.

18 Ample evidence and precedent support the United States’ contention that
19 firefighting operations and the use of backfires are grounded in social, economic, and
20 political considerations. Accordingly, the United States has met the second prong of the
21 discretionary function test, and the Court must dismiss this matter for lack of jurisdiction.

22 **IV. Conclusion**

23 Plaintiffs’ claims for negligence and trespass are subject to the discretionary
24 function exception of the FTCA.

25 Accordingly,

26 **IT IS ORDERED** the United States’s Motion to Dismiss (Doc. 24) for lack of
27 jurisdiction is **GRANTED**.

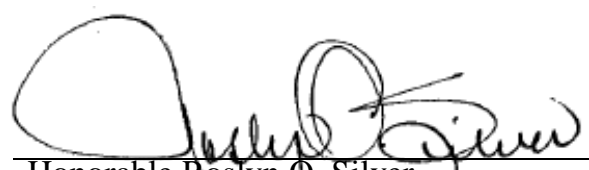
28 **IT IS FURTHER ORDERED** the United States’s Motion to Dismiss (Doc. 18) is
DENIED as moot.

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IT IS FURTHER ORDERED Plaintiffs' Motion to Amend/Correct Caption (Doc. 29) is **GRANTED**.

IT IS FURTHER ORDERED Plaintiffs' First Amended Complaint (Doc. 20) is **DISMISSED WITH LEAVE TO AMEND**. Plaintiffs may file an amended complaint no later than February 7, 2025. If no amended complaint is filed by that date, the Clerk is directed to enter a judgment of dismissal with prejudice.

Dated this 28th day of January, 2025.



Honorable Roslyn O. Silver
Senior United States District Judge