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3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

5 **DANIEL KIM, et al.,**

6 **Plaintiffs,**

7 **v.**

8 **UNITED STATES OF AMERICA,**

9 **Defendant.**

1:16-cv-01656-LJO-SKO

**MEMORANDUM DECISION AND
ORDER GRANTING MOTION TO
DISMISS (Doc. 19)**

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12 **I. PRELIMINARY STATEMENT TO PARTIES AND COUNSEL**

13 Judges in the Eastern District of California carry the heaviest caseloads in the nation, and this
14 Court is unable to devote inordinate time and resources to individual cases and matters. Given the
15 shortage of district judges and staff, this Court addresses only the arguments, evidence, and matters
16 necessary to reach the decision in this order. The parties and counsel are encouraged to contact the
17 offices of United States Senators Feinstein and Boxer to address this Court's inability to accommodate
18 the parties and this action. The parties are required to reconsider consent to conduct all further
19 proceedings before a Magistrate Judge, whose schedules are far more realistic and accommodating to
20 parties than that of U.S. District Judge Lawrence J. O'Neill, who must prioritize criminal and older civil
21 cases.

22 Civil trials set before Judge O'Neill trail until he becomes available and are subject to suspension
23 mid-trial to accommodate criminal matters. Civil trials are no longer reset to a later date if Judge O'Neill
24 is unavailable on the original date set for trial. Moreover, this Court's Fresno Division randomly and
25 without advance notice reassigns civil actions to U.S. District Judges throughout the nation to serve as

1 visiting judges. In the absence of Magistrate Judge consent, this action is subject to reassignment to a
2 U.S. District Judge from inside or outside the Eastern District of California.

3 **II. INTRODUCTION**

4 This matter involved Defendant's March 27, 2017, motion to dismiss pursuant to Federal Rule of
5 Civil Procedure ("Rule") 12(b)(1) for lack of subject matter jurisdiction. Doc. 19. On April 10, 2017,
6 Plaintiffs filed an opposition. Doc. 21. On April 17, 2017, Defendant filed a reply. Doc. 23. For the
7 following reasons, Defendant's motion is granted, and Plaintiffs' complaint is DISMISSED.

8 **III. FACTUAL BACKGROUND**

9 The following facts are drawn from the complaint and filings in this matter, and are accepted as
10 true only for the purpose of this motion to dismiss. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.
11 2009). On August 14, 2015, Dragon Kim and Justin Lee, both fourteen years of age, were camping with
12 Dragon's parents, Plaintiffs Daniel and Grace Kim, and Dragon's sister, Plaintiff Hannah Kim, at the
13 Yosemite Valley Upper Pines Campground in Yosemite Valley National Park. Doc. 1 at ¶¶ 2-6, 15-16;
14 Doc. 19-1 at 2. At approximately 5 a.m., the tent in which Dragon and Justin were sleeping was struck
15 by a limb which fell from a California black oak ("the Subject Tree"). Doc. 1 at ¶ 16. Both boys died of
16 crushing injuries sustained as a result. *Id.* at ¶ 17-18. There were no warning signs placed near the
17 Subject Tree. *Id.* at 22. Plaintiffs bring claims for wrongful death and negligent infliction of emotional
18 distress against Defendant, alleging that Defendant was negligent in maintaining the Subject Tree and
19 the area around it, and that Defendant knew or should have known of a defect in the tree. *Id.* at ¶¶ 1, 20.

20 **IV. STANDARD OF DECISION**

21 A motion to dismiss under Rule 12(b)(1) challenges the subject matter jurisdiction of the Court.
22 Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511
23 U.S. 375, 377 (1994). A "court of the United States may not grant relief absent a constitutional or valid
24 statutory grant of jurisdiction." *United States v. Bravo-Diaz*, 312 F.3d 995, 997 (9th Cir. 2002). "A
25 federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively

1 appears. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). “When subject
2 matter jurisdiction is challenged under [Rule] 12(b)(1), the plaintiff has the burden of proving
3 jurisdiction in order to survive the motion.” *Tosco Corp. v. Communities for Better Env’t*, 236 F.3d 495,
4 499 (9th Cir. 2001) *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010). No
5 presumption of truthfulness applies to a plaintiff’s allegations when evaluating the merits of
6 jurisdictional claims. *Thornhill Pub. Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir.
7 1979).

8 A Rule 12(b)(1) motion may make facial or factual attacks on the existence of jurisdiction. *Safe*
9 *Air for Everyone v. Meyer*, 373 F.3d 1034, 1039 (9th Cir. 2004). A facial attack contests whether the
10 allegations in the complaint are sufficient to invoke federal jurisdiction, while a factual challenge
11 “disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.”
12 *Id.*; *see also Thornhill Publ’g Co. v. gen Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

13 When the existence of subject matter jurisdiction is at issue, a court “is not restricted to the face
14 of the pleadings.” *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). A court may rely on
15 evidence extrinsic to the pleadings and resolve factual disputes relating to jurisdiction. *St. Clair v. City*
16 *of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). In doing so, a court may “rely on affidavits or any other
17 evidence properly before the court.” *Id.* When considering items outside the pleading, the court resolves
18 “all disputes of fact in favor of the non-movant.” *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir.
19 1996).

20 **V. ANALYSIS**

21 **A. The Federal Tort Claims Act**

22 “It is elementary that the United States, as sovereign, is immune from suit save as it consents to
23 be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain
24 the suit. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.”
25 *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Without a waiver of sovereign immunity, a federal

1 court lacks jurisdiction where the United States is sued. *Tobar v. United States*, 639 F.3d 1191, 1195
2 (9th Cir. 2011).

3 The Federal Tort Claims Act (“FTCA”) allows the government to be sued “under circumstances
4 where the United States, if a private person, would be liable to the claimant in accordance with the law
5 of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). It waives the United States’
6 sovereign immunity for tort claims caused by negligence on the part of government employees acting
7 within the scope of their employment. *Terbush v. United States*, 516 F.3d 1125, 1128 (9th Cir. 2008).
8 The FTCA, however, includes a number of exceptions to this otherwise broad waiver of sovereign
9 immunity. *Id.* at 1129.

10 Among the limitations on the FTCA’s immunity waiver is the discretionary function exception,
11 which bars claims “based upon the exercise or performance or the failure to exercise or perform a
12 discretionary function or duty on the part of a federal agency or an employee of the Government,
13 whether or not the discretion involved by abused.” 28 U.S.C. § 2680(a). The discretionary function
14 exception reinstates sovereign immunity in situations where “employees are carrying out governmental
15 or ‘regulatory’ duties.” *Faber v. United States*, 56 F.3d 1122, 1124 (9th Cir. 1995). The exception is
16 limited to discretionary acts, that is, acts “involv[ing] an element of judgment or choice.” *Berkovitz by*
17 *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). “The purpose of the discretionary function
18 exception is to protect the ability of the government to proceed with decisionmaking in carrying out its
19 unique and vital functions without ‘second-guessing’ by the courts as to the appropriateness of its policy
20 choices.” H.R. Rep. No. 1015, 101st Cong. 2nd Sess. 134 (1991).

21 The two part *Berkovitz* test is used to determine if a claim is subject to the discretionary function
22 exception. *Terbush*, 516 F.3d at 1129. In the first step, the court determines whether the government’s
23 “actions involve an ‘element of judgment or choice.’” *Terbush*, 516 F.3d at 1129 (quoting *United States*
24 *v. Gaubert*, 499 U.S. 315, 322 (1991)). “This inquiry looks at the ‘nature of the conduct, rather than the
25 status of the actor’ and the discretionary element is not met where ‘a federal statute, regulation, or policy

1 specifically prescribes a course of action for an employee to follow.” *Terbush*, 516 F.3d at 1129
2 (quoting *Berkovitz*, 486 U.S. at 536). There can be no discretion if a statute or policy mandates a course
3 of action and an employee “has no rightful option but to adhere to the directive.” *Berkovitz*, 486 U.S. at
4 536; *Navarette v. United States*, 500 F.3d 914, 916 (9th Cir. 2010) (“An agency lacks discretion where a
5 statute or policy directs mandatory and specific action, and an employee has no lawful action other than
6 to comply with the directive.”).

7 If the conduct satisfies the first step and involves an element of choice or judgment, a court must
8 next consider “whether that judgment is of the kind that the discretionary function exception was
9 designed to shield.” *Berkovitz*, 486 U.S. at 536. “[O]nly governmental actions and decisions based on
10 considerations of public policy” are protected. *Id.* at 537. “The decision need not be actually grounded in
11 policy considerations, but must be, by its nature, susceptible to a policy analysis.” *Miller v. United*
12 *States*, 163 F.3d 591, 593 (9th Cir. 1998). “When established governmental policy, as expressed or
13 implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it
14 must be presumed that the agent’s acts are grounded in policy when exercising that discretion.” *Gaubert*,
15 499 U.S. at 324.

16 When it invokes the discretionary function exception, the government “bears the burden of
17 proving the applicability of one of the exceptions to the FTCA’s general waiver of immunity” because
18 such an exception “is analogous to an affirmative defense” to correctly place the burden on
19 the party which benefits from the defense.” *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992).
20 “Although the plaintiff bears the initial burden of proving subject matter jurisdiction under the FTCA,
21 ‘the United States bears the ultimate burden of proving the applicability of the discretionary function
22 exception.’” *Faber*, 56 F.3d at 1124 (quoting *Prescott v. United States*, 973 F.2d 696, 701-02 (9th Cir.
23 1992)).

24 If the government successfully shows that that challenged act or omission satisfies both steps of
25 the *Berkovitz* test, then the discretionary function exception applies, and the federal courts lack subject

1 matter jurisdiction. *Bailey v. United States*, 623 F.3d 855, 860 (9th Cir. 2010). Even if the “action or
2 omission constituted an abuse of discretion or was a wrong choice under the circumstances,” the
3 government is immune from suit under the FTCA. *Id.*

4 **B. Application of the Discretionary Function Exception**

5 Defendant asserts that the discretionary function exception to the FTCA applies to Plaintiff’s
6 claims of wrongful death and negligent infliction of emotional distress. Doc. 19-1 at 11. Defendant
7 argues that Plaintiffs’ complaint does not identify any specific statute, regulation, or policy which
8 mandates specific action regarding hazard trees, and that in fact no hazardous tree policy at Yosemite
9 National Park requires such action. *Id.* at 11. Instead, Defendant contends, the hazardous tree policies
10 merely provide a framework and that Park Service personnel are accorded leeway to address hazard
11 trees on a case-by-case basis. *Id.* at 11-12.

12 Defendant also argues that the management of hazard trees in Yosemite National Park is
13 susceptible to policy analysis and therefore satisfies the second step of the *Berkovitz* test. Doc. 19-1 at
14 12. Specifically, Defendant contends that tree management involves policy decisions as to timing,
15 location, manner, and regularity of tree surveys, the proper response to identified hazards, and the type
16 of warnings to post, if any. *Id.* at 15. Likewise, Defendant maintains that tree management decisions also
17 involve balancing safety with other policy goals, such as “resource conservation, employee safety,
18 visitor enjoyment and experience, ecological factors, cultural factors involving Native American tribes,
19 and budgeting and staffing.” *Id.* Defendant asserts that the nature of tree management, which must take
20 into account the aforementioned policy considerations, is of the type described in the second step of the
21 *Berkovitz* test, and the discretionary function exemption therefore applies. *Id.*

22 Plaintiffs counter that the discretionary function exception does not apply to their wrongful death
23 and negligent infliction of emotional distress claims. Doc. 21 at 3. The tortious actions which Plaintiffs
24 allege Defendant took involve primarily operational, and not planning, decisions, Plaintiffs claim. *Id.* To
25 the extent that the tree management decisions did involve some element of judgment, Plaintiffs argue,

1 those decisions are not of the sort which the discretionary function exception was designed to shield. *Id.*
2 at 4. Rather than a criticism of Defendant’s tree management plan, Plaintiffs assert that their “claims are
3 based upon [Defendant’s] blatant disregard of a known danger.” *Id.* at 4. The discretionary function
4 exemption, Plaintiffs argue, was not intended to restore immunity to the federal government when
5 employees disregard known risks. *Id.* at 5. Moreover, Plaintiffs argue, Yosemite National Park’s written
6 plan for hazard tree management mandates abatement or mitigation for trees with a high hazard rating.
7 *Id.* at 6.

8 **1. Applicable National Park Service Policies**

9 The authority for the National Park Service’s management of national parks such as Yosemite is
10 found in the Organic Act, which states that the Park Service’s purpose is “to conserve the scenery,
11 natural and historic objects, and wild life in the [National Park System] and to provide for the enjoyment
12 of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave
13 them unimpaired for the enjoyment of future generations.” 54 U.S.C. § 100101(a) (amending and
14 replacing 16 U.S.C. § 1 (repealed 2014)); see *Terbush*, 516 F.3d at 1130. The Organic Act further grants
15 the Secretary of the Interior and the National Park Service authority to “provide for the destruction of
16 such animals and plant life as may be detrimental to the use of any System unit.” 54 U.S.C. § 100752.

17 The Organic Act does not specify any particular guidelines or methodology for the Secretary or
18 the National Park Service to follow in maintaining trees or other features of the National Parks System
19 or in evaluating which animals or plant life may be detrimental to the use of any National Park System
20 unit. Instead, it sets out a general framework, and affords the National Park Service “discretion to design
21 and implement a policy for evaluating and removing trees” from National Park System units. *Autery v.*
22 *United States*, 992 F.2d 1523, 1528 (11th Cir. 1993) (citing *Zumwalt v. United States*, 928 F.2d 951,
23 954-55) (10th Cir. 1991).

24 Several policy documents, including the National Park Service Management Policies (“the
25 Management Policies”), Pacific West Region Directive PW-062 (“Directive PW-062”), Yosemite

1 National Park Directive # 25 (“Directive # 25”), the Yosemite Vegetation Management Plan (“the
2 Vegetation Management Plan”), and the 1993 Guidelines for Managing Hazardous Trees (“the 1993
3 Guidelines”), constitute the National Park Service’s policy for hazard tree management in Yosemite
4 National Park. Doc. 19-2 ¶ 6. The Management Policies specify that “Congress has given the [National
5 Park Service] the management discretion to allow impacts within parks” but the National Park Service
6 “must leave park resources and values unimpaired unless a particular law directly and specifically
7 provides otherwise.” Doc. 19-3 at 12. Park resources and values include native plants. *Id.* The National
8 Park Service may intervene to manage native plants only in limited circumstances, including “to protect
9 human health” and “to maintain human safety.” *Id.* at 18. The Management Policies further specify that
10 “[t]he saving of human life will take precedence over all other management actions” but “[t]he means by
11 which public safety concerns are to be addressed is left to the discretion of superintendents and other
12 decision-makers at the park level who must work within the limits of funding and staffing.” *Id.* at 20.

13 Directive PW-062, which addresses hazard tree management in a region which includes
14 Yosemite National Park, indicates that “[s]urveys/inspections of tree hazards should be made on a
15 regular periodic basis” with the frequency of surveys in each area recorded in the hazard tree plan. Doc.
16 19-4 at 7. “All hazard tree management programs need to have some method of objectively rating
17 hazards” and “parks will implement a professionally recognized, documented and quantified hazard tree
18 rating system.” Doc. 19-4 at 8. Directive PW-062 does not specify that any particular rating system must
19 be used, but lists factors which any rating system should consider and four action thresholds which a tree
20 hazard management program must consider. *Id.* at 8-9. The action thresholds divide hazardous condition
21 ratings as low, medium/moderate, high, and very high. *Id.* at 9. Hazardous conditions rated high require
22 a management action, and “[h]azardous conditions rated very high require prompt actions to both notify
23 park users and to execute abatement/mitigation measures.” *Id.* However, Directive PW-062 states that
24 parks “may consider the knowledge, experience and judgment of the park’s field staff in conjunction
25 with the numerical hazard tree rating system to determine the appropriate management response for a

1 species- and target-specific hazard.” *Id.* While “[t]rees with a high or very high hazard rating will
2 require some type of abatement/mitigation” the specific method to be used is not specified and “[p]rior
3 to any action, a review of resource issues should be made considering the various environmental laws
4 and the resources potentially impacted.” *Id.*

5 Directive # 25, effective as of September 6, 2013, has as its primary purpose “the safety of the
6 visiting public and park employees, along with conservation of park resources.” Doc. 19-5 at 3. All
7 activities in Directive # 25 “are to be undertaken to the fullest extent feasible and consistent with
8 available resources while still providing for the safety of park operations.” *Id.* Directive # 25 provides
9 Yosemite National Park “with a framework for a hazard tree program” and explains that “[a] park
10 hazard tree management program provides a systematic method for mitigating tree hazards.” *Id.*

11 Directive # 25 states that “[t]he park superintendent retains discretion to administer the [park
12 hazard tree management program] with available park staff and financial resources in the context of
13 other legal requirements and other considerations.” *Id.* at 5. Directive # 25 uses a mix of mandatory and
14 optional language. For example, while “[i]ndividuals involved in hazard tree management . . . must be
15 fully briefed and adequately trained” and tree inspectors “must follow defined safety standards” and
16 “must use Personal Protective Equipment,” *Id.* at 5, it leaves decisions as to the type of hazard rating
17 system, mitigation and abatement responses, and even the need for a hazard tree management program
18 to the park superintendent. *Id.* at 7-8, 12.

19 The 1993 Guidelines provide guidance on factors to consider in a hazard tree management
20 program, particularly compliance and preservation concerns such as environmental impact and cultural
21 and historical landscape management. Doc. 19-6 at 8-12. They also state that “[i]t is proper exercise of
22 discretionary function for the park Superintendent . . . to determine which one of a variety of health and
23 safety issues is most critical.” Doc. 19-6 at 7. Concerns which may be taken into account in tree hazard
24 management include “rare and endangered species or their critical habitat, impacts to visual resources or
25 cultural landscape values, impacts to soils and hydrology, significant alteration of local natural forest

1 structure and composition, wildlife nesting or breeding periods, surface disturbance of archaeological
2 sites, and cumulative effects from ongoing programs or extended projects” in addition to visitor
3 experience and safety. *Id.* at 8.

4 The Vegetation Management Plan identifies hazard trees as an issue for vegetation management,
5 and states that “[r]easonable and prudent measures should be taken to protect safety and property.” Doc.
6 19-7 at 12. A vegetation management program should “provide a reasonable level of personal safety and
7 property protection . . . while preserving and sustaining healthy trees as components of the ecosystems.”
8 *Id.* at 13. “Tree hazards will be removed using approved hazard surveillance, mitigation, abatement, and
9 prevention techniques.” *Id.* The Vegetation Management Plan states that a rating system will be used for
10 evaluating and designating trees for removal, and all methods of tree hazard mitigation should be
11 considered. *Id.* at 16. The priorities of the Vegetation Management Plan include “the identification,
12 prioritization, and mitigation of tree hazards within Yosemite National Park in a safe and cost-effective
13 manner, conserving park values, natural and cultural resource integrity, and minimizing visual,
14 biological, and physical evidence of hazardous tree treatments.” *Id.* at 20.

15 The fiscal year 2014 Annual Work Plan for Yosemite National Park specified that campgrounds
16 and picnic areas were to be surveyed and hazard reductions completed between January and April. Doc.
17 19-9 at 2. The fiscal year 2015 Work Plan indicated that work in the Upper Pines Campground, where
18 the Subject Tree was located, would be completed in January and February. Doc. 19-8 at 2.

19 **2. Step One of the *Berkovitz* Test**

20 At step one of the *Berkovitz* test, the Court must determine whether the challenged conduct
21 “involve[d] an element of judgment or choice.” *Terbush*, 516 F.3d at 1129. To determine whether the
22 discretionary function exception applies to a challenged governmental action, a court must undertake “a
23 particularized analysis of the specific agency action challenged.” *Young v. United States*, 769 F.3d 1047,
24 1053 (9th Cir. 2014). Therefore, the Court must identify the challenged agency action before it may
25 determine whether that conduct involved “an element of judgment or choice.” Plaintiffs’ claims are

1 premised on the assertion that Defendant was negligent in maintaining and managing the Subject Tree
2 and the area around it, leading to the establishment of an unsafe area. Doc. 1 at ¶¶ 28, 42. In particular,
3 Plaintiffs argue that Defendant “failed to use reasonable care in keeping the subject premises in a
4 reasonably safe condition, . . . that Defendant[] failed to use reasonable care to discover any unsafe
5 conditions and to repair, replace, or give adequate warning to anything that could be reasonable
6 expected to harm others” and Defendant knew or should have known about the condition of the Subject
7 Tree. *Id.* at ¶¶ 33-34. In essence, Plaintiffs argue that Defendant’s management of the Subject Tree, and
8 the area immediately around it, gives rise to their claims.

9 The National Park Service and Yosemite National Park policies, guidelines, and work plans
10 offered by Defendant indicate that the National Park Service and the park superintendents are
11 responsible for inspecting trees and for formulating and carrying out appropriate responses to hazards.
12 They do not, however, establish any specific rules regarding timing of inspections, evaluation criteria, or
13 mitigation and abatement techniques, though they do suggest a number of possible options. The National
14 Park Service instead has discretion to formulate an appropriate means of identifying and responding to
15 tree hazards in Yosemite National Park.

16 Plaintiffs do not dispute that the relevant policies and guidelines do not set forth a specific
17 method for identifying and responding to tree hazards, but argue that the statement in Directive # 25 that
18 “[t]rees with a high or very high hazard rating will require some type of abatement/mitigation”
19 establishes that some response is mandatory once a sufficiently severe tree hazard is identified. Doc. 21
20 at 6. That is to say, Plaintiff’s position is that Defendant may not “ignore visible hazards that pose a risk
21 to human lives.” *Id.* This is the only source of a mandatory duty Plaintiffs identify.

22 Plaintiff’s argument ultimately does not hold weight. Plaintiffs have not offered any evidence
23 that Defendant in fact rated or should have rated the Subject Tree as a high or very high hazard.
24 Plaintiffs offer the declaration of Jim Clark, a specialist in tree risk assessment, who states that he would
25

1 have rated the Subject Tree as a high hazard based on the Subject Tree’s codominant stem¹ nature, the
2 previous failure of one of the codominant stems, the presence of saprophytic fungi on the previously
3 failed stem, and the poor structure of the stem which fell on August 14, 2015. Doc. 21-1 at ¶ 14-15. The
4 seven point system which Mr. Clark applied was not a mandatory system applied in Yosemite National
5 Park, but only one suggested approach for rating hazard trees. The various policies and guidelines which
6 address tree hazard ratings in Yosemite National Park vest considerable discretion in park staff to
7 determine the level of hazard posed by vegetation in the park. For example, Directive PW-062 states that
8 a park may apply “the knowledge, experience and judgment of the park’s field staff in conjunction with
9 the numerical hazard rating system to determine the appropriate management response” to a hazard tree.
10 Doc. 19-4 at 8. Whether park staff failed to sufficiently inspect the Subject Tree or rate it at the proper
11 hazard level goes to the merits of Plaintiffs’ negligence claim, not whether Defendant had discretion to
12 determine how to manage hazard trees in Yosemite National Park. “At step one of the discretionary-
13 function-exception analysis, all that matters is that there was, in fact, discretion.” *Chadd v. United*
14 *States*, 794 F.3d 1104, 1111 (9th Cir. 2015). Moreover, the policies and guidelines do not mandate any
15 specific type of abatement or mitigation even if a tree is determined to pose a high or very high hazard.
16 The documents present instead a non-exclusive list of optional responses. *See* Doc. 19-4 at 9.

17 Taken as a whole, the policies afford the National Park Service considerable discretion in
18 addressing hazard trees, which is not negated by the presence of some mandatory language. *See Miller v.*
19 *United States*, 163 F.3d 591, 595 (9th Cir. 1998) (discretionary function exception applied where
20 standards for fighting forest fires “outline[d] certain requirements” but did not “tell the Forest Service to
21 suppress the fire in a specific manner and within a specific period of time”). The broad functions of
22

23 ¹ According to Mr. Clark, the Subject Tree displayed “codominant stems that form a “V” shape.” Doc. 21-1 at ¶ 8.

24 “Codominant stems fail at a much higher rate than a single stem. A ‘V-shaped’ union is much more likely to fail than a ‘U-
25 shaped’ union.” *Id.* at ¶ 9.

1 hazard tree management, which concern balancing safety, budgetary, and conservation goals,
2 “necessarily involve[s] an element of discretion.” *Id.* Accordingly, having found no specific mandatory
3 tree hazard management protocol which displaces the element of discretion afforded to the National
4 Park Service in Yosemite, the Court concludes that Defendant has met its burden at the first step of the
5 *Berkovitz* test.

6 **3. Step Two of the *Berkovitz* Test**

7 Once a court has concluded that the challenged governmental action is discretionary in nature,
8 the court must next consider whether the discretion left to the government “is of the kind that the
9 discretionary function exception was designed to shield.” *Bailey*, 623 F.3d at 860. The challenged action
10 “need not be actually grounded in policy considerations, but must be, by its nature, susceptible to a
11 policy analysis.” *Miller*, 163 F.3d at 593. There is “a strong presumption that a discretionary act
12 authorized by the regulation involves consideration of the same policies which led to the promulgation
13 of the regulations.” *Gaubert*, 499 U.S. at 324.

14 The Ninth Circuit recognizes a “design-implementation distinction” in the application of the
15 discretionary function exception. *Gonzalez v. United States*, 814 F.3d 1022, 1034 (9th Cir. 2016). This
16 distinction recognizes that, at step two of the *Berkovitz* test, “the *design* of a course of governmental
17 action is shielded by the discretionary function exception, whereas the *implementation* of that course of
18 action is not.” *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (emphasis in original).
19 When the implementation itself implicates policy concerns, however, the implementation is shielded by
20 the discretionary function exception. *Chadd*, 794 F.3d at 1112.

21 The Court concludes that Defendant has met its burden at step two. In addition to the “strong
22 presumption” that the challenged conduct involved policy considerations, the policies and guidelines for
23 hazard tree management in Yosemite National Park offered by Defendant evidence the need to consider
24 broad policy concerns in managing hazard trees. For example, Directive PW-062 mandates that, before
25 taking any particular action to address a hazard tree, “a review of resources should be made considering

1 the various environmental laws and the resources potentially impacted.” Doc. 19-4 at 9. Likewise, the
2 1993 Guidelines list a number of special concerns which may be taken into account when managing tree
3 hazards, including environmental, cultural, and archaeological impacts as well as visitor safety and
4 experience. Doc. 19-6 at 8. These policy concerns are the type of decisions protected by the
5 discretionary function exception.² See *Chadd*, 794 F.3d at 1112 (“[A]t step two of the discretionary-
6 function-exception analysis, where there is even *one* policy reason why officials may decide not to take
7 a particular course of action to address a safety concern, the exception applies.”).

8 Plaintiffs have not offered any evidence to rebut either the “strong presumption” or the
9 applicability of the specific policies and guidelines relied upon by Defendant. In arguing that the
10 challenged conduct is not protected by the discretionary function exception because Defendant
11 disregarded a known risk in implementing tree hazard management policy, Doc. 21 at 6, Plaintiffs
12 ignore the recognized principle that “implementation of a government policy is shielded where the
13 implementation itself implicates policy concerns.” *Whisnant*, 400 F.3d at 1182 n. 3. Even where a
14 condition presents a known danger, so long as the implementing decision itself is susceptible to a policy
15 analysis it falls within the discretionary function exception. *Chadd*, 794 F.3d at 1113-14 (holding that
16 Park officials decision not to exterminate non-native, non-endangered mountain goats fell within the
17 discretionary function exception even though the goats presented a known risk to park visitors); see also
18 *Valdez v. United States*, 56 F.3d 1177, 1180 (9th Cir. 1995) (the discretionary function exception
19 protects “a choice between the competing policy considerations of maximizing access to and
20 preservation of natural resources versus the need to minimize potential safety hazards”).

21 Plaintiffs have offered no evidence that the challenged conduct was based on technical,

22
23 ² While budgetary considerations are not protected by the discretionary function exception, *Bolt v. United States*, 509 F.3d
24 1028, 1034 (9th Cir. 2007), the conduct here also involved weighing conservation, safety, environmental, and other policy
25 concerns.

1 objective, or scientific standards which would make them not susceptible to policy analysis. *See*
2 *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1030 (9th Cir. 1989) (“[D]ecisions
3 involving the ‘application of objective scientific standards’—such as how much dynamite to use to
4 produce a refraction—are not insulated by the discretionary function exception because they do not
5 involve the weighing of economic, political and social policy considerations.”) (quoting *Berkovitz*, 486
6 U.S. at 545). Nor have Plaintiffs argued that the challenged conduct was in fact not based on a
7 consideration of policy. For the foregoing reasons, the Court concludes that Defendant has met its
8 burden to satisfy the second step of the *Berkovitz* test. Therefore, the challenged conduct is subject to the
9 discretionary function exception, and the Court lacks subject matter jurisdiction over this matter.

10 **C. Plaintiffs’ Request for Discovery**

11 Plaintiffs request that they be permitted to conduct discovery relating to the prior failure of one
12 stem of the Subject Tree before the Court rules on Defendant’s motion to dismiss. Doc. 21 at 12. The
13 Court “is vested with broad discretion to permit or deny discovery. *Laub v. U.S. Dep’t of the Interior*,
14 342 F.3d 1080, 1093 (9th Cir. 2003). “Refusal to grant discovery to establish jurisdiction is not an abuse
15 of discretion when ‘it is clear that further discovery would not demonstrate facts sufficient to constitute a
16 basis for jurisdiction’” *Id.* (quoting *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n. 24
17 (9th Cir. 1977)).

18 Here, the application of the discretionary function exception turns on whether the National Park
19 Service has discretion in deciding how to evaluate and respond to tree hazards, and whether its decision
20 regarding the Subject Tree is susceptible to a policy analysis. Plaintiffs’ proposed discovery regarding
21 previous failures of the Subject Tree might be pertinent to establishing negligence, but would not weigh
22 on either step of the *Berkovitz* test. Even if the National Park Service was aware of a previous stem
23 failure by the Subject Tree, it would still have discretion in evaluating and responding to that
24 information under the relevant policies and guidelines. Since the proposed discovery would not impact
25 whether the Court has jurisdiction in this matter, Plaintiff’s request for discovery is DENIED.

1 **VI. CONCLUSION AND ORDER**

2 The events which occurred in Yosemite National Park are tragic and devastating. While it is
3 unlikely that Plaintiffs will be able to establish the Court's subject matter jurisdiction over this action, in
4 an abundance of caution Plaintiffs are granted leave to amend their complaint. This will be Plaintiffs'
5 only chance to amend their complaint. For the foregoing reasons, Defendant's motion to dismiss is
6 GRANTED and Plaintiffs' complaint is dismissed with leave to amend. Plaintiffs shall file any amended
7 complaint within 30 days of this order.

8
9 IT IS SO ORDERED.

10 Dated: June 15, 2017

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE