When the Rules Burn: A New Approach to Governmental Discretion in Firefighting Operations

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Abstract

The Federal Tort Claims Act (FTCA) broadly waives the federal government's sovereign immunity, but the discretionary function exception (DFE) preserves immunity for acts grounded in judgment or choice. A doctrinal tension arises from the Supreme Court's instruction in Berkovitz v. United States that the DFE does not apply when a directive "specifically prescribes a course of action." In high-stakes contexts such as wildfire suppression, government actors sometimes deviate from such mandatory directives to make split-second, policy-driven decisions. Yet, in most cases, courts still treat these violations as discretionary acts protected by the DFE, often without explaining how this outcome comports with the Supreme Court's clear instruction in Berkovitz.

This Comment argues for a new interpretation of Berkovitz's first prong: a directive should eliminate discretion only when it specifies concrete actions that advance the overarching policy objectives of the government operation. Thus, when compliance with a directive would fail to change the manner of operational execution or would frustrate policy objectives, even a mandatory directive should not eliminate discretion. This framework reconciles the varied approaches in case law, aligns with Supreme Court precedent, and reflects the realities of emergency response. It also promotes judicial economy by filtering out tort claims that would otherwise fail on causation or negligence grounds.

I. Introduction

In 2016, a wildfire in the Great Smoky Mountains National Park in Eastern Tennessee spread into neighboring cities and counties, wreaking havoc in its path.[1] In the aftermath, insurance companies that paid claims to policyholders sued the National Park Service (NPS)

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[1] Am. Reliable Ins. Co. v. United States, 106 F.4th 498, 501–03 (6th Cir. 2024).

for negligence under the Federal Tort Claims Act (FTCA),[2] alleging that the NPS failed to adhere to mandatory guidelines during the fire suppression efforts.[3] This lawsuit and the subsequent appellate decision in *American Reliable Insurance Co. v. United States*[4] brought to the forefront a complex legal question concerning government liability in emergency response. Central to such cases is the FTCA's discretionary function exception (DFE), which generally shields discretionary and policy-grounded government actions from tort liability.[5] However, in *American Reliable*, the Sixth Circuit was divided on whether the NPS's alleged violation of a mandatory guideline—specifically, its failure to set up a required chain of command structure—qualified as the type of discretionary action protected by the DFE.[6] Underscoring the issue's gravity, the partial dissent warned that the decision risked creating "a circuit split on an important issue."[7] This scenario thus illustrates the central question explored in this Comment: When the government conducts activities characterized by exigency and requiring quick judgment, such as fire suppression, under what circumstances can the government violate specific mandates and still have said violation treated as a discretionary action shielded from tort liability?

The need for a unified, consistent answer to this question is especially acute in the context of wildfire suppression for several reasons. First, wildfire management involves high-stakes decisions, which balance public safety, resource allocation, and environmental concerns.[8] In such an environment, where the line between policy judgments and operational execution is easily blurred, determining a clear and proper boundary between protected discretionary choices (e.g., prioritizing speed over formal procedure) and reviewable operational errors (e.g., ignoring a specific safety mandate) is crucial. Doing so will provide greater clarity for both government actors and potential plaintiffs, ensuring necessary judgment calls in emergencies are not chilled while still allowing recourse for genuine government negligence. Second,

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2 28 U.S.C. §§ 1346, 2401, 2671–80.

3 *Am. Reliable*, 106 F.4th at 504.

4 106 F.4th 498 (6th Cir. 2024).

5 28 U.S.C. § 2680(a) (excluding "the exercise or performance or the failure to exercise or perform a discretionary function" from the waiver of sovereign immunity); Berkovitz v. United States, 486 U.S. 531, 539 (1988) ("The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.").

6 *Am. Reliable*, 106 F.4th at 509–10; *id.* at 519 (Nalbandian, J., concurring in part and dissenting in part).

7 *Id.* at 519.

8 *See, e.g.*, Evans v. United States, 598 F. Supp. 3d 907, 918 (E.D. Cal. 2022) ("[D]ecisions on how to fight the fire typically implicate public policy concerns because they involve balancing of 'cost, public safety, firefighter safety, and resource damage.'" (quoting Miller v. United States, 163 F.3d 591, 595 (9th Cir. 1998))).

courts have struggled to apply the relevant legal test consistently when mandatory directives are allegedly violated during firefighting operations, leading to judicial confusion and the potential for circuit splits.[9] Existing case law reveals divergent approaches: Influential decisions from the Ninth and Tenth Circuits, which have handled most wildfire suppression cases, emphasize the inherent discretion and operational demands of firefighting and consistently shield the government even when clear directives are ignored.[10] Others, like the Sixth Circuit in *American Reliable*, adopt a stricter view and focus on the facial characteristics of directives, finding that violation of a specific directive can remove DFE protection.[11] Thus, wildfire suppression serves as an ideal case study for the DFE framework, as this context presents a well-developed, frequently litigated body of case law and reveals significant doctrinal variation.

To situate the various judicial approaches in their doctrinal background, one must begin with the governing legal test articulated by the Supreme Court in *Berkovitz v. United States*.[12] This two-prong test requires courts to examine whether a federal agency or employee's conduct is both discretionary and policy-based.[13] While both prongs must simultaneously be satisfied for the DFE to apply, this Comment focuses on the test's first prong—whether the conduct is discretionary—since it has presented especially contested interpretive challenges.

Under the first prong, the government is not protected by the DFE when a directive "specifically prescribes a course of action."[14] The central difficulty lies in determining what this phrase means in practice.

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[9] *See, e.g.*, *Recovering the Lost Meaning of the Federal Tort Claims Act's "Discretionary Function Exception*," 138 HARV. L. REV. 654, 665 (2024) [hereinafter *Recovering the Lost Meaning*] ("[C]ourts have long struggled to determine the exception's bounds.").

[10] *See, e.g.*, Miller v. United States, 163 F.3d 591, 595 (9th Cir. 1998) (reasoning that even directives containing mandatory language do not eliminate discretion when "they do not tell firefighters how to fight the fire" and "when the broader goals sought to be achieved necessarily involve an element of discretion"); *see also* Hardscrabble Ranch, L.L.C. v. United States, 840 F.3d 1216, 1221–22 (10th Cir. 2016) (holding that a mandatory checklist did not eliminate the government's discretion because "the various considerations necessary in answering the questions posed by the Checklist . . . [were] inherently discretionary," and "the broader goals sought to be achieved necessarily involve[d] an element of discretion" (citing *Miller*, 163 F.3d at 595)); Gonzalez v. United States, 814 F.3d 1022, 1030 (9th Cir. 2016) (holding that, viewing policy goals of the guidelines, "mandatory-sounding language such as 'shall' does not overcome the discretionary character of the Guidelines").

[11] *Am. Reliable*, 106 F.4th at 509–11; *see also* Pearce v. United States, No. CV-05-3969, 2006 WL 1181879, at *2 (D. Ariz. May 1, 2006) ("By challenging Defendant's implementation of fire safety measures and firefighting techniques, Plaintiffs suggest that prescribed firefighting policies and procedures were not followed. Such actions would not be covered by the discretionary function exception.").

[12] 486 U.S. 531, 536–37 (1988); *see also* United States v. Gaubert, 499 U.S. 315, 324 (1991) (reiterating the same standard).

[13] *Berkovitz*, 486 U.S. at 536–37.

[14] *Id.* at 536.

Although this language seems to suggest that the government is never protected when it violates a mandate,[15] this Comment proposes a context-sensitive interpretation: a directive only prescribes a "course of action" when it dictates substantive, operational conduct that is aligned with overarching policy objectives. Only in those circumstances is a government violation of directives not protected from tort liability by the DFE. Conversely, directives that conflict with policy goals in exigent circumstances or fail to constrain operational decision-making do not automatically eliminate the government's protected discretion, even when the government has clearly violated them.

With this interpretation of the first prong of the *Berkovitz* test, this Comment aims to respond to the challenges of the operational realities and varying judicial approaches in wildfire suppression. Moreover, while prior scholarship has observed the near-immunity afforded to the government in wildfire litigation, much of it focuses on isolated observations and has not systematically accounted for the diverse judicial approaches or their doctrinal underpinnings.[16] To fill these gaps, this Comment will first systematically categorize how courts have treated alleged violations of different types of directives in fire suppression cases. Then, it will defend the proposed interpretation in view of Supreme Court precedent, the operational realities of firefighting, and core tort principles of causation and negligence.

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[15] *See* Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365, 382 (1995) ("Commonly the plaintiff finds a supposedly mandatory provision that the government officer has violated. The plaintiff asserts there is no judgment or choice allowed to the government officer.").

[16] Existing scholarship frequently identifies the general outcome of government immunity but does not offer a systematic categorization of the varied judicial rationales that lead to this result. For example, some sources state the outcome as a general rule from a practitioner's standpoint. *See, e.g.*, DANIEL A. MORRIS, FEDERAL TORT CLAIMS § 15:7 (Clark Boardman Callaghan ed. 2024) ("Claims involving how the government conducts fire suppression operations are generally barred by the FTCA's discretionary function exception."). Other sources describe the practical result of this immunity or emphasize the uniqueness of the wildfire suppression context without a systematic analysis of different judicial approaches. *See* Federico Cheever, *The Phantom Menace and the Real Cause: Lessons from Colorado's Hayman Fire 2002*, 18 PENN ST. ENVTL. L. REV. 185, 206 (2010) (describing the status quo as "a sort of equilibrium in which liability is threatened but (almost) never imposed"); Robert H. Palmer III, *A New Era of Federal Prescribed Fire: Defining Terminology and Properly Applying the Discretionary Function Exception*, 2 SEATTLE J. ENVTL. L. 279, 291 (2012) ("[A] federal land agency should succeed in defending a damages claim resulting from the agency's response to a wildfire by using the discretionary function exception . . . ."); Karen M. Bradshaw, *Backfired! Distorted Incentives in Wildfire Suppression Techniques*, 31 UTAH ENVTL. L. REV. 155, 163 (2011) ("The government is typically found liable for wildfire damage caused through its actions as a land manager, but is not liable when it acts in its firefighting capacity.").

II. BACKGROUND

A. The Doctrinal Framework

The Federal Tort Claims Act (FTCA) creates a cause of action for private parties to sue the United States government for negligence after suffering injury.[17] Generally, the United States government is protected by sovereign immunity, a legal doctrine that prevents the government from being sued in its own courts, unless it consents to being sued.[18] The FTCA provides a limited waiver of this immunity for certain tort claims, providing that the United States can be liable "in the same manner and to the same extent as a private individual under like circumstances."[19]

However, this waiver is subject to several exceptions. Claims against the government that fall within these exceptions are barred, and the government is thus protected from tort liability. One of the most significant and frequently litigated exceptions is the discretionary function exception (DFE), codified in 28 U.S.C. § 2680(a). The DFE bars claims "based upon . . . 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] As the Supreme Court explained in *United States v. Varig Airlines*,[21] Congress's core purpose in creating the DFE was to "prevent 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[22]

In *Berkovitz v. United States*, the Supreme Court established the controlling framework for determining whether the DFE applies by creating a two-prong test. First, the challenged governmental conduct must be discretionary, meaning it must involve "an element of judgment or choice."[23] Critically, the Court stated that the DFE does not apply "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" because the government has no choice or discretion when such a mandate exists.[24] Second,

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[17] *See* Hardscrabble Ranch, L.L.C. v. United States, 840 F.3d 1216, 1219 (10th Cir. 2016).

[18] *See, e.g.*, United States v. Orleans, 425 U.S. 807, 814 (1976) ("[T]he United States can be sued only to the extent that it has waived its immunity . . . .").

[19] 28 U.S.C. § 2674.

[20] 28 U.S.C. § 2680(a).

[21] 467 U.S. 797 (1984).

[22] *Id.* at 798.

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

[24] *Id.*

the judgment exercised must be "of the kind that the discretionary function exception was designed to shield,"[25] which encompasses "legislative and administrative decisions grounded in social, economic, and political policy. . . ."[26] If both prongs are met, the government's action is protected by the DFE, and the suit is barred. While the second prong's policy analysis is essential to the DFE, this Comment focuses on the first prong, as this threshold question of whether any discretion can exist in the face of seemingly mandatory directives presents the most pressing and contested interpretative challenges in the case of fire suppression.

B. Interpretive Confusion After *Berkovitz*

Three years after *Berkovitz*, the Supreme Court revisited the DFE in *United States v. Gaubert*.[27] There, the Court presented three illustrative examples of how the first prong of the *Berkovitz* test operates: (1) the DFE applies when a government actor "obeys the direction" of a regulation, (2) it may apply when "a regulation allows the employee discretion," but (3) it does not apply when "the employee violates the mandatory regulation."[28] While this framework provides three points of reference, it does not establish an operationally-specific test applicable to all situations. As the following analysis will show, this doctrinal ambiguity has left lower courts to grapple with how to apply the first prong in cases that fall between these illustrative examples, particularly when the precise nature and effect of various directives are ambiguous.

Applying the first *Berkovitz* prong has proven difficult and has "generated a 'quagmire' of interpretive confusion."[29] This confusion stems from two related factors inherent in the Supreme Court's framework. First, the Court could not foresee every potential fact pattern and thus did not comprehensively define crucial terms and phrases like "specific," "mandatory," and "prescribes a course of action." Accordingly, important questions remain unanswered. For instance, how specific must a directive be to eliminate the government actor's entitlement to discretion?[30] What constitutes the relevant "course of action" in complex

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[25] *Id.*

[26] *Id.* (quoting *Varig Airlines*, 467 U.S. at 814).

[27] 499 U.S. 315.

[28] *Id.* at 324.

[29] 14 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3658.1 (4th ed. 2024); *see also* Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 263 (2009) ("[T]he United States Supreme Court has addressed the DFE only four times in its sixty-year history, and the Court has created an evolving and confusing test or set of standards to be applied . . .").

[30] *See, e.g.*, Kelly v. United States, 241 F.3d 755, 761 (9th Cir. 2001) (discussing whether "a general regulation or policy" suffices to remove discretion).

governmental operations?[31] Second, the Court did not fully clarify the logical relationship between the existence of a mandatory directive and the elimination of the government's overall discretion. To be sure, a mandatory directive implies that the government lacks discretion with respect to that particular directive itself—i.e., the government should have no choice but to comply. But does the existence of a single mandatory instruction necessarily render the government's broader course of conduct non-discretionary and remove DFE protection altogether?[32] What if the directive is unrelated to the plaintiff's alleged harm?[33] Or, particularly in high-stakes emergency contexts, what if compliance with the directive would undermine broader policy goals or interfere with urgent operational decisions?[34] The Supreme Court's framework leaves these questions open, and lower courts have yet to formulate a coherent principle to resolve them.

The practical result is that courts reviewing FTCA claims involving wildfire suppression are often reluctant to find the DFE inapplicable, even when specific directives were allegedly violated.[35] Out of approximately three dozen cases relevant to the application of the DFE in fire-suppression contexts, only four resulted in findings that the government failed to meet the first prong of the test.[36] This trend is especially

[31] *See infra* Part III.

[32] *See, e.g.*, Hardscrabble Ranch, L.L.C. v. United States, 840 F.3d 1216, 1221 (10th Cir. 2016) (finding the government met the first *Berkovitz* prong despite failing to complete a mandatory checklist during the firefighting operation because, had the government fulfilled the requirement, its discretion in choosing the firefighting strategy would not have been restricted anyway).

[33] *See*, *e.g.*, Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 766 (1997) (explaining that a plaintiff's claim based on the government's failure to follow a non-discretionary procedure is still barred by the DFE if establishing proximate cause requires proving that a discretionary government act was influenced by the alleged non-discretionary error in the process leading up to the plaintiff's injuries); *see also infra* Section IV.D.1 (arguing that claims based on violations of directives unrelated to the alleged harm would likely fail on causation grounds at the merits stage).

[34] Am. Reliable Ins. Co. v. United States, 106 F.4th 498, 520–22 (6th Cir. 2024) (Nalbandian, J., concurring in part and dissenting in part) (arguing that the government retained discretion because it served policy objectives for the government to contravene a mandatory requirement concerning the chain of command).

[35] *See infra* Sections III.C and III.D (discussing cases involving violations of facially mandatory and specific directives).

[36] Reed v. United States, 426 F. Supp. 3d 498, 505 (E.D. Tenn. 2019) ("[W]hile regulations may fail to specify how and when they are to be implemented, they may nonetheless be non-discretionary as to *whether* they are to be implemented."); Pearce v. United States, No. CV-05-3969, 2006 WL 1181879, at *2 (D. Ariz. May 1, 2006) ("By challenging Defendant's implementation of fire safety measures and firefighting techniques, Plaintiffs suggest that prescribed firefighting policies and procedures were not followed. Such actions would not be covered by the discretionary function exception."); Galapagos Corporacion Turistica (Galatours), S.A. v. Pan. Canal Comm'n, 205 F. Supp. 2d 573, 579 (E.D. La. 2002) ("[T]he PCC and Commander Shannon did not close the watertight doors leading to the vessel's engine and stabilizer rooms . . . . The Court finds that the evidence pointed to strongly suggests that in fighting the fire, the PCC was subject at least in part to non-discretionary policy directives that government employees may have violated."); *Am. Reliable*, 106 F.4th at 511 (holding that the NPS's failure to establish a mandatory chain of command

noticeable in the Ninth and Tenth Circuits, which have handled most of these cases.[37] In these circuits, no court has found the government to fail the first prong of the DFE test in nearly two decades.[38] This pattern of deference is not merely an unstated practice; some decisions from these circuits explicitly acknowledge the history of shielding fire suppression activities from liability, and in doing so, these opinions themselves become precedents that solidify the trend.[39] This judicial trend appears to reflect the unique operational aspects of fire suppression: As one commentator has noted, wildfire response involves high-stakes, time-sensitive decisions requiring improvisation and real-time judgment, and this fluid operational environment can come into tension with pre-established directives.[40] Moreover, unpredictable circumstances may arise where strict adherence to preset rules is impractical or even counterproductive to the primary policy goals of safety and resource protection.[41] Thus, in the absence of clear doctrinal guidance from the Supreme Court, some courts have effectively crafted a more flexible application of the first *Berkovitz* prong—one that implicitly accommodates these functional demands of emergency response.[42]

The evolution of the DFE doctrine has therefore led to a consistent but undertheorized outcome in fire suppression cases: courts implicitly protect government discretion, even in the face of violated mandates, but rarely provide consistent reasoning for doing so. To build a principled framework that explains such outcomes, this Comment will first bring the courts' unstated logic to light. The next section does so by

was not a discretionary act covered by the discretionary function exception).

[37] As an illustration, out of the twenty-four fire suppression cases referenced in this Comment, eleven are from the Ninth Circuit and six are from the Tenth Circuit.

[38] For example, in the Ninth Circuit, the most recent fire-suppression case where the government failed the first prong appears to be *Pearce*, 2006 WL 1181879, which was decided in 2006.

[39] *See, e.g.*, Atwater v. United States, No. 23-CV-01147, 2024 WL 266721, at *2 (E.D. Cal. Jan. 24, 2024) ("The Ninth Circuit has held repeatedly that decisions on how and whether to fight fires involve the exercise of discretionary judgment if they require balancing competing policy interests and allocating limited resources between competing goals."); Evans v. United States, 598 F. Supp. 3d 907, 920 (E.D. Cal. 2022) ("[A]ny conduct based on the performance of fire suppression activities and decisions about allocation of these resources implicate policy concerns that courts should not second guess.").

[40] *See, e.g.*, Palmer, *supra* note 16, at 314 (arguing that wildfire response "requires a variety of permissive discretionary choices" and that the government "needs discretion to quickly evaluate each emergency and determine how to respond").

[41] *See, e.g.*, *Am. Reliable*, 106 F.4th at 509–11 (Nalbandian, J., concurring in part and dissenting in part) (arguing that the government retained discretion because it served policy objectives for the government to contravene a mandatory requirement concerning the chain of command); *see also* Zillman, *supra* note 15, at 387 ("The emphasis on finding a violation of a regulation, directive, or office manual may ignore congressional objectives. As has been observed in many bureaucracies, the certain way to cripple operations is to insist on literal compliance with every regulatory provision.").

[42] *See infra* Sections III.C & III.D (discussing cases where courts emphasized the government's operational freedom and the fundamental discretion needed in the firefighting context).

identifying four recurring and often implicit patterns of reasoning that courts use to preserve governmental discretion.

III. JUDICIAL APPROACHES IN FIRE SUPPRESSION CASES

This section surveys how courts have approached fire suppression cases involving different types of directives that were allegedly violated, while categorizing these cases according to courts' reasoning about the nature and legal effect of the disputed directives. In doing so, it reveals the implicit patterns of reasoning that have shaped courts' tendency to preserve government actors' discretion under the first *Berkovitz* prong even in the face of clear violations. Understanding these patterns is essential for crafting a more coherent and unified approach in the next section—one that builds on what courts are already doing in practice and supplies the doctrinal grounding that they have yet to articulate.

A survey of fire suppression case law reveals four recurring patterns of reasoning that courts employ to find governmental actions discretionary, thus satisfying the first *Berkovitz* prong despite alleged violations of directives. First, courts often conclude that a directive is not truly mandatory by pointing to permissive language or explicit grants of discretion in the text.[43] Second, even where a directive contains mandatory language, courts often find that the directive is insufficiently specific and thus implicitly invites the government to exercise interpretive discretion.[44] Third, some courts even look past the violation of a specific and mandatory directive if they find that compliance would not have meaningfully constrained the government's key operational decisions in the first place.[45] Fourth, in the most deferential approach, courts find that the inherently discretionary nature of firefighting can override even directives that are mandatory, specific, and would have substantively restricted operational discretion if followed.[46]

A. First Category: Non-Mandatory Directives

In the first and most straightforward pattern of reasoning, courts conclude that governmental conduct is discretionary when a directive's text is not mandatory but instead uses permissive language or explicitly grants discretion to the government actor. This judicial approach aligns squarely with Supreme Court precedent. By focusing on the non-mandatory nature of the directive, these decisions adhere to the core inquiry from *Berkovitz*: whether the conduct involves an "element of judgment

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[43] *See infra* Section III.A.

[44] *See infra* Section III.B.

[45] *See infra* Section III.C.

[46] *See infra* Section III.D.

or choice."[47] Furthermore, this result also mirrors the fact pattern in *Gaubert*, where the government was shielded from liability precisely because no specific directive required it to act in the manner the plaintiff demanded.[48]

The Ninth Circuit's decision in *Esquivel v. United States*[49] offers a clear illustration. There, the plaintiffs argued that the Forest Service Manual (FSM) imposed binding duties, but the court rejected this argument by pointing to the Manual's express acknowledgment that because the wildfire environment is "dynamic, chaotic, and unpredictable," "reasonable discretion in decision-making may be required."[50] Recognizing this explicit reservation of discretion, the court concluded that such a manual cannot provide a specific and mandatory directive that eliminates choice under the first *Berkovitz* prong.[51]

Courts have applied similar logic in other scenarios, such as when a directive only requires an agency to "consider" certain actions rather than implement them,[52] or when a guideline outlines necessary conditions for acting but does not mandate the action itself once those conditions are met.[53] Therefore, when a directive's own language preserves choice, courts consistently find that the government's action remains discretionary and satisfies the first prong of the test.[54]

B. Second Category: Mandatory but Unspecific Directives

The second recurring pattern is that even when a directive uses mandatory language, courts may still uphold governmental discretion by reasoning that the directive is insufficiently specific to prescribe a

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47 Berkovitz v. United States, 486 U.S. 531, 536 (1988).

48 United States v. Gaubert, 499 U.S. 315, 329 (1991) (finding that the "agencies here were not bound to act in a particular way").

49 21 F.4th 565 (9th Cir. 2021).

50 *Id.* at 575.

51 *Id.*

52 Garcia v. United States, 707 F. Supp. 3d 885, 895 (D. Ariz. 2023) (refusing to characterize a manual as mandatory when "the Manual says that the BAER team should 'consider' response actions whenever there is a very high or high risk, but the Manual does not require the BAER team to implement or create a response action whenever there is a very high or high risk").

53 Pope & Talbot, Inc. v. Dep't of Agric., 782 F. Supp. 1460, 1465 (D. Or. 1991) ("[T]he mere existence of these factors does not mandate that the woods be closed, just that the threshold requirement has been met and the woods may be closed.").

54 *See also* Juras v. United States, No. 11-CV-00155, 2011 WL 13223900, at *3 (D.N.M. Oct. 14, 2011) ("The [Forest Service Manual] is ripe with language indicating that fire suppression operations entail a great deal of discretion."); Mich. Dep't of Nat. Res. v. United States, No. 11-CV-303, 2012 WL 13028277, at *4 (W.D. Mich. May 29, 2012) (finding that the disputed Prescribed Fire Plan itself "allow[ed] for discretion in that 'the Holding Boss [would] determine the number and location of holding forces depending on wind direction and actual fire behavior'" (citation omitted)).

concrete course of action. As shown below, this lack of specificity typically appears in two forms: the directive either articulates broad policy goals without operational steps, or it uses seemingly concrete terms that require significant interpretation by the government actor at the time of execution.

This first form of unspecific directive is exemplified by the Tenth Circuit case of *Tippett v. United States*.[55] There, the court examined a directive stating that saving human life "take[s] precedence over all other management actions."[56] The court concluded that this was not a specific order because it was "too general to remove the discretion."[57] In other similar cases, statements of mandatory agenda or action items without specifying when or how the government must achieve them have consistently been deemed insufficiently specific to preclude the government's discretion.[58]

The second form of unspecific directives, ones that require interpretation at the time of execution, was central to the Sixth Circuit's reasoning in *Abbott v. United States*.[59] There, the court analyzed a rule requiring that "[p]ark visitors and local residents will be notified of" fire management activities "that have the potential to impact them."[60] While the word "will" indicated a mandatory duty to notify, the court reasoned that the directive was not sufficiently specific to remove discretion because an employee first had to exercise judgment to determine if a particular fire activity had the "potential to impact" anyone before the duty to notify was ever triggered.[61] Under the same logic, in another analogous case, the instruction for the Forest Service to eliminate safety hazards from recreation sites "to the extent practicable" was found discretionary, as it required the agency to exercise judgment in deciding whether an action contemplated by this mandatory directive was practicable.[62]

[55] 108 F.3d 1194 (10th Cir. 1997)

[56] *Id.* at 1197.

[57] *Id.*

[58] *See, e.g.*, Green v. United States, 630 F.3d 1245, 1251 (9th Cir. 2011) (holding that the development of a map was an objective without specifying the manner in which the agency must complete the task); *In re* Yellow Line Cases, 273 F. Supp. 3d 168, 175 (D.D.C. 2017) ("Phrases such as 'assume overall command,' 'control . . . the incident,' and 'maintain . . . accountability' simply do not convert decisions that would otherwise involve discretion and policy analysis . . . into mere ministerial acts involving no choice or judgment."); State Farm Fire & Cas. Co. v. United States, No. 06-CV-01135, 2008 WL 5083502, at *12 (D. Colo. Nov. 25, 2008) ("[A]gency policy manuals and regulations that only mandate broad policy goals still allow for discretion, in that the employees involved with implementation must determine when and how to meet the broad mandate.").

[59] 78 F.4th 887 (6th Cir. 2023).

[60] *Id.* at 900.

[61] *Id.* at 900–01.

[62] Rosebush v. United States, 119 F.3d 438, 441–42 (6th Cir. 1997).

Overall, the principle that vague or interpretive directives do not eliminate protected discretion still aligns closely with *Berkovitz*'s mandate that directives must "specifically" prescribe a course of action to negate the DFE.[63] Given that many operational guidelines are intentionally drafted to preserve flexibility for on-the-ground decision-making, the courts' finding of discretion in this category of cases remains a practical and doctrinally grounded application of the first *Berkovitz* prong.

C. Third Category: Mandatory and Specific Directives That Do Not Restrain Operational Discretion

A third, more deferential pattern of reasoning emerges when courts find that even a violation of a specific and mandatory directive does not remove discretion. In these cases, courts reason that compliance with the directive would not have practically constrained the government's essential operational judgments in the first place. Here, the courts' focus shifts from the nature of the violated rule to its real-world effect on the government's broader course of action.

This reasoning is most clearly articulated in the Tenth Circuit decision in *Hardscrabble Ranch, L.L.C. v. United States*.[64] The plaintiffs in that case pointed to the Forest Service's failure to complete a mandatory checklist during their fire response.[65] The Tenth Circuit held that this failure did not practically "remove USFS employees' choice or judgment regarding what measures to take" because "the various considerations necessary in answering the questions posed by the Checklist . . . and their weighing[] are inherently discretionary."[66]

The Tenth Circuit has recently extended the *Hardscrabble* logic to similar procedural requirements: In *Strawberry Water Users Ass'n v. United States*,[67] the court addressed the government's alleged failure to prepare a mandatory Environmental Impact Statement (EIS) and concluded that discretion was not removed because an EIS "[did] not limit the actions the Forest Service may take with respect to wildfire management,"[68] even though the EIS was mandatory. In other words, even though the government clearly disobeyed this directive by not preparing an EIS, the Tenth Circuit focused not on the facial violation but on

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

[64] 840 F.3d 1216 (10th Cir. 2016).

[65] *Id.* at 1221.

[66] *Id.*

[67] 109 F.4th 1287 (10th Cir. 2024).

[68] *Id.* at 1296.

the reality that, had the government prepared an EIS, its decision-making in fighting the fire would not have been impacted anyway.[69]

Similarly, in *4sees v. United States*,[70] a district court in the Tenth Circuit found that failing to "formalize and certify" the Incident Complexity Analysis (ICA) process remained a discretionary act and thus met the first *Berkovitz* prong.[71] The court reasoned that even a completed ICA would not have dictated specific suppression measures; therefore, the government actor would have retained operational discretion even if he had complied with the requirement.[72]

In these cases, the courts treated the directives as non-substantive formalities, reasoning that compliance would not have eliminated the government's need to exercise practical judgment in the field. Thus, these cases reflect a significant analytical shift from focusing on a directive's facial specificity and compulsory character to evaluating its practical effect on decision-making. While intuitively appealing, this reasoning does not appear clearly anchored in the Supreme Court's stated test: As discussed in the next section, one may raise concerns about whether these courts have quietly substituted a new standard for *Berkovitz*'s "specifically prescribes a course of action" test without explicit justification.[73]

D. Fourth Category: Inherent Discretion in Firefighting Activities

In the fourth and most deferential pattern of reasoning, courts find that the demands of firefighting can override even directives that are mandatory, specific, and capable of restricting operational discretion. In these decisions, the judicial focus shifts almost entirely from the text of the violated rule to the general context of wildfire response, reasoning that the nature of firefighting itself demands broad and fundamental discretion that even the most specific and substantive mandates can barely take away.

This approach was clearly articulated by the Ninth Circuit in *Miller*, where the court analyzed specific requirements governing fire suppression.[74] It held that even though such standards existed, "they [did] not eliminate discretion because they [did] not tell firefighters how to

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[69] *See id.*

[70] No. 16-CV-695, 2020 WL 5495183 (D. Utah Sept. 9, 2020).

[71] *Id.* at *4.

[72] *Id.* ("[A]t the end of the ICA is a notation providing that, if three or more of the analysis boxes have been checked 'yes,' the IC should 'consider requesting the next level of incident management support.'").

[73] *See infra* Section IV.A.

[74] 163 F.3d 591, 595 (9th Cir. 1998).

fight the fire."[75] This core logic that any directive short of a step-by-step manual for firefighting on the ground is insufficient to remove discretion has been invoked in later decisions, where fire suppression was deemed so inherently judgment-driven that any operational decision was by default discretionary.[76]

This reasoning was taken even further in the Ninth Circuit's decision in *Woodward Stuckart, LLC v. United States*.[77] There, the court found that discretion was preserved despite a violation of Wildland Fire Use (WFU) guidelines because the guidelines themselves did not specify a mandatory response "if there is any deviation."[78] In effect, the court's logic implies a new, higher bar for plaintiffs: To remove discretion, a directive must not only command an action but also prescribe a specific fallback procedure in the event of its own breach.[79] Because few, if any, directives contain such a fallback provision, this interpretation seems to grant an effectively all-encompassing degree of deference to the government.

Similarly, a recent Tenth Circuit case addressed the allegation that, in adopting fire suppression strategies, the Forest Service considered a factor that the Forest Service Manual prohibited.[80] The Tenth Circuit did not find this alleged violation sufficient for eliminating the government's protected discretion, focusing instead on the inherent discretion exercised by firefighters and concluding that "the Forest Service Manual does not prevent the Service from making a judgment call in its initial response to a fire of human or unknown origin."[81]

In sum, these cases reflect courts' choice to prioritize the context of firefighting over the text of a specific mandate. By characterizing operational judgment in emergencies as categorically discretionary, courts appear to move beyond the directive-centered inquiry required under

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[75] *Id.*

[76] *See, e.g.*, Kimball v. United States, No. 12-CV-00108, 2014 WL 683702, at *7 (D. Idaho Feb. 20, 2014) ("[T]he decision of how to fight a fire is generally discretionary in nature and involves an element of choice. The Incident Command Team had been making daily choices on how to fight the fire based on weather predictions, public safety, firefighter safety, the demands of other ongoing fires, etc. There was no 'mandatory' Forest Service or fire fighting policy, objective, guideline or plan that *required* the Incident Command Team or the firefighters on the ground to take certain action or that prevented the 'firing of the line' decision." (emphasis in original)); State Farm Fire & Cas. Co. v. United States, No. 06-CV-01135, 2008 WL 5083502, at *12 (D. Colo. Nov. 25, 2008) ("The overriding policy and objectives of the Forest Service do not dictate how to fight forest fires and provide broad discretion to firefighters. No mandatory directives exist that tell a Forest Service employee exactly how to fight any specific fire.").

[77] 650 F. App'x 380 (9th Cir. 2016).

[78] *Id.* at 381–82.

[79] *See id.*

[80] Knezovich v. United States, 82 F.4th 931, 940–41 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 2521 (2024).

[81] *Id.* at 940.

Berkovitz, implicitly transforming the first prong into a more open-ended, context-driven policy analysis. As argued in the next section, while this trend may have understandably stemmed from courts' inclination to protect the government's fundamental discretion in carrying out complex and urgent tasks, its doctrinal looseness may shield truly erroneous conduct from review and transform the DFE into a blanket immunity for emergency response. This trend thus calls for a clearer, more principled rule that respects the Supreme Court's framework while accounting for the real-world demands of firefighting.

IV. A NEW INTERPRETATION OF THE *BERKOVITZ* TEST

As the survey of the case law demonstrates, the application of the first *Berkovitz* prong in the fire suppression context appears varied, inconsistent, and often without a clear doctrinal basis or a limiting principle. This doctrinal uncertainty necessitates a new framework that can reconcile the text of *Berkovitz* with the practical realities of emergency response. To that end, this Comment proposes a functional interpretation of what it means for a directive to specifically prescribe a course of action: A directive only removes the government's protected discretion when it (1) dictates concrete, operational conduct and (2) furthers the operation's overarching policy objectives.

This context-sensitive and unified interpretation of the "specifically prescribes a course of action" language serves a dual purpose. On the one hand, it aims to offer the needed doctrinal hook for courts seeking to expand protection for policy-based discretion even when mandatory and specific directives are violated, as often seen in the Ninth and Tenth Circuits.[82] On the other hand, it provides a crucial limiting principle by identifying the type of directive that does negate discretion, ensuring that the government remains accountable for its violations of substantive and policy-aligned directives.

The subsequent analysis will elaborate on the doctrinal uncertainty and defend this interpretation by arguing that it is consistent with Supreme Court jurisprudence, accounts for the operational realities of emergency response, and promotes judicial economy by aligning with tort law principles.

A. Consistent Outcomes, Divergent Approaches

As demonstrated by the four categories of cases outlined in Section III, applying the first prong of the *Berkovitz* test presents significant

[82] *See supra* Sections III.C & III.D.

interpretive challenges. In the wildfire suppression context, these challenges are particularly acute because pre-established rules can conflict with the urgent goals of public safety and resource protection.[83] While courts have consistently found the government's conduct to be discretionary in fire suppression cases, this consistency in outcomes masks deeper doctrinal problems.

In particular, while the first two categories may be seen as doctrinally straightforward applications of the *Berkovitz* framework to specific factual situations involving non-mandatory or unspecific directives, the latter two represent a true divergence in judicial approach because they implicitly created a more deferential, context-driven framework that seems to lack clear grounding in the Supreme Court's DFE jurisprudence: These courts found discretion even in the presence of mandatory and specific directives, but they have not explained how such reasoning comported with the Supreme Court's explicit instruction in *Berkovitz* that the government's conduct is not discretionary when a directive "specifically prescribes a course of action."[84] The result, therefore, seems like an implicit override of *Berkovitz* without an articulated doctrinal justification. Relatedly, the approaches in these more deferential categories do not offer a workable test. There, courts invoked the need for operational judgment or the inherent discretionary nature of fire suppression but said little about how to distinguish protected discretion from genuine operational errors. This is particularly evident in the fourth category, where the DFE was effectively turned into a blanket immunity for emergency response and thus dissolved such distinctions altogether.[85] Therefore, despite reaching outcomes that may seem consistent and intuitive, these courts have yet to explicitly identify their doctrinal underpinnings and articulate coherent rules.

This implicit doctrinal looseness also results in tension among the categories of cases surveyed above. On the one hand, the textual analysis used in the first two categories cannot justify the outcomes in the latter two: Courts in the first two categories find discretion only because a directive's text is non-mandatory or insufficiently specific. If this logic were applied consistently, it would also eliminate discretion in the third and fourth categories of cases, where the directives are specific and mandatory.[86] Indeed, the courts in these latter categories offered no in-

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[83] *See infra* Section IV.C.

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

[85] *See, e.g.*, Miller v. United States, 163 F.3d 591, 595 (9th Cir. 1998); *Knezovich*, 82 F.4th at 940.

[86] *See, e.g.*, Strawberry Water Users Ass'n v. United States, 109 F.4th 1287, 1295 (10th Cir. 2024) ("NEPA requires federal agencies to prepare an environmental impact statement (EIS) before taking major federal action."); Hardscrabble Ranch, L.L.C. v. United States, 840 F.3d 1216, 1221 (10th Cir. 2016) (stating that the requirement to complete a checklist was indeed mandatory).

depth explanation as to why a directive's specific and binding text should suddenly lose its force simply because a court deemed the context to be an emergency giving rise to an impenetrable degree of discretion.[87] On the other hand, the context-driven rationale of the third and fourth categories undermines the textual analysis of the first two: If a court can always find discretion by appealing to the inherent nature of emergency response, then the entire textual inquiry into whether a directive is mandatory and specific becomes superfluous. Thus, no coherent analytical framework has emerged for all these categories of directives. The current judicial landscape may seem like a series of ever-moving goalposts for the plaintiffs: Identifying a clear violation of a mandatory directive is no guarantee against a finding of discretion, and plaintiffs must overcome a fluid set of judicial rationales that can re-characterize almost any government action in emergencies as discretionary conduct.

What is needed, therefore, is a more principled and administrable test that draws a clearer boundary between discretionary policy judgment and non-discretionary operational error, while also providing self-consistent doctrinal support for cases involving alleged violations of directives. The following analysis will justify how the proposed interpretation fulfills these functions by first revisiting the source of the confusion: the text and principles of *Berkovitz*.

B. The Interpretation is Grounded in Supreme Court DFE Jurisprudence

Textually, the Supreme Court's language in *Berkovitz* bears the proposed interpretation that a "course of action" refers to substantive, policy-aligned conduct. The Court's deliberate choice of the phrase "course of action" is itself significant. A "course" implies a purposeful sequence of actions, not merely an isolated, procedural task.[88] By contrast, if the Court had intended to bar the DFE whenever the government failed to perform any substantive or procedural actions required by any directive, it could have used clearer and simpler language referring only to "actions," rather than a "course of action." Thus, the "course

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[87] *See, e.g.*, *Hardscrabble Ranch*, 840 F.3d at 1221 (concluding that even if there was a mandatory requirement for the Forest Service to complete a checklist, "[t]he [c]hecklist simply did not remove USFS employees' choice or judgment regarding what measures to take").

[88] *See Course of Action*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/course%20of%20action [perma.cc/3U78-DY6G] ("the actions to be taken"); *Course*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/course [perma.cc/2YGT-4RU2] ("an ordered process or succession"). Both definitions refer to a sequence or a multitude of actions, rather than an isolated act.

of action" phrase itself invites an inquiry not just into a directive's mandatory character, but also into its substance and purpose within a broader sequence.

Furthermore, the proposed interpretation is consistent with the Supreme Court's foundational principles for the DFE.[89] While *Berkovitz* establishes the key rule that the government fails the first prong of the DFE test when "a federal statute, regulation, or policy specifically prescribes a course of action,"[90] this rule is rooted in a more fundamental inquiry: "[W]hether the action is a matter of choice for the acting employee" or, in other words, whether the conduct "involves an element of judgment or choice."[91] Further bolstering this point, the Court references an older case, *Dalehite v. United States*,[92] which instructs that the DFE protects "the discretion of the executive or the administrator to act according to one's judgment of the best course."[93] Similarly, in *Gaubert*, the Court reaffirms this principle and emphasizes that the amount of discretion in the government's conduct is closely intertwined with whether the conduct aligns with policy. Specifically, the Court points out that the reason why the government does not have a choice when subject to a prescribed course of action is that a violation of such a course of action is a violation of the underlying policy.[94]

Thus, although the *Berkovitz* test seemingly focuses on mandatory directives, the Supreme Court's broader guidance clarifies that the ultimate factor in determining DFE applicability is whether the government can execute judgment and choice in accordance with policy. Consequently, significant tension can arise when mandatory directives conflict with the overarching policy objectives they are meant to serve. In some situations, particularly emergencies, government actors may choose to depart from certain mandatory directives to preserve or advance overarching policy. Failing to comply with some directives in the face of exigent circumstances may reflect a deliberate, policy-driven

[89] As a note on interpretation, the statutory language of the FTCA offers little guidance because it does not define "discretionary function." *See Recovering the Lost Meaning*, *supra* note 9, at 665 ("The FTCA does not include a definition of the phrase 'discretionary function or duty.'" (citing Payton v. United States, 679 F.2d 475, 479 (5th Cir. Unit B 1982) (en banc))). Furthermore, legislative history offers no additional clarity, as Congress effectively "invited the federal agencies . . . and the federal courts . . . to define 'discretionary functions.'" Zillman, *supra* note 15, at 367. Therefore, the most important guideposts for this interpretative exercise remain the Supreme Court's seminal cases.

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

[91] *Id.*

[92] 346 U.S. 15 (1953).

[93] *Id.* at 34.

[94] United States v. Gaubert, 499 U.S. 315, 324 (1991) ("[T]here is no room for choice and the action will be contrary to policy.").

choice rather than a disregard for the policy itself.[95] This choice should therefore be protected by the DFE because it ultimately aligns with the Supreme Court's principle that the government's actions should be characterized as discretionary when the actor has a choice and exercises its judgment in accordance with policy.

Therefore, the *Berkovitz* rule must not be read to bar DFE protection when the government violates just *any* directive. Such a strict rule would create a paradox: The government would fail the first prong of the *Berkovitz* rule for violating a directive and thus potentially become liable, despite exercising precisely the kind of policy-oriented discretion that the DFE is designed to protect—namely, the discretionary decision not to comply with a mandatory directive for the sake of prioritizing the overarching policy. This paradox is resolved under the proposed interpretation. By limiting the *Berkovitz* rule so that discretion is removed only when the violated directive is substantive and aligns with policy, the proposed interpretation allows the government to retain DFE protection when choosing to forgo a conflicting directive. Such an interpretation thus ensures that the *Berkovitz* rule remains consistent with the Supreme Court's fundamental inquiry concerning whether the government's conduct reflects "judgment or choice" executed in accordance with policy.[96]

C. Justifying Discretion in Emergency Contexts

1. The proposed interpretation reconciles historical precedent

The proposed interpretation finds support in historical precedent and demonstrates its utility by harmonizing the principles from *Berkovitz* and *Gaubert* with earlier circuit court case law addressing emergencies. By incorporating insights from earlier cases that recognized the need for discretionary overrides of mandatory directives in urgent contexts, the proposed interpretation applies particularly well to fire suppression and similar scenarios in which exigent circumstances may necessitate deviating from standard requirements.

Some pre-*Berkovitz* courts recognized that deviating from a specific directive was not inherently incompatible with the exercise of protected discretion under broader policy objectives.[97] For example, in *Collins v.*

[95] *See, e.g.*, Palmer, *supra* note 16, at 314 ("During a wildfire response, the government needs discretion to quickly evaluate each emergency and determine how to respond.").

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

[97] John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L.J. 223, 234 (1993).

United States,[98] the Fifth Circuit acknowledged that "policy considerations, perhaps of an emergency nature, might dictate overriding . . . a command" to follow "a mandatory statute or regulation."[99] The *Collins* court illustrated this point with the hypothetical example of emergency responders entering a forbidden location to rescue a trapped miner, a situation where adherence to the order prohibiting entry would conflict with the overarching policy objective of saving a life.[100] In such a situation, therefore, the decision to deviate itself can constitute a protected exercise of policy-driven discretion.[101] Arguably, the later Supreme Court decisions in *Berkovitz* and *Gaubert* did not explicitly invalidate this line of reasoning, as neither case involved a fact pattern where the mandatory directive at issue conflicted with a superior, identifiable policy objective. Because cases like *Berkovitz* addressed scenarios where there was no conflict between the mandate and the overall policy it served, the holdings in those cases should not preclude the *Collins* principle from applying in situations where such a conflict does exist.

Accordingly, the proposed interpretation—that a directive prescribes a course of action and thus eliminates protected discretion only if it both dictates substantive operational conduct *and* aligns with policy objectives—provides a framework that coherently accommodates these two types of precedent. On the one hand, the proposed interpretation confirms that discretion is removed in situations analogous to *Berkovitz*.[102] In *Berkovitz*, the vaccine testing requirements at issue sufficiently dictated on-the-ground conduct to be taken, while also furthering the core public health policy of ensuring vaccine safety.[103] Therefore, under the proposed framework, the government's violation of such requirements should not be a discretionary decision protected by the DFE. Conversely, where directives conflict with overarching policy objectives, the proposed interpretation provides a doctrinal justification for preserving government discretion. In the hypothetical posed by *Collins*, the no-entry directive conflicted with the immediate, paramount policy objective of preserving life and ensuring public safety in an emergency, and the *Collins* court explained that in such situations, policy considerations may override specific commands.[104] The proposed interpretation directly supports this reasoning. Because compliance would have con-

[98] 783 F.2d 1225 (1986).

[99] *Id.* at 1231.

[100] *Id.*

[101] *Id.*

[102] 486 U.S. 531, 540–42 (1988).

[103] *Id.*

[104] *Id.*

flicted with overarching policy, the no-entry directive failed to "prescribe a course of action" as defined by this interpretation and was therefore insufficient to remove the government's discretion regarding how to save the miner. The government should consequently meet the first *Berkovitz* prong.

In sum, this interpretation resolves the apparent tension between these lines of precedent by recognizing a key distinction: whether a specific, mandatory directive advances or frustrates policy. It clarifies that a command is only truly prescriptive when it aligns with its underlying policy, as in *Berkovitz*. Conversely, when a directive would lead to an outcome that frustrates that policy, as in the *Collins* hypothetical, it fails to genuinely prescribe a course of action and thus should not eliminate the government's protected discretion.

2. The proposed framework is valuable for wildfire response cases

Furthermore, this framework is particularly suitable when applied to government discretion during wildfire response. The value of this approach can be illustrated by contrasting wildfire suppression with prescribed burns. Prescribed fires are intentionally ignited to achieve certain land management objectives. Because this process is deliberate, the mandatory directives in the plans are meticulously designed in advance to align with policy objectives as closely as possible. Therefore, compliance is the norm: Operations must be conducted "in accordance with those agency directives and the mandatory prescribed fire plan."[105] In this scenario, the straightforward logic of *Berkovitz* applies seamlessly: Since the directives are policy-aligned, any deviation necessarily contravenes the established policy and should not be shielded from tort liability.[106] Wildfire suppression, by contrast, is inherently reactive and unpredictable. Faced with rapidly evolving conditions, firefighters must improvise and adapt, making it counterproductive to rigidly adhere to planned directives that no longer suit the unfolding circumstances. Consequently, the government "needs discretion to quickly evaluate each emergency and determine how to respond."[107] This need for discretion is especially critical given the increasing pressures of tort liability faced by firefighters when making split-second decisions on the

[105] Palmer, *supra* note 16, at 304.

[106] *See, e.g.*, State of Fla. Dep't of Agric. & Consumer Servs. v. United States, No. 09-CV-386, 2010 WL 3469353, at *4 (N.D. Fla. Aug. 30, 2010) ("While Defendant may have had discretion as to the analysis conducted within the Burn Plan, Defendant had no judgment or choice whether to complete a Plan and then follow it once approved.").

[107] Palmer, *supra* note 16, at 314.

ground.[108] Therefore, by conditioning the removal of discretion on a directive's actual alignment with policy during the operation at issue, the proposed approach can better accommodate the volatile reality of emergency operations where pre-set mandates may not always fit evolving circumstances.

This framework provides a clear metric for resolving the doctrinal disagreement in *American Reliable*. There, the majority adopted a strict, text-focused view, finding that the violation of a clear directive to establish a chain of command was not discretionary.[109] The dissent, by contrast, argued for a context-driven approach, reasoning that the policy objective of a timely response justified the discretionary choice to dispense with a procedural formality.[110] Under the proposed framework, instead of examining the mandatory character of the directive statically, one would ask whether compliance, in that moment, would have furthered or frustrated the overarching policy of public safety, and whether this directive would have required the government to act differently in the firefighting operation. If, as the dissent suggests, adhering to the chain-of-command requirement would have dangerously delayed the fire response and contravened the policy of managing the fire in the "most efficient means,"[111] the directive would fail to prescribe a course of action in that context. Therefore, the decision to override the directive would be found discretionary and meet the first *Berkovitz* prong. In this way, the proposed test shields emergency responders from liability in exigent circumstances without creating blanket immunity.

D. Promoting Judicial Economy

Beyond its grounding in DFE precedent, the proposed interpretation offers a significant practical benefit: It promotes judicial economy by functioning as a discerning jurisdictional filter at the first *Berkovitz* prong. Rather than allowing all tort claims based on directive violations to proceed, the proposed approach permits the government to satisfy the first *Berkovitz* prong even where certain types of directives have been violated, thus preserving the government's eligibility for DFE protection in such situations. As the following analysis demonstrates,

[108] *See, e.g.*, Charles H. Oldham, *Wildfire Liability and the Federal Government: A Double-Edged Sword*, 48 ARIZ. ST. L.J. 205, 206 (2016) ("Firefighters are now caught in the catch-22 of deciding whether to risk life and limb to protect private homeowners living on the fringe of the WUI or liability for failing to protect those same homeowners in the name of safety. Where fire once constituted the primary danger to a firefighter, today a firefighter must also be concerned about the post-fire ramifications of decisions made and strategies implemented.").

[109] Am. Reliable Ins. Co. v. United States, 106 F.4th 498, 508–11 (6th Cir. 2024).

[110] *Id.* at 521–22 (Nalbandian, J., concurring in part and dissenting in part).

[111] *See id.* at 521–24.

claims barred by the operation of the proposed interpretation in this manner are precisely those that would likely encounter insurmountable barriers on causation or negligence grounds if they were to reach the merits stage. By filtering out these non-viable claims early, therefore, the proposed interpretation conserves judicial resources and spares courts from adjudicating suits that are effectively doomed to failure.[112]

1. Causation poses an insurmountable hurdle

Several tort elements would likely fall short even if a plaintiff were able to proceed with a claim based on the government's alleged violation of a directive that, under the proposed interpretation, fails to prescribe a specific course of conduct.

First, if the allegedly violated mandatory directive does not dictate the government's on-the-ground actions, the plaintiff would be unable to establish but-for causation. For example, had the claim in *Hardscrabble Ranch* proceeded to the merits, the plaintiff would have needed to establish that the injury was caused by the firefighters' decision not to complete a mandatory checklist. However, the mandatory checklist, even if completed, would have allowed the government to exercise discretion and would not have restricted the government's freedom in selecting how to fight the fire.[113] Because the government's course of action would have remained unchanged regardless of compliance, the plaintiff would fail to establish but-for causation at the merits stage.

Second, if the directive at issue conflicts with overarching policy, the plaintiff would similarly fail to prove causation because the causation element would require the court to conduct an inquiry barred by statute. 28 U.S.C. § 2680(a) precludes claims "based upon the exercise or performance . . . [of] a discretionary function . . . ."[114] Courts have interpreted the "based upon" language in § 2680(a) to refer to causation. For instance, the Third Circuit in *Fisher Bros. Sales v. United States*[115] held that an inquiry is foreclosed whenever "the immediate cause of the plaintiff's injury is a decision susceptible of policy analysis."[116] Some scholarly analysis further suggests that even claims targeting the government's failure to follow a non-discretionary procedure should still be

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[112] *See*, *e.g.*, Seamon, *supra* note 33, at 741–42 (explaining concerns about the "cost of requiring officials who exercise discretionary functions to defend against FTCA actions"); Tristen Rodgers, *Sovereign Immunity or: How the Federal Government Learned to Stop Worrying and Love the Discretionary Function Exception*, 63 B.C. L. REV. E-SUPPLEMENT II.-17, II.-29–II.-30 (2022) (explaining concerns about "unwarranted expenditure of scarce judicial resources," "separation of powers," and "judicial intervention").

[113] Hardscrabble Ranch, L.L.C. v. United States, 840 F.3d 1216, 1216 (10th Cir. 2016).

[114] 28 U.S.C. § 2680(a).

[115] 46 F.3d 279 (3d Cir. 1995).

[116] *Id.* at 282.

forbidden if establishing proximate causation requires the plaintiff to prove that the non-discretionary error influenced a discretionary act in the process leading up to the plaintiff's harm.[117] In essence, these analyses suggest that courts remain precluded from probing into the government's policy-related judgment when examining the causation of a plaintiff's injury.

When the government violates a directive that conflicts with policy, the government's noncompliance may reflect an implicit judgment to prioritize policy objectives over adherence to a conflicting rule. A plaintiff seeking to prove that the injury is caused by such noncompliance necessarily invites judicial scrutiny of whether the government should have exercised its judgment differently. At a minimum, the court would be forced to ask whether the government should have prioritized compliance instead. However, as explained above, this is precisely the kind of inquiry forbidden by § 2680(a), as it targets a decision that is "susceptible of policy analysis."[118] As an illustration, had the claim in *American Reliable* proceeded to the merits, the causation element would require the court to scrutinize the government's calculus in deciding not to establish the required chain of command. This inquiry would require the court to second-guess the government's policy-related judgment, such as balancing emergency response efficiency against procedural formality. Therefore, the causation element in the plaintiff's claim would entail an inquiry forbidden by the "based upon" language in § 2680(a), and the plaintiff consequently would not be able to demonstrate causation.

2. A negligence claim is unlikely to succeed

Beyond the significant hurdle of causation, such a claim would also likely fail on the element of negligence. Although the DFE doctrine itself does not turn on whether the government acted negligently, a plaintiff must still prove negligence as an element of the tort claim once past the jurisdictional stage.[119] For this element, the plaintiff would be unable to prevail under either of the two primary standards for establishing a breach of duty: the reasonably prudent person standard, which evaluates conduct against a hypothetical standard of ordinary care,[120] or the

[117] Seamon, *supra* note 33, at 766.

[118] Fisher Bros. Sales v. United States, 46 F.3d 279, 282 (3d Cir. 1995).

[119] *See, e.g.*, Whisnant v. United States, 400 F.3d 1177, 1184–85 (9th Cir. 2005) ("[T]he question of *whether* the government [is] negligent is irrelevant to the applicability of the discretionary function exception, [but] the question of *how* the government is alleged to have been negligent is critical.") (emphasis in original).

[120] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (AM. L. INST. 2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances.").

negligence per se doctrine, which can automatically treat the violation of a statute as negligence.[121]

First, under the reasonably prudent person standard, violations of non-prescriptive directives are unlikely to support a finding of negligence. Under the proposed interpretation, such a directive either fails to determine the government's substantive actions or fails to align with overarching policy. In the former case, the directive does not meaningfully constrain how the government should act on the ground, so compliance is unlikely to result in any concrete benefit. In the latter case, the directive calls for actions that run counter to policy objectives, thereby increasing the risk or severity of injury. In either situation, the burdens or costs of compliance are unlikely to be offset by the corresponding reduction in the risk or severity of harm.[122] Indeed, in case a directive conflicts with overarching policy, noncompliance may represent the more prudent course of action by promoting policy goals and delivering benefits associated with that policy. Accordingly, a plaintiff would likely fail to establish that the government's conduct fell below the standard of reasonable care.[123]

Second, the plaintiff is also unlikely to prevail under a negligence per se theory. Scholarly analysis has suggested that the "exercising due care" language in the first clause of § 2680(a)—a clause that operates independently of the DFE—effectively abrogates the doctrine of negligence per se in FTCA actions.[124] Because that clause bars claims based on a government employee's act or omission if done with due care in executing a statute or regulation, a plaintiff at the merits stage cannot establish breach merely by showing a statutory or regulatory violation.[125] But even assuming negligence per se remains available at the merits stage of some FTCA cases, the doctrine's exceptions would likely defeat the plaintiff's claim. As illustrated in *American Reliable*, when a directive fails to prescribe a specific course of action by conflicting with

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[121] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 15 (AM. L. INST. 2010).

[122] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (AM. L. INST. 2010) ("Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.").

[123] *See* Tarak Anada, *The Perfect Storm, an Imperfect Response, and a Sovereign Shield: Can Hurricane Katrina Victims Bring Negligence Claims Against the Government?*, 35 PEPP. L. REV. 279, 325–26 (2008) (suggesting the reasonable person standard as a plausible standard for determining whether the government breaches its duty to protect and aid citizens).

[124] Chelsea Sage Durkin, *How Strong Stands the Federal Tort Claims Act Wall? The Effect of the Good Samaritan and Negligence Per Se Doctrines on Governmental Tort Liability*, 39 ARIZ. ST. L.J. 269, 273–75 (2007).

[125] *Id.*

policy objectives, noncompliance may in fact reduce the risk of harm.[126] For example, firefighters who dispense with a time-consuming procedural requirement like a formal chain of command may respond more quickly and effectively to an unfolding emergency.[127] In such cases, an exception to the negligence per se doctrine applies because "the actor's compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance."[128] Accordingly, the negligence element is unlikely to be established.

3. The DFE can serve as an efficient jurisdictional filter

In sum, this discussion has centered around the hypothetical scenario that a plaintiff's claim based on the government's violation of a non-prescriptive mandate could survive the jurisdictional stage and proceed to the merits. As shown above, such claims would be unlikely to ultimately succeed as they would run into insurmountable barriers on causation or negligence grounds. While it is necessary to recognize the distinction between jurisdictional inquiries and arguments on the merits, and while the proposed interpretation of the first *Berkovitz* prong is not intended as a tool to screen out meritless claims, it incidentally achieves that benefit by more accurately identifying which directives truly eliminate discretion.

The foregoing analysis of merits-based issues like causation and negligence also answers the potential objection that ambiguities surrounding whether discretion was eliminated should be resolved by allowing the claim to get past the jurisdictional stage and further develop.[129] Although tort doctrines can serve as back-end filters, the legal defects in these claims are often foreseeable from the outset through applying the proposed DFE analysis. Identifying such issues early, in turn, avoids unnecessary litigation and ensures § 2680(a) operates as intended—barring suits where discretion remains, while preserving access to relief in genuinely non-discretionary cases.

[126] Am. Reliable Ins. Co. v. United States, 106 F.4th 498, 521–22 (6th Cir. 2024) (Nalbandian, J., concurring in part and dissenting in part).

[127] *Id.*

[128] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 15 (AM. L. INST. 2010).

[129] *See, e.g.*, Pearce v. United States, No. CV-05-3969, 2006 WL 1181879, at *2 (D. Ariz. May 1, 2006) (denying the defendant's motion to dismiss on the grounds that, even though Plaintiff's "allegations are vague and do not permit a particularized analysis of the facts . . . , the allegations appear to challenge at least some actions that do not involve the exercise or performance of discretionary functions").

V. CONCLUSION

Judicial application of the first *Berkovitz* prong in fire suppression cases has been marked by a significant paradox: consistent outcomes supported by divergent and often undertheorized reasoning. While courts routinely find governmental conduct discretionary even in the face of violated firefighting mandates, they have yet to articulate a coherent principle for determining what kinds of directives are sufficient to eliminate the government's discretion. As the case law shows, directives that are non-mandatory or unspecific are generally deemed insufficient to remove discretion, but greater doctrinal ambiguity arises in cases involving both mandatory and specific directives. To resolve this doctrinal uncertainty, this Comment has proposed a new interpretation of the "course of action" language in *Berkovitz*: A directive only removes the government's protected discretion if it dictates the government actor's concrete, operational conduct in furtherance of the operation's policy objectives. This interpretation is grounded in Supreme Court precedent, accounts for the practical demands of emergency response, and promotes judicial economy by aligning with tort principles. Ultimately, the proposed approach offers a principled and administrable rule that helps clarify the boundary between protected discretion and genuine operational error, while also reducing internal inconsistencies in the case law and improving coherence between the Supreme Court precedent and current judicial approaches.