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## Third Circuit Review

### WARNING! BARRACUDAS MAY BITE: THIRD CIRCUIT PUTS "TEETH" IN THE FTCA'S DISCRETIONARY FUNCTION EXCEPTION ANALYSIS

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#### I. INTRODUCTION

Imagine sitting on the sands of the beautiful Buck Island in St. Croix, Virgin Islands, your feet in the warm sea, when suddenly you feel a stunning blow to your foot—you look down to see blood spewing from your severed toes and a flash of barracuda tail swimming away from you.<sup>1</sup> How were you supposed to know that you were at risk for a shoreline barracuda attack? In *S.R.P. v. United States*,<sup>2</sup> twelve-year-old Sergio Perez (Perez) must have wondered the same thing when a barracuda attacked him while visiting Buck Island, a National Monument operated by the National Park Service (NPS).<sup>3</sup> After undergoing surgery to reattach his nearly severed toes, Perez unsuccessfully tried to recover damages from the United States under the Federal Tort Claims Act (FTCA).<sup>4</sup> Through his mother, Perez sued the NPS for failing to warn him of the possibility that a barracuda

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1. See *S.R.P. v. United States*, 676 F.3d 329, 330 (3d Cir. 2012) (recounting facts of case); Thomas Goreau, *Barracuda Attack*, UNDERCURRENT (Jan. 4, 2011), <http://www.undercurrent.org/blog/2011/01/04/barracuda-attack/> (retelling stories of barracuda attacks and describing one attack as “[a] stunning blow” and another as “a flash”).

2. 676 F.3d 329 (3d Cir. 2012).

3. See *id.* at 330 (detailing how barracuda attack occurred on Buck Island, “a unit of the National Park System under the control and management of the National Park Service”).

4. See *id.* (discussing facts and procedural history, including district court’s dismissal for lack of subject-matter jurisdiction due to application of discretionary function exception); see also Pat Murphy, *Is Park Service Liable for Barracuda Attack?*, BENCHMARKS (Apr. 11, 2012), <http://lawyersusaonline.com/benchmarks/2012/04/11/is-park-service-liable-for-barracuda-attack/> (discussing Third Circuit opin-

could attack him while he was on the shore.<sup>5</sup> The Third Circuit Court of Appeals affirmed the United States District Court for the Virgin Islands' dismissal of the case, finding that the NPS's failure to warn of a shoreline barracuda attack fell within the ambit of the discretionary function exception to the FTCA.<sup>6</sup>

Though the government generally waives its sovereign immunity for tort claims under the FTCA, certain discretionary decisions made by state actors remain immune pursuant to the discretionary function exception of the FTCA.<sup>7</sup> The Third Circuit in *S.R.P.* broadly construed the discretionary function exception but recognized two additional criteria in analyzing whether a government action involved a discretionary decision.<sup>8</sup> These two criteria are: whether the government knew about the specific risk of injury, and whether the remedial steps necessary to warn about that risk are "garden-variety."<sup>9</sup> Concurring in the decision, Judge Roth wrote separately to express the fear that evaluating FTCA claims under these two additional criteria will "eviscerate" the discretionary function exception altogether.<sup>10</sup> This casebrief, however, argues that the majority appropriately

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ion dealing with liability issue for National Park Service regarding barracuda attack at Buck Island in 2004).

5. See *S.R.P.*, 676 F.3d at 330–31 (discussing facts of case including how accident occurred, and lack of warning specifically addressing shoreline barracuda attacks on signage and in brochure given to visitors).

6. See *id.* at 330 (affirming district court's dismissal for lack of subject-matter jurisdiction because of discretionary function exception to FTCA).

7. See 28 U.S.C. § 1346 (2006) (granting federal courts original jurisdiction over civil suits against United States for negligence of state actors); *Id.* § 2680(a) (providing exception to Section 1346 waiver of immunity for claims based upon state actor's "exercise or performance or the failure to exercise or perform a discretionary function or duty").

8. See *S.R.P.*, 676 F.3d at 338 (recognizing risk of "overly broad construction" in that "it could easily swallow the FTCA's general waiver of sovereign immunity and frustrate the purpose of the statute"). In further discussion, the court reasoned that "where the Government is aware of a specific risk and responding to that risk would only require the Government to take garden-variety remedial steps, the discretionary function exception does not apply." *Id.*; see also Murphy, *supra* note 4 (discussing how Third Circuit Judge D. Michael Fisher "thr[e]w the plaintiffs' bar a bone, recognizing that" government's knowledge of specific risk of injury and garden-variety type of remedy for that risk will render discretionary function exception inapplicable). For a further discussion of the court's analysis, see *infra* notes 109–37 and accompanying text.

9. *S.R.P.*, 676 F.3d at 338 (acknowledging that knowledge of risk and garden-variety type of remedy bar application of discretionary function exception according to Third Circuit jurisprudence).

10. *Id.* at 345 (Roth, J., concurring) ("[M]y concern [is] that the majority's opinion will eviscerate the discretionary function exception by inserting an improper element into the analysis of whether sovereign immunity has been waived under the FTCA."). Judge Roth opines that these two elements "are both irrelevant . . . [and] should not remove the shield of sovereign immunity." *Id.* Although Judge Roth rejects the use of both the knowledge and garden-variety criteria, she mainly took issue with the latter. See *id.* at 348 ("I would apply the discretionary function exception here to bar waiver of sovereign immunity—without the 'garden-variety' condition imposed by the majority.").

puts "teeth" into an otherwise "toothless standard" of the discretionary function analysis that would threaten to deprive meritorious tort claims from succeeding against the government.<sup>11</sup>

Part II discusses the statutory language of the FTCA and its discretionary function exception, examining how the Supreme Court and appellate courts, including the Third Circuit, have developed the analysis surrounding the exception.<sup>12</sup> Part III analyzes the Third Circuit's holding in *S.R.P.* that the NPS's failure to warn of shoreline barracuda attacks was sufficiently discretionary.<sup>13</sup> It further analyzes the court's discussion of the government's lack of specific knowledge of the risk of a shoreline barracuda attack and its inability to remedy the risk through garden-variety measures.<sup>14</sup> Part IV discusses the implication of the court's decision for practitioners, highlighting how some plaintiffs may still prevail in FTCA claims involving discretion by incorporating these two criteria in their arguments.<sup>15</sup>

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11. *See id.* at 336 (recognizing that discerning whether discretionary decision is subject to policy analysis is "not a toothless standard that the [G]overnment can satisfy merely by associating a decision with a regulatory concern") (alteration in original) (internal citation omitted). For a critique of the discretionary function exception as being overly broad, see James R. Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1538 (2000) ("[T]he discretionary function exception has swallowed much of the liability the FTCA creates, leaving many deserving claimants without a remedy."); Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 449–50 (2012) (arguing one reason to repeal discretionary function exception is because it screens out too many "potentially meritorious claims against the government, including claims in which a federal official's carelessness can be proved"); Andrew Hyer, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. REV. 1091, 1149 (2007) (characterizing application of discretionary function exception per Supreme Court's most recent test as too broad and proposing "incentive recognition" approach). *But see* Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1138 (2009) ("The FTCA succeeds at the task Congress set for it. . . . [Serving] as a drawbridge across the moat of sovereign immunity, providing a remedy for those claims that fit within the bounds of the drawbridge, comply with the procedures of the bridge keeper, and avoid the exceptions Congress built into the bridge."); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1545 (arguing despite variances in interpreting discretionary function exception, "Congress's articulation of the exception unquestionably helps preserve majoritarian policy").

12. For a brief statutory analysis of the FTCA and its discretionary function exception, see *infra* notes 21–29 and accompanying text. For a discussion of courts' interpretation of the scope of the discretionary function exception to the FTCA, see *infra* notes 30–97 and accompanying text.

13. For a discussion of how the court in *S.R.P.* reached its holding, see *infra* notes 113–28 and accompanying text.

14. For a discussion of additional criteria for analyzing claims under the discretionary function exception as applied in *S.R.P.*, see *infra* notes 129–37 and accompanying text.

15. For a discussion of how practitioners representing FTCA plaintiffs, as well as the government, might craft arguments before the Third Circuit as to whether

## II. THE CHANGING TIDES OF SOVEREIGN IMMUNITY: THE EVOLUTION OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE FTCA

Before Congress enacted the FTCA in 1946, the United States enjoyed sovereign immunity from tort claims brought against it.<sup>16</sup> The FTCA creates a general waiver of sovereign immunity for torts committed by governmental actors.<sup>17</sup> Nevertheless, the FTCA contains numerous exceptions, including the discretionary function exception.<sup>18</sup> The Supreme Court has interpreted the scope of the discretionary function exception with increasing breadth, causing some to fear that it is screening out meritorious tort claims against the government.<sup>19</sup> Due to these concerns, the Third Circuit recently followed its own precedent and the lead of other courts by narrowing the discretionary function exception.<sup>20</sup>

### A. *The Tidemark Set by Statutory Language of the FTCA*

The FTCA grants district courts jurisdiction to hear tort claims brought against the United States as long as they allege money damages for personal injury incurred by the negligent acts or omissions of a United States employee in the scope of employment.<sup>21</sup> Additionally, Congress set forth an interesting analogy: the United States would be liable “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or

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the discretionary function exception applies, see *infra* notes 151–54 and accompanying text.

16. See Figley, *supra* note 11, at 1107 (discussing extent of American sovereign immunity before passage of FTCA). Figley further notes that although “Americans injured by torts of the federal government could not sue it for damages,” these claimants could still “petition the government for redress of grievances.” *Id.* He explains that resorting to the “legislative process” was insufficient and eventually gave way to the passage of the FTCA in 1946, waiving sovereign immunity for tort claims. See *id.* at 1107–09.

17. See 28 U.S.C. § 1346 (2006) (waiving immunity from suit for civil actions against United States for negligence of governmental actors).

18. For a discussion of the discretionary function exception of the FTCA and a brief statutory analysis, see *infra* notes 21–29 and accompanying text.

19. For a discussion of the Supreme Court’s recent interpretation of the scope and policy surrounding the discretionary function exception, including the development and alteration of a two-part test, see *infra* notes 30–58 and accompanying text.

20. For a discussion of United States Courts of Appeals’ decisions in interpreting the discretionary function exception, including the Third Circuit, see *infra* notes 59–97 and accompanying text.

21. See 28 U.S.C. § 1346(b)(1) (“[D]istrict courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment”).

omission occurred."<sup>22</sup> Thus, under this analogy, a negligent government actor is subjected to state tort law.<sup>23</sup>

Of the many exceptions to the FTCA, the most litigated and broadest is the discretionary function exception.<sup>24</sup> This exception provides that the main provision of the FTCA shall not apply to claims stemming from any "discretionary function or duty" that the United States' agent or employee performs.<sup>25</sup> This is true regardless of whether the discretionary function or duty is abused.<sup>26</sup> Procedurally, the discretionary function exception determines whether a court has subject-matter jurisdiction to hear the claim.<sup>27</sup> If the discretionary function exception applies, the United States is immune from suit, thus stripping the court of subject-matter jurisdiction over the claim.<sup>28</sup> Congress left the interpretation of what actions are "discretionary" to the courts to develop.<sup>29</sup>

22. *Id.*

23. *See* Figley, *supra* note 11, at 1114 (explaining that "the United States' liability is like that of a private person, not of a state or municipality," emphasizing requirement for "analogous private person liability" as defined by state tort law).

24. *See* Levine, *supra* note 11, at 1541 (noting discretionary function exception is "most gaping and frequently litigated of the FTCA's exceptions").

25. 28 U.S.C. § 2680(a). Thus, the main provisions of Section 1346 do not apply to:

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

*Id.*

26. *See id.* (providing operational language that if government employee's action is based upon discretionary function, it is protected "whether or not the discretion involved be abused").

27. *See id.* § 1346(b) ("[T]he district courts, together with the . . . District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . ."); *see also* *S.R.P. v. United States*, 676 F.3d 329, 333 n.2 (3d Cir. 2012) (recognizing discretionary function exception was "jurisdictional on its face," but also deeming it "analogous to an affirmative defense"). In *S.R.P.*, the plaintiff invoked jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1367(a), and the FTCA, 28 U.S.C. §§ 2674 and 1346(b). *See id.* at 331–32; *see also* Figley, *supra* note 11, at 1109–10 (discussing jurisdictional grant of FTCA, which defines scope of waiver of sovereign immunity).

28. *See, e.g.*, Figley, *supra* note 11, at 1118 ("[U]nless a claim falls within the specific language of § 1346(b), it is excluded from the FTCA's general waiver of sovereign immunity."). Figley describes the jurisdictional grant in terms of the following metaphor: "Absent any of these elements, the claim cannot use the FTCA as a bridge across the moat of sovereign immunity." *Id.*

29. *See* Hyer, *supra* note 11, at 1096 (discussing how Congress "provided little concrete guidance" as to interpreting scope of discretionary function, as other commentators have suggested as well).

B. *From Low Tide to High Tide: Supreme Court Expands the Scope of the Discretionary Function Exception*

Early Supreme Court cases discussing the scope of the discretionary function exception used the status of the governmental actor to determine whether the action involved sufficient discretion to confer immunity.<sup>30</sup> This interpretation gave way to a two-part test, focusing on the nature of the governmental actor's decision and on the actor's subjective decision-making process when determining if an action is susceptible to policy analysis.<sup>31</sup>

1. *First Interpretations: Focus on the Actor's Role and Separation of Powers Justifications*

The Supreme Court initially framed its analysis of the scope of the discretionary function exception in terms of the United States actor's status, differentiating between "operational" level and higher-level actors.<sup>32</sup> In *Dalehite v. United States*,<sup>33</sup> one of the Court's first opportunities to interpret the scope of the discretionary function exception, the Court found that employees who were simply carrying out operations set in place by "cabinet-level" decision-makers used sufficient discretion to fit under the exception.<sup>34</sup> The Court, after examining the legislative history of the

30. For a discussion of the first discretionary function exception Supreme Court cases, see *infra* notes 32–43 and accompanying text.

31. For a discussion of how the Supreme Court developed and modified a two-part test to determine susceptibility to policy analysis, see *infra* notes 44–58 and accompanying text.

32. See *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955) (discussing "operational level" distinction and imposing liability on government to same extent as for "a private individual under like circumstances"); *Dalehite v. United States*, 346 U.S. 15, 35–37 (1953) (holding that government actors at operational or administrative level exercise discretion in carrying out directives from higher-level government employees).

33. 346 U.S. 15 (1953).

34. See *id.* at 35–37 (finding that discretionary function or duty "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations"). The Court further found that the activities of "subordinates" in accordance with "cabinet-level" directions were immune from suit because this kind of operational level decision-making had "room for policy judgment and decision," giving rise to discretion. *Id.* To illustrate the full significance of the *Dalehite* case, briefly setting forth its facts may be helpful. After World War II, the United States converted the manufacture of ammonium nitrate from a war-inspired need for explosives to a commercially-driven need for fertilizer both in the United States and in Europe. See *id.* at 18–19. One particular shipment of this ammonium nitrate fertilizer "produced and distributed . . . according to the specifications and under the control of the United States" made its way to Texas City for storage. See *id.* at 19–22. Over 2,000 tons of the fertilizer was loaded onto French ships, which then exploded in the harbor, leveling the city and killing "many" people. See *id.* at 22–23. The ensuing lawsuit was the Supreme Court's first chance to interpret the scope of the discretionary function exception. See *id.* at 17 (granting certiorari "because the case presented an important problem of federal statutory interpretation [of the Federal Tort Claims Act]").

FTCA, found that “it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.”<sup>35</sup> The Court, however, declined to define with precision where this discretionary function ends.<sup>36</sup> Instead, it held that the protection afforded to higher government actors making decisions also shielded subordinates merely following orders.<sup>37</sup>

Separation of powers has been touted as one reason for subsequently developing the Court’s discretionary function exception jurisprudence cautiously.<sup>38</sup> This view is clearly expressed in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*,<sup>39</sup> where the Court refocused the scope of the discretionary function exception to “the challenged acts of a Government employee—whatever his or her rank.”<sup>40</sup> The Court interpreted Congress’s intent as wishing to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”<sup>41</sup> Thus, the discretionary function exception was the “boundary” between allowing tort claims against the federal government to succeed and pro-

35. *Id.* at 27–28.

36. *See id.* at 35 (finding it “unnecessary to define, apart from this case, precisely where discretion ends”). The Court’s next case affirmed the status-based distinction in the scope of the discretionary function exception and took up the issue of the private person analogy expressed in the main provision of the FTCA. *See Indian Towing Co.*, 350 U.S. at 68–69 (“The broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable.”).

37. *See Dalehite*, 346 U.S. at 36 (“Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.”).

38. *See, e.g., Krent, supra* note 11, at 1530–31 (“Judicial review could impede majoritarian policymaking if judges were empowered to review certain discretionary executive branch actions for their reasonableness or to force the executive branch to uphold contractual obligations that it believes are no longer in the nation’s best interests.”). *But see* Bruno, *supra* note 11, at 435–38 (criticizing scholars’ arguments that discretionary function immunity preserves balance of powers that would otherwise “be compromised were such [policy] judgment subject to judicial review through the adjudication of tort claims”). Bruno proposes that this fear of legislative and agency policy-making being subjected to judicial review in areas where the judiciary has no experience is “exaggerated.” *See id.* at 438. Bruno argues that the negligence framework allows judges to review tort claims without “overstep[ping] their legal authority or competence” in deciding tort claims against the government. *See id.* at 440. He states:

The question presented by a tort claim that arises from some federal employee’s policy-based decision is not whether, in the abstract, the decision taken was sound or wise . . . . [But rather] whether, in light of existing case law, the allegedly tortious acts or omissions at issue constituted breach of some valid duty of care owed to the plaintiffs.

*Id.*

39. 467 U.S. 797 (1984).

40. *Id.* at 813.

41. *Id.* at 814.



protecting the government's role in exercising discretion while creating and implementing important policy goals.<sup>42</sup> But this did little to clarify what *Dalehite* declined to define: where the discretionary function exception does not apply.<sup>43</sup>

## 2. *The Supreme Court's Two-Part Test*

Four years later in *Berkovitz v. United States*,<sup>44</sup> the Supreme Court identified two particular instances where the discretionary function exception does not bar a plaintiff's tort claim: where policy "leaves no room for an official to exercise policy judgment in performing a given act," and where an act simply does not involve the exercise of judgment.<sup>45</sup> The Court also set forth a two-part test meant to analyze tort claims in light of the discretionary function exception.<sup>46</sup> The first part asks whether any regulations, policies, or statutes specifically mandate a course of action that ultimately gives rise to the tort claim.<sup>47</sup> If so, the government employee or actor has no business exercising discretion in the first place, and the discretionary function exception necessarily does not apply.<sup>48</sup> However, if there is no such regulation mandating a specific course of action, or if the regulation is sufficiently broad enough to allow discretion within its bounds, courts should advance to the second part of the test: whether the discretion exercised is the kind of discretion that the exception is designed to protect.<sup>49</sup>

Almost three years after *Berkovitz*, in *United States v. Gaubert*,<sup>50</sup> the Supreme Court transformed this two-part test and expanded the scope of the

42. *See id.* at 808 ("The discretionary function exception . . . marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.").

43. For a discussion of where the *Dalehite* court declined to extend the scope of the discretionary function exception, see *supra* note 36 and accompanying text.

44. 486 U.S. 531 (1988).

45. *See id.* at 546–47 ("[I]f the [governmental actor's] policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful.").

46. *See id.* at 536 (setting forth two-part test).

47. *See id.* (discussing how existence of "a federal statute, regulation, or policy" that "specifically prescribes a course of action for an employee to follow" leaves that employee with "no rightful option but to adhere to the directive"). The Court reasoned that if the employee is forced to follow these directives, then this is not a meaningful exercise of discretion that would allow the discretionary function exception to apply. *See id.*

48. *See id.* ("[C]onduct cannot be discretionary unless it involves an element of judgment or choice.").

49. *See id.* (reasoning that if employee has no specific mandatory directive to follow and "the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield").

50. 499 U.S. 315 (1991).

discretionary function exception.<sup>51</sup> It found that “each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield.”<sup>52</sup> Moreover, the Court emphasized that governmental action need not have actually resulted from an exercise of policy judgment.<sup>53</sup> Rather, the focus of discretionary function analysis is “on the nature of the actions taken and on whether they are susceptible to policy analysis.”<sup>54</sup> This line of the decision essentially altered the second part of the *Berkovitz* test to whether actions are “susceptible to policy analysis.”<sup>55</sup> As a result, some commentators have pointed to the second part of the test as the source of much inconsistency within the circuits after *Gaubert*.<sup>56</sup> For instance, the lack of a clear standard in the second part of the test has led to partisan-based results.<sup>57</sup>

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51. See Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 456 (1997) (discussing Justice White’s “single sentence that changed the entire focus of the exception”). Peterson and Van Der Weide argue that Justice White “provided neither explanation nor authority for his transformation of the second prong of the *Berkovitz* test.” *Id.* They note the “inquiry moved from the realm of the factual to the realm of the hypothetical” when the nature of the actions, not the actor’s subjective intent, became the focus of discretionary function exception analysis. *Id.*; see also Bruno, *supra* note 11, at 429 (discussing how Supreme Court sought partly to “correct the Fifth Circuit’s proposition that ‘operational’ or low-level management decisions necessarily fall outside the scope of the government’s discretionary function immunity”). The *Gaubert* Court sought to resolve the agency issue framed in *Dalehite*, and in doing so, it expanded the scope of the discretionary function exception. See *id.*

52. *Gaubert*, 499 U.S. at 332. Here, the governmental actions at issue were the alleged negligence of the Federal Home Loan Bank Board and the Federal Home Loan Bank-Dallas in “carrying out their supervisory activities.” *Id.* at 318. The plaintiff, chairman of the board and the largest shareholder of a federally insured savings and loan, lost millions of dollars in a poorly supervised merger. See *id.* at 319–20. The Court found that the federal banking regulations on point “established governmental policy which is presumed to have been furthered when the regulators exercised their discretion to choose from various courses of action in supervising [one of the merged entities].” *Id.* at 332.

53. See Bruno, *supra* note 11, at 429 (discussing how *Gaubert* Court addressed longstanding “ambiguity in the case law as to whether a government agent’s action, in order to fall within the discretionary function exception, must have actually been the product of policy judgment”).

54. *Gaubert*, 499 U.S. at 325.

55. See Peterson & Van Der Weide, *supra* note 51, at 456 (discussing effect of Justice White’s alteration of second part of *Berkovitz* test).

56. See, e.g., 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 10:6 (2d ed. 2013) (stating that “courts are not entirely in agreement over the scope of the discretionary function exception,” particularly for recreation cases).

57. See Robert C. Longstreth, *Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?*, 8 U. ST. THOMAS L.J. 398, 399 (2011) (“[F]ederal Republican-nominated judges are more likely than Democratic-nominated judges to find that the discretionary function exception bars tort actions against the federal government.”). Judge Longstreth determined the partisanship of the judges according to the party of the President who nominated them. See *id.* at 398–99. He

Others argue that *Gaubert* made it easier for the government to prevail under the discretionary function exception.<sup>58</sup>

C. *There Are Plenty of Fish in the Sea: Interpretive Differences Among Courts*

Tracing the spectrum of decisions hinging on the applicability of the discretionary function exception shows that courts' analyses are subjective and fact-driven.<sup>59</sup> Distinguishing design from implementation, balancing safety considerations, knowledge of prior similar risks, ability to perform routine maintenance and repair work, and budgetary issues all surface as themes throughout the sea of cases.<sup>60</sup> Although some courts have found the discretionary function exception inapplicable under these themes, the lack of a bright-line rule has led to more favorable decisions for the government since *Gaubert*.<sup>61</sup>

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then proposed that, if the second prong of the discretionary function exception were sufficiently clear in terms of offering guidance to courts, there should be no variance among Republican and Democrat judges. *See id.* at 399. His findings indicated that there was little variance among decisions that turned on the first prong of the test (whether there was a federal statute on point to eliminate discretion), while Democratic-nominated judges were three times more likely than Republican-nominated judges to find that "the conduct at issue was not susceptible to policy analysis" in the second prong. *See id.* at 406. He concluded his article by arguing that "reducing the open-ended nature of the inquiry under the second prong" will help rein in some of the seemingly partisan biased opinions. *See id.* at 407.

58. *See* Peterson & Van Der Weide, *supra* note 51, at 465 (noting that "cases bear . . . out" the prediction that after *Gaubert* "the proportion of government defendants able to satisfy the second prong of the *Berkovitz* test and obtain discretionary function immunity" would increase).

59. *See, e.g.*, *Terbush v. United States*, 516 F.3d 1125, 1136 (9th Cir. 2008) ("[O]ur case law may not be in complete harmony on this issue, which is perhaps the inevitable result of such a policy-specific and fact-driven inquiry."). The court in *Terbush* further noted that the struggle courts engage in is marked by their reluctance to create bright-line rules, in keeping with Supreme Court precedent, which likewise refuses to "create formulaic categories." *See id.* at 1129–30 (discussing Supreme Court and lower court precedent refusing to create hard rules for classifications of conduct). Courts have instead chosen to define discretionary activity along a spectrum. *See O'Toole v. United States*, 295 F.3d 1029, 1035 (9th Cir. 2002) (describing analysis under second prong of test as falling along spectrum). As the court in *O'Toole* explained, at one end of the spectrum, "agency decisions [are] totally divorced from the sphere of policy analysis," as in car accidents caused by government actors. *Id.* At this end, the discretionary function exception does not apply because "[t]he 'discretion' exercised by the negligent government driver is just not the kind of decisionmaking" meant to be shielded. *Id.* At the other end of the spectrum, "agency actions [are] fully grounded in regulatory policy, where the government employee's exercise of judgment is directly related to effectuating agency policy goals." *Id.* These types of decisions are meant to be shielded, such as regulating airline safety. *See id.* (citations omitted).

60. For a discussion of the themes that courts draw on in discretionary function exception analysis, see *infra* notes 62–97 and accompanying text.

61. For a discussion of successful plaintiffs facing the discretionary function exception, as well as those cases where immunity is conferred, see *infra* notes 70–97 and accompanying text.

### 1. *The Design-Implementation Distinction and Safety*

Some discretionary decisions that involved design work, such as road design, were protected by the discretionary function exception.<sup>62</sup> On the other hand, when a decision involved merely implementing a design, any discretion involved was generally not the kind protected by the discretionary function exception.<sup>63</sup> This is particularly true in cases where the implementation of a design mostly involves safety concerns, such as maintaining a road's design so that it was safe for higher speeds.<sup>64</sup> Balancing competing safety concerns in implementing a design, however, may be susceptible to policy analysis.<sup>65</sup>

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62. *See, e.g.*, *ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir. 1987) ("Park Service's decision to design and construct [park road] without guardrails was grounded in social and political policy. . . . [And thus] is protected by the discretionary function exception."). *But see* *Soldano v. United States*, 453 F.3d 1140, 1150 (9th Cir. 2006) (finding Park Service's decision to design sign placement along park road was protected by discretionary function exception, but decision to design part of road with "an unsafe speed limit" did not insulate government from liability).

63. *See, e.g.*, *Whisnant v. United States*, 400 F.3d 1177, 1181, 1185 (9th Cir. 2005) (noting trend in case law distinguishing design from implementation and holding FTCA did not bar plaintiff's claim for negligence in implementing safety regulations); *Faber v. United States*, 56 F.3d 1122, 1126–27 (9th Cir. 1995) (rejecting government's argument that implementing safety mandate to post signs warning of diving hazards involved discretion); *cf.* *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995) (finding fault with plaintiff's argument that governmental actions of policy implementation are not protected by discretionary function exception because this argument "is merely an effort to establish yet another in a long series of 'analytical frameworks' that the Supreme Court has rejected as an inappropriate means of addressing the discretionary function exemption") (citation omitted).

64. *See, e.g.*, *Soldano*, 453 F.3d at 1150–51 (reasoning that Park Service's decision to design road without guard rail near vista point may have involved discretion but setting speed limit near vista point inconsistent with design choice was unsafe for park visitors and not protected by discretionary function exception); *Whisnant*, 400 F.3d at 1181 ("[M]atters of scientific and professional judgment—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy."); *ARA Leisure Servs.*, 831 F.2d at 195–96 (holding that, in contrast to designing park road without guardrail, neglecting to maintain road in safe condition subjected United States to liability when tour bus drove off road).

65. *See* *Bailey v. United States*, 623 F.3d 855, 863 (9th Cir. 2010) (holding United States Army Corps of Engineers immune under discretionary function exception because it had to balance competing safety considerations, rendering decision policy-oriented). The plaintiff-decedent in *Bailey* drowned when his boat went over a submerged dam, where warning signs had been washed away and not replaced. *See id.* at 858–59 (discussing facts). The Corps had to balance the risk that its employees might encounter dangerous water when trying to replace the signs with the risk that boaters would not be warned of the upcoming submerged dam. *See id.* at 862 (noting balancing). The court determined this was a balancing act of "competing policy interests" and was thus susceptible to policy analysis under the discretionary function exception. *See id.* The dissent argued this was inconsistent with case law establishing that "safety considerations are not policy considerations." *Id.* at 866 (Fletcher, J., dissenting) (citations omitted).

## 2. *Budgetary Considerations*

Governmental actors are frequently faced with a choice of how to allocate scarce funds when making a decision that could fall under the discretionary function exception.<sup>66</sup> But, budgetary considerations themselves have generally not been accepted as legitimate policy concerns.<sup>67</sup> Courts have recognized that budgetary concerns underlie virtually any decision a governmental actor must make, undoubtedly leading to the discretionary function exception swallowing the whole of the FTCA.<sup>68</sup> An exception has been made, however, when concerns with how to budget limited funds were balanced against virtually unlimited natural hazards for which warnings could be given.<sup>69</sup>

## 3. *Failure to Warn Cases: Policies Granting Discretion*

Courts are “not entirely in agreement” over the scope of the discretionary function exception in recreation cases involving “low-level governmental actions,” as in the decision of whether to warn of certain dangers.<sup>70</sup> Often, when a regulation or statute grants a governmental actor broad discretion, any decisions regarding warning about hazards has

66. See Peterson & Van Der Weide, *supra* note 51, at 498–500 (discussing cost considerations of governmental agencies).

67. See, e.g., *Cope*, 45 F.3d at 449 (rejecting government’s argument that “underlying fiscal constraints should therefore exempt ‘virtually all government activity’”); *ARA Leisure Servs.*, 831 F.2d at 196 (holding decisions of how to allocate funds for maintaining park system were not intended to confer immunity).

68. See, e.g., *Cope*, 45 F.3d at 449 (discussing how government’s budgetary argument leads to idea that governmental decisions that “involve choice and the faintest hint of policy concerns are discretionary and subject to the exception”). The *Cope* court remarked that this argument would “allow the exception to swallow the FTCA’s sweeping waiver of sovereign immunity.” *Id.* (citation omitted); see also *ARA Leisure Servs.*, 831 F.2d at 196 (“Budgetary constraints underlie virtually all governmental activity.”); Peterson & Van Der Weide, *supra* note 51, at 498–500 (explaining interaction between budget considerations and adoption of safety precautions, but recognizing that “courts’ acceptance of budgetary constraints as a ‘policy’ factor is understandable”). Peterson and Van Der Weide argue, however, that the Supreme Court has never officially recognized budget constraints as a policy factor and that courts should not permit private or public organizations to avoid liability on budgetary considerations. See *id.* at 501. Instead, “discretionary function immunity should only be available for decisions of a uniquely governmental—i.e., policy—nature” without considering monetary resources. *Id.*

69. See *Valdez v. United States*, 56 F.3d 1177, 1180 (9th Cir. 1995) (holding that National Park Service, “[f]aced with limited resources and unlimited natural hazards,” was protected in making policy decisions balancing “goal of public safety against competing fiscal concerns as well as the danger of an overproliferation of warnings”); see also *Elder v. United States*, 312 F.3d 1172, 1181 (10th Cir. 2002) (“[P]ark officials must weigh the cost of safety measures against the additional safety that will be achieved. Even inexpensive signs may not be worth their cost.”).

70. See COGGINS & GLICKSMAN, *supra* note 56 (surveying decisions in recreation cases that interpret scope of discretionary function exception and comparing results by circuit).

also been protected under the discretionary function exception.<sup>71</sup> Yet, there are exceptions to this general rule, such as decisions to zone a particular property, as articulated by the Tenth Circuit Court of Appeals in *Boyd v. United States*.<sup>72</sup> The decision of whether to zone water was considered discretionary because it exhibited a balance between expenditures on safety and recreational use; however, the court held the decision to neglect to warn of dangerous conditions in an unzoned water area simply did not involve discretion.<sup>73</sup>

Similarly, in *Smith v. United States*,<sup>74</sup> the Tenth Circuit considered the decision to leave an area undeveloped as sufficiently discretionary, but determined that the choice not to warn or safeguard this area from danger was not an exercise of discretion.<sup>75</sup> Conversely, in *Elder v. United States*,<sup>76</sup> the Tenth Circuit found that the decision not to post *additional* warning signs was continuing a course of action undertaken to provide warning and thus was discretionary because the decision was sufficiently grounded in social and economic policy.<sup>77</sup>

#### 4. *Knowledge of Risk of Harm and "Garden-Variety" Remedy*

The Third Circuit's additional two elements of knowledge and garden-variety remedies are not entirely novel within Third Circuit precedent.<sup>78</sup> Other courts have also considered these elements in analyzing

71. *See, e.g.*, *Childers v. United States*, 40 F.3d 973, 976 (9th Cir. 1995) (holding NPS's "decisions as to the *precise manner*" of warning public about open but unmaintained trails in winter "clearly [fell] within the discretionary function exception"); *Valdez*, 56 F.3d at 1179 (finding NPS was not liable in following guidelines that vested it with discretion in carrying out "general policy goals regarding visitor safety"). *But see* *Oberson v. U.S. Dep't of Agric., Forest Serv.*, 514 F.3d 989, 998 (9th Cir. 2008) (holding Forest Service liable for failing to warn of known hazard on snowmobile trail despite discretion granted as to how to warn visitors).

72. 881 F.2d 895 (10th Cir. 1989).

73. *See id.* at 897 (upholding jurisdiction for plaintiff's claim for husband's wrongful death when he was struck by boat and killed in unzoned waters because decision not to warn at all was not discretionary, even though decision whether to zone waters or not was susceptible to policy analysis).

74. 546 F.2d 872 (10th Cir. 1976).

75. *See id.* at 877 (holding that decision to leave area undeveloped was discretionary under discretionary function exception, but failing to post warning signs or provide safeguards around super-heated thermal pool was not discretionary).

76. 312 F.3d 1172 (10th Cir. 2002).

77. *See id.* at 1180 (finding that discretionary function exception applied to decision not to post more warning signs or erect more barriers in area where young boy slipped on algae and died while crossing stream in national park).

78. *See, e.g.*, *Cestonaro v. United States*, 211 F.3d 749, 752, 757 (3d Cir. 2000) (holding "subsequent decisions concerning the [parking] lot were not necessarily protected" due to NPS's failure to address known dangerous condition); *Gotha v. United States*, 115 F.3d 176, 181 (3d Cir. 1997) (characterizing case of failing to install handrails along dark pathway "mundane, administrative, garden-variety, housekeeping problem").

whether the discretionary function exception applies.<sup>79</sup> It is not clear, however, whether these courts intended the additional elements to be incorporated into an analysis of the susceptibility to policy analysis.<sup>80</sup>

a. Knowledge

Courts have found that when a governmental actor has reason to know about a specific risk of injury or harm but does nothing about it, future injuries of the same kind have rendered the discretionary function exception inapplicable.<sup>81</sup> Some courts have discussed the knowledge element as an important factor, while others have refused to review it as a matter of refraining from impermissible judicial review of policy decisions.<sup>82</sup> Specifically within the Third Circuit, in *Cestonaro v. United States*,<sup>83</sup> the court found the discretionary function exception did not bar the plaintiff's claim of negligent maintenance of a parking lot.<sup>84</sup> In that case, the plaintiff filed a claim on behalf of her husband, who was killed by an armed gunman in an unofficial parking lot in Christiansted National Historic Site—a lot maintained by the NPS.<sup>85</sup> The court noted that the NPS, though aware of crimes committed in the area and regular safety complaints around the lot, did not take any further actions in deterring nighttime parking at the lot.<sup>86</sup> The court emphasized that susceptibility analysis “is not a toothless standard that the government can satisfy merely by associating a decision with a regulatory concern.”<sup>87</sup> The court ultimately held the discretionary function exception did not apply because the court was unable to find a “rational nexus” between the NPS's inaction in maintaining the lot and its stated discretionary function of balancing concerns for historic preservation with safety.<sup>88</sup>

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79. For a discussion of other courts the Third Circuit relied on in *S.R.P.* when discussing these two elements, see *infra* note 132 and accompanying text.

80. For a discussion of how the Third Circuit utilized these two criteria in *S.R.P.*, see *infra* notes 129–50 and accompanying text.

81. See, e.g., *Oberson v. U.S. Dep't of Agric., Forest Serv.*, 514 F.3d 989, 998 (9th Cir. 2008) (finding Forest Service liable due to its knowledge of hazard on snowmobile trail through its own investigation sixteen days before plaintiff was injured, and its failure to warn about hazard); *Cope v. United States*, 45 F.3d 445, 452 (D.C. Cir. 1995) (holding that government's decisions on how and where to post warning signs for dangerous road condition was not shielded by discretionary function exception).

82. See, e.g., *Terbush v. United States*, 516 F.3d 1125, 1139 (9th Cir. 2008) (holding that NPS's determination not to warn public about rockfall that occurred three weeks prior to plaintiff's injury in subsequent rockslide was “precisely the kind of determination that is protected from [the court's] review”).

83. 211 F.3d 749 (3d Cir. 2000).

84. See *id.* at 757 (discussing court's holding).

85. See *id.* at 751 (discussing facts of case).

86. See *id.* at 752 (indicating court's reasoning).

87. *Id.* at 755 (citation omitted).

88. See *id.* at 759 (noting failure to find decision related to policy).

b. Ordinary and Routine Maintenance

Some courts discuss repairs in terms of how ordinary or garden-variety they are.<sup>89</sup> *Gotha v. United States*<sup>90</sup> is one example of a Third Circuit case upholding a claim over the discretionary function exception, offering a textbook example of the kind of negligence situation where the Third Circuit is comfortable holding the government liable.<sup>91</sup> In *Gotha*, the plaintiff fell and injured her ankle while descending a dark, unpaved pathway on the Navy facility where she was contracted to work.<sup>92</sup> She sued under the FTCA for negligent maintenance of the area, specifically for failure to light the area adequately and failure to provide a stairway with handrails.<sup>93</sup> The United States argued that constructing such handrails and lighting could interfere with cables linked to monitoring on-site weapons, which therefore required a discretionary decision grounded in policy concerns.<sup>94</sup> The court found this argument too speculative, noting “[t]his case is not about a national security concern, but rather a mundane, administrative, *garden-variety*, housekeeping problem that is about as far removed from the policies applicable to the Navy’s mission as it is possible to get.”<sup>95</sup> The court then squared its decision with *Gaubert*, finding that the conduct of maintaining the pathway was not sufficiently “grounded in the policy of the regulatory regime.”<sup>96</sup> In its analysis in *S.R.P.*, the Third Circuit explicitly incorporated the garden-variety remedy and the government’s knowledge of a specific risk of harm.<sup>97</sup>

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89. See, e.g., *O’Toole v. United States*, 295 F.3d 1029, 1035 (9th Cir. 2002) (describing policy analysis for second prong of test as falling along spectrum); *Mitchell v. United States*, 225 F.3d 361, 366 (3d Cir. 2000) (concluding that Park Service’s failure to repair concrete culvert on side of road that plaintiff smashed car into implicated policy concerns in “[the] decision not to undertake a reconstruction of all drainage ditches along [the road]” and therefore was “not [a] ‘mundane, administrative, garden-variety, housekeeping problem’”); *ARA Leisure Servs. v. United States*, 831 F.2d 193, 196 (9th Cir. 1987) (finding Park Service’s failure to maintain road safety “falls in the category of ‘ordinary garden-variety negligence’”).

90. 115 F.3d 176 (3d Cir. 1997).

91. See *id.* at 182 (“[I]t is difficult to conceive of a case more likely to have been within the contemplation of Congress when it abrogated sovereign immunity than the one before us.”).

92. See *id.* at 178 (examining facts of case).

93. See *id.* (stating plaintiff’s claims).

94. See *id.* at 181 (discussing government’s argument).

95. *Id.* (emphasis added).

96. *Id.* at 182 (citing *Gaubert v. United States*, 499 U.S. 315, 325 (1991)).

97. For a discussion of the Third Circuit’s analysis under *S.R.P.*, see *infra* notes 129–50 and accompanying text.



### III. THIRD CIRCUIT PREVENTS THE DISCRETIONARY FUNCTION EXCEPTION FROM SWALLOWING THE FTCA

Perez brought suit against the government for failing to warn him about a shoreline barracuda attack.<sup>98</sup> In reviewing the case, the Third Circuit first found that the government's decision not to warn involved the right kind of discretion under the discretionary function exception; however, it then analyzed the case in terms of whether the government had knowledge of the specific risk of a shoreline barracuda attack, and whether eliminating this risk would involve garden-variety type measures.<sup>99</sup> Though Perez did not succeed under either analysis, the court opened the door to future plaintiffs who meet the two additional criteria.<sup>100</sup> Though the concurrence criticized these criteria as potentially eviscerating the discretionary function exception, the majority prevents the exception from swallowing the whole of the FTCA by aligning it more closely to the purpose of the FTCA.<sup>101</sup>

#### A. *Paradise Lost*

On May 9, 2004, twelve-year-old Perez was playing on the beach of Buck Island in the Virgin Islands.<sup>102</sup> While sitting on the beach with his feet in the shallow water, a barracuda attacked him, nearly severing three of his toes, two of which required surgery to reattach.<sup>103</sup> Barracudas do not typically attack humans, and the NPS was only aware of one other barracuda attack on a human in Buck Island's recent history.<sup>104</sup> In addition to warning about other dangerous wildlife, the NPS warned visitors in a brochure and on signs posted around the island to treat barracudas with

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98. For a discussion of the facts and disposition of *S.R.P.*, see *infra* notes 102–08 and accompanying text.

99. For a discussion of the court's analysis of *S.R.P.*, see *infra* notes 109–28 and accompanying text.

100. For a discussion of how the Third Circuit's approach confines the discretionary function exception to a reasonable scope by adding two additional elements, see *infra* notes 129–37 and accompanying text.

101. For a discussion of the concurrence in *S.R.P.* and its criticism of the majority's approach, see *infra* notes 147–48 and accompanying text.

102. See *S.R.P. v. United States*, 676 F.3d 329, 330 (3d Cir. 2012) (discussing facts leading to plaintiff's injury).

103. See *id.* (discussing plaintiff's injury).

104. See *id.* at 331 (discussing how barracudas "are not generally aggressive toward humans" unless they mistake human limbs for prey, and relating event to prior attack at Buck Island). The NPS was aware of one other barracuda attack on a human at Buck Island that occurred about twenty-two years before Perez's attack. See *id.* (discussing previous barracuda attack on fisherman). That attack was distinguishable from the present one because the fisherman who was attacked allegedly attracted the barracuda by "pouring fish oil in the water around his feet." *Id.* Additionally, several other snorkelers nearby were not attacked in that incident. See *id.* (distinguishing fisherman's attack from present case).

caution.<sup>105</sup> Because Perez was injured on a unit of the National Park System controlled and managed by the NPS, Perez, through his mother, filed suit against the United States under the FTCA for failure to adequately warn visitors of the dangers posed by barracudas "to shallow water bathers."<sup>106</sup> The District Court for the Virgin Islands dismissed the case for lack of subject-matter jurisdiction, finding the discretionary function exception applied.<sup>107</sup> Perez then appealed to the Third Circuit.<sup>108</sup>

### B. *The Teeth in the Third Circuit's Analysis*

The court laid out a thorough analysis of the case under the two parts of the *Berkovitz/Gaubert* test, finding the NPS's decision not to post warnings about shoreline barracuda attacks was susceptible to policy analysis.<sup>109</sup> After doing so, however, the court considered the implications of an overly broad interpretation of the discretionary function exception and how this would frustrate the purpose of the FTCA.<sup>110</sup> In response to the concern that the exception might swallow the FTCA, the court articulated two new criteria for applying the discretionary function exception that has roots in Third Circuit precedent: knowledge of the specific risk, and whether the type of remedy required to address this risk was a routine,

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105. *See id.* (discussing NPS's efforts to warn of natural hazards on Buck Island). Visitors can only reach Buck Island by boat, and all private boaters who reach the island must obtain an anchoring permit. *See id.* at 330–31 (discussing accessibility of Buck Island by either private concessionaries or private boat and detailing process of receiving "Buck Island Reef Brochure"). The anchor permit contains "Safety Tips for Sea and Shore," among other pertinent information, which states:

Shallows and reefs near shore contain sharp corals, stingrays, spiny sea urchins, fire coral, fire worms, and barbed snails. Cuts from marine organisms infect quickly, so clean and medicate them. Portuguese man-o-war and sea wasps, both stinging jellyfish, are rarely found here. *Barracuda* and sharks, *if encountered, should be treated with caution but are not usually aggressive toward snorkelers.*

*Id.* at 331 (emphasis added). This information was also posted in English and in Spanish on signs in the picnic areas of Buck Island. *See id.* (detailing posted safety information).

106. *See id.* at 330 (stating procedural posture and relationship of Buck Island Monument to National Park Service).

107. *See id.* at 347 (discussing district court's findings).

108. *See id.* (discussing procedural history).

109. For a discussion of the court's application of the *Berkovitz/Gaubert* test, see *infra* notes 113–28 and accompanying text.

110. *See S.R.P.*, 676 F.3d at 338 ("We acknowledge that if the discretionary function exception is given an overly broad construction, it could easily swallow the FTCA's general waiver of sovereign immunity and frustrate the purpose of the statute.").

garden-variety type.<sup>111</sup> Ultimately, Perez's claim still failed under this analysis.<sup>112</sup>

### 1. *Susceptibility to Policy Analysis*

The court began its analysis with the “threshold matter” of “identify[ing] the conduct at issue.”<sup>113</sup> Perez alleged the United States was negligent specifically for not providing *enough* warning to shallow water bathers on the shoreline of barracuda attacks.<sup>114</sup> On the other hand, the United States argued that the NPS was only aware in the “most general sense” that barracudas were dangerous to humans, not that they “posed a risk to shoreline swimmers specifically.”<sup>115</sup> Thus, the “key dispute” in this case was how specific or general the government's knowledge was of the danger posed by barracudas.<sup>116</sup>

The court next determined whether any specific regulation mandated a course of action or, alternatively, whether there was room for discretion.<sup>117</sup> The court reviewed the NPS Organic Act, which directs the NPS to conserve “natural and historic objects” in national parks, as well as some of the NPS's internal policies, which provide the NPS's duty to “remove known hazards and apply other appropriate measures, including . . . *sign- ing* . . . . [T]hat have the least impact on park resources and values.”<sup>118</sup> The court determined that these policies “clearly vest[ed] local NPS officials with broad discretion” in crafting warnings against natural hazards.<sup>119</sup> Thus, no statute or regulation “mandated any particular method for warning about marine hazards on Buck Island.”<sup>120</sup>

111. For a discussion of the court's consideration of these two additional criteria, see *infra* notes 129–37 and accompanying text.

112. See *S.R.P.*, 676 F.3d at 342 (relying on *Gotha* and *Cestonaro* to find that “neither condition for finding the challenged conduct outside the scope of the discretionary function exception [was] present in this case”).

113. *Id.* at 332 (internal citation omitted).

114. See *id.* at 334 (discussing allegations of plaintiff's complaint). The NPS had already provided some warning about the presence of barracudas on Buck Island, but Perez defined the NPS's negligent conduct narrowly, alleging that the existing warnings “appl[ied] only to snorkelers.” *Id.*

115. *Id.*

116. See *id.* (“[K]ey dispute in this case is the extent of the NPS's knowledge regarding the dangers posed by barracudas.”).

117. See *id.* (noting that court must “first determine whether a statute, regulation, or other policy required the NPS to warn of hazardous conditions in a specific manner, or whether the NPS's actions were discretionary because they involved ‘an element of judgment or choice’” (internal citation omitted)). For a discussion of the two-part test first set forth in *Berkovitz* and modified by *Gaubert*, see *supra* notes 44–58 and accompanying text.

118. *S.R.P.*, 676 F.3d at 334–35 (internal citation omitted).

119. *Id.* at 335. The court agreed with the United States, who argued that “the question of whether and to what extent to warn involved significant policy considerations.” *Id.* at 331–35.

120. *Id.* The court aligned its reasoning with other appellate courts addressing the NPS's discretion in warning. See *id.* at 336 (citing *Terbush v. United States*,

Because the court found that the NPS used discretion in determining whether to warn of shoreline barracuda attacks, the court next analyzed whether this discretion was “susceptible to policy analysis.”<sup>121</sup> The court further noted, “susceptibility analysis is not a toothless standard” that the government can easily satisfy by pointing to some “regulatory concern.”<sup>122</sup> Rather, the court indicated that it would be looking for a “rational nexus” between the government’s decision and legitimate regime-oriented policy concerns.<sup>123</sup>

The NPS’s determination not to post additional warnings regarding barracudas was susceptible to policy analysis because it involved balancing safety with overloading visitors with warnings.<sup>124</sup> In deciding whether to warn about a shoreline barracuda attack and by how much, “the NPS had to weigh the potential benefits of additional warnings against the costs of such warnings, including the risk of numbing Buck Island visitors to all warnings.”<sup>125</sup> The court considered the “virtually unlimited natural hazards” present on Buck Island and reasoned that the NPS had to make “a policy determination” about which hazards to address and how to best advise visitors of their dangers.<sup>126</sup> Making this determination was “directly

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516 F.3d 1125 (9th Cir. 2008); *Elder v. United States*, 312 F.3d 1172 (10th Cir. 2002); *Shansky v. United States*, 164 F.3d 688 (1st Cir. 1999); *Blackburn v. United States*, 100 F.3d 1426 (9th Cir. 1996); *Valdez v. United States*, 56 F.3d 1177 (9th Cir. 1995)) (discussing First, Ninth, and Tenth Circuit cases dealing with NPS’s decisions to warn or not to warn of dangers).

121. *Id.* at 336 (quoting *Gaubert v. United States*, 499 U.S. 315, 325 (1991)). The court prefaced its analysis by first discussing the rebuttable presumption that actions by a governmental actor vested with discretion by legislation are “grounded in policy.” *See id.* (discussing rebuttable presumption arising when government agent may exercise discretion according to statute). The government agent’s acts are actually presumed to be “grounded in policy when exercising that discretion” when it is afforded by a statute. *Id.* The court cites Third Circuit precedent for the idea that the presumption is rebuttable. *See id.* (citing *Cestonaro v. United States*, 211 F.3d 749, 755 n.4 (3d Cir. 2000)).

122. *Id.* (citing *Cestonaro*, 211 F.3d at 755).

123. *Id.* (citing *Cestonaro*, 211 F.3d at 759).

124. *See id.* (proceeding to second part of *Berkovitz/Gaubert* test).

125. *Id.* (holding that NPS’s decision was right kind of discretion and was thus susceptible to policy analysis).

126. *Id.* at 336–37 (concluding that nature of NPS’s decision regarding posting signs involved policy determinations). Bombarding visitors with signs about every possible type of danger that could be encountered on the island—in addition to the warning signs and the brochures already provided by the park service—would actually run the risk of numbing visitors to dangers. *See id.* at 337 (discussing how policy involves determining whether warning involves “overloading visitors with unnecessary warnings”). Additionally, it would detract from the natural setting of the island. *See id.* at 335 (discussing NPS’s internal policies, which direct NPS officials to take park aesthetics into consideration when contemplating whether to install signs and other warnings); *cf. Elder v. United States*, 312 F.3d 1172, 1183–84 (10th Cir. 2002) (discussing impact of too many warning signs on important aesthetic value of Zion National Park’s Emerald Pool, where plaintiff slipped on algae). There, the plaintiff challenged the adequacy of the existing warning signs because no sign specifically addressed the “danger of algae in the streams” around the waterfall where the plaintiff slipped and died. *See id.* at

related to the NPS's mission of preserving national parks" and therefore grounded in regulatory policy.<sup>127</sup> In the court's view, this was "precisely the type of policy choice" that judges are prohibited from second-guessing under the discretionary function exception.<sup>128</sup>

## 2. *Knowledge and "Garden-Variety" Remedy*

After articulating its holding using the *Berkovitz/Gaubert* test, the court acknowledged that a broad interpretation of the discretionary function exception could "swallow" the waiver of sovereign immunity under the FTCA.<sup>129</sup> This would not only frustrate the purpose of the FTCA, but would also run contrary to congressional intent to impose liability on the United States for "ordinary common-law torts."<sup>130</sup> In order to reign in an overly broad construction, the court recognized that it "[has] held that where the Government is aware of a specific risk and responding to that risk would only require the Government to take garden-variety remedial steps, the discretionary function does not apply."<sup>131</sup> Other courts supported the Third Circuit's view, incorporating the government's knowledge of a "specific risk of harm" and "eliminating the danger" not by "implicat[ing] policy but . . . involv[ing] only garden-variety remedial measures."<sup>132</sup>

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1174–75. The court considered the impact more signage would have on the aesthetic value of the site and decided "it would be impossible to resolve Plaintiffs' negligence claims without evaluating decisions protected by the discretionary function exception." *Id.* at 1183–84.

127. *S.R.P.*, 676 F.3d at 336–37 (discussing how NPS's mission was related to determination of how to warn, thus part of "policy of regulatory regime" (citing *Gaubert v. United States*, 499 U.S. 315, 325 (1991))).

128. *Id.* at 337 (discussing judicial concern of not second-guessing policy decision made by governmental actor).

129. *Id.* at 338 ("[I]f the discretionary function exception is given an overly broad construction, it could easily swallow the FTCA's general waiver of sovereign immunity").

130. *Id.* (discussing how discretionary function exception has potential to "frustrate the purpose" of FTCA and that Supreme Court precedent explains congressional intent to waive immunity for ordinary torts involving basic safety concerns (citing *Dalehite v. United States*, 346 U.S. 15, 28 (1953))).

131. *See id.* (discussing two additional elements of knowledge and garden-variety remedial steps in preventing discretionary function exception from having overly broad construction). The court further noted this interpretation was "consistent with the primary purpose of the FTCA." *Id.*

132. *See id.* at 340 (discussing other circuit court cases' support before turning to case at issue); *see also* *Oberson v. U.S. Dep't of Agric., Forest Serv.*, 514 F.3d 989, 998 (9th Cir. 2008) (holding failure to warn about or remedy known hazard to snowmobilers not discretionary due to knowledge of that specific hazard); *Fabend v. Rosewood Hotels & Resorts*, 174 F. Supp. 2d 356, 360 n.10 (D.V.I. 2001) (finding knowledge of specific risk of harm where danger was "well-defined and specific, not . . . nebulous or hidden"); *George v. United States*, 735 F. Supp. 1524, 1528, 1533 (M.D. Ala. 1990) (holding Forest Service liable because it was on notice of danger of alligator attack from prior incidents of "aggressive alligator behavior" and yet it failed to remedy that danger); *Boyd v. United States*, 881 F.2d 895, 896, 898 (10th Cir. 1989) (holding decision not to warn swimmers of dangers in un-

The court next launched into an analysis of the government's "aware[ness] of a specific risk" and whether "responding to that risk would only require the Government to take garden-variety remedial steps."<sup>133</sup> In this case, the NPS was *not* aware of the specific risk of shoreline barracuda attacks.<sup>134</sup> Referring to the *Gotha* decision, the court determined that even if the NPS was on notice of a possible barracuda attack somewhere off shore, responding to the known hazard would *not* require "garden-variety action, such as putting up a rail or installing additional lighting, which does not implicate any overarching policy concerns."<sup>135</sup> Rather, the NPS's "determination regarding the content of warning signs on Buck Island involved significant policy considerations."<sup>136</sup> Therefore, neither the knowledge nor garden-variety type remedy criteria would place this discretionary decision outside of the discretionary function analysis.<sup>137</sup>

C. *S.R.P. May Have Lost the Battle, but Future FTCA Plaintiffs  
May Win the War*

The Third Circuit effectively wrote two decisions in *S.R.P.*: one using the susceptibility to policy analysis test under *Berkovitz/Gaubert*, and another, applying the knowledge and garden-variety remedy elements developed in its own precedent.<sup>138</sup> Interestingly, neither approach saved

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zoned area "did not implicate any social, economic, or political policy judgments").

133. *S.R.P.*, 676 F.3d at 338.

134. *See id.* at 340 ("[T]he NPS was not aware of a specific risk."). In a footnote, the court conceded that it was "possible that the NPS could be aware of a safety hazard so blatant that its failure to warn the public could not reasonably be said to involve policy considerations." *Id.* at 340 n.6. Yet, the court supported the district court's finding that although the warning signs indicated that NPS "was aware in a general sense that barracudas were potentially dangerous, there was no evidence that NPS officials were or should have been specifically aware of the risk of a shallow-water attack." *Id.* at 340. The court reviewed the district court's finding for clear error, which it did not find. *See id.* (discussing lack of clear error). An interesting argument that did not garner the court's support was that NPS "knew that barracudas posed a serious risk to shallow-water swimmers" because of the recent policies of the Secretary of the Interior prohibiting fishing in the area so as to "increase the barracuda population." *Id.* at 341. The court did not find the district court to have clearly erred in finding little merit in this argument. *See id.* (dismissing argument).

135. *Id.* (assuming "*arguendo*, that the NPS was aware of the risk" and determining whether the required response to that risk is garden-variety). The court was referring to its decision in *Gotha*, where installing handrails was *not* related to naval policy. *See Gotha v. United States*, 115 F.3d 176, 181 (3d Cir. 1997) ("This case is not about a national security concern, but rather a mundane, administrative, garden-variety, housekeeping problem that is about as far removed from the policies applicable to the Navy's mission as it is possible to get.").

136. *S.R.P.*, 676 F.3d at 342.

137. *See id.* at 340 ("[N]either condition for finding the challenged conduct outside the scope of the discretionary function exception is present in this case.").

138. For a discussion of the court's dual approaches to the case, see *infra* notes 140–50 and accompanying text.

S.R.P.'s failure to warn claim because the discretionary function exception applied under both modes of analysis.<sup>139</sup> The court discussed its motive for analyzing the case under two additional criteria as preventing the discretionary function exception from rendering the FTCA useless.<sup>140</sup> One commentator noted that the court may have simply "throw[n] the plaintiffs' bar a bone."<sup>141</sup> Regardless, the Third Circuit opened the door for future plaintiffs who can successfully prove these two criteria.<sup>142</sup>

Whether the government has the requisite knowledge under the Third Circuit's approach depends on the specificity of the risk of harm.<sup>143</sup> In *S.R.P.*, the plaintiff was required to demonstrate that the government failed to warn him in a very specific way because warnings to treat barracudas with caution already existed in brochures and on signs around Buck Island.<sup>144</sup> Without a previous barracuda attack to a shoreline bather, and with only one other barracuda attack in over twenty years on the island, the government was on better footing.<sup>145</sup>

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139. See *S.R.P.*, 676 F.3d at 336–37, 341 (holding that "NPS's decision not to post additional warning signs" was "susceptible to policy analysis" and that even if NPS had knowledge of specific risk of harm, it could not eliminate this risk without consulting policy considerations).

140. See *id.* at 338 (recognizing risk that broad interpretation of discretionary function exception could "easily swallow the FTCA's general waiver of sovereign immunity and frustrate the purpose of the statute").

141. See Murphy, *supra* note 4 (discussing Third Circuit's decision in *S.R.P.* and noting that, though majority favored government in this case, it did offer two considerations for future plaintiffs to bring suit against government where government was aware of specific risk of harm and had garden-variety way of fixing it).

142. See *id.* (considering effect of decision on plaintiffs); see also *S.R.P.*, 676 F.3d at 345 (Roth, J., concurring) (predicting that "majority's opinion will eviscerate the discretionary function exception by inserting an improper element into the analysis").

143. See *S.R.P.*, 676 F.3d at 340–42 (majority opinion) (discussing how one prior barracuda attack on human in "deeper water" was not sufficient to put NPS on notice of "the risk of a shallow-water attack"). The court emphasized that the "key question" for the knowledge element is "not whether the Government was aware of danger in the most general sense, but whether it was on notice of a specific hazard." *Id.* at 342.

144. See *id.* at 341 (discussing Perez's argument that existing warnings were not sufficient to warn him of shallow-water attack). In fact, Perez set forth evidence that he claimed the district court ignored. See *id.* (noting plaintiff's claim). He alleged the brochure was insufficient because it merely advised snorkelers to treat barracudas with caution, saying nothing about the risk of an attack on the shoreline. See *id.* (detailing plaintiff's claim). Furthermore, if the deeper water attack was attributed to pouring fish oil in the water, the NPS failed to prevent future attacks on the shore by warning beachgoers not to put food in the water. See *id.* (same). Finally, Perez alleged that "splashing in the 'shallows' was a risk factor which increases the likelihood of a barracuda attack." *Id.* The court found all of these arguments unpersuasive. See *id.* (noting court's conclusion).

145. See *id.* at 341–42 (discussing previous barracuda attacks at Buck Island and how NPS structured its warnings around belief that barracudas generally were not aggressive toward humans); cf. Francis v. United States, No. 2:08CV244 DAK, 2011 WL 1667915, at \*1, \*8 (D. Utah May 3, 2011) (awarding plaintiff, who was killed by bear at campsite, damages under FTCA for Forest Service's failure to

The garden-variety remedy is perhaps more promising to future tort plaintiffs in suits against the government.<sup>146</sup> Judge Roth, concurring in *S.R.P.*, wrote separately to express her concern that “inserting an improper element into the analysis” would “eviscerate the discretionary function exception.”<sup>147</sup> She disagreed with the majority’s holding that the knowledge element required the garden-variety type of remedy in order to keep it within the discretionary function exception.<sup>148</sup> But perhaps the majority is right in doing exactly what the concurrence accuses it of doing wrong: qualifying its holding with additional elements in the analysis.<sup>149</sup> Rather than “eviscerating” the discretionary function exception, the additional elements put “teeth” in an otherwise wide-open analysis that could prevent meritorious tort claims from succeeding against the government.<sup>150</sup>

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warn campers of previous bear attack at same campsite just twelve hours prior to plaintiff’s attack).

146. For a discussion of cases where plaintiffs have been successful because of the government’s failure to address ordinary, routine, or garden-variety repairs or maintenance, see *supra* notes 89–97 and accompanying text.

147. *S.R.P.*, 676 F.3d at 345 (Roth, J., concurring).

148. *See id.* at 346–47 (discussing how majority unnecessarily “limit[s] [its] holding by stating that ‘where the Government is aware of a specific risk and responding to that risk would only require the Government to take *garden-variety* remedial steps, the discretionary function exception does not apply’”). The concurrence notes that it is this final element—the garden-variety requirement—that the circuit judge takes issue with. *See id.* at 347 (“It is this ‘garden-variety’ language which has prompted my concurrence.”). One problem the concurrence sees with this language is that it is hard to define what a garden-variety remedy is. *See id.* (discussing difficulty in differentiating between garden-variety warning sign from one that is not). Judge Roth further argued:

[I]f the determination of the hazard is protected by the discretionary function exception but the risk of liability depends on whether the remedial steps to correct or warn of this risk are “garden-variety,” or not, haven’t we eviscerated the exception? Haven’t we protected policy choices which require expensive, extensive, or complicated remedies, but left the NPS open to liability if the remedy is simple or inexpensive?

*Id.*

149. *See id.* at 346–47 (discussing how majority qualifies its holding that discretionary function exception does not apply in this case because decision not to warn was susceptible to policy analysis).

150. *See id.* at 345 (accusing majority of eviscerating discretionary function exception); *see id.* at 338 (majority opinion) (discussing concern that discretionary function exception interpreted too broadly will swallow FTCA waiver of sovereign immunity); *see also* Bruno, *supra* note 11, at 449–50 (discussing how repealing discretionary function exception will allow meritorious tort claims to proceed where carelessness on behalf of governmental employee can be proven); Hyer, *supra* note 11, at 1149 (proposing incentive recognition approach to narrow scope of discretionary function exception); Levine, *supra* note 11, at 1538 (proposing administrative framework that will preserve remedies for those with valid tort claims); Peterson & Van Der Weide, *supra* note 51, at 502 (recommending that “discretionary function immunity be reserved for actual decisions about true policy factors made by officials with policy-making authority”).



## IV. CONCLUSION

Practitioners wishing to take advantage of these two criteria should still be wary: the more specific the plaintiff's injury is without a corresponding history of similar injuries, the less likely the court will find that the government was on notice of that specific risk of harm.<sup>151</sup> Furthermore, the remedy for this risk must be garden-variety in the sense that it does not involve significant policy considerations that relate to the regulatory regime.<sup>152</sup> The government still enjoys immunity if it can craft arguments that generalize the scope of the decision-making power it grants to its employees.<sup>153</sup> Moreover, the concurrence in *S.R.P.* also offers the argument that applying the garden-variety remedy to a known risk of harm could widely expose the United States to tort liability that Congress never intended.<sup>154</sup>

Although *S.R.P.* could have been resolved simply under the *Berkovitz/Gaubert* analysis, the Third Circuit added the extra considerations of the government's knowledge of the specific risk of harm and whether eliminating this risk involves garden-variety type remedies.<sup>155</sup> These additional criteria do not completely destroy the discretionary function exception, but instead add teeth to the exception by giving future plaintiffs more arguments in pursuit of claims that might otherwise be barred by the discretionary function exception.<sup>156</sup> By adding teeth to the discretionary function exception analysis, the Third Circuit ensures that the exception does not swallow the statute waiving sovereign immunity.<sup>157</sup>

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151. See *S.R.P.*, 676 F.3d at 340–42 (discussing how NPS was not aware of specific risk of shoreline barracuda attack).

152. See *id.* at 342 (finding supposed responses to known risk of shoreline barracuda attack would involve policy considerations “regarding the content of warning signs”).

153. For a discussion of policies that granted broad discretionary power to its employees, where the discretion was susceptible to policy analysis, see *supra* notes 70–77 and accompanying text.

154. See *S.R.P.*, 676 F.3d at 345 (Roth, J., concurring) (accusing majority of “inserting an improper element into the analysis of whether sovereign immunity has been waived under the FTCA”).

155. See *id.* (discussing how majority limits its holding).

156. For a discussion of the value of the two additional criteria set forth by the Third Circuit in *S.R.P.*, see *supra* notes 138–50 and accompanying text.

157. For a discussion of the court's analysis, see *supra* notes 113–50 and accompanying text.