A Price Tag on Adventure: Disorderly Conduct Liability for Search and Rescue in America's National Parks

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A Price Tag on Adventure: Disorderly Conduct Liability for Search and Rescue in America’s National Parks

Jenna VonHofe*

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I. INTRODUCTION

On August 2, 2018, Mark Lantis’s mother dropped him off at the Mount Holmes trailhead in Yellowstone National Park.¹ Lantis set out on a day hike to search for buried treasure he believed to be stashed somewhere within the area—a decision resulting not in riches, but years of litigation over Lantis’s eventual backcountry rescue.² Traditionally, the National Park Service (NPS) allocates the highest park management priority to keeping park visitors safe from harm.³ In recent years, this NPS priority for safety has led to it levying numerous criminal charges against park visitors whose actions necessitate the visitors’ subsequent rescue within the national park system.⁴ Lantis was similarly charged with disorderly conduct for his actions during his wilderness excursion.⁵

Pursuing high-altitude summits or a short hike in the woods within national parks requires park visitors to maintain a high level of personal accountability,⁶ a level that has weakened in recent years.⁷ More individuals are traveling to national

¹ United States v. Lantis, 17 F.4th 35, 37 (10th Cir. 2021).
³ See infra notes 23–25 and accompanying text.
⁴ See infra Part II.A.
⁵ See infra notes 167–212 and accompanying text.
⁶ Nat’l Park Serv., MANAGEMENT POLICIES 105 (2006), https://www.nps.gov/subjects/policy/upload/MP_2006.pdf [https://perma.cc/TA8R-LNZS] [hereinafter NPS MANAGEMENT POLICIES] (stating “the recreational activities of some visitors may be of especially high-risk, high-adventure types, which pose a significant personal risk to participants and which the Service cannot totally control”).
    Many of the newcomers to public lands are inexperienced and lack the appropriate gear, skills or fitness for major excursions. [Search and rescue] leaders say they often have to
parks and recreating within these established areas, leading to more calls for rescue.\(^8\) As American outdoor culture leads to increased park visitation, so does the need for additional search and rescue measures in America’s national parks.\(^9\) The NPS currently has discretion over whether to rescue park visitors and to hold such visitors accountable for consciously disregarding the risks associated with exploring national parks.\(^10\) A disorderly conduct charge related to rescue, however, generally stems from high-risk situations or particularly egregious behavior.\(^11\) Convictions for the disorderly conduct of lost hikers is an uncommon consequence of unprepared or misguided patronage within national parks.\(^12\)

The recent Tenth Circuit decision, *United States v. Lantis*, highlights the NPS’s ability to recover search and rescue restitution from lost park patrons.\(^13\) The recklessness standard applied in *Lantis* provides a broad catch-all standard for the NPS to deter visitor actions, even for merely taking a wrong turn on a popular hiking trail.\(^14\) The standard of recklessness applied in *Lantis*, therefore, is an overly broad and erroneous measure of park visitor culpability.\(^15\) The discretion of the NPS to levy charges upon lost recreators presents a concern for uniform applicability.\(^16\) A strict liability standard for all rescues, however, would go against the humanitarian perspective of search and rescue operations within national parks.\(^17\) This recent litigation highlights the importance of the NPS narrowing the application of disorderly conduct charges within its jurisdiction.\(^18\)

This comment evaluates NPS search and rescue services and the culpable disorderly conduct standard for lost recreators within the park system.\(^19\) Part II provides a summary of the discretionary nature of the NPS’s rescue actions and the implications of increased park visitation upon the cost and feasibility of search and rescue services.\(^20\) Part III compares existing state and federal measures to hold rescue hikers who become lost when their phone loses its signal or dies, or who try to summit a mountain they saw on Instagram without researching the terrain or weather.

*Id.*  
\(^8\) See id.  
\(^9\) NPS Management Policies, *supra* note 6, at 105–06.  
\(^10\) *Id.* at 105; *see also infra* Part II.A.  
\(^11\) *See infra* notes 167–227 and accompanying text.  
\(^12\) *See United States v. Albers*, 226 F.3d 989, 994 (2000) (“A conviction under § 2.34(a)(4) is uncommon.”). *But see United States v. Lantis*, 17 F.4th 35 (10th Cir. 2021).  
\(^13\) *See infra* notes 185–227 and accompanying text.  
\(^14\) *See infra* notes 185–227 and accompanying text.  
\(^15\) *See infra* notes 185–227 and accompanying text.  
\(^16\) *See infra* Part IV.  
\(^17\) *See infra* Part IV.  
\(^18\) *See infra* Part IV.  
\(^19\) *See infra* notes 23–313 and accompanying text.  
\(^20\) *See infra* Part II.
culpable recreators accountable for rescue actions. Finally, Part IV addresses the shortcoming of disorderly conduct charges in rescue operations for unprepared or misinformed park patrons and offers a path forward for the NPS.

II. BACKGROUND

The NPS manages the nation’s parks to conserve park resources and provide for their use and enjoyment, hoping to sustain the park system for future generations. The NPS has authority, vested by the Secretary of Interior, to make regulatory decisions in furtherance of park management. Chief among the entrusted regulatory duties of the national park system is the protection of park visitors. In 2021, the NPS hosted 297 million recreation visits. Given the sheer number of visitors, the NPS devotes significant resources to monitor and accommodate visitors daily.

This section first explores the nature of national park recreation and the growing strain on park services due to increased visitation. Increased park visitation corresponds with more search and rescue incidents, requiring the NPS to expend resources wisely in certain rescue operations. Second, it discusses the controversy of search and rescue costs, national park search and rescue funding, and the offset of search and rescue costs through rescue insurance programs. Third, this section explores the discretionary nature of NPS’s voluntary search and rescue operations.

A. Increased Park Visitation in National Parks Has Created an Additional Strain on National Park Resources Allocated to Search and Rescue Services

In recent years, outdoor recreation has gained popularity leading more individuals into the wilderness. Consequently, this increase in park visitation causes a greater strain on existing park management procedures and emergency

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21 See infra Part III.
22 See infra Part IV.
24 Id.
25 NPS Management Policies, supra note 6, at 105.
27 NPS Management Policies, supra note 6, at 105.
28 See infra notes 32–51 and accompanying text.
29 See infra notes 32–51 and accompanying text.
30 See infra notes 53–100 and accompanying text.
31 See infra notes 102-151 and accompanying text.
operations, such as search and rescue. For example, Yellowstone National Park hosted nearly five million recreation visits in 2021, a 28% increase from the previous year. With increased visitation, the NPS has experienced an increase in visitor related incidents. In recent years, Yellowstone has experienced a 90% increase in vehicle accidents, a 60% increase in ambulance requests, and a 130% rise in search and rescue incidents. While some rescue operations may be lifesaving, others are merely the result of tired hikers.

Search and rescue responses vary by activity and situation. Visitors most frequently require search and rescue assistance while hiking, followed by boating, swimming, canyoneering, and mountaineering. Varied experience levels and visitor preparedness can further contribute to the need for emergency services in national parks, as these individuals may not properly understand the risks associated with outdoor recreation. Common factors for search and rescue assistance include errors in judgment, fatigue, physical conditioning, falls, and weather. Insufficient experience, equipment, or clothing may also be a factor. Statistics have illustrated that almost 40% of search and rescue operations in national parks resulted from recreators’ fatigue, physical unpreparedness, or judgment errors. Experts believe that social media has also played a role in recent outdoor incidents and unprepared


34 Annual Visitations Highlights, supra note 26.


37 Id.


40 See id. at 23; Travis Heggie & Michael E. Amundson, Dead Men Walking: Search and Rescue in US National Parks, 20 WILDERNESS & ENV’T MED. 244, 246 (2009).

41 See Randy M. Johnson et al., Injuries Sustained at Yellowstone National Park Requiring Emergency Medical System Activation, 18 WILDERNESS & ENV’T MED. 186, 186 (2007).

42 Heggie & Amundson, supra note 40, at 246.

43 Id.

44 Id.
recreation. A careless recreational mentality, given the lack of federal fines for rescue and the ease of using rescue beacons, has created a new age of “courtesy rescues” in state and federal jurisdictions.

The NPS seeks to provide a safe environment for park visitors, attempting to eliminate risks leading to search and rescue operations. The dangers of backcountry recreation in national parks are prevalent, encouraging the notion that personal safety is, in part, an individual’s responsibility. Some parks also implement visitor safety training and signage to prevent or mitigate an increase in visitor-related emergencies. The NPS has implemented successful safety measures, including enhanced visitor education regarding park risk, increased park personnel patrol, and newly established staff positions to address visitor issues. Attitudes toward recreational risk, physical stress, fatigue, as well as harsh park environments and other factors can limit park visitors’ preparedness, capabilities, and responses.

B. The Cost and Controversy of Rescue in America’s National Parks

The role that the national park system plays in American society has evolved over time. Similarly, the NPS’s assumed role in ensuring visitors’ safety has changed dramatically. Historically, the early exploration of national parks relied on informal efforts to conduct rescues. In modern times, however, search and rescue operations are a formalized, advanced mechanism to ensure visitor safety.

45 See Zachary N. Lu et al., The Associations Between Visitation, Social Media Use, and Search and Rescue in United States National Parks, 32 Wilderness & Env’t Med. 463, 466 (2021).


47 NPS MANAGEMENT POLICIES, supra note 6, at 105.


49 Id.

50 Id.


52 Villella & Keen, supra note 33, at 330.

53 Id. The early days of search and rescue has been described:

Prior to the first formal SAR operations, there were, no doubt, countless efforts to aid fellow wilderness travelers who were lost, injured, or in other imminent distress. Those who embarked on rescue efforts did so without a legal obligation or any expectation of reimbursement of rescue expenses. They engaged in a humanitarian act.

54 Id.

55 Id.
Through the years, the state and federal governments slowly began designating agency responsibility for search and rescue operations in both a volunteer and statutory capacity.\textsuperscript{56} In 1973, the federal government created a formal plan to address search and rescue at the federal level, targeting several national agencies responsible for search and rescue responses, including the NPS.\textsuperscript{57}

Despite statistical evidence demonstrating that large-scale and high-cost search and rescue operations are relatively rare occurrences, the subjective debate surrounding search and rescue operations remains focused on whether rescue agencies should charge individuals for the cost of their rescue.\textsuperscript{58} The significant amount of publicity surrounding dramatic search and rescue operations frequently ignites national discussion regarding charge-for-rescue actions.\textsuperscript{59} The search and rescue community is largely against charging individuals for their rescues, regardless of the surrounding circumstances.\textsuperscript{60} Many take this stance out of fear that charging for rescue could create additional problems for search and rescue operations and lifesaving action should take precedence over all other considerations.\textsuperscript{61} A prevailing argument maintains that charging for search and rescue services is contrary to national government humanitarian policies and may cause a chilling effect on lost or injured individuals and delay their calls for help—an outcome that could put both victims and rescuers in more danger during an already complicated search and rescue situation.\textsuperscript{62} A delay in calling for aid based on the fear of impending charges could lead to costlier operations or an increased risk of injury or death due to a delay in response time.\textsuperscript{63} The mission of search and rescue organizations is to save the lives of those needing rescue, regardless of that party’s capacity to pay the bill.\textsuperscript{64}

\textsuperscript{58} Id. (stating that “[a]uthorities with responsibility for SAR and SAR organizations can not allow cost reimbursement to delay response to any person in danger or distress”). There is an inherent conflict in balancing safety and cost:

Charging for search and rescue transforms a public safety activity that is principally about saving lives into a business decision—with many unanticipated consequences. The agencies and individuals closest to the issue feel strongly that charging for search and rescue is unwise, creates added safety risks for victims and rescuers, and could open up government agencies to costly lawsuits.

Athearn, supra note 59, at 8.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 1.
\textsuperscript{61} NASAR Position Statement, supra note 58.
The cost of search and rescue operations is not a new burden for the NPS, and this cost metric has been addressed through park regulations. In 1994, the federal government launched an experimental program requiring park patrons engaging in high-risk activities to pay for any incurred search and rescue expenses. The program initially addressed climbing rescues, and the government intended for Denali and Rainier National Parks to pilot the program. Despite the push for additional cost-recovery, the program disbanded before implementation expanded. A study followed the failed implementation program to address high-cost and high-risk search and rescue operations, recommending against additional charges to individuals for services rendered. The NPS has since elected not to pursue additional regulations to recover the cost of search and rescue efforts and has explicitly stated that it will not charge patrons for costs associated with such efforts.

1. Search and Rescue Operations are Funded in Full by the National Park Service

Once a search and rescue operation is launched, it continues until all reasonable hope of rescuing the individual passes, leading to variability in search and rescue efforts and expenditures. Emergency search and rescue services are conducted in diverse and dangerous environments, including rugged and remote regions of the United States. Operations often require extensive response times, specialized personnel, and equipment considerations. In all 50 states, emergency services include the medical oversight of emergency providers rendering aid to patrons, a service that averages more than 13,000 times per year. The NPS manages

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67 Id.

68 Villella & Keen, supra note 33, at 353.

69 See Report to Congress, supra note 65, at 8, 10, 12.

70 Id. at 3; NPS Management Policies, supra note 6, at 105.


72 Ward et al., supra note 65, at 103.

73 National SAR Plan, supra note 71, at 6.

74 Id.

emergency procedures in diverse areas nationwide, requiring various levels of search and rescue services. Therefore, discretion is left to individual park services for most emergency management procedures.

The NPS is a participant under the National Search and Rescue Plan, and each federal participant of this plan funds that individual agency’s search and rescue activities. The agency cannot delay rescue due to cost considerations, nor can the NPS seek reimbursement from those they rescue. Therefore, any incident leading to a search and rescue operation in a national park is fully funded by the NPS. In fiscal year 2022, the NPS requested $43.1 million to fund the National Park Health and Safety program, a program that funds search and rescue operations and other similar services. Funding for NPS search and rescue operations is further supported by park visitor entrance fees. The uniqueness of each national park requires individual parks to manage their operating budgets to accommodate specific search and rescue needs.

The accumulative costs allocated to search and rescue operations within the national park system can be substantial, especially considering the inclusion of overarching emergency services. A rescue is defined under the National Search and Rescue Plan as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.” From 1992 to 2007, search and rescue operations conducted by the NPS cost over $58 million. During that same time, over 4,000 search and rescue operations occurred annually, amounting to $3.7 million in costs each year. From 2016 to 2022, the annual cost of major search and rescue incidents averaged around $3.2 million. Experts

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76 National SAR Plan, supra note 71, at 5.
78 Id. at 5, 7, 13.
79 Id. at 13.
80 See id.
83 2021 Budget Justification, supra note 75, at ONPS-81.
84 Ward et al., supra note 65, at 103.
85 National SAR Plan, supra note 71, at 2.
86 Heggie & Amundson, supra note 40, at 245.
87 Id.
suspect, however, that actual search and rescue expenditures are underreported due to lack of information on personnel expenditures, equipment expenditures, and similar cost-based analyses. There is also a general trend to underbudget national park search and rescue expenditures. While the cost of search and rescue within the park is covered by tax dollars, a rescued individual may be responsible for emergency transportation or services once the NPS completes the rescue.

2. Insurance Programs Are Unlikely to Cover Search and Rescue Operations Involving Criminal Conduct

Some individuals who recreate in wilderness areas have sought to cover their rescue costs through rescue insurance. An individual can purchase rescue insurance through a reputable supplier, including specific rescue insurance plans through membership or in addition to satellite devices. The depth of an insurance member’s rescue coverage varies, and plans could cover part of, or the full cost of rescue operations. For example, a member may be reimbursed for expenses incurred during their rescue if they are involved in a backcountry or recreational accident. Rescue insurance, however, does not generally apply beyond the scope of the rescue, excluding coverage for medical transportation or an extended hospital stay.

Rescue insurance also generally excludes coverage for incidents involving an individual accused of or charged with a crime. If a state or federal agency chooses to recoup the cost of rescue through criminal restitution, rescue insurance would likely not cover the cost for recreators that are liable for crimes relating to their annual search and rescue cost estimation, however only incidents classified by the National Park Service as major incidents are tracked annually. Id.


90 Michael de Yoanna, Rocky Mountain National Park is Third for Most Search and Rescues, KUNC (July 17, 2018), https://www.kunc.org/news/2018-07-17/rocky-mountain-national-park-is-third-for-most-search-and-rescues [https://perma.cc/HZP6-SQCK] (“[T]he National Park Service said that it is difficult to predict the costs of search and rescues so additional funds are kept at regional levels to provide flexibility in responding.”).


92 See Villella & Keen, supra note 33, at 352.


93 Villella & Keen, supra note 33, at 352.

95 See Global Rescue, supra note 93, § 2.1.4.

96 See id. § 2.5.

97 Id. § 2.1.2(a).
Therefore, outdoor recreators requiring rescue in a national park would be responsible for any fees, such as fines or restitution associated with the rescue, if charged with disorderly conduct or interference following a rescue operation. The rescue insurance company, however, has discretion whether to assign individuals the obligation to pay the associated medical or rescue expenses. Rescue insurance plans, while generally a viable solution to fees associated with rescue, would be rendered moot if an individual faces a criminal charge by the NPS.

C. National Park Search and Rescue is a Discretionary Governmental Function

The Secretary of Interior may, through the NPS, aid park visitors within the national park system in the event of an emergency, making the NPS’s basic authority to conduct search and rescue operations discretionary. Search and rescue “refers to an emergency operation commenced to render aid to individuals believed to be in distress, ill or injured, and possibly lost.” In executing these search and rescue missions, the NPS can create formal agreements with outside agencies, such as sheriff’s departments, to aid in the search and rescue. NPS management can also decide to terminate a search and rescue operation when necessary. Despite the discretionary nature of national park search and rescue operations, the NPS management policy on search and rescue services explicitly states that saving someone’s life takes precedence over all other NPS management obligations. In effect, the NPS provides patrons with safe park visits by assuming responsibility to make reasonable efforts to search for recreators who may be injured, lost, or stranded.

The National Search and Rescue Plan (Plan), to which the NPS is a party, provides additional guidance and framework for federal agencies and departments to

98 See id.
99 See id.
100 See id.; AAC Member Rescue Benefit, supra note 93.
101 See supra notes 97–100 and accompanying text.
103 See id.
104 Heggie & Amundson, supra note 40, at 244.
105 NPS Management Policies, supra note 6, at 105–06.
106 Id. at 106.
107 Id. at 105.
108 Id. at 106. The National Park Service describes its policy:
The Service will make reasonable efforts to search for lost persons and rescue sick, injured, or stranded persons. This responsibility may be fulfilled by NPS staff or by qualified search-and-rescue organizations or agencies that are capable of responding to life-threatening emergencies pursuant to the terms of a formal agreement. Deceased persons will be evacuated unless the level of risk to the rescue party is found to be unacceptably high. Search managers and superintendents will jointly determine when to terminate a search.

Id.
coordinate search and rescue operations.\textsuperscript{109} The Plan is a voluntary agreement among federal agencies that delineates uniform search and rescue policies and procedures.\textsuperscript{110} Other signatory participants of the Plan include the Department of Interior, the Federal Emergency Management Agency, and the United States Coast Guard.\textsuperscript{111} Under the Plan, the NPS has agreed to facilitate search and rescue services on lands managed by the NPS, assist park visitors, and aid neighboring jurisdictions.\textsuperscript{112}

Emergency services, including search and rescue, are vital to park management, and the NPS has deemed them an essential priority to ensure visitor safety within the parks.\textsuperscript{113} The NPS assumed a voluntary management duty to make reasonable efforts to search and rescue visitors within the park.\textsuperscript{114} Despite this priority to park visitors, discretionary decisions and management, such as search and rescue operations, may only be undertaken if the operation will not impair park resources and values.\textsuperscript{115}

Notably, this discretionary park policy to rescue patrons does not create an affirmative duty for the NPS to rescue individuals or render emergency services, and thus, the NPS’s duty is not legally enforceable.\textsuperscript{116} The Tenth Circuit affirmed that the NPS is not liable for failed search and rescue missions in \textit{Johnson v. Department of the Interior}.\textsuperscript{117} In \textit{Johnson}, a group of four recreators hiked a peak in Grand Teton National Park.\textsuperscript{118} After reaching the summit, the group descended down a nontechnical route.\textsuperscript{119} Johnson, an inexperienced climber, attempted to descend the rock face and strayed from the intended route during the climb.\textsuperscript{120} Johnson continued along his modified route causing Johnson’s group to lose visual of his descent.\textsuperscript{121} Members of Johnson’s group alerted the NPS that they could not find Johnson, and the NPS formed a search and rescue operation to locate him.\textsuperscript{122}

\textsuperscript{109} \textit{National SAR Plan, supra} note 71, at 1 (“This Plan continues, by interagency agreement, the effective use of all available resources in all types of SAR operations to enable the United States to satisfy its humanitarian, national, and international commitments and obligations.”).

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Id.} at 4–5.

\textsuperscript{112} \textit{Id.} at 5.

\textsuperscript{113} \textit{See} Lu et al., \textit{supra} note 45, at 463.

\textsuperscript{114} Heggie & Amundson, \textit{supra} note 40, at 244; \textit{see also} NPS \textit{Management Policies, supra} note 6, at 106.

\textsuperscript{115} NPS \textit{Management Policies, supra} note 6, at 105.

\textsuperscript{116} \textit{Report to Congress, supra} note 65, at 8.

\textsuperscript{117} 949 F.2d 332 (10th Cir. 1991).

\textsuperscript{118} \textit{Id.} at 334.

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}
Unbeknownst to his climbing group or the NPS, Johnson had fallen during his descent and sustained serious injuries. The search and rescue team dispatched a helicopter the following morning, locating Johnson’s body. Unfortunately, by this time, Johnson had succumbed to his injuries and died of hypothermia the previous evening.

Johnson’s estate filed a wrongful death action against the NPS alleging, among other claims, that the NPS was negligent in failing to conduct a reasonable rescue effort after receiving reports that Johnson was lost. The court confronted whether the NPS should be shielded from liability under an exception to the Federal Tort Claims Act (FTCA), despite the failed rescue mission. In some instances, the FTCA waives sovereign immunity for civil suits brought against the United States government for damages due to personal injury or death caused by negligence or a wrongful act committed by a government employee while acting within the scope of their government employment. This waiver of sovereign immunity, however, is limited by an exception that precludes the United States from liability for government conduct “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.” The Tenth Circuit in Johnson held that search and rescue operations are a discretionary function of the government and, therefore, these functions preclude FTCA liability. Under this discretionary exception, the NPS is insulated from FTCA liability because the decisions of the NPS often involve competing policy considerations when carrying out the agency’s purpose and function.

In Johnson, NPS personnel were required to weigh visitor safety, available resources, and the appropriate measure of governmental interference to determine when and how to rescue Johnson. Johnson also held that the specific factual issues surrounding the NPS’s alleged negligence were irrelevant to whether the NPS’s actions fell under the discretionary function exception because the decisions involved an exercise in judgment on behalf of the NPS. Moreover, the court applied a two-prong test to evaluate the discretionary function exception.

123 Id.
124 Id. at 335.
125 Id.
126 Id.
127 Id.
129 Id. § 2680(a).
130 Johnson, 949 F.2d at 334; see also § 2680(a).
131 See § 2680(a).
132 Johnson, 949 F.2d at 336–37; NPS Management Policies, supra note 6, at 105–06.
133 Johnson, 949 F.2d at 340.
134 Id. at 336.
First, the court evaluated whether the challenged conduct involves an element of judgment or choice.\textsuperscript{135} Second, the court considered whether that judgment is a kind of decision that the discretionary function exception was designed to shield.\textsuperscript{136} Park search and rescue decisions are not guided by formal standards but instead on a case-by-case basis at the discretion of the search and rescue personnel of individual national parks.\textsuperscript{137} Each NPS decision to deploy rescue services is grounded in social, economic, and public policy, which the court interpreted as the kind of decisions that Congress intended to shield from liability.\textsuperscript{138} Johnson affirmed there is no statutory provision allocating a duty to rescue and, similarly, there is no formal framework or regulation standardizing a course of conduct for national park search and rescue efforts.\textsuperscript{139} The NPS search and rescue teams have discretion to decide whether to form a search and rescue operation, how to do so, and when to initiate it.\textsuperscript{140} An NPS search and rescue team consequently has the discretion to respond to rescue requests after evaluating applicable circumstances.\textsuperscript{141}

Further, in a search and rescue operation, an NPS ranger must evaluate the circumstances of a situation, such as the status of a park visitor as injured or merely overdue, the weather and terrain connected with search and rescue, the number of visitors affected, and associated leadership presence.\textsuperscript{142} Rangers must also consider available manpower, responsible use of economic resources, and the governmental intervention upon the visitor’s activity.\textsuperscript{143} Based on these considerations, rangers make policy judgments for each individual search and rescue operation.\textsuperscript{144} No matter the circumstances surrounding an NPS rescue operation, rescuers face risk and a positive rescue outcome is not guaranteed.\textsuperscript{145} Under the FTCA, the discretionary nature of the NPS policy judgment is an important shield for the NPS liability when conducting search and rescue operations.\textsuperscript{146}

Some experts argue that if the NPS were to charge individuals for their search and rescue, it could jeopardize the NPS’s shield from FTCA liability.\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{135} Id. at 336.
\item \textsuperscript{136} Id. at 339.
\item \textsuperscript{137} Id. at 339.
\item \textsuperscript{138} Id. at 336.
\item \textsuperscript{139} Id. at 337.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} See Villella & Keen, supra note 33, at 367.
\item \textsuperscript{142} Johnson, 949 F.2d at 339.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Two Fatigued Climbers, supra note 38 (stating “[p]ark rangers want to underscore the point that calling for a rescue is a serious request, with the outcome never guaranteed. It is important for climbers and backcountry travelers to recognize the risk they are creating to others when requesting a rescue”).
\item \textsuperscript{146} See Ahearn, supra note 59, at 6.
\item \textsuperscript{147} Id.
\end{itemize}
decisions to rescue based on the weight of specific factors could be considered mandatory in certain circumstances. Johnson held that an individual could not maintain a lawsuit challenging the way a rescue was conducted by the NPS. If the NPS charged for rescue, these charges or fees could imply an affirmative duty to rescue, potentially subjecting the NPS to liability for alleged negligent actions when conducting search and rescue missions. Therefore, the federal government should be wary of charging visitors for their search and rescue, as the costs associated with liability to rescue all park visitors under the FTCA could establish a greater burden on the NPS than the current discretionary standard.

III. SEARCH AND RESCUE CULPABILITY STANDARDS VARY SIGNIFICANTLY BETWEEN STATE AND FEDERAL JURISDICTIONS

Some state and local governments have implemented legislation allowing government entities to bill rescued individuals for search and rescue services. Those in support of the government charging for search and rescue argue that individuals who directly cause a need for their rescue or the rescue of others should be held accountable for such decisions. Nonetheless, existing laws and policies address a broad legal spectrum of search and rescue liability, ranging from strict liability to more forgiving negligence standards.

New Hampshire is perhaps the leader in regulatory charge-for-rescue recovery, implementing a negligence standard. Where an individual negligently requires a search and rescue response, the individual may be held liable for the cost of the response in New Hampshire. Five additional states—Idaho, Hawaii, Maine, Vermont, and Oregon—have similar legislation allowing state agencies to bill individuals for the cost of search and rescue services, but these measures are rarely, if ever, exercised in these jurisdictions.

148 See id.
149 See supra notes 130–131 and accompanying text.
150 See supra notes 142–149 and accompanying text.
151 See supra notes 147–150 and accompanying text.
153 See infra notes 253–291 and accompanying text.
155 See infra Part III.B.
Similarly, the NPS possesses legal regulatory power to criminally charge rescued park patrons. This section first explores the NPS’s ability to criminally charge rescued patrons to discourage reckless or frivolous rescue operations. Then it evaluates New Hampshire’s charge-for-rescue scheme, an extreme example of a minimal culpability standard fostering controversial convictions. Finally, this section analyzes Colorado’s funding structure as an alternative to search and rescue charges in the state.

A. The National Park Service Has Legal Avenues Available to Pursue Park Visitor Liability in Search and Rescue Incidents

Given the national park policy against charging park patrons for rescue services, the NPS has limited means to impose liability or recover search and rescue costs. Some existing laws, however, create liability for park patrons under certain circumstances permitting the NPS and other governmental agencies to recover the costs of that patron’s rescue. First, as displayed in Lantis, the NPS can charge park visitors for disorderly conduct, reflecting a relatively minimal standard of park patron awareness. The broad application of the recklessness standard encompasses a range of actions that could be problematic for uniform application. Second, the NPS can charge park visitors for interfering with an agency function, including when an individual unnecessarily calls for their own rescue.

1. A Standard of Recklessness Establishes an Overbroad Measure of Culpability in National Parks

Disorderly conduct is a versatile charge that may encompass a range of situations, from BASE jumping to lewd behavior. Given this broad applicability, it is difficult to uniformly apply a recklessness standard to lost hikers. There are

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158 See infra notes 162–166 and accompanying text.

159 See infra notes 162–252 and accompanying text.

160 See infra notes 253–291 and accompanying text.

161 See infra notes 293–313 and accompanying text.

162 See NPS Management Policies, supra note 6, at 106.

163 See 36 C.F.R. § 2.32, .34.

164 See infra notes 167–227 and accompanying text.

165 See infra notes 167–227 and accompanying text.

166 See infra notes 228–252 and accompanying text.

167 See 36 C.F.R. § 2.34; Raymond B. Hunkins, Criminal Jurisdiction in the National Park—A Clarification, 2 LAND & WATER L. REV. 151, 160 (1967) (stating that “it has become standard operating procedure to make use of the disorderly conduct regulation as a sort of catch-all provision”).

168 See Hunkins, supra note 167, at 160.
few instances in which a disorderly conduct charge has been litigated for search and rescue, and historically very few disorderly conduct charges result in convictions. A disorderly conduct charge could result in a fine or imprisonment, both of which are harsh consequences for a lost park visitor. Examples of disorderly conduct charges for search and rescue missions provide a glimpse into a tumultuous future for disorderly conduct charges in national parks.

A person commits disorderly conduct when “with intent to cause public alarm, nuisance, jeopardy or violence, or knowingly or recklessly creating a risk [of these outcomes] . . . creates or maintains a hazardous or physically offensive condition.” The regulation was originally envisioned to deter disruptive and dangerous behavior. These prohibited acts include rock throwing, trail modification, and other hazardous acts involving structures or objects that create a risk of injury. Further, previous disorderly conduct regulations detail that if the actor commits a prohibited action with knowledge of, or reckless disregard for the consequences of his or her action, the mens rea for disorderly conduct is met. The regulation has been applied by the NPS and courts as a broad catch-all for reckless or intentional behavior in national parks. Some parks warn visitors about the potential for disorderly conduct charges if poor decisions while recreating lead to a search and rescue operation.

Disorderly conduct charges in national parks in recent years highlight the circumstances required by park patrons to warrant such charges. The NPS...

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169 See United States v. Albers, 226 F.3d 989, 994 (2000) (“A conviction under § 2.34(a)(4) is uncommon; only one federal court has addressed its contours.”).
171 See United States v. Lantis, 17 F.4th 35 (10th Cir. 2021).
172 36 C.F.R. § 2.34 (emphasis added).
174 Id. at 30270.
175 Id. (“The concept of ‘jeopardy’ is meant to apply to situations or hazards that threaten physical harm or injury . . . ‘Public Alarm’ refers to actions producing, in a reasonable person, an apprehension of danger or sudden fear.”).
176 See id.
previously issued charges for disorderly conduct when skiers disregarded emergency closure lines in Grand Teton National Park.\textsuperscript{179} During an emergency closure, Andrew Richards left the designated ski boundary despite an emergency closure for avalanche danger.\textsuperscript{180} Two other skiers, however, followed Richards into the area and became lost.\textsuperscript{181} Richards contacted the Jackson Hole Mountain Resort Ski Patrol, which informed Teton County Search and Rescue and the Grand Teton National Park rangers that there were skiers in need of rescue.\textsuperscript{182} After his friends were rescued, Richards pled guilty to the emergency boundary closure charges and disorderly conduct.\textsuperscript{183} The NPS, therefore, is willing to charge park visitors with disorderly conduct after patrons break park rules leading to their need for rescue.\textsuperscript{184}

Notably, the standard for reckless conduct in search and rescue situations was only recently discussed by the Tenth Circuit in \textit{Lantis}.\textsuperscript{185} When Lantis departed from the base of the Mount Holmes trailhead, he was wearing only a t-shirt, jeans, and a light jacket.\textsuperscript{186} He also carried a small backpack that contained water, bear spray, a cellphone, a walkie-talkie, and a GPS device.\textsuperscript{187} During the hike, Lantis noticed bear droppings and fur along the trail.\textsuperscript{188} To avoid an animal encounter, he chose to leave the marked trail and head back to the trailhead through the unmarked wilderness, thinking that it might be a faster and safer way out of the wilderness.\textsuperscript{189} It was late in the day and Lantis did not make it out of the park by nightfall, instead, spending the night in the rugged backcountry.\textsuperscript{190} The next day, Lantis’s mother called a park ranger and expressed her concern for Lantis.\textsuperscript{191} The ranger communicated with Lantis by cellphone and obtained Lantis’s location via a 911 call.\textsuperscript{192} As the day continued, Lantis eventually expressed he could not continue the hike and needed rescue.\textsuperscript{193} Unfortunately, it was too late in the day

\textsuperscript{179} \textit{Skier Offers Guilty Plea}, supra note 178.
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} See United States v. Lantis, 17 F.4th 35, 39–40 (10th Cir. 2021).
\textsuperscript{186} \textit{Id.} at 37.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Id.}
for park personnel to hike into Lantis’s location, requiring the ranger to organize a helicopter rescue. When Lantis was safely out of the wilderness, the ranger issued him a citation for disorderly conduct.

After a bench trial, the court found Lantis guilty of disorderly conduct, sentenced him to five years of probation, and banned him from returning to Yellowstone National Park for five years. The court also ordered Lantis to pay $2,880 in restitution to the NPS. Lantis appealed the conviction claiming that the court did not evaluate his subjective intent, as required for a disorderly conduct conviction. The Tenth Circuit disagreed with Lantis and upheld the lower court’s ruling. The Tenth Circuit adopted the Model Penal Code’s interpretation of recklessness as “consciously disregard[ing] a substantial and unjustifiable risk.” A disorderly conduct conviction, therefore, requires showing the subjective intent of an individual to disregard a known risk of harm. In Lantis, the court considered whether the application of the recklessness standard was made appropriately by the lower court. Specifically, the court discussed whether the lower court held Lantis to an objective, rather than subjective, intent standard.

Subjective intent for a disorderly conduct conviction may be proven with circumstantial evidence, but this evidence only speaks to a court’s perception of obvious risk and not the hiker’s perception. A court may find that an individual knew about a substantial risk merely because the risk was obvious and, as a result, the individual’s subjective knowledge of such a risk is satisfied. The Lantis court determined that based on the evidence presented, Lantis was reckless “of the highest magnitude” due to the obvious risk and danger. The court, therefore, inferred Lantis’s subjective state of mind and conscious disregard for risk from the obviousness of the risk associated with his decisions and the surrounding circumstances. The court emphasized specific facts supporting the conscious disregard of a known risk. Specifically, Lantis ventured out on a formidable day hike,
and after observing the potential presence of wildlife, he left the designated hiking trail and hiked into remote terrain late in the day. The court determined that given these circumstances, Lantis was bound to be lost. The court also inferred that, based on Lantis’s actions and attempt to prepare for the hike, he was aware of the risk that he consciously disregarded. Lantis brought supplies with him—bear spray, water, a cell phone, and a GPS device—indicating a subjective awareness of the general risk presented by the wilderness. Yet, despite this preparation and subjective knowledge, Lantis still chose to leave the marked trail.

*Lantis* highlights the relatively minimal awareness required to convict a park patron of disorderly conduct. In *Lantis*, the court’s determination about Lantis’s knowledge of the surrounding danger was based not on his subjective knowledge as an experienced hiker or a finding that Lantis himself should have been aware of the risk presented. Instead, the court made the finding of subjective recklessness based on Lantis’s awareness of the risks associated with leaving the marked trail, which the court found he consciously disregarded.

Based on *Lantis*, the NPS could implement a new wave of search and rescue culpability. Under the *Lantis* court’s broad, catch-all application of the disorderly conduct regulation, the NPS could charge a hiker with disorderly conduct for attempting to mitigate risk or for simply taking a wrong turn. It is not commonplace to charge restitution or cost recovery for a search and rescue resulting from a hiking incident. A shift towards this type of individual park patron liability creates several difficult issues. The prevailing issue created by *Lantis* is that wilderness awareness is not uniform even for experienced hikers, and an obvious risk may not be obvious to all rescued individuals. Lantis, for example, thought he was mitigating risk by leaving the trail. Based on this interpretation, one could argue that setting out on a day hike in a rugged national park is a conscious

208 Id. at 39.
209 Id. at 40.
210 Id.
211 Id.
212 Id.
213 See id.; Skier Offers Guilty Plea, supra note 178.
214 *Lantis*, 17 F.4th at 40.
215 Id.
216 See supra notes 204–215 and accompanying text.
217 See supra notes 213–215 and accompanying text.
219 See infra notes 217–227 and accompanying text.
220 See supra notes 204–212 and accompanying text.
221 See United States v. Lantis, 17 F.4th 35, 36 (10th Cir. 2021).
disregard for known risks associated with park patronage, an extreme allowed by
the Lantis interpretation.222

A court will generally give substantial deference to the NPS’s interpretation
of an NPS regulation unless the plain language of the regulation indicates another
meaning or if the Secretary’s intent was indicated at the time of the regulation’s
creation.223 The relevant history of the regulation, however, does not indicate that
Congress intended to criminalize unprepared or lost park patrons.224 Given the
NPS’s policy to not charge patrons for their rescue, a disorderly conduct citation
could be intended to provide only a limited avenue to deter or punish unlawful
and reckless conduct warranting a search and rescue operation.225 Currently,
however, this limited avenue is based on a risk that may not be obvious to every
park patron.226 Therefore, the reckless culpability standard from Lantis serves an
improper function, allowing the NPS to charge lost or stranded park patrons
for conduct that is not innately reckless and for actions which the NPS did not
originally intend to deter.227

2. Interference with an Agency Function Provides an Additional Avenue of
Culpability for Park Visitors Needing Rescue

The NPS can alternatively recover from park visitors that interfere with agency
functions.228 This recovery scheme is a reasonable alternative to disorderly conduct
charges because interference charges work to deter frivolous or falsely warranted
rescues.229 Interference includes “knowingly giving a false or fictitious report or
other false information” or “violating the lawful order of a government employee
or agent authorized to maintain order.”230 Therefore, interference with an agency
action could serve as viable criteria for a disorderly conduct charge.231 Park rangers
use this legal proscription to cite national park recreationalists whose actions
contribute to dangerous rescues.232 In several high-profile incidents, park patrons
requested rescue services when there was no significant need for rescue.233 In those
cases, patrons strained search and rescue services to accommodate their rescue and

222 See id. at 39–40.
223 See Albers, 226 F.3d at 993.
224 See supra notes 173–176 and accompanying text.
225 See Villella & Keen, supra note 33, at 340.
227 See supra notes 167–226 and accompanying text.
228 36 C.F.R. § 2.32 (2022).
229 See Villella & Keen, supra note 33, at 340.
230 36 C.F.R. § 2.32.
231 See id.
232 Villella & Keen, supra note 33, at 340.
233 See Perkins, supra note 46.
created additional and unwarranted alarm. Such cases illustrate the charges that the NPS can bring against park patrons who create dangerous situations for park officials through risky or egregious behavior while disregarding the risk for park officials who later rescue them.

Every rescue operation involves risk to the parties involved, and unwarranted rescue involves the same significant risk but with little to no justification. Mount McKinley is a contentious recreational location in Denali National Park where numerous high-profile search and rescue missions occur. In 2010, the NPS encountered an unreasonable rescue request at Mount McKinley that warranted subsequent fines for the rescued climber. In that case, a Croatian climber, with no apparent injury or medical issue, refused to continue climbing at 15,800 feet and instead decided to return to a staffed camp at a lower altitude. The climber eventually requested to be flown off the mountain by air support, requiring Denali rangers to rescue the climber via helicopter due to the climber’s high-altitude location, adding an unwarranted risk. After her rescue, the climber was charged with interfering with an agency function, a citation that carried a penalty of up to $5,000 and six months in jail if convicted. Similar to charging visitors for disorderly conduct within national parks, charging park visitors for creating hazardous conditions deters unwarranted rescue that puts search and rescue personnel at risk.

If a park visitor makes a false claim, this individual may face federal charges for interfering with an agency function and disorderly conduct. Recently, a doctor from Utah sought an emergency evacuation from Mount McKinley after supplying

234 Id.

235 See Patten v. United States, No. 09–cv–308, 2009 WL 890660 (D. Nev. Mar. 30, 2009). When a hiking companion was in distress, defendant called for help from the Lake Mead ranger station and later disregarded an order to remain on a marked trail. Id. at *1. The court held that once the defendant had called for rescue assistance, the nature of the rescue was no longer his decision. Id. Therefore, by disobeying a park ranger order in the course of a rescue operation the defendant was in violation of 36 C.F.R. § 2.32(a)(2). Id.

236 Athearn, supra note 59, at 8 (stating “[a]ll emergency response activities put responders at risk of injury or death, regardless of whether the mission is searching for a lost child, rescuing a stranded boater, responding to a motor vehicle accident, or putting out a house fire”); see also Beth Bragg, ‘Attitude’ Sickness Halted Denali Climber, ANCHORAGE DAILY NEWS (Sept. 27, 2016), https://www.adn.com/alaska-news/article/attitude-sickness-halted-denali-climber/2010/05/20/ [https://perma.cc/F6ZL-8R5Q).

237 See Bragg, supra note 236.

238 See id.

239 Id.

240 Id. (“Any time that helicopter flies, it’s a special use. It is not a normal mission to land on a glacier at 14,000 feet. There’s a risk to everybody involved, and we use it sparingly . . . .”).

241 Id.


false information to the NPS at Denali. During an ascent to the summit, the doctor requested helicopter rescue, claiming that other climbers were experiencing early hypothermia and medical shock. The information was false, as none of the climbers were experiencing these symptoms when the helicopter was dispatched for their rescue. In actuality, the team attempted to convince the doctor to descend, and rather than doing so, the doctor insisted that they receive rescue. Eventually, the climbing team descended, and when they arrived at the bottom of the climb, a Denali mountaineering ranger and law enforcement officer were waiting to interview the climbers. Subsequently, the NPS charged the doctor with disorderly conduct and interference with an agency function.

Interference with an agency function can provide evidence to support disorderly conduct charges in which an individual’s action necessitating their rescue may indicate a conscious disregard for a known risk. Knowingly reporting false information would equally satisfy a violation of disorderly conduct. These instances provide a more uniform application of park patron liability and provide an avenue for the NPS to hold individuals accountable under a disorderly conduct standard.

**B. New Hampshire Negligence Standard: A Strict Standard of Recovery**

Based on a loosely defined negligence standard, New Hampshire’s application of rescue liability is a model that the NPS should not emulate. New Hampshire’s charge-for-rescue statute offers an extreme measure of liability for individuals seeking rescue. New Hampshire Department of Fish and Game (the Department) is responsible for search and rescue operations in the state, and it established a specialized team for such operations in 1996. Under New Hampshire’s statute, the Department shall bill any person in need of search and rescue that

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245 Id.

246 Id.

247 Id.

248 Id.

249 Id.

250 *See supra* notes 167–227 and accompanying text.

251 *See supra* notes 167–227 and accompanying text.

252 *See supra* notes 167–227 and accompanying text.

253 *See infra* notes 254–291 and accompanying text.

254 *See infra* notes 255–291 and accompanying text.

the Department deems to have acted negligently. The mandatory charge-for-rescue obligation results from an individual assessment of each search and rescue incident. Most of these missions were not billed, however, due to exceptions to the rescue reimbursement; exceptions include rescued individuals who had previously purchased a state-issued hunting or fishing license, a snowmobile or vessel registration, or a voluntary hike safe card.

New Hampshire’s general goal of financial recovery is to promote recreational safety and reduce the risk of search and rescue personnel. New Hampshire courts disfavor the imposition of strict liability in statutory interpretation unless expressly implicated by legislative intent. In 1999, the New Hampshire legislature passed a statute requiring hikers to adhere to a culpable standard when requesting search and rescue services. The bill served as a warning to hikers about the dangers of hiking without prior preparation. Under this statute, hikers were liable if they engaged in behavior that the Department deemed to be reckless. In 2008, New Hampshire passed a new statute imposing liability if hikers’ behavior rose only to negligence.

Despite the statute’s language requiring the Department to levy fines, the law allows the Department discretion to investigate and pursue these fines. Currently,

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257 Plunkett, supra note 152, at 102–03.
258 N.H. Rev. Stat. Ann. § 206:26-bb. New Hampshire implemented the Hike Safe cards to offset potential fees from negligent recreationalist requiring rescue. Theodore Tauscher, Who Pays for all the Rescues in the White Mountains?, CONCORD MONITOR (July 16, 2021), https://www.concordmonitor.com/Hikepass-41452099 [https://perma.cc/Y3VP-PEJE]. Since the card’s implementation the department has never billed a hiker carrying a Hike Safe card. Id. The Department averages about 190 rescues and bills negligent hikers between 10 and 15 times per year for costs. Id.
260 See Bagley v. Controlled Env’t Corp., 503 A.2d 823 (1986).
261 Deblois, supra note 156, at 123.
263 Deblois, supra note 156, at 123. In 1988, New Hampshire fined the first hiker in a search and rescue incident before the state had imposed a statutory standard for rescue cost recovery. Id.
the state’s attorney general decides whether to fine negligent hikers. In 2015, the New Hampshire Supreme Court established a negligence standard for search and rescue recovery charges as a result of the rescue of hiker Edward Bacon. Bacon suffered a significant hip injury when he attempted to jump onto a ledge along a trail in the White Mountains and fell. The Department was notified of Bacon’s injuries and dispatched personnel to rescue him. Bacon was later charged under New Hampshire’s rescue statute. After a bench trial, the court found that Bacon violated the New Hampshire statute for negligent conduct leading to the need for the Department’s search and rescue operations. On appeal, Bacon alleged that the court erred by applying an ordinary standard of negligence, insisting he did not act negligently while hiking. The court held on appeal that based on the plain language of the statute, the duty of care owed was that of common law negligence, defined as “how a reasonable person would be expected to act under the same circumstances.” Therefore, to avoid liability for search and rescue operations in New Hampshire, a hiker must conduct themselves in a manner that is reasonable under the circumstances.

Bacon also argued that he did not act negligently because he was physically capable of completing the hike, had the appropriate equipment, and had sufficiently planned for the journey. Based on the evidence provided, however, the court disagreed and deemed Bacon’s conduct unreasonable under the circumstances. The court recited that Bacon underwent previous hip surgeries for his bad hip, trained in inadequate terrain, continued the hike despite inclement weather, and decided to jump over a rock ledge. Further, the court affirmed that Bacon’s injury was both foreseeable and the direct cause for his need to be rescued. The court affirmed that the Department should evaluate recovery of rescue costs based on a hiker’s negligence using a common law case-by-case evaluation.

266 Zezima, supra note 264.
268 Id. at 1063.
269 Id.
270 Id. at 1062.
271 Id.
272 Id. at 1064.
273 Id.
274 See id.
275 Id. at 1065.
276 Id.
277 Id.
278 Id.
279 See id. at 1064–65.
reasonable under the circumstances, however, may vary depending on the nature of the negligent conduct. 280

In another rescue incident, a Massachusetts Eagle Scout was hiking along a popular trail in New Hampshire when he decided to take a shortcut down the mountain after injuring his ankle. 281 He had previously consulted with mountain club staff about alternative routes down the mountain, including his shortcut. 282 The route he chose did not lead him to safety; instead, the Eagle Scout became lost in the woods for three days. 283 His skills as a scout aided in his resourceful journey, helping him light fires with hand sanitizer to keep warm and to wear plastic bags on his feet to keep out water. 284 Rescue crews finally spotted the Eagle Scout hiking towards the mountain’s summit. 285 New Hampshire officials celebrated the scout’s resourceful experience and successful rescue. 286 Nevertheless, following the rescue, New Hampshire’s Attorney General billed the scout nearly $26,000 for the cost of his rescue. 287 Officials elaborated that the scout was considered negligent in his actions leading to the rescue because the scout continued the hike while injured and departed from the main trail. 288

These two instances demonstrate New Hampshire’s extreme application of the charge-for-rescue statute. 289 Given the recent NPS disorderly conduct charge, the NPS could consider similar instances a conscious disregard for known risk under a reckless standard. 290 Accordingly, Congress should consider limiting the NPS’s ability to charge park patrons with disorderly conduct to ensure that strict outcomes do not discourage recreation in America’s national parks. 291

C. Colorado’s Proactive Approach to Search and Rescue Operations

Unlike New Hampshire, Colorado does not charge individuals for the cost of their rescue. 292 Recently, however, Colorado sought to address budgetary concerns

280 See id.
282 Id.
283 Id.
284 Id.
286 Id.
287 Id.
288 Id.
290 See supra notes 314–369 and accompanying text.
291 See supra notes 314–369 and accompanying text.
292 See Colo. Parks & Wildlife, Backcountry Search and Rescue Study 46–49 (2022) [hereinafter Colo. SAR Study].
for its search and rescue expenditures. Some search and rescue resources in Colorado note the particular policy considerations and complexity of search and rescue weighing against charging for any rescue operations. Colorado county sheriffs have the duty and discretion to coordinate search and rescue operations. The majority of Colorado's search and rescue teams are volunteer groups overseen by the sheriff's office, including a specialized backcountry search and rescue team. Calls for rescue have increased in frequency and difficulty, causing the Colorado legislature to acknowledge the prevailing challenges of a volunteer system with fewer individuals opting to participate.

Colorado also implements a novel funding program to connect recreators with the ability to contribute to search and rescue reimbursements within the state. When formed, the Colorado Search and Rescue Fund was the first statewide program to offset search and rescue costs by charging a fee for outdoor licenses and a novel rescue card. Colorado's backcountry search and rescue plan established a fund within the state treasury to cover search and rescue associated costs for individuals holding fishing or hunting licenses, off-highway vehicle registrations, or Colorado outdoor recreation backcountry search and rescue (COSAR) cards.

The COSAR card is available to the general public to purchase for just three dollars and is intended for people recreating in the Colorado backcountry.

In Colorado, search and rescue teams do not charge individuals for rescue operations, and rescue organizations voluntarily assume the duty to rescue. The

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293 See id.

There are many instances of individuals fearing a bill and attempting to self-rescue. This often causes more harm to themselves or others trying to help. There are numerous examples of people delaying a call for help because they fear a bill. This delay often creates more dangerous conditions for the SAR teams. Charging for SAR in Europe has been shown to increase the number of calls and may create a “duty to rescue”; thus stressing the SAR system further and increasing the risk to those involved.

Id.
296 Colo. SAR Study, supra note 292, at 19.
297 See id. at 3; Colo. Rescue Primer, supra note 294, at 3.
299 Colo. Rescue Primer, supra note 294, at 1, 2.
301 Id.
302 See Travis Coon, Comment, Hike at Your Own Risk: In Support of No-Rescue Wilderness
possession of a COSAR card or relevant sportsman’s license does not affect the organization’s decision to rescue an individual because county departments generally rescue all individuals in need.\textsuperscript{303} After a search and rescue operation, the county where the rescue occurred sends a request for reimbursement from the treasury fund for immediate processing.\textsuperscript{304} In recent years, though, the requests for funding far outweigh the extent of the fund.\textsuperscript{305} If the rescued individual did not have a COSAR card upon rescue, then county funds are withheld until the end of the year to pay for the rescue.\textsuperscript{306} This program fund can cover costs for fuel, vehicles, helicopters, boats, horses, meal reimbursement, and mileage for rescue volunteers and state organizations.\textsuperscript{307} The fund does not reimburse a specific rescued individual’s medical expenses or medical transportation.\textsuperscript{308}

Given the similarity between the NPS search and rescue program and Colorado’s search and rescue services, the NPS should consider adopting a proactive funding model similar to Colorado’s for addressing search and rescue expenditures.\textsuperscript{309} A proactive model, with additional participation from park patrons, could help provide preventative education to avoid search and rescue incidents.\textsuperscript{310} Some national parks, such as Grand Canyon National Park, welcome donations for search and rescue services, and other national parks allocate funding for search and rescue operations through the park’s operating budget.\textsuperscript{311} In the face of increased strain upon NPS resources and overwhelming visitation to the park, an amended funding model to include additional methods to account for search and rescue costs would benefit the park’s underbudgeted emergency services department.\textsuperscript{312} Each individual park manages its own search and rescue budget, and this program would allow the individual parks to make accommodations for these expenses and independently tailor their resources to implementing novel programs.\textsuperscript{313}

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\textsuperscript{303} See Colorado Search and Rescue Fund, supra note 298, at 2; Colo. Rescue Primer, supra note 294, at 2–3.

\textsuperscript{304} Colo. SAR Study, supra note 292, at 42.

\textsuperscript{305} Colo. Rescue Primer, supra note 294, at 2.

\textsuperscript{306} See Colo. Rev. Stat. § 33-1-112.5; Colo. SAR Study, supra note 292, at 42.

\textsuperscript{307} Colorado Search and Rescue Fund, supra note 298, at 1.

\textsuperscript{308} See id.

\textsuperscript{309} See Ward et al., supra note 65, at 104.

\textsuperscript{310} See supra notes 47–51 and accompanying text.


\textsuperscript{312} See supra notes 78–91 and accompanying text.

\textsuperscript{313} See supra notes 78–91 and accompanying text.
IV. Standard of Recklessness is Too Arbitrary and Overbroad to Apply Uniform Accountability for National Park Visitor Recreation

The NPS preserves the resources and values of America’s national parks for the benefit of future generations so that others may enjoy the inspiration afforded by these special locations. National parks are places where skilled individuals can experience the thrill of summitting mountains, the allure of reaching new heights, and the excitement of conquering dangerous adventures. Despite the freedom associated with exploration and new experiences, the NPS also requires visitors to assume some degree of risk and responsibility when recreating in a national park. Entrusted as a steward of America’s national parks, the NPS holds a delicate responsibility to protect and provide a safe environment for park visitors, while upholding the rules and regulations of the NPS.

In many respects, given the nature of search and rescue by the NPS, the NPS’s discretion is fundamentally a humanitarian act. Relatedly, the decision to aid park visitors that are lost, injured, or sick rests entirely with the NPS. Search and rescue experts have long maintained that such discretion should similarly bolster agency policy against levying fees or criminal charges for rescue operations. Every search and rescue operation involves risk to those involved, however, in jurisdictions where individuals know they may be charged for their rescue request, this knowledge can create dangerous situations. Rather than a fine or fees for rescue, the NPS has effectively created the same outcome by charging rescued park patrons with criminal penalties and restitution to the park.

In effect, a charge for disorderly conduct in a rescue operation like Lantis criminalizes the need for help. Under the disorderly conduct regulation, it is possible that a park patron’s actions may not create public alarm or jeopardy until the moment an individual seeks assistance. Recent litigation highlights the need to narrow the NPS’s application of criminal charges to rescue victims. Under the Lantis decision, if Lantis had found his way back to the trailhead and the parking

316 See supra notes 47–51 and accompanying text.
317 NPS Management Policies, supra note 6, at 106.
318 See Report to Congress, supra note 65.
320 See supra notes 58–64 and accompanying text.
321 See supra notes 53–70 and accompanying text.
322 See supra notes 162–227 and accompanying text.
323 See supra notes 167–227 and accompanying text.
324 See supra notes 167–227 and accompanying text.
325 See supra notes 167–227 and accompanying text.
lot, he would have been collected by his mother to return home—without the buried treasure.\textsuperscript{326} In this hypothetical, the biggest loss of the day would have been leaving the wilderness without the rumored treasure chest.\textsuperscript{327} When Lantis acknowledged the need for help while he was lost, this action led to his criminal charges.\textsuperscript{328} If the NPS chooses to charge park patrons with disorderly conduct for their actions necessitating rescue, it must do so in a narrow manner to limit the effects of charges upon visitor actions, such as delay in calling for help.\textsuperscript{329} The chilling effect of criminal charges for lost park patrons outweighs the presumed need to hold these individuals accountable for simply experiencing some of the negative risks associated with recreating in America’s national parks.\textsuperscript{330}

The general goal of financial recovery in a charge-for-rescue state is recreational safety and the risk reduction for search and rescue personnel.\textsuperscript{331} Conversely, charging individuals for actions that may necessitate rescue is seen as enforcement of park patron’s accountability for their actions and deterrence against certain behavior.\textsuperscript{332} The substantive discussion surrounding charge-for-rescue measures remains steadfast.\textsuperscript{333} If the NPS can arbitrarily and broadly apply criminal charges to rescue victims, this action steers dangerously close to the criminal charges in charge-for-rescue jurisdictions.\textsuperscript{334}

The reckless standard prescribed to the NPS disorderly conduct regulation creates a broad application of disorderly conduct in national parks.\textsuperscript{335} This standard does not adequately address a uniform application to all recreators and creates an arbitrary measure of park patron culpability.\textsuperscript{336} There is evidence that statutory recovery for search and rescue operations remains largely unenforced, in part, due to research and the belief by many that enforcing a cost recovery statute would deter calls for rescue and increase dangerous rescue situations.\textsuperscript{337} Further, the NPS already can evaluate the circumstances and make appropriate decisions about the nature and feasibility of rescue.\textsuperscript{338} A similar balancing test is applied by the NPS when weighing the subjective intention of park patrons under the disorderly conduct

\begin{itemize}
\item \textsuperscript{326} See supra notes 167–227 and accompanying text.
\item \textsuperscript{327} See supra notes 167–227 and accompanying text.
\item \textsuperscript{328} See supra notes 167–227 and accompanying text.
\item \textsuperscript{329} See supra notes 167–227 and accompanying text.
\item \textsuperscript{330} See supra notes 58–64 and accompanying text.
\item \textsuperscript{331} Thomson, supra note 259.
\item \textsuperscript{332} See supra notes 223–227 and accompanying text.
\item \textsuperscript{333} See supra notes 58–64 and accompanying text.
\item \textsuperscript{334} See supra Part III.
\item \textsuperscript{335} See supra notes 167–227 and accompanying text.
\item \textsuperscript{336} See supra notes 167–227 and accompanying text.
\item \textsuperscript{337} See Annie Brett & Kenneth Broad, The Litigation of Exploration, 63 Vill. L. Rev. 241, 260 (2018); Villella & Keen, supra note 33, at 338.
\item \textsuperscript{338} See supra notes 117–146 and accompanying text.
\end{itemize}
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regulation. In Lantis, however, this balancing test took the notion of park visitor accountability too far. \textsuperscript{340}

An “obvious” or “common-sense” risk to one park patron may not be an obvious or common-sense risk to other patrons with less outdoor experience, but this should not stifle park patrons from visiting national parks. \textsuperscript{341} Assigning culpability can be difficult given the varying recreational ability and knowledge. \textsuperscript{342} For example, Lantis was not particularly reckless when he decided to go off-trail. \textsuperscript{343} Indeed, his level of preparedness, including his equipment, indicated that while on his hike, he may encounter issues in the wilderness, which he could mitigate the effects of through his relative preparedness. \textsuperscript{344} An obvious risk in national parks is encountering issues on the trail, for which Lantis was adequately prepared. \textsuperscript{345} Leaving a marked trail to avoid an animal encounter is not a conscious disregard of a known risk. \textsuperscript{346} He would not have faced criminal charges if Lantis had later found his way out of the wilderness. \textsuperscript{347} Charging lost park patrons for their rescue does not make the risks associated with hiking in national parks and the “reasonable” decisions that one should make in the event of an animal encounter or other emergency any more obvious to other park patrons. \textsuperscript{348} Therefore, a charge for disorderly conduct in similar circumstances is an error on behalf of the NPS. \textsuperscript{349}

A strict liability standard is against the spirit of NPS’s policy and purpose. \textsuperscript{350} A discretionary charge for an individual’s rescue operation is also a broad means of alleviating recreational risk for park patrons. \textsuperscript{351} Unless the national park service intends to charge every patron that ventures off-trail and needs rescue with disorderly conduct, the application of the disorderly conduct charge to hold visitors accountable does not deter park patrons from behavior courts deem reckless, like in Lantis. \textsuperscript{352} The NPS preserves the national park system for the enjoyment, education, and inspiration of this generation and future generations. \textsuperscript{353} Pursuant

\textsuperscript{339} See supra notes 117–146 and accompanying text.
\textsuperscript{340} See supra notes 167–227 and accompanying text.
\textsuperscript{341} See supra notes 47–51 and accompanying text.
\textsuperscript{342} See supra notes 47–51 and accompanying text; United States v. Lantis, 17 F.4th 35 (10th Cir. 2021); Holpuch, supra note 244.
\textsuperscript{343} See supra notes 167–227 and accompanying text.
\textsuperscript{344} See supra notes 167–227 and accompanying text.
\textsuperscript{345} See supra notes 167–227 and accompanying text.
\textsuperscript{346} See supra notes 167–227 and accompanying text.
\textsuperscript{347} See supra notes 167–227 and accompanying text.
\textsuperscript{348} See supra notes 167–227 and accompanying text.
\textsuperscript{349} See supra notes 167–227 and accompanying text.
\textsuperscript{350} See Report to Congress, supra note 65.
\textsuperscript{351} See id.
\textsuperscript{352} See supra notes 167–227 and accompanying text.
\textsuperscript{353} See supra notes 23–27 and accompanying text.
to this mission, the NPS and states have succeeded in reducing the number of search and rescue operations through preventative measures, including education and enhanced trail safety measures.\textsuperscript{354}

Courts give significant deference to the NPS to interpret park service regulations.\textsuperscript{355} The disorderly conduct regulation is broad and encompasses a wide range of park visitor actions.\textsuperscript{356} Accordingly, the NPS should narrowly apply disorderly conduct charges to rescue victims.\textsuperscript{357} When applied, a disorderly conduct analysis could look like a legal analysis of the NPS’s interference with an agency function regulation.\textsuperscript{358} If a park patron knowingly provides false information, this exchange is a violation for interfering with an agency function by providing erroneous information to the NPS and similarly creates public alarm under the disorderly conduct regulation.\textsuperscript{359} “Knowingly” is a stricter mens rea than “reckless.”\textsuperscript{360} Therefore, the NPS would form a more concrete illustration of which park actions lead to criminal charges.\textsuperscript{361} Similarly, in many of these situations, such as the Denali climber, the park visitor puts search and rescue personnel at risk despite the lack of need for rescue.\textsuperscript{362} These charges for unnecessary rescues fall under the “knowing” standard, a less arbitrary and capricious standard than the current disorderly conduct reckless standard applied in \textit{Lantis} and creates a less chilling standard for the average recreator.\textsuperscript{363}

Until the NPS takes on an affirmative obligation to inform all park patrons of “obvious risks” within the national park system, the opportunity to charge a lost hiker for recreational activity leading to rescue presents an issue for the NPS.\textsuperscript{364} It is impossible for an inexperienced hiker to discern what decisions could lead to criminal charges, and the national park should not require park patrons to understand park liability standards.\textsuperscript{365} Hiking is the most common activity in national parks and the most common activity requiring rescue.\textsuperscript{366} Historically, individuals were only cited for disorderly conduct related to high-risk rescue activities, such as BASE jumping within the national parks.\textsuperscript{367} The current shift to

\begin{itemize}
\item \textsuperscript{354} See supra notes 293–313 and accompanying text.
\item \textsuperscript{355} See supra notes 223–227 and accompanying text.
\item \textsuperscript{356} See supra notes 167–227 and accompanying text.
\item \textsuperscript{357} See supra notes 167–227 and accompanying text.
\item \textsuperscript{358} See supra notes 228–252 and accompanying text.
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\item \textsuperscript{362} See supra notes 228–252 and accompanying text.
\item \textsuperscript{363} See supra notes 228–252 and accompanying text.
\item \textsuperscript{364} See Part III.
\item \textsuperscript{365} See supra notes 167–227 and accompanying text.
\item \textsuperscript{366} See supra notes 40–44 and accompanying text.
\item \textsuperscript{367} See United States v. Albers, 226 F.3d 989, 991–92 (2000).
\end{itemize}
charge lost hikers with disorderly conduct violates the very humanitarian principle of NPS search and rescue operations and is detrimental to the responsibilities of the NPS.\textsuperscript{368} A narrow application of disorderly conduct charges encourages outdoor participation, while discouraging irresponsible and reckless behavior.\textsuperscript{369}

\textbf{V. Conclusion}

The NPS attributes the highest management priority to saving the lives of park visitors, a discretionary act that the NPS has voluntarily assumed.\textsuperscript{370} The ability to respond to park visitor search and rescue needs is essential to the NPS’s dedication to patron safety.\textsuperscript{371} Just as the NPS has the discretion to search for and rescue park visitors, the NPS can similarly hold visitors accountable for consciously disregarding the risks associated with their visit to a national park.\textsuperscript{372} The full scope of risk associated with a patron’s adventure in the wilderness can never be mitigated completely, but obtaining the NPS’s commitment to more fairly apply criminal charges to all recreators is a start.\textsuperscript{373} Park patrons primarily frequent national parks for recreation, and in recent years, this increased desire to recreate has led to a strain on park services.\textsuperscript{374} Despite increased visitation, national controversy, and current state models for rescue charges, the NPS has maintained its decision to not charge rescue victims for the cost of their search and rescue operation.\textsuperscript{375}

As the nature of outdoor recreation in national parks shift, and more individuals seek the thrill of America’s national parks, Lantis highlights the NPS’s ability to arbitrarily charge lost visitors for search and rescue costs when their conduct leads to a need for rescue.\textsuperscript{376} Charging park patrons who are legitimately lost in the wilderness and require rescue, however, is against the fundamental mission of the NPS.\textsuperscript{377} Outdoor hiking and recreation in national parks presents obvious and inherent risks, but levying disorderly conduct charges to a park patron’s subjective understanding of wilderness recreation broadens the scope of the disorderly conduct regulation significantly.\textsuperscript{378} The NPS must address the implications of disorderly conduct charges for park patrons and provide for visitor safety by acknowledging the limitations of park patrons’ knowledge and experience recreating.\textsuperscript{379} In the
words of famous mountaineer, Ed Viesturs, “[g]etting to the top is optional, getting down is mandatory,” and for the NPS, rescuing individuals who push their limits while recreating is essential.\footnote{Ed Viesturs, No Shortcuts to the Top 207 (2006).}