

# Putting the Fire Out: An Analytical Analysis into the Bureau of Land Management's New Protest Petition Law

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How we should protect our forests is an on-going issue in our society.<sup>1</sup> New ideas or theories are continuously being introduced and revamped to address the evolving concern of preventing forest fires and the disasters surrounding them.<sup>2</sup> The history of wildlife management is just over one century old.<sup>3</sup> It started with Aldo Leopold, the father of wildlife ecology and the United States's wilderness system, who laid the critical foundation for wildlife management.<sup>4</sup> In 1907, the Agricultural Appropriations Act stated that "hereafter officials of the Forest Service should, in all ways that are practicable, aid in the enforcement of the laws of the States and Territories concerning the protection of fish and game."<sup>5</sup> During the 1920s, conflicts arose over managing overpopulated deer, which led to a Supreme Court decision allowing Forest Service employees to hunt excess game in order to protect the forage resources from being overgrazed by deer.<sup>5</sup>

In 1976, Congress passed the National Forest Management Act ("NFMA"), which required the United States Forest Service to have a plan to ensure plant and animal diversity in the nation's forests.<sup>6</sup> It required the Secretary of Agriculture to evaluate forest lands; develop a management program based on multiple-use,

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<sup>1</sup> See *Wildlife Mgmt.*, FOREST HIST. SOC'Y <https://foresthistor.org/research-explore/us-forest-service-history/policy-and-law/wildlife-management/> (last viewed Oct. 9, 2020) [<https://perma.cc/9UNF-8SCA>].

<sup>2</sup> *4 Ways the Right Policies Can Help Us Confront Wildfires*, ENV'T DEF. FUND, <https://www.edf.org/climate/4-ways-right-policies-can-help-us-confront-wildfires> (last viewed Sept. 4, 2021) [<https://perma.cc/8RAA-4CDX>].

<sup>3</sup> See *Wildlife Mgmt.*, *supra* note 1.

<sup>4</sup> *Id.*; *Aldo Leopold*, ALDO LEOPOLD FOUND. <https://www.aldoleopold.org/about/aldo-leopold/> (last viewed Oct. 9, 2020) [<https://perma.cc/TD74-YV4R>].

<sup>5</sup> See *Wildlife Mgmt.*, *supra* note 1.

<sup>6</sup> *Id.*

sustained-yield principles; and implement a resource management plan for each unit in the national forest system.<sup>7</sup> An essential aspect of this Act was the sale of timber, but only in terms of the appraisement value.<sup>8</sup> The overcrowding problems in national forests would be extremely difficult to tackle without guidance by the NFMA on timber sale regulations.

The raging wildfires in the western United States illustrate that our forests are still vulnerable and we have yet to find effective solutions to protect them.<sup>9</sup> The NFMA is still the standard used in the United States to manage the “fundamental need to protect, and where appropriate, improve the quality of soil, water, and air resources.”<sup>10</sup> Only recently have there been proposals of new bills to address the growing problem of overcrowding in forests where closely-growing trees allow ignited wildfires to quickly spread.<sup>11</sup>

Although the NFMA addresses timber sales, it does not discuss the issues surrounding the debate on public protests during the Bureau of Land Management (“BLM”) timber sale planning process. During the BLM timber sales, there has historically been a public forum that has allowed private citizens and conservation groups to protest.<sup>11</sup> A public protest for timber sales allows individuals the right to protest the logging of trees before the auction of the lumber begins, and to bring legal and scientific errors to the Bureau of Land Management.<sup>13</sup> The Trump administration proposed a change to the BLM rules, which in part would eliminate the fifteen day public protest period.<sup>12</sup> A discussion has emerged around the prevention of forest fires through better forest management, which even reached the presidential debate stage in 2020.<sup>14</sup> The proper way to handle wildfires has caused deep divides among many people concerned

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<sup>7</sup> National Forest Management Act of 1976, Pub. L. No. 588, 90 Stat. 2949 (1976).

<sup>8</sup> *Id.*

<sup>9</sup> Hayley Smith & Alex Wigglesworth, *As California burns, some ecologists say it's time to rethink forest management*, L.A. TIMES, (Aug. 21, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-08-21/california-burning-is-it-time-to-rethink-forest-management> [<https://perma.cc/2P59-4SY5>].

<sup>10</sup> *Id.*

<sup>11</sup> *Defend Your Right to Protest*, OR. WILD BLOG (July 29, 2020), <https://oregonwild.org/about/blog/defend-your-right-protest> [<https://perma.cc/W4BF-ZMZH>].

<sup>12</sup> *Id.*

about the different ways to approach forest management.<sup>13</sup> Some believe the root cause of wildfires is climate change, while others believe the root cause is poor forest management.<sup>14</sup>

The term climate change has been around since 1956.<sup>15</sup> Climate change is a change in the Earth's average temperature, which the Earth's temperature has been noticeably higher than in the past century.<sup>16</sup> With increasing temperatures, staggering rain, and severe droughts, many individuals believe that climate change is the leading cause of the wildfires out in the western United States.<sup>17</sup> Suggestions to fix this issue include: switching to green power, saving energy, optimizing an individual's diet, reducing the use of plastic in daily life, reusing and donating clothes, carpooling, shrinking an individual's digital footprint, and planting more trees.<sup>18</sup> Some believe that the country's constant on-the-go lifestyle has created a substantial, unhealthy impact on our environment.<sup>19</sup> This lifestyle has led to more droughts and less rain, or long periods of no rain in hot summers.<sup>20</sup>

Another standard solution to the wildfire problem is better forest management.<sup>21</sup> Forest Management focuses on managing vegetation, restoring ecosystems, reducing hazards, and

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<sup>13</sup> Andrew Selsky & Adam Beam, *Easing fires not as simple as climate change vs. forest work*, ASSOCIATED PRESS (Sept. 14, 2020), <https://apnews.com/article/wildfires-climate-change-climate-oregon-washington-redskins-49d872e449c66aa7a0a9c047a00a738f> [https://perma.cc/55CR-829A].

<sup>14</sup> *Id.*

<sup>15</sup> Emma McIntosh, *No, a Republican Strategist Didn't Invent the Term 'Climate Change'*, CAN. NAT'L OBSERVER (Aug. 1, 2019), <https://www.nationalobserver.com/2019/08/01/news/no-republican-strategist-didnt-invent-term-climate-change#:~:text=The%20roots%20of%20the%20term,site%20run%20by%20environmental%20scientist> [https://perma.cc/2WLC-CQF9].

<sup>16</sup> *What is Climate Change? A Really Simple Guide*, BBC (Aug. 9, 2021) <https://www.bbc.com/news/science-environment-24021772> [https://perma.cc/YAU7-NDZ6].

<sup>17</sup> Alejandra Borunda, *The Science Connecting Wildfires to Climate Change*, NAT'L GEOGRAPHIC (Sept. 17, 2020), <https://www.nationalgeographic.com/science/article/climate-change-increases-risk-fires-western-us> [https://perma.cc/8KNB-NE5J].

<sup>18</sup> *12 Things You Can Do Right Now on Climate Change*, RESET <https://en.reset.org/act/12-things-you-can-do-climate-change-0> (last viewed Oct. 17, 2020) [https://perma.cc/4V8X-KMXG].

<sup>19</sup> *See id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Forest Fire Management*, NATURE 4 CLIMATE <https://nature4climate.org/science/n4c-pathways/forests/forest-fire-management/> (last viewed Oct. 20, 2021) [https://perma.cc/NQ7U-YB8P].

maintaining overall forest health.<sup>22</sup> This kind of plan makes use of different practices such as timber stand improvement, thinning, prescribed burning, mechanical treatment, chemical treatment, timber harvesting, and regeneration.<sup>23</sup> These different processes vary by the determination of which trees to cut and which trees not to cut.<sup>24</sup>

Both ideas have compelling arguments, but our forests will still be overgrown, even if Americans were able to diminish the effects climate change. Forest fires will continue to run rampant even if we implement the various forest management practices of cutting down trees, due to the old petition protests frequently affecting whether trees can be cut down and sold.<sup>25</sup> When individuals or groups protest the cutting of trees, it can take years for these petitions to be processed. Meanwhile, the trees become rotted and cannot be sold to be used for timber. This eventually leads to overcrowding, leading to forest fires.<sup>26</sup> These fires do more than destroy our beautiful forests—they also destroy the homes of woodland creatures who consequently struggle to find food and shelter.<sup>27</sup>

This Note will explore why the old petition protest period desperately needs to be revamped and why this is the ultimate solution that will genuinely reduce forest fires. Additionally, this Note will discuss the importance of climate change and how this factor will not affect wildfires until the new protest petition law begins to take action against timber sales. This Note argues that better climate control policies will not play a significant factor, but instead will have little effect without more regulation of the petition protest. Furthermore, this Note will look at the history of the petition protest and how it has threatened the security of our forests. This Note will also explore how shortening the petition

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<sup>22</sup> *Forest Management*, U.S. FOREST SERV. <https://www.fs.fed.us/forestmanagement/> (last viewed Oct. 8, 2021) [<https://perma.cc/6DNU-6WNC>].

<sup>23</sup> *Forestry Management Techniques*, FORESTRY MGMT. TECH. [https://static.secure.website/wscfus/5302681/uploads/08\\_Forest\\_Management\\_Techniques%5b1%5d.pdf](https://static.secure.website/wscfus/5302681/uploads/08_Forest_Management_Techniques%5b1%5d.pdf) (last viewed Oct. 18, 2020) [<https://perma.cc/HJZ5-EEJ9>].

<sup>24</sup> *Id.*

<sup>25</sup> *BLM Proposes Modernizing Forest Management Rules*, U.S. DEPT INTERIOR BUREAU OF LAND MGMT. <https://www.blm.gov/press-release/blm-proposes-modernizing-forest-management-rules> (last viewed Oct. 19, 2020) [<https://perma.cc/2T4X-LH2B>].

<sup>26</sup> *Id.*

<sup>27</sup> Yvonne Barkey, *Wildlife and Wildlife Habitat*, SURVIVING WILDLIFE (Aug. 27, 2019), <https://surviving-wildfire.extension.org/wildfire-and-wildlife-habitat/> [<https://perma.cc/SX5X-QNZU>].

protest period will not cause timber shortage nor harm our forests. Lastly, this Note will discuss the constitutional aspects of the First Amendment regarding Freedom of Petition and how this solution does not violate the First Amendment.

This Note argues that reducing the protest period time, as suggested in the new Bureau Land Management (“BLM”) law, should be permitted.<sup>28</sup> Part I argues that there have been many problematic issues in the past with the petition protest’s process. Part II will demonstrate that reducing the protest period will reduce the overcrowding of trees, which will result in a decrease of total wildfires. Part III maintains that even though several claim climate change is the leading cause of wildfires, although plausible, it does not justify rejecting the shortening of the protest period for wildfires. People can attempt to fix climate change, but that will not reduce the forest overcrowding, which is the leading cause of wildfires across our country. Part IV will discuss how shortening the petition protest period does not violate the American people’s First Amendment right to Freedom of Petition.

## I. A BRIEF HISTORY OF TIMBER PROTESTS

For a long period of time, petition protests caused many drastic issues in our country. Unfortunately, these issues are currently the leading cause of the wildfires raging in the United States.<sup>29</sup> Until the petition protest period changes, trees will continue to rot. This will result in trees going unsold, and consequently there will be an overcrowding issue. The heat in the summer will then cause forest fires to grow out of control, rapidly killing forests.<sup>30</sup> During the summer of 1990, petition protest issues gained attention, causing other timber sale protests to follow.<sup>31</sup>

Now known as the “Redwood Summer,” the summer of 1990 was a monumental time for environmental activism.<sup>32</sup> There was a lengthy protest on California’s North Coast against the logging of trees.<sup>33</sup> This protest arose out of concern to protect loggers,

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<sup>28</sup> NATURE 4 CLIMATE, *supra* note 21.

<sup>29</sup> Adam M. Sowards, *The Lessons of Redwood Summer, Thirty Years Later*, HIGH COUNTRY NEWS (Sept. 29, 2020), <https://www.hcn.org/issues/52.11/north-reckoning-with-history-the-lessons-of-redwood-summer-thirty-years-later> [<https://perma.cc/QTG2-J8LK>].

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

which resulted in an initiative known as “Forests Forever.”<sup>34</sup> The law almost passed, receiving 48 percent of the vote, but ultimately failed.<sup>35</sup> Although the bill did not pass, the protest and subsequent proposed legislation left a lasting mark on the future of wildfires in our country.<sup>36</sup> The group behind the bill, Earth First!, ensured California did not violate any logging laws.<sup>37</sup> To assist with this, courts ruled on various laws that strengthened logging requirements, including the California Environmental Quality Act (“CEQA”).<sup>38</sup> The CEQA is a broad act that covers proposed environmental projects, prevents further damage to the environment, and allows the public to get involved in the project’s discussion.<sup>39</sup> This Act was a huge step in the right direction to prevent unnecessary harm during the logging process.<sup>40</sup>

Further, the Siskiyou logging protest that occurred in Oregon in 1995 was also effective.<sup>41</sup> The organization established the plan for this timber sale twenty years before its protest.<sup>42</sup> The sale did not occur because of the protest, which led the government to see that certain wildlife lived in the area and were dependent on the trees for shelter.<sup>43</sup> Although this idea sounds effective, without absolute control on tree-cutting practices, there would be no shelter left for animals during a wildfire.<sup>44</sup> This protest occurred due to the increasing concern of fire risks.<sup>45</sup> Although the protest seemed acceptable, the group was protesting the timber sale that occurs every fifteen years to help control wildfires.<sup>46</sup> An oxymoron at its finest.

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<sup>34</sup> *Id.*

<sup>35</sup> Adam M. Sowards, *The Lessons of Redwood Summer, Thirty Years Later*, HIGH COUNTRY NEWS (Sept. 29, 2020), <https://www.hcn.org/issues/52.11/north-reckoning-with-history-the-lessons-of-redwood-summer-thirty-years-later> [https://perma.cc/QTG2-J8LK].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *A Summary of the California Environmental Quality Act (CEQA)*, CAL. DEP’T FISH & WILDLIFE, <https://wildlife.ca.gov/Conservation/CEQA/Purpose> (last viewed Oct. 18, 2020) [https://perma.cc/8BZZ-SSX3].

<sup>40</sup> *See id.*

<sup>41</sup> *20 Arrested in Timber Sale Protest*, ASSOCIATED PRESS (Sept. 11, 1995), <https://apnews.com/article/2e6be00b89b05a863a7826c95b13f677> [https://perma.cc/CE4K-W7JR].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *See id.*

<sup>45</sup> Madison LaBerge, *Protesters gather outside Medford BLM office over Bear Grub project*, FOX 26, (July 2, 2020, 5:24 PM), <https://fox26medford.com/protesters-gather-outside-medford-blm-office-over-bear-grub-project/> [https://perma.cc/X2QN-LAGN].

<sup>46</sup> *Id.*

Another famous protest was the Pickett Hog Timber Sale.<sup>47</sup> This particular sale involved the cutting of old-growth trees.<sup>48</sup> Protestors claimed old-growth was one of the primary sources used to help reduce wildfires.<sup>49</sup> The term “old-growth” was first established to describe forests that were at least fifty to one hundred years old.<sup>50</sup> However, these old trees are not the best suited to be in high-intensity fire locations, as they are highly flammable, causing the spread of wildfires among such trees to be more rapid.<sup>51</sup> The Pickett Hog timber sale resulted in twenty-nine protests before the auction in September of 2017, which delayed the timber sale for more than a year.<sup>52</sup> Due to the delayed sale, a wildfire occurred which destroyed several sale units, causing the sale to never occur.<sup>53</sup> With our current knowledge of wildfires and the ability to continue to learn about how they spread and what we can do to prevent the spread of a wildfire, we must stop focusing on the emotional aspect of saving the old-growth trees and focus on what we can actively do to save our forests before they are all destroyed. To accomplish this, we must first understand how the logging projects’ protests began and what the Bureau of Land Management is currently doing in this area.

#### *A. Why the Old Protest Petition Law Needed A Change*

In 1984, Congress passed Protests, 43 CFR § 5003.03, which dealt with timber sale protests.<sup>54</sup> Under this regulation, protests of any timber sale must occur within fifteen days of the notice of the sale decision.<sup>55</sup> The protests are generally made in the

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<sup>47</sup> *100 Protest 6,000 Acre Pickett West BLM Timber Sale Auction*, ECOADVOCATES NW, <https://sites.google.com/site/ecosystemadvocates/100-protest-pickett-west-blm-auction> (last viewed Oct. 19, 2020) [<https://perma.cc/J22T-GL3P>].

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *New Findings about Old-Growth Forests*, U.S. DEP’T. AGRIC., FOREST SERV., PAC. NW. RSCH. STATION (2003), <https://www.fs.fed.us/pnw/pubs/science-update-4.pdf> [<https://perma.cc/2BYB-TS4L>].

<sup>51</sup> Daniel Binkley, Tom Sisk, Carol Chambers, Judy Springer, & William Block, *The Role of Old-growth Forests in Frequent-fire Landscapes*, ECOLOGY & SOC’Y. (2007), [https://www.fs.fed.us/rm/pubs\\_other/rmrs\\_2007\\_binkley\\_d001.pdf](https://www.fs.fed.us/rm/pubs_other/rmrs_2007_binkley_d001.pdf) [<https://perma.cc/Y736-FM99>].

<sup>52</sup> Press Release, U.S. Dep’t. of the Interior Bureau of Land Mgmt., BLM Proposes Modernizing Forest Management Rules (May 28, 2020), <https://www.blm.gov/press-release/blm-proposes-modernizing-forest-management-rules> [<https://perma.cc/2LCU-E3PJ>].

<sup>53</sup> *Id.* at 1.

<sup>54</sup> Protests, 43 C.F.R § 5003.03 (2020).

<sup>55</sup> *Id.*

newspapers or some other form of print communication containing a written statement explaining the reasons for the protest.<sup>56</sup> This regulation was the latest version of the protest petition law until 2020, when the BLM proposed to revise its regulations for these protests.<sup>57</sup> The prior petition protest law left the BLM with a law that was ultimately ineffective.<sup>58</sup> The old law led to this decision because people in the industry began to see the protest petition period delaying the logging process because of lengthy protests performed by those who are not satisfied with decisions to conduct a sale.<sup>59</sup> Responding to protests requires the BLM to spend a lot of time, money, and other resources, making it difficult to accomplish any logging deal.<sup>60</sup> The BLM has made new amendments to eliminate the protest process after issuing a forest management decision.<sup>61</sup>

With the previous law, the BLM regularly issued a forest management decision that could not be protested until the Bureau issued a notice of an advertised timber sale, which generally occurred long after the conducted environmental review.<sup>62</sup> An environmental review is a process of reviewing a project and its potential environmental impact to determine whether it meets federal, state, and local environmental standards.<sup>63</sup> The new protest petition law would allow a single forest management decision to cover all forest management activities covered in an environmental review document.<sup>64</sup> These activities include timber stand improvement, thinning, prescribed burning, and timber harvesting. This change would allow the public to identify any resource conflicts or other issues of concern earlier in the BLM's forest management process and enhance the BLM's ability to resolve those issues before it advertises a timber sale or implements other forest management activities.<sup>65</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> Forest Mgmt. Decision Protest Process and Timber Sale Admin., 85 Fed. Reg. 35,049-01 (June 8, 2020).

<sup>58</sup> *Id.* at 35,049.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Environmental Review*, HUD EXCHANGE (Feb. 23, 2020), <https://www.hudexchange.info/programs/environmental-review/> [https://perma.cc/7HFU-9J5J]

<sup>64</sup> *See generally Id.* (providing an overview of the environmental review process).

<sup>65</sup> *See generally Id.* (providing base information supporting conclusion).



The BLM's new protest petition law will allow issues with logging to be brought up earlier and dealt with when the environmental review is taking place instead of wasting time and resources to go back and look at specific issues after the environmental review is completed.<sup>66</sup> This law will also save the time of advertising a timber sale.<sup>67</sup> If there are too many issues for the sale to occur, then the BLM will not have to worry about spending time advertising it.<sup>68</sup> This law will allow those individuals who rightfully see issues with timber sales, because they violate a law or will endanger species or habitats, to speak up, rather than the individuals who are simply looking to delay the process in hopes of the timber sale never occurring.<sup>69</sup>

## II. BENEFITS OF TIMBER HARVESTING

The new petition protest law that went into effect in January of 2021 will reduce the overcrowding of trees, resulting in a reduction of massive wildfires.<sup>70</sup> Timber sales are a crucial aspect of forest management that significantly reduce the risk of wildfires.<sup>71</sup> Without the cutting down of trees, the trees can become hazardous fuels which start wildfires.<sup>72</sup> The trees stand and wait as their strong mandatory eviction closes in. Fire suppression techniques, extinguishing or fighting fires, and exclusion practices are all utilized to try to eliminate fires from the landscape.<sup>73</sup> These techniques have created a build-up of flammable material in

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<sup>66</sup> See generally Forest Mgmt. Decision Protest Process and Timber Sale Admin., 85 Fed. Reg. 35,049-01 (June 8, 2020).

<sup>67</sup> See generally *Id.* (summarizing BLM's proposed revisions to regulations).

<sup>68</sup> See generally *Id.* (summarizing proposed revisions demonstrating that previously required steps may not be necessary).

<sup>69</sup> See generally *Id.* (summarizing proposed revisions mentioning the improved ability of the BLM to participate in forest management).

<sup>70</sup> *Id.*

<sup>71</sup> Ian Fox, *Harvesting Trees in the Right Place at the Right Time*, U.S. DEPT AGRIC. (Oct. 23, 2020), <https://www.usda.gov/media/blog/2020/10/23/harvesting-trees-right-place-right-time#:~:text=Timber%20sales%20are%20an%20important,your%20national%20forests%20and%20grasslands.&text=At%20the%20same%20time%2C%20small,way%20we%20approach%20our%20work.> [https://perma.cc/GS43-SWCK].

<sup>72</sup> *Id.*

<sup>73</sup> Lydia Lee, *How Mass Timber Could Help Reduce Wildfire Risk*, METROPOLIS (Dec. 9, 2020), <https://www.metropolismag.com/sustainability/mass-timber-wildfire/> [https://perma.cc/K7AC-8JR6]; Robert E. Keane, Kevin C. Ryan, Tom T. Veblen, Craig D. Allen, Jesse Logan, & Brad Hawkes, *Cascading Effects of Fire Exclusion in Rocky Mountain Ecosystems: A Literature Review*, U.S. DEPT AGRIC. (May 2022), [https://www.fs.fed.us/rm/higherelevationwhitepines/Threats/pdf/fire\\_exclusion.pdf](https://www.fs.fed.us/rm/higherelevationwhitepines/Threats/pdf/fire_exclusion.pdf) [https://perma.cc/DR4R-U9JQ].

forests, which could be reduced through controlled burns and thinning of small trees and shrubs.<sup>74</sup>

Unfortunately, this is not a view accepted by all.<sup>75</sup> Popular negative comments about timber sales include the loss of animal habitat, loss of cultural diversity, loss of biodiversity, loss of carbon storage capacity, and loss of forests in general.<sup>76</sup> These negative views often overshadow the positives. To see the benefits of logging in reducing wildfires, a true understanding of the issues may displace these common concerns.

Logging trees is a crucial way to save animal habitats. The logging process prevents unnecessary, uncontrollable destruction of animal habitats. The environmental review will allow individuals to determine if there are issues with the logging that would endanger animals in the area.<sup>77</sup> Through logging, the company and government can determine what trees will come down and in which areas. With a wildfire, it is not easy to have the kind of control necessary to only burn select trees.<sup>78</sup> The freedom of choice is gone.<sup>79</sup> A wildfire will more likely ruin an animal's habitat because it will destroy everything in its wake.<sup>80</sup> This in turn makes it harder for wildlife to recover post-fire, as they have to move longer distances to re-colonize burned areas.<sup>81</sup>

Another prominent issue individuals have with logging is that it destroys biodiversity among trees.<sup>82</sup> However, logging actually encourages the growth and development of new species of trees and is a critical practice as it provides the sustained

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<sup>74</sup> Lee, *supra* note 73.

<sup>75</sup> See Tony Schick & Jes Burns, *Despite what the logging industry says, cutting down trees isn't stopping catastrophic wildfires*, OPB (Nov. 2, 2020 12:42 PM), <https://www.opb.org/article/2020/10/31/logging-wildfire-forest-management/> [<https://perma.cc/3B87-5EH6>].

<sup>76</sup> Puja Mondal, *3 Unintended Impacts of Timber Extraction on Environment*, YOUR ARTICLE LIBR. <https://www.yourarticlelibrary.com/environment/3-unintended-impacts-of-timber-extraction-on-environment/28200> (last viewed Feb. 23, 2020) [<https://perma.cc/ZMY3-DPH4>].

<sup>77</sup> See *Orientation to Environmental Reviews*, HUD EXCHANGE <https://www.hudexchange.info/programs/environmental-review/orientation-to-environmental-reviews/#overview> (last viewed Feb. 23, 2020) [<https://perma.cc/8FSG-EJJB>].

<sup>78</sup> See Doug Inkley, *5 Ways Wildfires Threaten Western Wildlife*, NAT'L WILDLIFE FED'N (June 19, 2012), <https://blog.nwf.org/2012/06/5-ways-wildfires-threaten-western-wildlife/> [<https://perma.cc/C2DU-PGTB>].

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> Mondal, *supra* note 76.

production of timber.<sup>83</sup> Logging also improves tree health, minimizes competition among the trees, provides necessary materials to humans, improves forest safety, and greatly diminishes the risk of forest fires.<sup>84</sup> It may also improve forest health by harvesting the dead and diseased trees, which would prevent the spread of fungi or bacteria—both of which can damage other parts of a tree.<sup>85</sup> Lastly, logging benefits the environment by minimizing competition among trees by harvesting older trees that are depriving younger trees that can provide more to the forest biosphere.<sup>86</sup>

Overcrowding, a thorn in the side of forest conservation, can be greatly mitigated by logging.<sup>87</sup> Overcrowding of trees leads to an increase of pathogens and disease which have the potential to kill thousands of healthy trees.<sup>88</sup> Logging benefits the environment by allowing more ground area to flourish, creating a lower density forest where more sunlight and air reaches the forest floor.<sup>89</sup> This benefit then encourages the diverse growth of grasses, bushes, ferns, and other plants desirable for wildlife.<sup>90</sup> As a result, the reduction in overcrowding trees creates many benefits for forests generally, all of which can be attributed to logging.<sup>91</sup>

Logging creates diversity in the forest which allows habitat expansion and wildlife proliferation.<sup>92</sup> Logging also diminishes forest fire risk as there are less trees to burn.<sup>93</sup> Timber sales do not cause harm to forests but instead help preserve them.<sup>94</sup> Once the negative views of logging are changed, individuals can look beyond what is happening and examine how logging is an effective means

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<sup>83</sup> *Six Benefits of Logging Forests*, FUTURE FOREST CONSULTING, INC. (Feb. 4, 2016), <https://www.futureforestinc.com/six-benefits-of-logging-forests/> [https://perma.cc/5TCM-NC9T].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *Id.*

<sup>94</sup> *See* Elizabeth L. Kalies & Larissa L. Yocum Kent, *Tamm Review: Are Fuel Treatments Effective at Achieving Ecological and Social Objectives? A Systematic Review*, 375 FOREST ECOLOGY & MGMT. 84, 84, 92 (2016).

of controlling wildfires. Even with these opposing views dispelled, the debate over forest management as a solution is far from over.<sup>95</sup>

### *A. Recent Political Views on Timber Harvesting*

The issue of forest overcrowding which leads to forest fires became a hot topic in the 2020 presidential election between Donald J. Trump and Joe Biden.<sup>96</sup> President Biden's position during the campaign was to have the United States rejoin the Paris Climate Agreement, re-instate Obama-era environmental regulations, eliminate the use of fossil fuels by 2035, and spend \$2 trillion dollars to achieve net-zero emissions by 2050.<sup>97</sup> Unlike his incumbent opponent, President Biden's plans viewed climate change as the cause of western wildfires instead of focusing on forest management.<sup>98</sup>

Former President Donald J. Trump made a post on Twitter where he dismissed the role of climate change as the cause of the worsening blazes across the western U.S.<sup>99</sup> This tweet was preceded by then-President Trump issuing Executive Order 18355, which directed the Forest Service and the Department of the Interior to increase timber production in national forests and on other federal lands.<sup>100</sup> This order would—if it took effect—result in a 31 percent increase in logging on national forest lands since 2017.<sup>101</sup> This order encouraged the Bureau of Land Management to develop the new procedural rule changing the length of time allowed to protest a Bureau of Land Management decision.<sup>102</sup>

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<sup>95</sup> Daniel Persica, *The Debate Over Forest Fire Control Rages On*, SUSTAINABLE BRANDS (Jan 23, 2018 9:00:00 PM), <https://sustainablebrands.com/read/supply-chain/the-debate-over-forest-fire-control-rages-on> [<https://perma.cc/U8PM-266B>].

<sup>96</sup> Peter Baker et al., *As Trump Again Rejects Science, Biden Calls Him A 'Climate Arsonist'*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/2020/09/14/us/politics/trump-biden-climate-change-fires.html> [<https://perma.cc/LPU3-FCCE>].

<sup>97</sup> Craig Welch & Sarah Gibbens, *Trump vs. Biden on the Environment – Here's Where They Stand*, NAT'L GEOGRAPHIC (Oct. 19, 2020), <https://www.nationalgeographic.com/science/graphics/trump-vs-biden-environment-heres-where-they-stand> [<https://perma.cc/75HU-3695>].

<sup>98</sup> *Id.*

<sup>99</sup> Nos. 35-37, TRUMP TWITTER ARCHIVE, <https://www.thetrumparchive.com/?results=1&dates=%5B%222019-11-03%22%2C%222019-11-04%22%5D> (Nov. 9, 2019) [<https://perma.cc/G3SJ-9WTK>].

<sup>100</sup> Bryant Baker, *Trump Issues Executive Order to Increase Logging on Federal Lands*, LOS PADRES FOREST WATCH (Jan. 17, 2019), <https://lpfw.org/trump-issues-executive-order-to-increase-logging-on-federal-lands/> [<https://perma.cc/39MM-KZZM>].

<sup>101</sup> *Id.*

<sup>102</sup> Exec. Order No. 18355, 85 Fed. Reg. 35,049-01 (2020).

Without shortening the protest petition period, we expose our forests to dangerous wildfires, as seen with the protests mentioned above.<sup>103</sup>

Members of Congress have recognized the problems with the logging process over the past several years.<sup>104</sup> During the 114th Congress, the House of Representatives passed the Emergency Wildlife and Forest Management Act of 2016.<sup>105</sup> The act's purpose was to return resilience to overgrown, fire-prone, forested lands by improving forest management activities on (1) National Forest System lands, (2) public lands under the Bureau of Land Management jurisdiction, and (3) tribal lands.<sup>106</sup> Although this Act did not pass the Senate, it shows that many forest management issues require attention.<sup>107</sup>

### III. THE VIEW OF CLIMATE CHANGE ON TIMBER HARVESTING

A note-worthy reason why individuals are reluctant to fully commit to improving the petition protest process and logging operations is climate change.<sup>108</sup> Although it is essential to consider climate change, the climate will continually fluctuate as the years continue to pass.<sup>109</sup> There will always be climate issues, but logging is a certifiable solution to wildfires.<sup>110</sup>

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<sup>103</sup> See Adam M. Sowards, *The Lessons of Redwood Summer, Thirty Years Later*, HIGH COUNTRY NEWS (Sept. 29, 2020), <https://www.hcn.org/issues/52.11/north-reckoning-with-history-the-lessons-of-redwood-summer-thirty-years-later> [https://perma.cc/QTG2-J8LK]; *20 Arrested in Timber Sale Protest*, ASSOCIATED PRESS (Sept. 11, 1995), <https://apnews.com/article/2e6be00b89b05a863a7826c95b13f677> [https://perma.cc/CE4K-W7JR]; Madison LaBerge, *Protesters gather outside Medford BLM office over Bear Grub project*, FOX 26, (July 2, 2020, 5:24 PM), <https://fox26medford.com/protesters-gather-outside-medford-blm-office-over-bear-grub-project/> [https://perma.cc/X2QN-LAGN]; *100 Protest 6,000 Acre Pickett West BLM Timber Sale Auction*, ECOADVOCATES NW, <https://sites.google.com/site/ecosytemadvocates/100-protest-pickett-west-blm-auction> (last viewed Oct. 19, 2020) [https://perma.cc/J22T-GL3P].

<sup>104</sup> H.R. 2647, 114th Cong. (2016) (as passed by House, July 9, 2015).

<sup>105</sup> Actions – H.R. 2647 – Emergency Wildlife and Forest Management Act of 2016, 114TH Cong. (Sept. 6, 2020 11:22 A.M.) [https://perma.cc/FW4C-4EM8].

<sup>106</sup> H.R. 2647, *supra* note 104.

<sup>107</sup> Actions – H.R. 2647 – Emergency Wildlife and Forest Management Act of 2016, *supra* note 105.

<sup>108</sup> See Breakthrough Staff, *Don't Make Forest Management All About Climate Change*, BREAKTHROUGH INST. (Sept. 3, 2020), <https://thebreakthrough.org/issues/conservation/forest-management-climate> [https://perma.cc/PN47-NDSW].

<sup>109</sup> U. N. Environmental Programme & WMO, Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis*, at 19-20, 25, 28, IPCC AR6 WGI (Aug. 7, 2021) <https://www.ipcc.ch/report/ar6/wg1/> [https://perma.cc/3428-62PJ].

<sup>110</sup> *Id.* at 17, 28.

Climate change is fluctuation in the weather patterns and related changes in oceans, land surfaces, and ice sheets, occurring over time scales of decades or longer.<sup>111</sup> Throughout history, the temperature of the Earth has always changed.<sup>112</sup> Despite the rising temperatures of today, planet Earth has often been much warmer than it is now.<sup>113</sup> One of the hottest times was during the geologic period known as the Neoproterozoic, between 600 and 800 million years ago, long before humans existed.<sup>114</sup> The average high global temperature was higher than ninety degrees Fahrenheit in this period.<sup>115</sup> With its permanent agriculture-based settlements, modern human civilization has developed over just the past 10 thousand years or so.<sup>116</sup> The modern period has generally been one of comparatively low temperatures and relative global climate stability.<sup>117</sup> The global average temperature in 2020 is less than sixty degrees Fahrenheit.<sup>118</sup> An over thirty-degree difference shows that the Earth was hotter millions of years ago when humans were nonexistent.<sup>119</sup>

Earth's temperature has experienced dramatic changes over the course of its multi-billion year history.<sup>120</sup> The Earth has shown that it will experience warming and cooling periods with or without the presence of humans.<sup>121</sup> However, despite the inevitable fluctuations that will occur naturally, humans have the

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<sup>111</sup> *What is climate change?*, AUSTL. ACAD. OF SCI., (Feb. 23, 2020), <https://www.science.org.au/learning/general-audience/science-climate-change/1-what-is-climate-change> [https://perma.cc/P8NB-QEJB].

<sup>112</sup> *Climate Change: How Do We Know?*, NASA <https://climate.nasa.gov/evidence/> (last viewed Oct. 9, 2021) [https://perma.cc/54JR-54TN].

<sup>113</sup> Michon Scott & Rebecca Lindsey, *What's the hottest Earth's ever been?*, NAT'L OCEAN & ATMOSPHERIC ADMIN. (June 18, 2020), <https://www.climate.gov/news-features/climate-qa/whats-hottest-earths-ever-been#:~:text=Conditions%20were%20also%20frequently%20sweltering,about%2056%20million%20years%20ago> [https://perma.cc/NT78-XZ4G].

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Michon Scott & Rebecca Lindsey, *What's the hottest Earth's ever been?*, NAT'L OCEAN & ATMOSPHERIC ADMIN. (June 18, 2020), <https://www.climate.gov/news-features/climate-qa/whats-hottest-earths-ever-been#:~:text=Conditions%20were%20also%20frequently%20sweltering,about%2056%20million%20years%20ago> [https://perma.cc/NT78-XZ4G].

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

power to artificially influence climate change as well.<sup>122</sup> Looking at climate change management practices as the primary solution may delay wildfires, but such techniques will not help fully control them in the long-term.<sup>123</sup>

Solving forest management issues—in terms of the petition protest period for logging—is a more permanent solution that will significantly reduce wildfires in the United States, especially out west.<sup>124</sup> According to research, climate changes create warmer, drier conditions, increased drought, and a more extended fire season that increase the risk of wildfires.<sup>125</sup> Wildfire risk depends on several factors, including temperature, soil moisture, and the presence of trees, shrubs, and other potential fuels.<sup>126</sup> Once a fire begins, warmer temperatures and drier conditions help fires spread and consequently make them harder to put out.<sup>127</sup> But in order for a fire to spread, there must be fuel.<sup>128</sup>

A principal fuel source for forest fires is dry grass, brush, or trees.<sup>129</sup> Trees which are very close together, will add fuel to a fires as it is easier for the fire to spread.<sup>130</sup> This closeness affects houses and other developments near grasslands, forests, or other undeveloped areas.<sup>131</sup> The wildland urban interface is vulnerable

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<sup>122</sup> *Mellissa Denchak, How You Can Stop Global Warming*, NAT'L. RES. DEF. COUNCIL (July 17, 2017), <https://www.nrdc.org/stories/how-you-can-stop-global-warming> [https://perma.cc/38DA-S5SM].

<sup>123</sup> NASA, *supra* note 112.

<sup>124</sup> Steven C. Beda, *Climate change and forest management have both fueled today's epic western wildfires*, CONVERSATION, (Sep. 16, 2020, 7:23 AM), <https://theconversation.com/climate-change-and-forest-management-have-both-fueled-todays-epic-western-wildfires-146247> [https://perma.cc/VB8V-9SQK].

<sup>125</sup> *Wildfires and Climate Change*, CTR. FOR CLIMATE & ENERGY SOL. (Feb. 23, 2020), <https://www.c2es.org/content/wildfires-and-climate-change/> [https://perma.cc/MMT9-89YQ].

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *3 Things a Fire Needs*, FRONTIER FIRE <https://www.frontierfireprotection.com/3-things-fire-needs/> (last viewed Feb. 23, 2020). [https://perma.cc/26DM-7QTR].

<sup>129</sup> *Fuels Management*, OFF. OF WILDLAND FIRE <https://www.doi.gov/wildlandfire/fuels> (last viewed Feb. 23, 2020) [https://perma.cc/M9B8-UH2X].

<sup>130</sup> *Frontline Defense against Wildfire: How Your Trees Can Protect You and Your Property*, AM. ARBORISTS (July 4, 2017), <https://www.americanarborists.net/tree-tips/2017/july/frontline-defense-against-wildfire-how-your-tree/#~:text=Fire%20can%20spread%20more%20easily,Keep%20your%20trees%20regularly%20maintained> [https://perma.cc/C6ML-WEL5].

<sup>131</sup> *Id.*

to wildfires because the fire's fuel virtually surrounds them.<sup>132</sup> The on-going fluctuation of the Earth's temperature will not have an effect upon the trees' closeness, as they will continue to grow unabated in the warm rays of the sun.

#### IV. FREEDOM OF PETITION IN TERMS OF TIMBER PROTESTS

Protecting the forest is vital for the environment. However, the BLM also understands that it is vital for individuals to speak up when they see an issue that the environmental review does not notice.<sup>133</sup> The BLM understands it is crucial for citizens to have the opportunity to exercise their constitutional rights and express their thoughts.<sup>134</sup> Our Founding Fathers knew this was extremely important, which is why they included the Bill of Rights in the United States Constitution in 1791.<sup>135</sup> The First Amendment states, “[c]ongress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>136</sup>

The Founding Fathers, coming from a despotic government in England, knew the importance of ensuring that the future citizens of the United States had rights the government could not infringe on.<sup>137</sup> The Bill of Rights fulfilled this purpose. But the meaning of the wording is still unclear, including the right to petition the government.

A petition is a request to do something, typically directed at a government agency or public official.<sup>138</sup> The request is made on behalf of a group, with individuals in the group recording their

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<sup>132</sup> S.M. Stein et al., *Wildfire, Wildlands and People: Understanding and Preparing for Wildfire in the Wildland-Urban Interface*, U.S. DEP'T AGRIC., Jan. 2013), <https://www.fs.fed.us/openspace/fote/reports/GTR-299.pdf> [<https://perma.cc/J5J5-NLJ2>].

<sup>133</sup> Angie Lara, *National Environmental Policy Act Public Participation And Meeting*, BUREAU LAND MGMT. (Aug. 12, 2014), <https://www.blm.gov/policy/im-ca-2014-030> [<https://perma.cc/JF2R-QY7F>].

<sup>134</sup> *Id.*

<sup>135</sup> *Bill of Right passes Congress*, HIST. (Mar. 3, 2010), <https://www.history.com/this-day-in-history/bill-of-rights-passes-congress> [<https://perma.cc/KQ49-33ES>].

<sup>136</sup> U.S. CONST. amend. I.

<sup>137</sup> HISTORY, *supra* note 135.

<sup>138</sup> Tiffany Middleton, *Right to Petition*, A.B.A. (Nov. 14, 2019), [https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-20/issue-1/learning-gateways-right-to-petition/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-20/issue-1/learning-gateways-right-to-petition/) [<https://perma.cc/Y6DX-HXUT>].



assent in some way such as signing their name to the request.<sup>139</sup> The protest petition falls in the category of a public purpose petition.<sup>140</sup> A protest petition is a petition that asks officials to take, or not take, a specific action.<sup>141</sup> The petitioners might address policymakers, government bodies, or administrative agencies.<sup>142</sup> These petitions are shared publicly to acquire signers.<sup>143</sup> Requirements are minimal or absent.<sup>144</sup>

This protest petition is one which asks the government not to move forward with a specific logging project.<sup>145</sup> Their reasons may range from environmental concerns to historical reasons.<sup>146</sup> With the BLM's new law, the American people's right to freedom of petition is still protected and undamaged.<sup>147</sup> If anything, the American peoples' right to petition has become more preserved and meaningful.<sup>148</sup> The BLM is not by any means taking away the right to petition.<sup>149</sup> They are revamping the process by which one would go about petitioning a logging project.<sup>150</sup>

Changing when one can file a petition does not violate a person's right to petition.<sup>151</sup> The government is allowed to restrict the freedom to petition with reasonable restrictions regarding time, place, and manner.<sup>152</sup> In *Hague v. Committee for Industrial Organization* (1939), the Supreme Court affirmed the freedom to petition the government again. In that case, a local city mayor used a city ordinance to prevent the Committee for Industrial Organization from meeting in public places in the city, calling it a

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Tiffany Middleton, *Right to Petition*, A.B.A. (Nov. 14, 2019), [https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-20/issue-1/learning-gateways-right-to-petition/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-20/issue-1/learning-gateways-right-to-petition/) [https://perma.cc/Y6DX-HXUT].

<sup>145</sup> ASSOCIATED PRESS, *supra* note 41.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Forest Mgmt. Decision Protest Process and Timber Sale Admin., 85 Fed. Reg. 35,049-01 (June 8, 2020).

<sup>151</sup> *Id.*; Kevin Francis O'Neill, *Time, Place, and Manner Restrictions*, FIRST AMEND. ENCYCLOPEDIA (Feb. 23, 2020), <https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions> [https://perma.cc/Y6DX-HXUT].

<sup>152</sup> Kevin Francis O'Neill, *Time, Place, and Manner Restrictions*, FIRST AMEND. ENCYCLOPEDIA (Feb. 23, 2020), <https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions> [https://perma.cc/Y6DX-HXUT].

communist organization.<sup>153</sup> The organization was trying to organize labor union meetings and distribute literature that promoted its view of labor relations.<sup>154</sup> The Court ruled that the ordinance prevented the organization from assembling and petitioning the government.<sup>155</sup>

The courts in the case above ruled the city ordinance violated the union's First Amendment right to freedom of petition because the ordinance that was in place completely prevented the organization from assembling and petitioning the government.<sup>156</sup> The BLM's new petition protest law does not entirely forbid or prevent any organization from forming a petition against logging.<sup>157</sup> The BLM's new law is merely moving the petition timeline with adequate restrictions.<sup>158</sup> Allowing the petition to commence after the completion of the environmental review is a waste of taxpayer dollars, in terms of the government's time and resources.<sup>159</sup> When a petition arises now, the government must go back and look at the environmental review again.<sup>160</sup> When the protest petition commences during the environmental review, the government can analyze the petition's issues during the environmental review.<sup>161</sup>

The BLM's new protest petition law is a reasonable restriction in terms of time, as a delay in petition protest is most likely to result in a superior outcome.<sup>162</sup> This law aims to improve efficiency within the government and assures the dismissal of fraudulent claims, which prevents the depletion of government resources caused by tree logging.<sup>163</sup> The BLM wants to ensure that every filed petition protest possesses meaning.<sup>164</sup> Individuals who are genuinely concerned with logging in specific areas will already be on alert if the trees are in danger of logging. However, those who will protest all logging episodes to save any and all trees will not

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<sup>153</sup> *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 531 (1939).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Forest Mgmt. Decision Protest Process and Timber Sale Admin., 85 Fed. Reg. 35,049-01 (June 8, 2020).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Forest Mgmt. Decision Protest Process and Timber Sale Admin., 85 Fed. Reg. 35,049-01 (June 8, 2020).

<sup>164</sup> *See id.*

be on alert because, realistically, they are waiting for them to burn and accordingly, continue to destroy our forests.

*A. The Constitutionality Interpretation of Timber Protests*

Depending on the Justices that would be on the Supreme Court, there are a few different ways in which changes in the petition protest period could be interpreted<sup>165</sup> We have the views of originalism, textualism, and purposivism.<sup>166</sup> Originalism is the original meaning of the Constitution.<sup>167</sup> This view looks at what the Founding Fathers meant at the time the Constitution was written.<sup>168</sup> Originalism tends to evaluate historical trends and events in attempt to examine the intent of the founding fathers when writing the Constitution.<sup>169</sup> Originalist Justices would look at the First Amendment's freedom of petition and see why the Founding Fathers included this measure in the Bill of Rights, to begin with.<sup>170</sup> During this time in U.S. history, Americans were at war with England, largely as a result of the English not listening to Americans and exercising strict control.<sup>171</sup> The Founding Fathers put the freedom of petition provision in the Bill of Rights because they wanted their citizens to feel as though they could petition their government without a penalty, such as jail time.<sup>172</sup> Originalism would say that the freedom of petition means being able to redress the government because citizens are unhappy with the government's action. They want their voices heard without penalty.<sup>173</sup>

Originalist justices on the Court will not have a problem if this law comes before them as violating an individual's freedom of

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<sup>165</sup> Brandon J. Murrill, *Modes of Constitutional Interpretation*, CONG. RSCH. SERV. (Mar. 15, 2018), <https://fas.org/sgp/crs/misc/R45129.pdf> [<https://perma.cc/XPY9-G8GQ>].

<sup>166</sup> Valerie C. Brannon, *Statutory Interpretation: Theories, Tools, and Trends*, CONGR. RSCH. SERV. (April 5, 2018), <https://fas.org/sgp/crs/misc/R45153.pdf> [<https://perma.cc/48EQ-QJ5A>].

<sup>167</sup> *Originalism*, MERRIAM WEBSTER <https://www.merriam-webster.com/dictionary/originalism> (last viewed Oct. 8, 2021) [<https://perma.cc/3NKE-UUF4>].

<sup>168</sup> Brannon, *supra* note 166.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> History.com Editors, *Revolutionary War*, HIST. (Feb. 23, 2020), <https://www.history.com/topics/american-revolution/american-revolution-history> [<https://perma.cc/73KJ-47KS>].

<sup>172</sup> *The Bill of Rights: A Brief History*, ACLU <https://www.aclu.org/other/bill-rights-brief-history> (last viewed Oct. 8, 2021) [<https://perma.cc/442S-Z8QE>].

<sup>173</sup> AM. ARBORISTS, *supra* note 134; ASSOCIATED PRESS, *supra* note 41.

petition. Citizens are still able to voice their opinion as the Founding Fathers envisioned for them.<sup>174</sup> Because the BLM's amended regulation does not deprive citizens of the right to protest, it does not go against an originalist interpretation of the First Amendment.<sup>175</sup>

Supreme Court Justices that employ a textualist approach believe that the language of the Constitution should be interpreted objectively.<sup>176</sup> Specifically, textualists heavily apply the Constitution with the “plain meaning” of the text itself, while rarely considering other historical materials indicative of the drafters' subjective intent.<sup>177</sup> Textualists consider exactly what is stated in the Constitution—no interpretation is sought at all.<sup>178</sup> As the freedom of petition clause states, “[c]ongress shall make no law . . . abridging the freedom . . . to petition the government for a redress of grievances.”<sup>179</sup> Because the amended regulation limits when citizens can protest the BLM's decisions, textualist Justices may find that it violates the First Amendment.<sup>180</sup> Particularly, if this regulation came before textualist Justices, it is possible that they would find its prescribed, limited time to protest the BLM's decisions to be a “. . . law. . . abridging the freedom. . .” of U.S. citizens, but where they can still protest the timber sale it may not be seen as “abridging the freedom.”<sup>181</sup>

On the other hand, some believe in the theory of a “Living Constitution,” and contend that constitutional law should evolve to conform with modern-day societal norms.<sup>182</sup> These individuals believe that because the world today is vastly different from the world in which its drafters lived in, the Constitution's original language should be construed to apply to legal issues that did not yet exist at the time of its ratification.<sup>183</sup> As it is generally undisputed that amending the Constitution is a difficult process, those that apply living constitutionalism believe that the

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<sup>174</sup> AM. ARBORISTS, *supra* note 134; ASSOCIATED PRESS, *supra* note 41.

<sup>175</sup> *Id.*; U.S. DEP'T. OF THE INTERIOR, *supra* note 25.

<sup>176</sup> Brandon J. Merrill, *Modes of Constitutional Interpretation*, CONG. RSCH. SERV., 5 (Mar. 15, 2018), <https://sgp.fas.org/crs/misc/R45129.pdf> [<https://perma.cc/C6A5-928R>].

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> U.S. CONST. amend. I.

<sup>180</sup> U.S. DEP'T. INTERIOR, *supra* note 25.

<sup>181</sup> U.S. DEP'T. INTERIOR, *supra* note 25; U.S. CONST. amend. I.

<sup>182</sup> David A. Strauss, *The Living Constitution*, U. CHI. L. REV. (Sept. 27, 2010), <https://www.law.uchicago.edu/news/living-constitution> [<https://perma.cc/WHU7-UTTB>].

<sup>183</sup> *Id.*

governing document may also “change... through interpretation....”<sup>184</sup> Technology is an example of an anomaly in the modern age that no American citizen could have reasonably foreseen at the time of ratification.<sup>185</sup>

Technology is continuously changing every day. When the Constitution intersects with technology, “it can call into question the actual substance and scope of [its] words and phrases[,]” such as whether First Amendment rights should apply to issues within the realm of social media.<sup>186</sup> Purposivism allows the Justices to reasonably believe whether the Founding Fathers would have intended for the freedom of speech to include those items and in which regard.<sup>187</sup>

Most Justices, though, are not strictly one or the other when it comes to their views, but are a mixture. Thus, on some issues, a particular Justice will use more textualism than purposivism or vice versa. However, regardless of the interpretation used, the courts want to prevent the abuse of constitutionally granted rights.<sup>188</sup>

### *B. Scrutiny Level Analyzed for Timber Protests*

The BLM’s new protest petition law will have little issue with constitutionality due to most justices being mixed with their views; however, the real test will come down to the level of scrutiny necessary for this law.<sup>189</sup> The different types of scrutiny are as follows: rational basis scrutiny, intermediate scrutiny, and strict scrutiny.<sup>190</sup> Each level of scrutiny is accompanied by a different analysis that courts use to review a case.<sup>191</sup>

Rational basis scrutiny applies in cases dealing with economic regulations and all other issues that do not fit into the

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<sup>184</sup> *Id.*; Vicki C. Jackson, *Constitutions as “Living Trees”? Comparative Constitutional Law and Interpretive Metaphors*, 75 *FORDHAM L. REV.* 921, 941 (2006), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4212&context=flr> [<https://perma.cc/G4JV-85YN>].

<sup>185</sup> O. Carter Snead, *Technology and the Constitution*, *NEW ATLANTIS* (Spring 2004), <https://www.thenewatlantis.com/publications/technology-and-the-constitution> [<https://perma.cc/7JSS-DUGP>].

<sup>186</sup> *Id.*

<sup>187</sup> See Brannon, *supra* note 166.

<sup>188</sup> See ACLU, *supra* note 172.

<sup>189</sup> ASSOCIATED PRESS, *supra* note 41.

<sup>190</sup> *Rational Basis Test*, *LEGAL INFO. INST.*, [https://www.law.cornell.edu/wex/rational\\_basis\\_test](https://www.law.cornell.edu/wex/rational_basis_test) (last viewed Feb. 23, 2020) [<https://perma.cc/3FM5-NX8M>].

<sup>191</sup> *Id.*

other scrutiny categories.<sup>192</sup> The challenger has the burden of proving that the law is unconstitutional.<sup>193</sup> The law will be deemed constitutional if it is for a legitimate government interest and is reasonably related to that goal.<sup>194</sup> It is difficult to prove that something violates rational basis scrutiny because it is easy to argue that almost anything can be reasonably related to a government's purpose.<sup>195</sup>

To prove that the BLM's new petition protest is unconstitutional, plaintiffs would have to show that the BLM's law is not reasonably related to the government's goal.<sup>196</sup> The government's goal is to help shorten and move the petition protest period to prevent unnecessary protests that result in overgrown forests, which lead to wildfires.<sup>197</sup> This law is also in place to help make the protest process more efficient on both sides, as it will be conducted during the environmental review process.<sup>198</sup> It is almost impossible to argue that this law is not reasonably related to this goal, since the purpose was designed exactly for wildfires.<sup>199</sup> Therefore, the law is reasonably related, since it is tailored to meet this goal.<sup>200</sup> Because of this, the law will easily pass the rational basis test.<sup>201</sup>

In regard to intermediate scrutiny, the scope of this analysis involves sex and nonmarital children.<sup>202</sup> For this scrutiny level, the law must serve an important government objective and be substantially related to achieving the objective.<sup>203</sup> It would be extremely difficult or near impossible to see how intermediate scrutiny would apply to this law since this law has no effect on gender or nonmarital children.<sup>204</sup> Therefore, immediate scrutiny would not apply to this law.<sup>205</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW (Jan. 27, 2014, 9:05AM), <https://www.findlaw.com/legalblogs/law-and-life/challenging-laws-3-levels-of-scrutiny-explained/> [<https://perma.cc/6MNQ-W773>].

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> See U.S. DEPT INTERIOR., *supra* note 25.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Intermediate Scrutiny*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/intermediate\\_scrutiny](https://www.law.cornell.edu/wex/intermediate_scrutiny) (last viewed Sept. 6, 2021) [<https://perma.cc/9739-NUSF>].

<sup>203</sup> Snider, *supra* note 193.

<sup>204</sup> LEGAL INFO. INST., *supra* note 202.

<sup>205</sup> Snider, *supra* note 193; Murill, *supra* note 176.

For strict scrutiny, the highest level of scrutiny, to apply, the law would have to target race, national origin, aliens, or fundamental rights.<sup>206</sup> It could be stated that freedom of petition is a fundamental right since a fundamental right is a group of rights that the Supreme Court has recognized as requiring a high degree of protection from government encroachment.<sup>207</sup> It is very difficult to survive strict scrutiny, which requires a compelling state interest and narrow tailoring.<sup>208</sup> The government must also prove that this law is using the least restrictive measures available.<sup>209</sup> The restrictive measure that BLM takes in their new petition protest law is limiting when an individual is allowed to protest a timber sale.<sup>210</sup> The government would have to prove that this is the least restrictive measure available to enforce this policy.<sup>211</sup> Strict scrutiny is generally used for equal protection cases, so in these cases we have to see the divide the law is making, and the divide here is between those who can and those who cannot protest.<sup>212</sup>

As long as there is another way to solve this issue with a protest petition that does not limit the right to petition, this law will be ruled unconstitutional.<sup>213</sup> Suppose there was a way to keep the protest petition where it was before this law, while still solving the pressing issues, that was not as restrictive as the new, actually proposed measure. In that case, the Government would be required to find a different measure.<sup>214</sup> While this part of the strict scrutiny test will not be easy to prove, the tailoring prong might be easier.<sup>215</sup>

For the tailoring part of the test to pass, it will be important to see if this law serves a compelling state interest.<sup>216</sup> The states that will benefit the most from this law are states out west—like

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<sup>206</sup> Snider, *supra* note 193.

<sup>207</sup> *Fundamental Right*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/fundamental\\_right#:~:text=Fundamental%20rights%20are%20a%20group,been%20found%20under%20Due%20Process](https://www.law.cornell.edu/wex/fundamental_right#:~:text=Fundamental%20rights%20are%20a%20group,been%20found%20under%20Due%20Process) (last viewed Sept. 6, 2021) [<https://perma.cc/C6Q2-B7HW>].

<sup>208</sup> Snider, *supra* note 193.

<sup>209</sup> Ruth Ann Strickland, *Narrowly Tailored Laws*, FIRST AMEND. ENCYCLOPEDIA <https://www.mtsu.edu/first-amendment/article/1001/narrowly-tailored-laws#:~:text=To%20ensure%20narrow%20tailoring%2C%20the,using%20the%20least%20restrictive%20means>. (last viewed Feb. 23, 2020). [<https://perma.cc/2CPG-BTBL>].

<sup>210</sup> ASSOCIATED PRESS, *supra* note 41.

<sup>211</sup> Strickland, *supra* note 209.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*; Strauss, *supra* note 182.

<sup>214</sup> Strauss, *supra* note 182.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

California—due to the vast number of wildfires there.<sup>217</sup> The compelling state interest would be to reduce the number of wildfires that happen in a respective state.<sup>218</sup> The courts would also have to ensure that the law is narrowly tailored to reach that goal without causing undue hardship in other ways.<sup>219</sup>

Strict scrutiny could cause issues with our fundamental rights and would not likely be easy to implement; however, once all the pros and cons are weighed against the law and precedents, the law will pass strict scrutiny.<sup>220</sup> Although the BLM's new protest petition law does limit the time a person may file a petition protest, the courts need to realize that this law does not take away the right to petition to any set groups of people.<sup>221</sup> Rather, the protest petition allows them to act in a more timely manner and assist in the environmental review process.<sup>222</sup> Regardless, if the law is analyzed under strict scrutiny or rational basis scrutiny, the law should be ruled as constitutional.<sup>223</sup>

#### CONCLUSION

All things considered, the BLM's new protest petition law makes major strides toward reducing horrendous wildfires.<sup>224</sup> The law is not a complete solution to all of our problems, but a solution that will help America reduce a large number of wildfires.<sup>225</sup> The law will also solve the past problematic issues with the old protest petition. Further, the law will reduce overcrowding of trees, which, leads to massive wildfires. And lastly, the law will also show that the climate is important to consider, but not the major factor for wildfires, and that the courts should rule this law as Constitutional.<sup>226</sup>

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<sup>217</sup> *August Complex Fire now the largest in recent California history, Creek Fire breaks top 10*, ABC 7 NEWS <https://abc7news.com/california-wildfires-fire-update-wildfire-disaster/3894361/> (last viewed Feb. 23, 2020). [<https://perma.cc/XBL7-3GLQ>].

<sup>218</sup> *Id.*; Snead, *supra* at note 185; ASSOCIATED PRESS, *supra* note 41.

<sup>219</sup> Snead, *supra* at note 185; ASSOCIATED PRESS, *supra* note 41.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Snead, *supra* at note 185; ASSOCIATED PRESS, *supra* note 41.

<sup>226</sup> *Id.*