No. 12-1092

IN THE

Supreme Court of the United States

KENT LATTIMORE, *et al.*,

Petitioners,

v.

UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF CONCERNED SCIENTISTS, ENGINEERS AND ACADEMICS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

Amici are an ad hoc coalition of 24 distinguished scientists, engineers and academics who ask this Court to grant the Petition for Writ of Certiorari to resolve the important question presented.

Amici have an interest in seeing that all members of their professions – whether they work in the private or public sectors – are held responsible for professional malfeasance or nonfeasance that falls below the standard of care of engineers and scientists who work on engineering projects and causes loss of life and property. Engineers in the public sector who make grossly erroneous scientific decisions, contradicted by all of the available scientific evidence available to them at the time of those decisions, are not exercising discretion or judgment embedded in public policy concerns. They are, instead, committing engineering malpractice, and should be held to the same high ethical and competency standards as engineers working in the private sector.

The individual members of the Concerned Scientists, Engineers and Academics are identified by name and

1. Pursuant to Supreme Court rule 37.6 counsel for *amici* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity, other than *amici*, their members, their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court rule 37.2(a) counsel for *amici* also represents that all parties have been given timely notice and have consented to the filing of this brief. Letters reflecting the consent of Petitioners and Respondents have been lodged with the Clerk.

affiliation in the attached Appendix A to the *Amici Curiae* Petition.[2]

SUMMARY OF ARGUMENT

Since the Code of Hammurabi, engineers and other design, construction and maintenance professionals whose negligence causes injury to life, limb or property, have been held liable for their errors and omissions. All people have the right to trust that those professionals who design and build structures of all types – buildings, bridges, roads and waterways – adhere to a standard of care the puts public safety first.

Here, the decision of the Fifth Circuit Court of Appeals (*Robinson et al v. United States of America*, 696 F.3d 436 (2012)) immunizes the Army Corps of Engineers from gross negligence in the operation and maintenance of the Mississippi River Gulf Outlet ("MRGO") canal, which negligence was a substantial factor in the devastating loss of life and property in sections of New Orleans after Hurricane Katrina. The issue is not causation – that is undisputed – but instead is whether the Corps of Engineer's "engineering malpractice" was a matter of discretion and public policy that immunizes it from liability for the harm it caused to thousands of residents of New Orleans.

Amici suggest that engineers have no discretion to negligently endanger the lives and property of tens of

2. Two of the members of the Coalition – Dr. Robert G. Bea and Dr. Paul Kemp, served as expert witnesses for plaintiffs.

thousands of people. Congress did not intend to exempt from liability government engineers who rely on outdated science and thereby allow a risk to public safety to fester unabated. Such immunity for the Corps of Engineers' dereliction of duty, itself violates public policy.

For all of these reasons, we ask this Court to grant the petition for writ of certiorari and reverse the judgment of the Fifth Circuit Court of Appeals.

ARGUMENT

This Court Should Grant Certiorari to Consider Whether Engineers in the Public Sector who Engage in Professional Malpractice, Based Not on Discretion or Public Policy but on Scientific Error, Should Be Immune from Liability When Those Errors and Omissions Result in Loss of Life And Property

The highest ethical priority for civil engineers is to "hold paramount the safety, health and welfare of the public."[3] This standard of professional and scientific competence in the interest of public safety, health and welfare applies to all engineers – regardless of whether they practice in the private or public sector.

Indeed, the Army Corps of Engineers ("Corps") shares that priority, stating that its mission is to provide "[e]ngineering and technical services in an environmentally

3. See, e.g., Canon 1 of the Code of Ethics of the American Society of Civil Engineers (http://www.asce.org/Leadership-and-Management/Ethics/Code-of-Ethics/ as of April 1, 2013).

sustainable, economic, and technically sound manner *with a focus on public safety* and collaborative partnership." (Emphasis added). [4]

From that perspective, civil engineers have no more "discretion" to engage in malfeasance or non-feasance that violates their professional standards of care and causes harm, than do doctors who violate the Hippocratic Oath or attorneys who violate their ethical duties. An engineer owes a duty to exercise the degree of professional care and skill customarily employed by others of his or her profession in the same general area, and can be held liable for professional malpractice in the design of a structure. (*Raburn and Associates*, 875 So.2d 119 (La., 2004); *Emond v. Tyler Building and Construction Co., Inc.*, 438 So.2d 681, 685 (La. Ct. App. 1983). See, e.g., Louisiana Civil Code §2315(A): "An act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.")

Indeed, the liability of a builder whose poor construction causes injuries dates back to the earliest codification of rules of civil society – the ancient Code of Hammurabi.[5] Many if not all states recognize a cause of action for

4. See http://www.usCorps.army.mil/Portals/2/docs/civilworks/news/2011-15_cw%20stratplan.pdf as of April 1, 2013.

5. See Hammurabi Code 229: If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death; and Code 232. If it ruin goods, he shall make compensation for all that has been ruined, and inasmuch as he did not construct properly this house which he built and it fell, he shall re-erect the house from his own means.

"engineering malpractice" by design professionals such as engineers and architects.[6]

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6. See, e.g., *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472, 477 (8th Cir. 1968) (providing that the standards of reasonable care, are the same for engineers as those applied to doctors, lawyers, architects, and "like professional men engaged in furnishing skilled services for compensation"); *Specialty Restaurants Corp. v. Bucher*, 967 F.2d 1179, 1181 (8th Cir. 1992) (discussing statute of limitation for professional negligence claims against engineers); *Sawtell v. E.I. du Pont de Nemours and Co., Inc.*, 22 F.3d 248, 250, n.2 (10th Cir. 1994) (stating that the discovery rule applies to professional malpractice suits -- such as engineer malpractice suits); *Peck v. Horrocks Engineers, Inc.*, 106 F.3d 949, 956 (10th Cir. 1997) (providing that "the liability of engineers is based upon professional negligence with respect to which only those qualified in the field can testify as to the standard of competence and care possessed by professional men in the locality and whether there has been a breach of that standard of care"); *Algonquin Power Income Fund v. Christine Falls of N.Y., Inc.*, 2013 U.S. App. LEXIS 2038, at *7 (2d Cir. 2013) (holding that a tort claim for engineering malpractice is assignable as an action or right in action related to property); *Vista del Mar Condominiums, LLC v. Nichols Brosch Wurst Wolfe & Associates, Inc.*, 2013 WL 625455, 3 (D.S.D. 2013) (discussing whether the court should have permitted expert testimony on the standard of care for engineering professional negligence based on local standards as opposed to a more national standard); *Olenicoff v. UBS AG*, 2010 WL 8530286, 28 (C.D. Cal. 2010) (providing that professional malpractice can apply to engineers); *Conte v. Usalliance Federal Credit Union*, 2007 WL 3355281, at 4 (D. Conn. 2007) (providing that "a court has held that expert testimony regarding the requisite standard of care is necessary in a malpractice claim against an engineer"); *King County, Wash. v. IKB Deutsche Industriebank AG*, 863 F.Supp.2d 288, 304 (S.D.N.Y. 2012) (placing engineers in the same category as attorneys, accountants and architects that are professionals that might be liable for malpractice); *Northview Christian Church, Inc. v. J &*

Nor should it matter that the negligent professional – the engineer, doctor or attorney – is employed by or operates as a governmental agency. Thus the Federal government's discretionary function exception does not exempt liability for negligent medical care (see, e.g., *Jackson v. Kelly*, 557 F.2d 735, 738 (10th Cir., 1977) and public defenders attorneys can be held liable for professional malpractice (see *Sanchez v. Murphy*, 385 F.Supp. 1362, 1364 (D. Nev. 1974): "The fact that the attorney, in a sense, holds a public office and is compensated from public funds makes no difference."[7])

J Group, Inc., 2010 WL 4641661, at 9 (D. Idaho 2010) (denying motion to dismiss engineering malpractice claim); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 419 N.W.2d 920 (N.D.1988) (applying malpractice statute of limitations to engineering firm's design of water system); *John Martin Co., Inc. v. Morse/Diesel, Inc.*, 819 S.W.2d 428 (Tenn. 1991) (providing that the standard of care applicable to the conduct of an engineer is the same as that applied to doctors, lawyers, architects, accountants, and "others furnishing skilled services for compensation and that standard requires reasonable care and competence therein"); *Bayne v. Everhorn*, 197 Mich. 181, 197-200 (1917) (in case against engineering and architect firm, noting "the responsibility of an architect does not differ from that of a lawyer or physician"); *Columbus v. Smith and Mahoney*, 686 N.Y.S.2d 235, 236, 259 A.D.2d 857, 858 (1999) (dismissing engineering malpractice claim where expert did not establish deviation from applicable standard of care); *Southland Constr., Inc. v. Richeson Corp.*, 642 So.2d 5, 8 (Fla. 5th DCA 1994) (permitting negligence claim by general contractor against an engineer, individually, for professional malpractice).

7. See also Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant* (1988) 61 Temp. L. Rev. 1171.

It is therefore not a novel or expansive concept to hold government engineers – such as the Corps – civilly liable for injuries caused by their *professional negligence* in designing and/or maintaining a project – be it a building, a bridge, or a man-made waterway.

Amici are professional scientists and engineers working in both the private and public sector. They are well aware of the Federal Tort Claims Act (FTCA), and Congress' intent to waive sovereign immunity on the one hand ("The United States shall be liable... in the same manner and to the same extent as a private individual under like circumstances... (28 U.S.C.A. § 2674), while also protecting "certain governmental activities from suit by private individuals" by operation of the discretionary function exception to such liability (28 USCA §2680(A); *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984)).

But the Fifth Circuit's application of the discretionary function exception to the Corps under the circumstances of this case is a breathtaking miscarriage of justice, shielding the Corps from errors *of science* – not mistakes of judgment – that would, if committed by private sector engineers or scientists, expose those actors to liability for the devastating injuries caused by its careless and, perhaps, gross negligence.

Amici posit that, in light of the District Court's factual findings (after a 19 day trial), no reasonable person could conclude that the Corps's conduct was "susceptible to policy analysis" or, even if its conduct involved an element of judgment, that such judgment "is of the kind that the discretionary function exception was designed to shield", i.e., "governmental actions and decisions based

on considerations of public policy." (*Berkovitz v. United States*, 486 U.S. 531, 536 – 537 (1988)). In short, the Corps's failure to study potentially devastating risks to public safety cannot be characterized as a discretionary governmental act based on considerations of public policy when the evidence available to the Corps should have prevented it from continuing to rely on an out-of-date study.

The evidentiary record developed by the District Court, which was not challenged by the Government nor modified by the Court of Appeals, makes clear that the Corps failed to adhere to non-discretionary professional standards of engineering practice that all engineers are bound to apply, or face liability for the harm caused by neglecting to do so.

As the District Court found, for decades the Corps failed to comply with current engineering and scientific standards with regard to the MRGO. It stood by and watched MRGO fail, taking little to no action to mitigate that failure, under the mistaken belief that the expanding MRGO did not pose a risk of augmenting storm surge aimed squarely at the City of New Orleans. And because of that that same mistaken belief, the Corps never warned Congress of the potential catastrophe looming if it did not provide funding to remedy the failure of the MRGO.

The Court of Appeals, in its second decision, found that the Corps's "actual reasons for the delay are varied and sometimes unknown, but there can be little dispute that the decisions here were susceptible to policy considerations." and that there is "ample record evidence indicating the public-policy character of the Corps's

various decisions contributing to the delay" in armoring Reach 2 (696 F.3d at 451).

Not so. In fact, there is virtually no such evidence in the record, as the Court of Appeals recognized in its original Opinion (673 F.3d at 394). Instead, the District Court's unchallenged factual findings demonstrate that while the Corps was aware of the tremendous erosion that was destroying the MRGO's banks and widening the channel, it insisted that these changes would have no effect on hurricane storm surge because of a 1966 study that based its analysis on the MRGO's original width (647 F.Supp.2d 644, 677 - 678).

The trial court found that the channelized nature of the MRGO induced large ship waves during vessel passage, causing severe erosion and the buildup of materials into the waterway. This bank erosion occurred at high rates, mainly due to this ship wave impact; between 1964 to 1996, the banks lost 12 to 26 feet per year. This bank erosion resulted in channel shoaling, which requires periodic maintenance dredging – "a scenario that was largely unsustainable from the engineering, environmental, and economic perspectives. *The Corps's failure to armor the waterway, and thus mitigate this erosion and shoaling, led to deleterious, interconnected effects.*" (647 F.Supp.2d at 656; emphasis added.)

By 1962, the Corps recognized that erosion would widen MRGO's banks. Nonetheless, from 1968 until 1982, nothing was constructed, even though by 1980 the Corps determined that "due to technical problems related to extremely poor foundation conditions, additional study and revision of the original design [for foreshore protection] is necessary." (647 F.Supp.2d at 657).

As for the North Bank of Reach 2, no foreshore protection for the North Bank of Reach 2 was forthcoming until the 1990s *"by which time catastrophic damage to the wetland banks of the MRGO had occurred."* (647 F.Supp.2d at 659)

It is clear that the Corps had knowledge by the early 1970's that protection was necessary to prevent further erosion and channel widening. The extreme loss of wetlands particularly along the North Bank was recognized by 1973. At extreme risk was the land bridge which prevented Lake Borgne from flowing directly into the MRGO *"which could catastrophically magnify the force and intensity of storm surge and wave propagation that could occur in the context of a substantial hurricane."* (647 F.Supp.2d at 659; emphasis added);

Nonetheless, Col. Early J. Rush, II who served as the New Orleans District commander from 1974 through 1978, testified that he could not recall ever forwarding anything up the chain of command discussing the bank erosion problem, which by then was clearly significant. Indeed he stated that he never got "any information along that line that there was a major problem." The District Court found that Col. Rush was not credible, however. In July 1976, the Corps issued a public notice, signed by Col. Rush, concerning foreshore protection for the Citrus Back Levee along Reach 1. In addition, Col. Rush signed an April 1978 memo concerning North Bank protection in which he stated that South Bank foreshore protection would be addressed in a future report with construction scheduled to begin in 1980 (647 F.Supp.2d at 659)..

The District Court went on to find that *"Moreover ... the land loss was patently visible. Furthermore, the*

amount of dredging that had taken place to that point would have placed the Corps on notice of the problems with sloughing that the operation of the MRGO was creating." (647 F.Supp.2d at 659, emphasis added.)

The Corps took as its primary mission, to "*keep the shipping channel open to deep draft traffic regardless of the consequences.*" And it ignored evidence that cast doubt on the validity of the 1966 study on which it based its claim that the MRGO would have no effect on storm surge. Thus the Corps looked at possible mitigation of the bank erosion problem only from the perspective of how it would effect maintenance costs and not as a measure that could save lives. "*In conducting these studies neither was a dollar amount assigned to the value of human life nor to the cost of the destruction of property.* (647 F.Supp.2d at 660, emphasis added)

The District's Court's factual conclusions, based on this and other examples of nonfeasance and malfeasance by the Corps, take the Corps's conduct out of the range of discretionary or policy-based action. *Amici* contend that professional engineers who are charged with the maintenance of an engineering project are always obliged to be alert to the dangers to the public that their action or inaction might create, and that engineers violate their professional duties of care when they manage such a project based on a scientific study that is based on out-of-date facts.

The District Court correctly applied this standard-of-care to the Corps:

> Clearly, the Corps shortchanged the inhabitants of New Orleans and the environs by its myopic

> approach to the maintenance and operation of the MRGO. *It simply chose to ignore the effects of the channel; it only examined the requirements to keep the channel open regardless of its effects on the environment and the surrounding communities.* Indeed, prior to Hurricane Katrina, it grounded its engineering position that the MRGO had no adverse effects with respect to storm surge on a report done in 1966. The findings of that study were based on the "as designed" parameters of the channel-that is 500 feet wide by 36 feet deep. By 1972, any layperson, much less an engineer, could see that the dimensions of the channel had already grown excessively. *There is no policy involved in such immense engineering failures which threatened the safety of a major metropolitan area which duty the Corps is charged with protecting.*

(647 F.Supp.2d at 708, emphasis added)

The District court concluded, after conducting a lengthy bench trial and observing the witnesses, and assessing their qualifications and credibility:

> Considering the facts as found above, clearly, once the Corps exercised its discretion to create a navigational channel, it was obligated to make sure that the channel did not destroy the environment surrounding it thereby creating a hazard to life and property. When the Corps designed the MRGO, it recognized that foreshore protection was going to be

> needed, yet the Corps did nothing to monitor the problem in a meaningful way. *It was as if the Corps built a factory; it knew after a period of time it would produce deadly emissions; but instead of checking the emissions and correcting its ill-effects before people died of its fumes, the Corps stood by noticing the horrible nature of the air and the soot-ridden nature of that factory and did nothing.* (647 F.Supp.2d at 708, emphasis added)

Finally, the District Court found that the Corps violated its obligations to Congress:

> Additionally, at some point during the time continuum from the MRGO's construction, the Corps certainly could have warned Congress about the potential catastrophic loss of life and property. It did not, and funding only comes with knowledge. Even the Corps's own witness testified that it was a failure of duty for the Corps to fail to remediate a known safety problem.

(647 F.Supp.2d at 709)

These gross errors and omissions by the Corps, is not the "kind of conduct that can be said to be grounded in the policy of the regulatory regime" nor was it an exercise of judgment "of the kind that the discretionary function exceptions was designed to shield" *(United States v. Gaubert,* 499 U.S. 315, 322; 325 (1991)).

CONCLUSION

This court has not considered the scope of the discretionary function exception since the Gaubert decision in 1991 (*United States v. Gaubert*, 499 U.S. 315 (1991). If there was ever a time to reconsider the scope and meaning of this exception as applied to an actual catastrophe that could and should have been prevented by Federal government engineers, it is this case. With the quickening of the effects of global warming and recent events such as Superstorm Sandy, the time is ripe for a reconsideration of the scope of the discretionary function exception as applied to government engineers who are charged with the duty to promote public safety. Perfection may not be possible, but engineering negligence that results in death and destruction should not be shielded.

Respectfully submitted,

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