No. 12-1092

In The Supreme Court of The United States

KENT LATTIMORE, LATTIMORE & ASSOCIATES, TANYA SMITH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF ENTERGY NEW ORLEANS, INC. AND ENTERGY LOUISIANA, LLC, AND HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Entergy New Orleans, Inc. and Entergy Louisiana, LLC, (together, the "Entergy Companies") and Hartford Steam Boiler Inspection and Insurance Company ("Hartford" and, collectively, the "Entergy *Amici*") respectfully submit this brief as *amici curiae* in support of Petitioners.[1]

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INTERESTS OF THE *AMICI CURIAE*

The Entergy *Amici* are plaintiffs in a case that was consolidated with related cases, including the *Lattimore* case, which is the subject of the Petition for Writ of Certiorari (the "Petition") before this Court. The Entergy *Amici*'s case is currently stayed in the United States District Court for the Eastern District of Louisiana. *Entergy New Orleans, Inc. v. United States*, No. 10-77 (E.D. La. filed Jan. 12, 2010) (consolidated with related cases under the umbrella case *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182 (E.D. La. filed Sept. 19, 2005)).

Entergy New Orleans, Inc. is a regulated public utility that provides electric and natural gas

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the intention of the Entergy *Amici* to file this brief. The parties have consented to the filing of this brief. Counsel for the Petitioners has filed a letter of blanket consent to filing *amicus* briefs and that letter is lodged with the Clerk. Letters of consent from Respondents Norman and Monica Robinson as well as Respondent United States of America accompany this brief. Pursuant to this Court's Rule 37.6, the Entergy *Amici* and their counsel hereby represent that no party to this case, nor their counsel, authored this brief in whole or in part, and that no person other than the Entergy *Amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

services in Orleans Parish. Entergy New Orleans, Inc. currently serves approximately 160,000 electricity customers, using 22 substations, 158 miles of transmission lines, and 1,430 miles of distribution lines. The company also serves approximately 100,000 natural gas customers, using 34 miles of transmission lines and 1,678 miles of distribution lines. Entergy New Orleans, Inc. employs approximately 6,000 direct and indirect employees in the New Orleans area, with approximately 1,500 Entergy retirees continuing to reside in the New Orleans area.

Entergy Louisiana LLC serves over one million electric customers in 58 parishes, employs approximately 4,500 people in Louisiana, with approximately 2,200 Entergy retirees continuing to reside in Louisiana.

The Entergy Companies sustained approximately $1.3 billion in damages as a consequence of Hurricane Katrina. Hartford, as one of the Entergy Companies' excess insurers, is subrogated to the Entergy Companies' claims in the amount of $69 million for extensive infrastructure and business income losses sustained by Entergy New Orleans, Inc. Those losses are attributable, in part, to the inundation of water from the Mississippi River Gulf Outlet ("MRGO") throughout the areas of the Upper and Lower Ninth Ward, New Orleans East, and St. Bernard Parish, which are substantial sections of the Greater New Orleans Area and are at issue in this case.

The Entergy *Amici* have previously served as *Amici Curiae* in the present matter in both the

District Court and the United States Court of Appeals for the Fifth Circuit.

The Entergy Companies sustained significant physical damages to their infrastructure across the geographic area covered in the *Lattimore* trial. Because the *Lattimore* case will function as the *de facto* bellwether trial on liability, the outcome of this proceeding will have a direct effect on the Entergy *Amici,* as well all other litigants whose cases are stayed in the *In re Katrina Canal Breaches Litigation.* As such, the Entergy *Amici* have an acute interest in the resolution of the *Lattimore* case.

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SUMMARY OF THE ARGUMENT

This Court should grant the Petition because it raises a significant question regarding the limits of a federal agency's ability to invoke the discretionary function exception ("DFE") under the Federal Tort Claims Act ("FTCA") to avoid tort liability. The decision by the Fifth Circuit, specifically on the issue of whether blatant disregard and noncompliance with a prescribing federal statute can be described as "discretion" deserving of immunity from tort liability under the DFE of the FTCA, represents a misapplication of this Court's long-held precedent.

The Fifth Circuit initially affirmed, but then abruptly reversed, the District Court, which ruled that the United States Army Corps of Engineers (the "Corps") did not enjoy immunity for its conduct under the DFE because the choices exercised by the Corps were not based in public policy. The District Court cited the Corps' noncompliance with the National Environmental Policy Act ("NEPA"), 42

U.S.C. §§ 4321–4370(h), as an *additional* reason for denying DFE immunity; but the Fifth Circuit summarily rejected the District Court's detailed analysis of that point, holding that the Corps had merely abused its discretion in its disregard of NEPA.

In doing so, the Fifth Circuit confused and misapplied this Court's two-part test described in *Berkovitz v. United States*, 486 U.S. 531 (1988), and its progeny; indeed, in light of the undisturbed factual findings of the District Court, the Corps cannot satisfy the first prong of that test, which states that the challenged act of a government agency must first involve an element of judgment. *See id.* at 543; *see also United States v. Gaubert*, 499 U.S. 315, 322 (1991). Because the Corps cannot show that it had "room for choice" in complying with NEPA, it fails the *Berkovitz* test and provides an independent basis in the record for a finding that the Corps is not immune from liability under the DFE.

Additionally, this Court should grant the Petition because the resolution of this case will have immediate, widespread impact for thousands of private citizens and businesses that have suffered the devastating effects caused by the inundation of water from the MRGO. But this case will also have sweeping impact upon individuals and businesses that live and work in other parts of the country that rely upon the Corps to adhere strictly to congressional mandates and administer federal programs with competence and integrity. If the Fifth Circuit's decision is upheld, then individuals and businesses across the United States would bear *all* of the risk and the cost when the Corps is allowed

to ignore its mandatory duties under NEPA, deprive Congress and the public from knowledgeable oversight of the Corps' activities, and then invoke immunity to avoid all liability and accountability for its own negligence.

Indeed, in the words of the District Court, when the government's gross negligence is regarded as policy, then the DFE "swallow[s] the Federal Torts Claim Act[,] leaving it an emasculated statute." *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 732 (E.D. La. 2009). In the end, the Corps' gross negligence in managing and maintaining the MRGO caused the damage affecting the Entergy *Amici* and so many others. Pursuant to this Court's precedent, however, the Corps is not allowed under long-held case law to shield itself from liability by invoking the DFE after intentionally ignoring congressional mandates designed to encourage agency oversight and prevent such negligence.

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ARGUMENT

Although the Entergy *Amici* support the Petition on all issues, this brief is limited to the issue of whether the Corps should enjoy immunity under the DFE of the FTCA when it refused to comply with the mandatory requirements of NEPA.

The District Court found—without challenge on appeal—that the Corps violated NEPA's mandates in multiple ways, specifically finding as follows:

> [T]he exponential increase in the width of the channel caused by erosion

brought about by wave wash and the Corps' failure to provide foreshore protection in a timely manner constitute "significant" changes in the environment which triggered the Corps' obligation to file a more complete FEIS in 1976, file a SEIS subsequent to that, perhaps earlier but on no account later than 1988. Moreover, it is clear the Corps knew for a substantial period of time that there were "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). A review of the evidence presented leads this Court to believe that the Corps was obdurate and arbitrarily and capriciously violated its NEPA mandate. Clearly, where an agency's own findings and reports demonstrate a positive belief and objective recognition that the environmental impact of a project requires on-going action, such as dredging for its maintenance, has created a new detrimental circumstance, such as the decimation of an extremely large swath of wetlands, a SEIS would be mandated. Furthermore, the utter failure to ever properly examine the effects of the growth of the channel on the safety of the human environment violates NEPA.

Id. at 730. Because of those NEPA violations, the District Court found that the Corps "does not have the benefit of the discretionary function exception." *Id.*

The Fifth Circuit issued two opinions in this matter. The first upheld the district court's judgment for the plaintiffs, holding that the Corps forfeited DFE immunity as its decisions regarding the MRGO were erroneous scientific judgment not rooted in public-policy considerations. *See In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 395–96 (5th Cir. 2012). But upon rehearing, the Fifth Circuit reversed the District Court, holding that the Corps was entitled to DFE immunity because the choices exercised by the Corps were public-policy based. *See In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 451 (5th Cir. 2012).

Neither Fifth Circuit opinion, however, correctly considered the unchallenged finding by the District Court that "the Corps was obdurate and arbitrarily and capriciously violated its NEPA mandate" over the course of many years. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d at 730. The District Court cited the Corps' noncompliance with NEPA as an *additional* reason for denying DFE immunity; the Fifth Circuit, however, summarily, rejected the District Court's detailed analysis of that point, incorrectly holding that the Corps—not Congress—"retains substantive decisionmaking power regardless" of whether it complies with NEPA mandates, thus concluding that the Corps enjoys the latitude to abuse its discretion and disregard compliance with statutes it deems

merely "procedural." *In re Katrina Canal Breaches Litig.*, 696 F.3d at 450.

I. The Fifth Circuit's Decision Misapplies This Court's Holdings in *Berkovitz v. United States* and Its Progeny

In holding that the Corps' noncompliance with NEPA constituted merely an abuse of discretion, the Fifth Circuit misapplies this Court's two-prong DFE test described in *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988), providing this Court with an independent basis to reverse the Fifth Circuit's decision.

A. The *Berkovitz* Dual Test Determines Whether the Discretionary Function Exception Has Been Triggered

This Court established a two-part test in *Berkovitz* that courts have used to determine whether a government employee or agency may invoke the DFE under the FTCA when faced with a challenge to its action. For the exception to apply, the challenged act must first involve an element of judgment, meaning that the employee or agency must show that there was "room for choice" in making the allegedly negligent decision. *United States v. Gaubert*, 499 U.S. 315, 324 (1991) (describing *Berkovitz* test). If a federal statute, regulation, or policy specifically prescribes a course of action for the federal employee or agency to follow, that employee or agency has no choice but to adhere to the directive. *See id.* at 322; *Berkovitz*, 486 U.S. at 536. In other words, if the federal employee or

agency can establish that the challenged act involved an element of judgment, then the analysis proceeds to step two and the DFE will apply only if that judgment is of the kind that the exception was designed to shield. *See Gaubert*, 499 U.S. at 322–23; *Berkovitz*, 486 U.S. at 536–37.

Importantly, "in order to effectuate Congress's intent to compensate individuals harmed by government negligence, the FTCA, as a remedial statute, should be construed liberally, and its exceptions should be read narrowly." *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002) (citing *Kielwien v. United States*, 540 F.2d 676, 681 (4th Cir. 1976)).

B. Compliance With the National Environmental Policy Act Is a "Discretionless Obligation"

Compliance with NEPA is a "discretionless obligation" of the Corps, impermissible to abuse. In interpreting congressional intent, this Court has held that use of the term "shall" indicates an intent to "impose discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *see also Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008); *United States v. Monsanto*, 491 U.S. 600, 607 (1989).

In enacting NEPA, Congress mandated that

> (2) all agencies of the Federal Government *shall*—
>
> . . . .
>
> (C) include in every recommendation or report on proposals

for legislation and other major Federal actions 'significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . .

42 U.S.C. § 4332(2)(C).

This Court has also ruled that to achieve NEPA's statutory purpose of prohibiting uninformed agency action, NEPA requires agencies to prepare detailed impact statements. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349,

351 (1989); 115 CONG. REC. 40425 (1969) (remarks of Sen. Muskie). Further, this Court has held that NEPA imposes procedural requirements on federal agencies, "with a particular focus on *requiring* agencies to undertake analyses of the environmental impact of their proposals and actions." *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004) (citing *Methow Valley Citizens Council*, 490 U.S. at 349–50).

The plain language of the statute dictates the Corps' discretionless obligation; therefore, the Corps cannot show that it enjoyed any "room for choice" in making its decision to ignore NEPA mandates.

C. The Corps' Failure To Satisfy the First Prong of the *Berkovitz* Test Is Sufficient To Find that the Corps Is Not Immune Under the Discretionary Function Exception

The first prong of the *Berkovitz* test requires the Corps to show that its actions involved an element of judgment—that it had "room for choice" in making its decision to disregard NEPA mandates. *United States v. Gaubert*, 499 U.S. 315, 324 (1991) (describing *Berkovitz* test). NEPA specifically directs the Corps to evaluate and submit reports to Congress regarding environmental impacts of projects such as the management of the MRGO. Thus, the Corps had no choice but to adhere to that directive. The District Court's finding that the Corps disregarded and completely failed to comply with NEPA mandates is undisturbed. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 725 (E.D. La. 2009).

The fact that the Corps failed to follow the requirements of NEPA means that it cannot satisfy the first prong of the *Berkovitz* test. Because *Berkovitz* requires both prongs to be satisfied for the Corps to enjoy immunity under the DFE, that failure is sufficient to bar the Corps from invoking the DFE to avoid liability under the FTCA.[2]

II. Congress Did Not Intend that an Agency Should Enjoy Immunity Under the Discretionary Function Exception to the Federal Tort Claims Act Where the Agency Fails To Adhere to the Mandates Set Forth in the National Environmental Policy Act

In holding that the Corps' noncompliance with NEPA amounted to merely an abuse of discretion, the Fifth Circuit also failed to appreciate that Congress—not the Corps—retains substantive decisionmaking power. *See Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 492 F.2d 1123, 1140 (5th Cir. 1974) (stating that Congress is the "ultimate decisionmaker" in determining whether Corps projects will proceed).

"Environmental impact statements are not confidential or internal documents for agency eyes alone." *Id.* "NEPA was intended not only to insure that the appropriate responsible official considered

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[2] The District Court, however, found that the Corps failed both prongs of the *Berkovitz* test. As the Petition demonstrates, the Fifth Circuit's reversal of the District Court on the second prong—after initially affirming the District Court—conflicts with the decisions of other courts of appeal and warrants this Court's plenary review.

the environmental effects of the project, but also to provide Congress (and others receiving such recommendation or proposal) with a sound basis for evaluating the environmental aspects of the particular project or program." *Id.* (internal quotations and citations omitted).

Congress, and not a federal agency, holds ultimate decisionmaking authority, and Congress makes its decisions based upon competent reports and analyses provided by its agencies that are required by statutes such as NEPA. Indeed, "[t]he spirit of [NEPA] would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review. Every such decision pretermits all consideration of that which Congress has directed be considered to the fullest extent possible." *Manasota-88, Inc. v. Thomas*, 799 F.2d 687, 691 (11th Cir. 1986). When the Corps made its own renegade decision to ignore its statutory obligations under NEPA and failed to inform Congress of the egregious negative environmental impact that ongoing dredging of the MRGO would inflict upon the surrounding area, it robbed Congress of its right to make informed decisions regarding the MRGO project.

As evidenced by the plain language Congress used in the text of the statute, NEPA is more than a collection of bureaucratic, procedural hoops through which an agency may jump—or not.[3] Indeed, failure

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[3] At least one district court has addressed the assertion that NEPA's character as a procedural statute does not impact the consequences of noncompliance with NEPA, finding compliance

to comply with mandatory statutes and regulations causes real harm. As the District Court found:

> [T]here is the causal connection between the Corps' failures to file the proper NEPA reports and the harm which plaintiffs incurred. The loss of

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with NEPA mandates to be the threshold over which an agency must cross before it earns the right to use its discretion to make policy and project determinations. *See Adams v. United States*, No. CV-03-0049, 2006 WL 3314571, at *2 (D. Idaho Nov. 14, 2006). The *Adams* court explained:

> The [federal agency's] failure to comply with NEPA meant that the agency had no discretion—it could not proceed until it complied with NEPA. The [agency] argues, however, that NEPA is merely a procedural statute, and that the [agency] retains full discretion to proceed with the project even if the NEPA analysis identifies possible environmental impacts. The [agency] is essentially saying that the NEPA analysis would have made no difference.
>
> But there is no way to know. While a bad NEPA report does not automatically block a project, it could lead to that result, or to significant modifications. It is impossible to say what the result would be. And that means that the [agency] loses because it has the burden of proof. [*See Marlys Bear Medicine v. United States*, 241 F.3d 1208, 1210 (9th Cir. 2001)] (government bears the burden of proving that the discretionary function exception is applicable). The burden is on the [agency] to show that the NEPA analysis would make no difference—a showing it cannot make because the analysis *might have* made a difference.

Id.

> wetlands and widening of the channel brought about by the operation and maintenance of the MRGO clearly were a substantial cause of plaintiffs' injury. Had the Corps adequately reported under the NEPA standards, their activities and the effect on the human environment would have had a full airing.

In re Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644, 730–31 (E.D. La. 2009).

By making compliance with NEPA mandatory through the plain language of the statute, it is the view of the Entergy *Amici* that Congress did not intend that the Corps should enjoy immunity under the DFE of the FTCA when it wilfully disregards congressional mandates and usurps the final authority of Congress.

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CONCLUSION

"Although NEPA itself does not mandate particular results," it "prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Thus, liability for harms caused in the negligent action of the agency lies in the failure to carry out the process. The decision the Corps made to ignore NEPA mandates deprived decisionmakers of the necessary insight into the harms the Corps' operation and maintenance of the MRGO would have on the human environment absent appropriate foreshore protection. The Corps' admitted failure to adhere to the mandates of NEPA to study and disclose to

Congress adverse environmental consequences of its proposed conduct regarding the MRGO is not a simple abuse of discretion for which the Corps is immune—it is conduct for which it has no cloak of discretionary immunity pursuant to this Court's holding in *Berkovitz* and its progeny.

For the foregoing reasons, the Entergy *Amici* respectfully urge this Court to grant the Petition for Writ of Certiorari to review and reverse the Fifth Circuit's decision.

Respectfully submitted,

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