No. 12-1092

In the Supreme Court of the United States

KENT LATTIMORE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception in the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' claims that property damage they suffered in Hurricane Katrina in 2005 was caused by the Army Corps of Engineers' decision in the 1960s and 1970s to dredge a shipping channel and maintain the height of a nearby levee using "lifts," rather than to armor the channel's banks.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-29a) is reported at 696 F.3d 436. The initial opinion of the court of appeals (Pet. App. 30a-60a) is reported at 673 F.3d 381. The district court's post-trial opinion (Pet. App. 61a-245a) is reported at 647 F. Supp. 2d 644.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 2012. A petition for rehearing en banc was denied on December 7, 2012 (Pet. App. 246a-247a). The petition for a writ of certiorari was filed on March 7, 2013. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1965, following Hurricane Betsy, Congress enacted the Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1077, which created the Lake Pontchartrain and Vicinity Hurricane Protection Project (LPV) to protect the greater New Orleans area from flood damage. Pet. App. 68a-70a. The LPV was designed and constructed by the Army Corps of Engineers (Corps) to protect a region that lies largely below sea level and that is surrounded and crisscrossed by natural and man-made bodies of water. *Id.* at 70a-72a; see *id.* at 252a (map); Gov't C.A. Appellant Br. 2.

In August 2005, Hurricane Katrina made landfall to the east of New Orleans. Pet. App. 124a. Hurricane Katrina was one of the most devastating hurricanes ever to hit the United States. *Id.* at 123a. A massive Category 3 hurricane with winds of about 125 miles per hour, see *id.* at 124a, it generated the largest storm-surge elevations in the Nation's history, *id.* at 123a-124a. LPV levees and floodwalls were breached in many parts of New Orleans, and at one point, "approximately eighty percent of the city was submerged in water." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 195-196 (5th Cir. 2007), cert. denied, 552 U.S. 1182 (2008).

2. Following Hurricane Katrina, the Corps received approximately 500,000 administrative claims seeking to hold the United States liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), for damage caused by the flooding. Gov't C.A. Appellant Br. 13. The FTCA generally permits a plaintiff to bring an action against the United States, following the exhaustion of administrative remedies, for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of

any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2675. Plaintiffs alleging damages from Hurricane Katrina have filed hundreds of such suits, many of which were consolidated before a single district judge. Pet. App. 2a.

The district court worked with plaintiffs' litigation committees to identify categories of plaintiffs and individual "bellwether" plaintiffs who resided in different parts of New Orleans when Hurricane Katrina struck and who offered different theories for why LPV levees and floodwalls failed to contain the flooding. Pet. App. 2a. The district court subsequently held that the claims of some, but not all, plaintiffs were barred by the Flood Control Act of 1928 (Flood Control Act), ch. 569, § 3, 45 Stat. 535, and by the FTCA's discretionary function exception, 28 U.S.C. 2680(a). Pet. App. 7a. The relevant provision of the Flood Control Act, codified at 33 U.S.C. 702c, broadly provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." The discretionary function exception provides that the FTCA "shall not apply to" a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

2. Petitioners are a bellwether group of plaintiffs who resided in an area known as the St. Bernard polder. Pet. 6; see Pet. App. 12a; see also *id.* at 6a n.3 (explain-

ing that a "polder" is "a tract of low land reclaimed from a body of water"). That area was flooded when Hurricane Katrina's flood waters breached the LPV levee known as the Reach 2 levee. *Id.* at 125a.[1] The Reach 2 levee parallels the stretch of the Mississippi River-Gulf Outlet (MRGO) shipping channel known as Reach 2, which branches off the Gulf Intracoastal Waterway and runs along the southwestern shore of Lake Borgne. *Id.* at 3a-4a; see *id.* at 252a (map). The MRGO channel was authorized by Congress in 1956 and built by the Corps in the late 1950s and 1960s to facilitate maritime traffic between the Gulf of Mexico and New Orleans. *Id.* at 63a-64a, 66a.

The district court concluded that neither Section 702c of the Flood Control Act nor the discretionary function exception applied to petitioners' claims, and, following a bench trial, it found the United States liable to petitioners for damages of approximately $720,000 (plus interest and costs). Pet. App. 6a-7a, 243a-245a. The district court accepted the causation model offered by petitioners' expert and concluded that, if the Corps had armored the banks of the MRGO channel against erosion (a process also called "foreshore protection") before 1975 rather than in the 1980s and 1990s, then the Reach 2 levee would have lost less of its height; the MRGO chan-

[1] The St. Bernard polder was also flooded by breaches of the LPV levee along the east side of the Inner Harbor Navigation Canal. Pet. App. 126a-127a. Those breaches were the subject of a separate trial, which recently concluded with a judgment for the United States on the ground that the plaintiffs failed to establish a causal connection between their flood damage and government conduct. See *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2013 WL 1562765, at *20-*21 (E.D. La. Apr. 12, 2013). As petitioners note, see Pet. 7 n.4, other claims against the government for damages from Hurricane Katrina have also been rejected on a variety of grounds.

nel would not have widened as much; the waves generated by Hurricane Katrina would not have struck the Reach 2 levee with the same amount of force; and the levee would have withstood Hurricane Katrina. *Id.* at 6a; see, *e.g.*, *id.* at 81a, 110a-111a, 115a. Before the 1980s, the Corps had decided to maintain the height of the levee through a series of "lifts," *id.* at 111a-112a, and to maintain the navigability of the adjacent MRGO channel through dredging projects, *id.* at 86a; see 5/14/09 Tr. 3998 (explaining that a "lift" is the addition of material to the top of a levee). The district court stated that the Corps "knew the dangers that the MRGO was creating." Pet. App. 181a. The court found the Corps negligent for "failure to implement foreshore protection when it recognized or should have recognized the extreme degradation that failure caused to the Reach 2 Levee" and "failure to warn Congress officially and specifically and to provide a mechanism to rectify the problem by properly prioritizing * * * requested funding" for foreshore protection projects. *Ibid.*[2]

Petitioners' claims were tried jointly with the claims of another bellwether group of plaintiffs (the New Orleans East plaintiffs), who resided in the adjacent New Orleans East polder. Pet. App. 6a-7a, 16a, 61a n.1, 127a-128a.[3] The New Orleans East plaintiffs advanced a

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[2] Because the breach of the Reach 2 levee was not the sole cause of flooding in the St. Bernard polder, the district court did not award the full amount of the damages claimed by all of the bellwether plaintiffs from that area. Pet. App. 28a. That causation ruling was appealed, but the issue was rendered moot when the court of appeals determined that the discretionary function exception barred their claims in full. *Id.* at 29a. The causation issue is not before this Court.

[3] The New Orleans East plaintiffs are Norman and Monica Robinson. Pet. App. 162a. Because the cases were tried jointly, the court of appeals opinion sometimes refers to the "*Robinson* plaintiffs"

different theory of liability, which the district court rejected. *Id.* at 26a; see *id.* at 159a-162a. The New Orleans East plaintiffs claimed that a "funnel effect" was created by the confluence of MRGO Reach 2 and the Gulf Intracoastal Waterway, causing storm surge to overtop the Citrus Back levee on the north side of Reach 1 and flood the New Orleans East polder. *Id.* at 26a, 120a-121a, 159a; see *id.* at 252a (map). The New Orleans East plaintiffs argued that the Corps was negligent in relying on a 1966 report known as the "Breitscheider & Collins Report," which concluded that the MRGO channel would have almost no effect on storm surge, and that the Corps should have constructed a surge protection barrier across the throat of the funnel to prevent storm surge from entering MRGO Reach 1. *Id.* at 159a-161a; see *id.* at 121a. The district court determined, however, that the New Orleans East plaintiffs "did not present sufficient evidence that the Corps was unreasonable or negligent in relying on the conclusions set forth in that report," *id.* at 161a, and it accordingly entered judgment in favor of the United States on the New Orleans East plaintiffs' claims, *id.* at 245a.[4]

3. The government appealed the district court's judgment in favor of petitioners, and the New Orleans

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when it is discussing issues relevant to petitioners and/or the New Orleans East plaintiffs. *E.g.*, *id.* at 6a.

[4] The district court additionally observed that the New Orleans East plaintiffs' claims "present[ed] substantial causation issues," but saw no need to address those issues in light of its "finding of no negligence." Pet. App. 162a. The district court further noted that the New Orleans East plaintiffs' claims might have been barred by Section 702c of the Flood Control Act, and found it unnecessary to address evidence presented by the government in support of applying the discretionary function exception to those claims. *Id.* at 162a & n.50.

East plaintiffs appealed the district court's judgment in favor of the government. Pet. App. 2a. The court of appeals affirmed the district court's judgment in the New Orleans East plaintiffs' case. *Id.* at 29a; see *id.* at 26a-28a. The court of appeals determined, *inter alia*, that the district court "did not clearly err in finding that the Corps was reasonable in relying" on the 1966 Breitscheider & Collins Report. *Id.* at 27a.

With respect to petitioners' claims, the court of appeals agreed with the district court that the claims were not barred by the United States' immunity from "liability of any kind * * * for any damage from or by floods or flood waters at any place" under the Flood Control Act. Pet. App. 8a (quoting 33 U.S.C. 702c); see *id.* at 7a-16a. The court of appeals acknowledged that "the text of Section 702c could not more broadly preserve immunity." *Id.* at 9a. But it concluded that "the United States enjoys immunity under that section only where damages result from waters released by flood-control activity or negligence therein." *Id.* at 12a. The court reasoned that "the flood waters that destroyed [petitioners'] property were not released by any flood-control activity or negligence therein," because, in the court's view, the "dredging of MRGO was not a flood-control activity, nor was MRGO so interconnected with the LPV as to make it part of the LPV." *Id.* at 16a.

The court of appeals also initially concluded that petitioners' claims were not barred by the FTCA's discretionary function exception, and thus affirmed the district court's judgment in favor of petitioners. Pet. App. 49a-53a, 60a. The court of appeals reasoned that the discretionary function exception is inapplicable to a decision that "involves only the application of scientific principles," *id.* at 49a, and it concluded that the Corps'

decision to delay armoring the banks of the MRGO shipping channel fit that description, *id.* at 49a-53a. In reaching that conclusion, the court of appeals relied on (and quoted at length from) an amicus brief filed by AT&T Inc. and affiliated companies, which detailed the Corps' reliance on the 1966 Breitscheider & Collins Report and argued that the delay in armoring the channel was the product of negligent reliance on bad and outdated scientific data. *Id.* at 50a-51a. The court of appeals also observed that the government had acknowledged during the litigation that the Corps had relied on "its flawed scientific knowledge" in deciding not to construct storm-surge barriers. *Id.* at 51a-52a.

4. The government filed a petition for rehearing or rehearing en banc, in which, *inter alia*, it explained that the AT&T amicus brief "on which the panel relied" had "confused the claims on which the government prevailed at trial with the claims on which the government lost." Gov't Reh'g Pet. 13-14. The argument that the Corps had negligently failed to construct storm-surge barriers, in reliance on an allegedly outdated report (the Breitshcieder & Collins Report), had been raised by the New Orleans East plaintiffs—not by petitioners—and the district court had "*rejected* [the New Orleans East plaintiffs'] claim[s], finding that the Corps was *not* negligent in relying on [that] report." *Id.* at 14; see pp. 5-6, *supra*. The judgment in favor of petitioners, in contrast, had been premised on a different theory of liability that did not involve a "mistaken scientific belief." Gov't Reh'g Pet. 14 (quoting Pet. App. 50a). Rather, petitioners' theory was that "the Corps *knew* the widening of MRGO was having an effect on the adjacent flood control levee" but unreasonably delayed in armoring the banks to stop that widening. *Ibid.*; see pp. 4-5, *supra*.

Following the filing of that rehearing petition, the court of appeals withdrew its initial opinion and issued a new one, which concluded that the discretionary function exception "completely insulates the government from liability" on petitioners' claims and reversed the district court's judgment against the United States on those claims. Pet. App. 2a, 29a. Aside from the discretionary-function-exception discussion (and some changes to the background section), the new opinion was largely the same as the original one. Compare *id.* at 1a-29a, with *id.* at 30a-60a. The revised discretionary-function-exception discussion removed all references to the AT&T amicus brief on which the original decision had relied. *Id.* at 22a-23a. The court explained in a footnote that although petitioners "point[ed] to record evidence suggesting that the Corps flatly failed to gauge the risks posed by leaving MRGO's banks unarmored," most or all "of the proffered evidence * * * suggests negligence in the original design of MRGO * * * and does not support the theory that the Corps's decision to delay armoring was grounded in a purely scientific misjudgment." *Id.* at 23a n.9.

The court of appeals' revised discretionary-function-exception discussion accepted that if a governmental action "is susceptible only to the application of scientific principles, * * * it is not immune" from an FTCA suit. Pet. App. 22a. But the court rejected petitioners' contention that "the critical calculations made by the Corps in waiting to armor MRGO were only erroneous scientific judgments, not decisions susceptible to public-policy considerations." *Ibid.* The court found "ample record evidence indicating the public-policy character of the Corps' various decisions contributing to the delay in armoring Reach 2" of the channel. *Id.* at 23a. "Alt-

hough the Corps appears to have appreciated the benefit of foreshore protection as early as 1967," the court explained, "the record shows that it also had reason to consider alternatives (such as dredging and levee 'lifts') and feasibility before committing to an armoring strategy that, in hindsight, may well have been optimal." *Ibid.* The court concluded that the "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." *Ibid.* [5]

5. Petitioners filed a petition for rehearing and rehearing en banc, which the court of appeals denied, with no active member of the court requesting a vote. See Pet. App. 247a.

ARGUMENT

Petitioners contend that this Court should grant certiorari to address whether the discretionary function exception in the Federal Tort Claims Act applies "when the failure to follow objective, scientific principles causes a decisionmaker to forgo action resulting in harm to persons or property." Pet. i; Pet. 18-33. This case does not present that question. The court of appeals accepted

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[5] The petition incorrectly states that the government on appeal "did not challenge *any* of the district court's findings of fact, including its causation finding." Pet. 13. The government's appellate briefs in fact argued that the district court's own reasoning "underscore[d] the absence of any causal nexus between the Corps' assertedly negligent conduct and the breach of the levee." Gov't C.A. Appellant Br. 45; see also Gov't C.A. Resp. and Reply Br. 33 (arguing that petitioners' "theory of causation fails even on its own terms"). The court of appeals had no reason to address the findings on causation, given its conclusions that the government was immune from suit. The district court's findings would not bind the government in other suits. *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984) (nonmutual offensive collateral estoppel does not apply against the United States).

the proposition that erroneous scientific judgments can lead to liability under the FTCA, and it simply rejected petitioners' assertion that, with respect to their particular claims in this case, "the critical calculations made by the Corps in waiting to armor MRGO were only erroneous scientific judgments, not decisions susceptible to public-policy considerations." Pet. App. 22a. Petitioners' criticism of that fact-bound conclusion repeats the mistake of the AT&T amicus brief on which the court of appeals erroneously relied in its initial opinion (see pp. 7-9, *supra*); it relies on a theory of liability that was advanced by the New Orleans East plaintiffs (who are not petitioners in this Court) and that was *rejected* on factual grounds by the district court. Compare, *e.g.*, Pet. 20-23, with Pet. App. 159a-162a. There are, moreover, alternative grounds for affirming the court of appeals' judgment. Petitioners' claims arise from damages caused by flood waters—indeed, flood waters that the flood-control levees constructed by the Corps of Engineers could not contain—and are therefore separately barred by Section 702c of the Flood Control Act. No further review is warranted.

1. a. The FTCA effects a "limited waiver of sovereign immunity" that authorizes certain suits against the United States based on state tort law. *United States* v. *Orleans*, 425 U.S. 807, 813 (1976). "The Act did not waive the sovereign immunity of the United States in all respects, however; Congress was careful to except from the Act's broad waiver of immunity several important classes of tort claims." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). The first such listed exception is the discretionary function exception, which forecloses suits "based upon the exercise or performance or the

failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). As this Court has explained, the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals," and its purpose is "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 808, 814.

This Court's decision in *United States* v. *Gaubert*, 499 U.S. 315 (1991), makes clear that the discretionary function exception bars an FTCA plaintiff from seeking damages based on governmental actions that (1) "involve an element of judgment or choice" and (2) are "based on considerations of public policy." *Id.* at 322-323 (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536-537 (1988)) (brackets omitted). *Gaubert* further explains that "[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Id.* at 324. "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325.

b. The court of appeals correctly applied those settled legal principles to petitioners' claims. As discussed above, see pp. 4-5, *supra*, the district court had deemed

the Corps negligent in failing "to implement foreshore protection when it recognized or should have recognized the extreme degradation that failure caused to the Reach 2 Levee," and in failing "to warn Congress officially and specifically and to provide a mechanism to rectify the problem by properly prioritizing * * * requested funding" for a foreshore-protection project. Pet. App. 181a. The district court faulted the Corps on the ground that it "did not actively pursue funding for [foreshore] protection" at an earlier point in time, *id.* at 5a (quoting *id.* at 91a), and because the Corps did not place foreshore protection projects "at the top of the budgeting heap," *id.* at 187a. That theory of liability falls squarely within the scope of the FTCA's discretionary function exception.

On the first step of the *Gaubert* analysis—whether the challenged government action "involve[s] an element of judgment or choice," 499 U.S. at 322 (original alteration omitted)—the court of appeals held, and the petition does not dispute, that no mandatory directive required the Corps to armor the banks of the MRGO channel. Pet. App. 21a. To the contrary, the design for the MRGO channel expressly contemplated that erosion would occur and did not provide for armoring the banks. *Ibid.* The Corps accordingly had the discretion to decide, as it did, to address potential concerns about the interaction of the MRGO channel and the Reach 2 levee by dredging the channel and maintaining the height of the levee through a series of lifts.

On the second step of the *Gaubert* analysis—whether the challenged government action was "based on considerations of public policy," 499 U.S. at 323—the court of appeals found "ample record evidence indicating the public-policy character of the Corps's various decisions

contributing to the delay in armoring Reach 2" of the channel. Pet. App. 23a. The court explained that, although "the Corps appears to have appreciated the benefit of foreshore protection as early as 1967, the record shows that it also had reason to consider alternatives (such as dredging and levee 'lifts') and feasibility before committing to an armoring strategy that, in hindsight, may well have been optimal." *Ibid.* In particular, the Corps undertook a cost-benefit analysis about how best to manage the MRGO channel, in conjunction with the levee, while prioritizing the Corps' "primary mission * * * to keep the [MRGO shipping] channel navigable." *Id.* at 5a. This Court has specifically recognized that a tort suit challenging the Corps' balancing of "safety" concerns with "the reality of finite agency resources" is "precisely [the] sort of judicial intervention in policy-making that the discretionary function exception was designed to prevent." *Varig Airlines*, 467 U.S. at 820.

A tort suit that invites "judicial second-guessing," *Varig Airlines*, 467 U.S. at 814 (internal quotation marks omitted), of the Corps' funding requests to Congress, Pet. App. 181a, would be an especially unwarranted intrusion upon executive and legislative prerogatives. See *Gaubert*, 499 U.S. at 323 ("[T]he purpose of the exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy.") (internal quotation marks and citation omitted). In light of the Constitution's vesting of discretionary power in the President to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient," U.S. Const. Art. II, § 3, serious constitutional questions would be raised by a federal court's award of damages against the United States based on the failure by the

Executive Branch to recommend a measure to Congress. And any claim that has as a link in the chain of causation a failure by Congress to appropriate money would be inconsistent with Congress's exclusive authority over the federal Treasury under the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7. See *OPM* v. *Richmond*, 496 U.S. 414, 424-425 (1990).

c. Petitioners' challenge to the court of appeals' decision rests on two independently erroneous premises. First, petitioners assert that the court of appeals "held that the discretionary function exception to the FTCA shields the government from liability for negligence that results when the failure to follow objective, scientific principles causes a decisionmaker to forgo action resulting in harm to persons or property." Pet. i; see, *e.g.*, Pet. 26 (similarly broad description of the court of appeals' decision). That is not what the court of appeals held. Rather, the court of appeals recognized that to fall within the discretionary function exception, an agency's decision must be "susceptible to public-policy considerations," and it accepted that a decision "susceptible only to the application of scientific principles * * * is *not* immune" to challenge under the FTCA. Pet. App. 22a (emphasis added). The court of appeals simply determined that the particular agency decisions here did not fall into that latter category. *Id.* at 22a-23a.

To the extent that petitioners acknowledge the actual legal test applied by the court of appeals, they argue that the court "asked the wrong question when it considered whether the Corps' 'decision to delay armoring' MRGO was a decision of a 'public-policy character' or a 'purely scientific misjudgment.'" Pet. 24 (quoting Pet. App. 23a & n.9). Petitioners provide no meaningful support for that challenge to the court of appeals' legal

framework, which directly tracks this Court's explanation in *Gaubert* that the "focus of the [discretionary-function-exception] inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." 499 U.S. at 325. The court of appeals' application of settled discretionary-function-exception principles to the facts of this case does not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

Petitioners' second erroneous premise is their repeated assertion that the district court found their damages from Hurricane Katrina to have been caused by the Corps' negligent reliance on outdated scientific data. See, *e.g.*, Pet. 2, 21-26. Petitioners assert (Pet. 21), for example, that the "district court's unchallenged findings of fact demonstrate that the Corps sought out objective scientific analysis in 1966 to determine whether MRGO presented a threat to New Orleans, and negligently continued to rely on the results of that analysis long after demonstrably changed conditions had vitiated the scientific validity of the original study's findings." *Ibid.* That is incorrect. As previously explained, see pp. 5-6, *supra*, it was the New Orleans East plaintiffs, not petitioners, who advanced that theory of liability (which concerned only the flooding in the New Orleans East polder), and the district court *rejected* the theory. The district court determined that the New Orleans East plaintiffs "did not present sufficient evidence that the Corps was unreasonable or negligent in relying [on] the conclusions set forth in [the 1966 Breitscheider & Col-

lins] report." Pet. App. 161a. The court of appeals expressly declined to disturb the district court's finding on that point, *id.* at 26a-28a, and the New Orleans East plaintiffs have not sought further review in this Court.[6]

In advancing the New Orleans East plaintiffs' inapplicable and squarely rejected theory of liability as a reason why their own claims are not barred by the discretionary function exception, petitioners invite this Court to make precisely the same mistake that the AT&T amicus brief caused the court of appeals to make in its original opinion. See pp. 7-9, *supra*. Following the government's petition for rehearing, the panel unanimously recognized the mistake and corrected it. Compare Gov't Reh'g Pet. 13-14, with Pet. App. 22a-23a & n.9. Petitioners provide no reason why the court of appeals' correction of its original fact-bound mistake warrants further review in this Court.

d. The decision below does not conflict with any decision of this Court or another court of appeals. Petitioners' contention (Pet. 25-30) that the decision "creates a conflict among the courts of appeals over whether a negligent decision is protected by the discretionary

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[6] Petitioners' contention (Pet. 23) that the government "conceded" this theory of liability rests on a misinterpretation of the record. In the cited passage, which comes from a pre-trial ruling in this case, the government acknowledged the Corps' reliance on the 1966 Breitscheider & Collins Report in deciding not to take storm-surge-prevention measures such as "build[ing] larger levees or stronger levees or put[ting] levees in different places." *In re Katrina Canal Breaches Consol. Litig.*, 577 F. Supp. 2d 802, 815 (E.D. La. 2008). The government did not concede liability, and the district court subsequently found that the Corps' actions were not negligent. Pet. App. 161a. In any event, as explained in the text, all of this relates to a theory of liability advanced by the New Orleans East plaintiffs, not by petitioners.

function exception when the failure to apply scientific, or other objective, principles blinds the decisionmaker to the harm that will result" rests on the two erroneous premises just discussed. The court of appeals in this case did not have occasion to consider whether, and did not hold that, an agency's overarching discretion to make a particular decision shields it from a claim that it was negligent in failing to obtain certain information necessary to make that decision. Rather, the theory of liability adopted by the district court, and thus the theory at issue the court of appeals, was that the agency "*knew* the dangers the MRGO was creating," but erred in initially electing to address the problem through dredging and lifts rather than armoring the channel banks. Pet. App. 181a (emphasis added); see, *e.g.*, *id.* at 23a ("Although the Corps appears to have appreciated the benefit of foreshore protection as early as 1967, the record shows that it also had reason to consider alternatives."). In finding that theory of liability barred by the discretionary function exception, the court of appeals neither needed to nor did address the question on which petitioners claim a circuit conflict.

Furthermore, neither of the decisions relied on by petitioners—*Appley Brothers* v. *United States*, 7 F.3d 720 (8th Cir. 1993), and *In re Glacier Bay*, 71 F.3d 1447 (9th Cir. 1995)—suggests that the deciding court would have found the discretionary function exception inapplicable on the particular facts of this case. In each case, the court found the discretionary function exception inapplicable in circumstances where specific actions by agency officials were contrary to non-discretionary agency directives. In *Appley Brothers*, the plaintiffs alleged losses "caused by the negligent failure to follow specific agency regulations," 7 F.3d at 721, and the

Eighth Circuit agreed that federal grain inspectors had committed a "violation of mandated agency policy" by failing to determine whether a warehouse had cured prior deficiencies in grain inventories. *Id.* at 725-726; see *id.* at 725 (noting that the inspectors had "no discretion" about the inspection). Similarly, in *Glacier Bay*, the plaintiffs alleged that federal hydrographers negligently "failed to follow mandatory instructions" about the creation of nautical charts, 71 F.3d at 1450, and the Ninth Circuit agreed that agency manuals divested the hydrographers of discretion with respect to some of the allegedly negligent acts, see *id.* at 1452-1454.

Here, in contrast, the court of appeals found no mandatory directive constraining the Corps' discretion in any relevant way. Pet. App. 21a. Petitioners do not contest that conclusion.[7] And they offer no meaningful reason why the Eighth and Ninth Circuits would have disagreed with the court of appeals' conclusion, based on its review of the record in this particular case, that the Corps' decisions about how best to allocate its resources, arrange its priorities, and determine whether to request funding from Congress with respect to the MRGO chan-

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[7] The court of appeals specifically rejected an argument that the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, imposed relevant constraints on the Corps' discretion here. Pet. App. 19a-21a. Although some of petitioners' amici challenge that conclusion, see Entergy New Orleans et al. Amicus Br. 5-16, petitioners themselves do not, and the issue is outside the scope of their question presented, which asks this Court to address the application of the discretionary function exception when an agency "fail[s] to follow objective, scientific principles," not when it fails to comply with NEPA. Pet. i; see Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). In any event, the amici identify no circuit conflict on the NEPA issue.

nel and the Reach 2 levee were "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325; see Pet. App. 22a-23a. Such decisions are at the very core of the discretionary function exception.

2. An additional reason for the Court to forgo further review of the court of appeals' discretionary-function-exception conclusion is that petitioners' claims are separately barred by Section 702c of the Flood Control Act. Although the court of appeals concluded that Section 702c did not apply, that conclusion was incorrect, and the government is free to raise this issue as an alternate ground for affirmance if this Court were to review the case. See, *e.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (explaining that even if a particular claim is "not encompassed in the question on which this Court granted certiorari," a "prevailing party, without cross-petitioning, is entitled under our precedents to urge any grounds which would lend support to the judgment below") (internal quotation marks and citation omitted); see also Eugene Gressman et al., *Supreme Court Practice* §§ 6.26(c), 6.35 (9th ed. 2007).

a. Section 702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c. This Court has recognized that the provision "outlines immunity in sweeping terms" and "safeguard[s] the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language." *United States* v. *James*, 478 U.S. 597, 604, 608 (1986) (internal quotation marks and citation omitted).

In *Central Green Co.* v. *United States*, 531 U.S. 425 (2001), this Court emphasized the importance of Section 702c's plain language in determining whether im-

munity applies. *Id.* at 431, 434. The Court held that, "in determining whether § 702c immunity attaches, courts should consider the character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project." *Id.* at 437. The Court explained that while some lower courts had "focused on whether the damage relates in some, often tenuous, way to a flood control project, rather than whether it relates to 'floods or flood waters,'" *id.* at 430, the "text of the statute does not include the words 'flood control project.'" *Id.* at 434. "Rather, it states that immunity attaches to 'any damage from or by floods or flood waters.'" *Ibid.* The damage that petitioners suffered from Hurricane Katrina falls squarely within Section 702c's broad grant of immunity.

b. In *Central Green*, the Court considered whether Flood Control Act immunity applied to a claim alleging negligence in the design, construction, and maintenance of an irrigation canal that could potentially also hold flood waters. 531 U.S. at 427, 434-436. The Court remanded for further proceedings, noting that the application of Section 702c is "not such a simple matter when damage may have been caused over a period of time in part by flood waters and in part by the routine use of [a] canal when it contained little more than a trickle." *Id.* at 436. This case presents no such difficulties.

The inundation of New Orleans was unquestionably caused by "a catastrophic hurricane and the excess water associated with it." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 215 (5th Cir. 2007), cert. denied, 552 U.S. 1182 (2008). The "levees built alongside the canals to hold back their floodwaters failed to do so" and, "[a]s a result, an enormous volume of water inundated the city." *Id.* at 214. "In common parlance, this event is

known as a flood." *Ibid.* That "man's efforts to mitigate the effect of the natural disaster failed," *id.* at 215, does not alter that conclusion. Indeed, the court of appeals has held, in parallel litigation involving private insurance companies, that flood exclusions in insurance policies "unambiguously preclude * * * recovery" for damage caused by Hurricane Katrina. *Id.* at 196.

The court of appeals in this case mistakenly reasoned that, "after *Central Green*, waters have the immune character of 'flood waters'" under Section 702c only "if the government's link to the waters is through flood-control activity." Pet. App. 12a. That atextual limitation on the plain terms of Section 702c appears nowhere in the *Central Green* decision itself. In any event, even on the court of appeals' mistaken reading of *Central Green*, Section 702c still bars petitioners' claims. None of the bellwether plaintiffs, including petitioners, has disputed that their properties were flooded when levees or floodwalls failed to contain waters from Hurricane Katrina. See, *e.g.*, p. 4 & n.1, *supra* (discussing flooding of St. Bernard polder). The flood-control "link" required by the court of appeals accordingly exists here. As this Court held in *United States* v. *James*, *supra*, and reaffirmed in *Central Green*, Section 702c's reference to "'floods or flood waters'" at the very least encompasses "those waters that a federal project is unable to control." *Central Green*, 531 U.S. at 431. The United States is thus immune to petitioners' suits seeking recovery for damages caused by such waters, even assuming the discretionary function exception were inapplicable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2013