No. 12-1092

IN THE
Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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June 4, 2013

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CORPORATE DISCLOSURE STATEMENT

Petitioner Lattimore & Associates' Rule 29.6 Statement was set forth at p. iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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In direct conflict with Eighth and Ninth Circuit decisions applying the discretionary function exception, the Fifth Circuit reversed itself and immunized the government from liability for "the Corps' negligent failure to maintain and operate the MRGO properly," even though that negligence — as the district court expressly found and the panel initially acknowledged — resulted from the Corps' "immense engineering failures" over decades of operating MRGO. App. 162a, 184a; *see* App. 52a-53a. This Court's review is necessary to correct the Fifth Circuit's legal error in this case arising out of the historic — but entirely avoidable — devastation in the St. Bernard Polder during Hurricane Katrina.

The government does not deny that the Eighth and Ninth Circuits apply the correct legal test when faced with a claim that the discretionary function exception immunizes government decisionmakers acting based on erroneous objective or scientific facts. Nor does it seriously dispute that the Fifth Circuit's Substituted Opinion adopts a legal test that departs from the applicable Eighth and Ninth Circuit standard. Rather, the government asserts (at 10) that "[t]his case does not present that question."

In fact, the brief in opposition erroneously seeks to conflate petitioners' arguments with those of other plaintiffs to obscure the Fifth Circuit's legal error. Contrary to the government's opposition, the district court found that "the cataclysmic flooding which occurred in the St. Bernard Polder would not have happened" had Katrina struck "with the MRGO as designed"; that "the Corps' negligent failure to maintain and operate the MRGO properly was a substantial cause for the fatal breaching of the Reach 2 Levee and the subsequent catastrophic flooding

of the St. Bernard Polder"; and that "the Corps's defalcations with respect to the maintenance and operation of the MRGO were in direct contravention of professional engineering and safety standards" so that the "Corps is prohibited from seeking protection from [the discretionary function] exception." App. 129a-130a, 162a, 178a. As the district court concluded, "[t]he Corps cannot mask these failures with the cloak of 'policy.'" App. 186a. The Fifth Circuit initially — and correctly — agreed that petitioners had "mustered enough record evidence to demonstrate that the Corps's negligent decisions rested on applications of objective scientific principles" so that "the DFE is inapplicable." App. 52a-53a. The Substituted Opinion's unexplained about-face and decision to apply an overly broad "public-policy character" test (App. 23a) thus squarely raises the Question Presented.

ARGUMENT

I. THE DISCRETIONARY FUNCTION EXCEPTION TEST THE FIFTH CIRCUIT'S SUBSTITUTED OPINION APPLIED CONFLICTS WITH EIGHTH AND NINTH CIRCUIT DECISIONS

As the Eighth and Ninth Circuits hold, the government cannot use the discretionary function exception to shield from liability a decision made on the basis of erroneous scientific or objective information. Even where the "ultimate decision . . . [is] discretionary," the proper inquiry focuses on whether the government actor "made a decision based on erroneous information." *Appley Bros. v. United States*, 7 F.3d 720, 725-26 (8th Cir. 1993). Whether those scientific or objective "errors actually caused the[] injury" goes to the merits — and proof of "proximate cause" — but is "irrelevant to the discretionary function inquiry."

In re Glacier Bay, 71 F.3d 1447, 1451 (9th Cir. 1995). The Fifth Circuit's Withdrawn Opinion — like the district court — properly focused its discretionary function analysis on the Corps' erroneous "applications of objective scientific principles." App. 52a-53a. As the panel initially recognized, the destruction in the St. Bernard Polder was not caused by a Corps that "recognized a risk and chose not to mitigate it out of concern for some other public policy," but by a Corps that "flatly failed to gauge the risk." App. 53a.

The Substituted Opinion departed from that approach, to ask whether the Corps' ultimate decision about whether and when to "armor[] Reach 2" had a "public-policy character," irrespective of the numerous engineering errors underlying that decision. App. 23a. The government acknowledges (at 15-16) that the Substituted Opinion focused only on the "final product" of government decisionmaking, rather than the "separate action[s]" of the Corps' engineers underlying that ultimate decision. *Glacier Bay*, 71 F.3d at 1451. The government thus highlights and confirms the existence of the conflict among the circuits for this Court to resolve.

The government, however, asserts that this case differs meaningfully from *Appley Brothers* and *Glacier Bay* because the agencies in those cases had written down in a handbook or a manual how their agents were to inspect warehouses and create nautical charts. Opp. 18-19. But engineers do not need government handbooks to know that they are obligated to comply with the "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." Scientists, Engineers & Academics Amicus Br. 8. As the district court properly concluded, "[i]gnoring safety and poor engi-

neering are not policy, and clearly the Corps engaged in such activities." App. 178a. The brief in opposition emphasizes the absence in this case of a document stating what, to an engineer, should have been obvious. Opp. 18-19. But that position simply encourages agencies to avoid handbooks and manuals so that it can cloak scientific or other objective errors within the discretionary function exception.

Equally erroneous is the government's contention that this case differs from *Appley Brothers* and *Glacier Bay* because, here, the Corps did not make any engineering errors and "'*knew* the dangers the MRGO was creating.'" Opp. 18 (quoting App. 181a). The government has long conceded that the Corps' "'didn't think'" that the ever-widening MRGO was "'threatening the City of New Orleans.'" *In re Katrina Canal Breaches Consol. Litig.*, 627 F. Supp. 2d 656, 690 n.17 (E.D. La. 2009) (quoting government counsel). Indeed, the government conceded that "'there is no policy basis'" to let MRGO "'get wider and threaten people.'" *Id.* (quoting government counsel).[1] The district court likewise found that the Corps "fail[ed] . . . to recognize . . . the potential hazard that [MRGO] created." App. 182a. The Corps did not come to appreciate the "dangers that the MRGO was creating by virtue of its own engineering mistakes" until decades later, App. 181a — well past the "point[] where it could have mattered," App. 53a. *See* App. 186a

[1] The government seeks (at 17 n.6) to explain away (without denying) its district court concession that, in 1966, the Corps had "'determined that the MRGO played no role in major hurricane events.'" *In re Katrina Canal Breaches Consol. Litig.*, 577 F. Supp. 2d 802, 815 (E.D. La. 2008) (quoting government counsel). It tellingly ignores this further concession about the Corps' continuing ignorance, over time, of the dangers MRGO posed to the St. Bernard Polder.

("By 1988, [the Corps] knew that indeed all of the engineering blunders that it had made now put the Parish of St. Bernard at risk."). Thus, the government's assertion (at 14-15) that the discretionary function exception applies here because petitioners' complaint actually concerns the Corps' failure to obtain congressional appropriations overlooks on-point district court findings that the Fifth Circuit did not disturb.[2]

II. THE GOVERNMENT, NOT PETITIONERS, SEEKS TO CONFUSE THE ISSUES ON WHICH PETITIONERS PREVAILED BEFORE THE DISTRICT COURT

Unable to dispute that the Substituted Opinion conflicts with Eighth and Ninth Circuit decisions, the government asserts (at 16) that the petition is based on the "erroneous premise . . . that the district court found their damages from Hurricane Katrina to have been caused by the Corps' negligent reliance on outdated scientific data." The district court, however, squarely held just that. Nor is there any merit to the government's claims that petitioners are pursuing a theory that "the district court *rejected*," *id.*, or that the panel reversed itself because it agreed that it had been taken in by an *amicus* brief.

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[2] In fact, there is no merit to the government's claim that the district court's liability finding turned on the Corps' failure to make requests of Congress. The single passage the government cites, *see* App. 181a, appears in the middle of the court's discussion of the discretionary function exception, which concluded that the Corps' scientific errors prevented it from claiming the benefit of that exception. *See*, *e.g.*, App. 184a. In all events, the government long ago conceded that "'if the Corps had been convinced that [MRGO] was a threat to human life they would have gone to Congress.'" *In re Katrina*, 627 F. Supp. 2d at 690 n.17 (quoting government counsel).

A. As the district court explained, petitioners' theory of liability for the St. Bernard Polder was that the Corps' negligent failure "to prevent the exponential growth of [MRGO] from its design width to as much as three times that size . . . created forces which resulted in the cataclysmic failure of the Reach 2 levee." App. 128a. That catastrophe would not have occurred "but for the MRGO 'as was' — that is in its 2005 parameters." App. 129a; *see* App. 129a-130a ("Had the Katrina event occurred with the MRGO as designed, the cataclysmic flooding which occurred in the St. Bernard Polder would not have happened."). In contrast, the Corps contended that "MRGO did not cause the breaches in the Reach 2 Levee" and that "neither the surge nor the waves nor the Reach 2 Levee itself was at all affected by the [Corps'] operation and maintenance of the MRGO." App. 130a.

The district court then canvassed the extensive evidence that both sides put forward during the 19-day bench trial with respect to the breach of the Reach 2 levee. *See* App. 130a-159a. The court determined that petitioners' experts testified credibly and substantiated their contention that, but for the massive widening of MRGO and the associated wetlands destruction, residents in the St. Bernard Polder would have suffered only "a few wet carpets," not complete devastation of their homes or loss of life. *E.g.*, App. 137a. In contrast, the court found that the government experts pressing the alternative explanation for the destruction of the St. Bernard Polder were "less than credible," had "manipulated" data, and offered opinions that were "disproved by hard, empirical evidence." App. 142a, 154a-155a, 159a. The court, therefore, concluded "that the Corps' negligent failure to maintain and operate the

MRGO properly was a substantial cause for the fatal breaching of the Reach 2 Levee and the subsequent catastrophic flooding of the St. Bernard Polder." App. 162a; *accord* App. 237-238a (conclusions of law on negligence).

Having found the Corps negligent in its operation of MRGO and liable for the resulting damages to the St. Bernard Polder, the district court then considered the government's immunity claims. *See* App. 165a-236a. With respect to the discretionary function exception, the court agreed with petitioners that "the Corps's defalcations with respect to the maintenance and operation of the MRGO were in direct contravention of professional engineering and safety standards and thus the Corps is prohibited from seeking protection from [the discretionary function] exception." App. 178a.

The court further determined that the "failure of the Corps to recognize the destruction that the MRGO had caused and the potential hazard that it created is clearly negligent on the part of the Corps." App. 182a. In finding the discretionary function exception inapplicable, the court repeatedly highlighted the Corps' "engineering mistakes," "engineering failures," and "engineering blunders." App. 181a, 184a, 186a. Moreover, the court explained that the Corps "grounded its engineering position that the MRGO had no adverse effects with respect to storm surge on the Bretschneider and Collins report done in 1966." App. 184a. Even though that study's findings "were based on the 'as designed' parameters" of MRGO, the Corps continued to adhere to that engineering position long after "any layperson, much less an engineer, could see that the dimensions of the channel had already grown excessively." *Id.*

Thus, there is no basis for the government's erroneous assertion (at 16) that the district court did not hold that the damages that petitioners and other residents of the St. Bernard Polder suffered were "caused by the Corps' negligent reliance on outdated scientific data."[3] And the Fifth Circuit properly affirmed that holding in the Withdrawn Opinion. App. 52a-53a.

B. Equally erroneous is the government's claim (at 16-17) that petitioners — who live in the St. Bernard Polder — are pressing the unsuccessful claims of the Robinsons, who live in the New Orleans East Polder. The Robinsons argued that the intersection of MRGO with the Gulf Intracoastal Waterway created a funnel effect that would exacerbate the effects of storms against the Reach 1 levee. *See* App. 120a-123a; App. 252a (map); *In re Katrina*, 577 F. Supp. 2d at 809-11.[4] The Robinsons argued further that the "Corps was negligent for failing to have

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[3] The government asserts (at 10 n.5) that it challenged the district court's causation finding, but points only to passing references to causation in the portions of its briefs appealing the district court's conclusion that the Corps' violations of the National Environmental Policy Act of 1969 ("NEPA") provided an independent basis for rejecting the government's reliance on the discretionary function exception. Moreover, the government incorrectly claims (*id.*) that the Fifth Circuit "had no reason to address the findings on causation." In the Withdrawn Opinion, the court affirmed the judgment for petitioners; the court thus would have had every reason to address the causation findings, had the government actually challenged them.

[4] To reiterate, petitioners' theory of liability was that the Corps' negligence in maintaining MRGO caused the breach of the Reach 2 Levee — an entirely distinct theory of liability from the one advanced by the Robinson plaintiffs. *See* Pet. 6, 13, 24-25 & n.13; *supra* pp. 5-7.

constructed a surge protection barrier across the throat of the funnel." App. 159a.

The Corps argued that it was not negligent in failing to build that surge barrier, pointing to the 1966 Bretschneider and Collins Report that found MRGO had negligible effects on storm surges. *See* App. 160a. The district court agreed, finding that the Robinsons had not "present[ed] sufficient evidence that the Corps was unreasonable or negligent in relying in the conclusions set forth in that report." App. 161a. The Robinsons cross-appealed that decision, which the panel affirmed as not clearly erroneous. *See* App. 28a; App. 57a.

The government's contention that petitioners here are pressing the Robinsons' unsuccessful funnel-effect argument is incorrect and appears to be based entirely on petitioners' reference to the 1966 Bretschneider and Collins Report. *See* Opp. 8, 16-17. But, as shown above, the district court addressed that report in resolving a *separate* issue: its ruling in *petitioners'* favor on the government's claim of immunity under the discretionary function exception for the damages it caused in the St. Bernard Polder. In discussing the Corps' "engineering failures" with regard to the widening of MRGO and the destruction of the Reach 2 levee, the district court explained that, "prior to Hurricane Katrina, [the Corps] grounded its engineering position . . . on the Bretschneider and Collins report," which was "based on the 'as designed' parameters" of MRGO, which the Corps subsequently allowed to "grow[] excessively." App. 184a.[5]

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[5] There can be no dispute that this discussion of the Bretschneider and Collins Report in the district court's analysis of the government's claim of discretionary function exception immunity relates to petitioners' successful arguments with regard

In sum, although the Robinsons failed to prove that the Corps negligently relied on that report with respect to the funnel — an element of the "original design" of MRGO, App. 161a — petitioners successfully proved that the Corps was negligent in relying on that report with regard to the "potential hazard" that MRGO posed to the Reach 2 levee as it grew to three times its design width, App. 182a. The Fifth Circuit correctly relied on that finding — as urged both by petitioners[6] and by its *amicus* AT&T — in the Withdrawn Opinion. *See* App. 52a-53a. Petitioners properly rely on that finding here.

Finally, nothing in the Withdrawn Opinion supports the government's claim that the panel was initially fooled by AT&T's *amicus* brief into conflating the district court's findings for petitioners and against the Robinsons. Indeed, the panel offered no reason at all in the Withdrawn Opinion for its abrupt about-face on the discretionary function exception, or its replacement of the correct legal standard with an erroneous one that conflicts with the approach of the Eighth and Ninth Circuits. *See* App. 22a-23a.

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to the St. Bernard Polder. The court stated that it would "not . . . discuss[]" the discretionary function exception with regard to the Robinsons' claims, in light of its "finding of no negligence." App. 162a n.50.

[6] *See* Br. for Pls.-Appellees/Cross-Appellants at 105-06, *In re Katrina Canal Breaches Litig.*, 673 F.3d 381 (5th Cir. 2012) (No. 10-30249, filed Feb. 18, 2011), 2011 WL 990297.

III. THE GOVERNMENT'S OVERBROAD AND UNIFORMLY REJECTED THEORY OF FLOOD CONTROL ACT IMMUNITY IS NO OBSTACLE TO THIS COURT'S REVIEW

The district court rejected the government's claim that the Flood Control Act of 1928 ("FCA") immunizes the government for the damages that the Corps' negligence caused in the St. Bernard Polder. *See* App. 165a-166a; *In re Katrina*, 577 F. Supp. 2d at 822. The Fifth Circuit did as well, rejecting the government's argument in the Withdrawn Opinion, *see* App. 42a-43a, and preserving that holding in the face of the government's rehearing petition, *see* App. 15a-16a. As both courts found, the FCA offers no immunity where — as here — the government negligently "destroy[s]" a levee and "causes a flood." App. 15a.

The government continues to repeat its thrice-rejected FCA immunity argument, asserting (at 20-22) that it provides an additional ground for denying the petition. Yet the government cannot identify a single lower court decision adopting its expansive theory of FCA liability. And nothing in *United States v. James*, 478 U.S. 597 (1986), or *Central Green Co. v. United States*, 531 U.S. 425 (2001), interprets the FCA to immunize the government when it negligently knocks over a levee, allowing water to flow through and destroying property and killing citizens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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