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

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are individual Members of Congress who ask this Court to grant the petition for writ of certiorari to resolve the important question it presents.

Amici have an interest in seeing that legislation enacted by Congress in general, and the Federal Tort Claims Act ("FTCA") in particular, is interpreted in accord with congressional intent. That intent, this brief argues, is to compensate parties injured by the negligence of the United States or its actors where, as here, the injury-causing action or inaction is not informed by the exercise of discretion or the result of a policy choice. Further, *amici* have an interest in ensuring that their constituents are made whole when they are injured by negligent acts of the federal government.

The individual Members on whose behalf this brief is filed are:

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[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, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties were notified ten days before the due date of this brief of the intention to file this brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amici* also represents that all parties have consented to the filing of this brief. Counsel for petitioners has filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs. Letters reflecting the consent of respondent United States of America and respondents Norman and Monica Robinson have been lodged with the Clerk.

Senators:

Maria Cantwell, Washington

Mary Landrieu, Louisiana

Harry Reid, Nevada

David Vitter, Louisiana

Representatives:

Charles W. Boustany, Jr., Louisiana 3rd District

Corrine Brown, Florida 5th District

Danny K. Davis, Illinois 7th District

Sheila Jackson Lee, Texas 18th District

Eddie Bernice Johnson, Texas 30th District

Cedric Richmond, Louisiana 2nd District

Steve Scalise, Louisiana 1st District

Bennie Thompson, Mississippi 2nd District

Frederica Wilson, Florida 24th District

SUMMARY OF ARGUMENT

In denying relief to homeowners, other individuals, and businesses harmed by the Army Corps of Engineers' negligence—and not any policy decisions it made—the Fifth Circuit lost its way, misunderstood the purpose of the Federal Tort Claims Act, and failed to carry out congressional intent to provide relief to victims of government negligence not affected by policy. This historic tragedy deserves this Court's

time and attention. We ask this Court to grant the petition for writ of certiorari and reverse the judgment of the Fifth Circuit.

ARGUMENT

This Court Should Grant Certiorari to Resolve the Important Question the Petition Presents and to Protect Individuals and Businesses from Harm Caused by the Federal Government

Before Congress passed the FTCA the United States was immune from suit: "the only means for parties to seek redress for injury caused by the government was 'through the cumbersome mechanism of private bills issued by Congress.'" Andrew Hyer, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 B.Y.U. L. Rev. 1091, 1093-94 (quoting Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. Rev. 871, 875-76 (1991)). Indeed, by the time Congress enacted the FTCA, the number of claims brought before Congress reached 2,300 in just one session, putting a great burden on Congress and distracting its members from legislative work. Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 Harv. J. on Legis. 411, 417 (2012).

Despite the burden the private bill process imposed on Congress, relieving it of this quasi-adjudicative burden was no easy matter: "No fewer than thirty general tort claims bills were considered by Congress between 1921 and 1946." Bruno, *supra*, at 419; *see also* Mark C. Niles, *"Nothing But Mischief"*: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 Admin. L. Rev. 1275, 1297 (2002) ("[F]inal passage of the FTCA was actually 'preceded by more than a century of legislative deliberation accompanied by inequity and hardship suffered by victims of the torts, misfeasance, or wrongful conduct of federal employees and representatives.'" (quoting 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 2.01, at 2-3 (1994))).

In 1946, Congress passed the FTCA, leading many to believe that governmental immunity from responsibility for negligent conduct was now a relic of the past. *See Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987) (McKay, J., concurring) ("After the passage of the Federal Tort Claims Act . . . many people, as well as the lower federal courts, assumed that the old governmental immunity from responsibility for negligent conduct that injures individual citizens was gone.").

The FTCA states in no uncertain terms that subject to certain exceptions, the federal government shall be held liable in tort "in the same manner and to the same extent as private individuals under like circumstances. . . ." 28 U.S.C. § 2674. This Court has said that this statute "waives the Government's

immunity from suit in sweeping language." *United States v. Yellow Cab*, 340 U.S. 543, 547 (1951); *see also, Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957) ("[T]he very purpose of the [FTCA] was to waive the Government's traditional all-encompassing immunity from tort action and to establish novel and unprecedented governmental liability.").

True, the FTCA provides for certain exceptions, 28 U.S.C. § 2680, but as this Court said in *Yellow Cab*, "'[w]here a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain exceptions, resort to that rule (of strict construction) cannot be had in order to enlarge the exceptions.'" 340 U.S. at 548 n.5 (quoting *Employers' Fire Ins. Co. v. United States*, 167 F.2d 655, 657 (9th Cir. 1948)); *accord Dolan v. United States Postal Service*, 546 U.S. 481, 491 (2006) (acknowledging that the rule that a waiver of sovereign immunity will be strictly construed "is 'unhelpful' in the FTCA context" because it would "'run the risk of defeating the central purpose of the statute'" (quoting *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984))); *see also United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) ("[W]e should not take it upon ourselves to extend the waiver beyond that which Congress intended.").

The court of appeals relied upon the discretionary function exception to deny relief to Katrina victims. The discretionary function exception provides that the

> provisions of this chapter shall not apply to—
> [¶] (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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).

In the congressional hearings leading up to the passage of the FTCA, Assistant Attorney General Francis Shea spoke concerning the discretionary function exception. He stated that "the Act was not intended to allow 'the constitutionality of legislation, the legality of regulation, or the propriety of a discretionary administrative act' to be 'tested through the medium of a damage suit in tort'. . . ." Niles, *supra*, at 1302 (quoting *Dalehite v. United States*, 346 U.S. 15, 27 (1953)); *see also Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988) ("The basis for the discretionary function exception was Congress' desire 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.'" (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984) (internal quotation marks omitted)).

We wish to make two main points.

First, the discretionary function exception should not apply here. This is not a case challenging the "propriety of a discretionary administrative act" or one that involves "second-guessing" of any policy decision. The district court's findings, not contested on the appeal, show that the Corps' decision not to protect New Orleans by ensuring that the Mississippi River Gulf Outlet ("MRGO") remained at its designed and congressionally-authorized width was not based on any policy considerations.[2] The Fifth Circuit's initial opinion agreed, referring to "ample record evidence indicating that policy played no role in the government's decision to delay armoring MRGO." *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 394 (5th Cir. 2012), *opinion withdrawn on rehearing by* 696 F.3d 436 (5th Cir. 2012). Instead, the Corps failed to act, as the Fifth Circuit said, because "the Corps disbelieved the scientific evidence of the MRGO's storm surge effect." *Id.* at 395. Because the Corps did not exercise any discretion or make any policy choice in its injury-causing inaction, this is not a case where granting relief would "foster perverse incentives

[2] This district court found credible an expert's testimony that had MRGO been maintained at its design width, St. Bernard Parish and the Lower Ninth Ward "would not have flooded" and there would only have been a very small overflow leading to "'a few wet carpets.'" *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d 644, 685 (E.D. La. 2009).

distracting [government] officials from their proper policy objectives." Niles, *supra*, at 1296.

In sum, this is not a case where there was an exercise of discretion or policy choice that should be protected by the discretionary function exception. The FTCA was intended to ensure that citizens and businesses are compensated from immense harms that result from government negligence as well as narrower governmental negligence, such as the run-of-the-mill traffic accident for which the government indisputably would be liable under the FTCA. *Dalehite,* 346 U.S. at 34 (recognizing that the government is not relieved from liability for automobile collisions). If the court of appeals' decision stands, there will be few if any government acts of negligence that will not be immunized.

Second, Congress recognized that a principal purpose of the FTCA was to make whole those injured by negligent governmental conduct. Congress thus understood that the government would—and should—be called upon to pay for its negligence. Just because the liability is potentially large should not impede this court from granting certiorari and providing relief to the plaintiffs. *See Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (noting that this Court should not act "as a self-constituted guardian of the Treasury [to] import immunity back into a statute designed to limit it.").

In this way, the FTCA comports with modern tort theory, which is largely based on the concept of loss

spreading, namely, that an enterprise is better-suited to pay for the harm it causes than an individual who is harmed by it. *See, e.g., Rayonier,* 352 U.S. at 319 ("Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on the taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed."); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 657 (1980) (recognizing in 42 U.S.C. § 1983 case against municipality that "[d]octrines of tort law have changed significantly over the past century"—specifically "the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct"—and concluding that "our notions of governmental responsibility should properly reflect that evolution").

Thus, "a government is a more appropriate candidate to bear the costs incurred by its negligent acts than the private citizen who sustains an injury through no 'fault' of her own." Niles, *supra*, at 1294. As Niles goes on to say, "a government's unique ability to socialize losses arising from accidental harm through taxes and other potentially equitable means of community cost sharing make it the *model* tort defendant." *Id.* at 1295-1296 (emphasis in original). *See* Krent, *supra*, at 872 ("[T]he question remains why the federal government should not be forced—like any private entity—to internalize the

costs of its actions by paying tort judgments."). And not invoking loss-spreading necessarily harms innocent victims of governmental negligence. *See* Barry R. Goldman, Note, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 Ga. L. Rev. 837, 857 (1992) ("[U]sing the discretionary function exception to the FTCA to bar suits against the government unfairly shifts the entire burden of harm caused by negligent government employees to the injured person.").

CONCLUSION

This court should grant the petition for writ of certiorari.

Respectfully submitted,

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