No. 10-30249

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: KATRINA CANAL BREACHES LITIGATION

NORMAN ROBINSON, KENT LATTIMORE, LATTIMORE & ASSOCIATES, TANYA SMITH, ANTHONY FRANZ, JR., LUCILLE FRANZ, individually,
Plaintiffs-Appellees-Cross-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant-Cross-Appellee

MONICA ROBINSON,
Plaintiff-Appellee-Cross-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant-Cross-Appellee.

On Appeal From The United States District Court for the Eastern District of Louisiana (Stanwood R. Duval, Jr., J.)

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

In this action brought under the Federal Tort Claims Act ("FTCA"), the district court held the United States liable for flood damage caused by Hurricane Katrina. The district court rejected the government's contention that this suit is barred by the Flood Control Act of 1928, which 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. The court also rejected the government's contention that this suit is independently barred by the FTCA's discretionary function exception, which precludes "[a]ny 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." 20 U.S.C. § 2680(a).

Given the importance of the issues presented, the United States respectfully requests oral argument.

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JURISDICTIONAL STATEMENT

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1346(b)(1), and 2674. Jurisdiction is contested, as discussed in the Argument. The district court entered final judgment under Fed. R. Civ. P. 54(b) on November 18, 2009. Government Record Excerpts ("GRE") 171-72. The court denied motions filed under Fed. R. Civ. P. 59(e) on December 29, 2009. GRE16. The United States and plaintiffs filed timely notices of appeal on February 25, 2010. GRE3, GRE6. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

In this suit under the Federal Tort Claims Act ("FTCA"), the district court held the United States liable for flood damage caused by Hurricane Katrina. The government's appeal presents the following questions:

1. Whether this suit is barred by the Flood Control Act of 1928, which 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.

2. Whether this suit is independently barred by the FTCA's discretionary function exception, which precludes "[a]ny 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).

STATEMENT OF THE CASE

1. Over the course of decades, Congress enacted a series of flood control statutes that authorized the construction of public works projects to protect different regions of the United States from flood risks. The flood protections for New Orleans that are at issue in this suit were constructed pursuant to the Flood Control Act of 1965, which created the Lake Pontchartrain and Vicinity, Hurricane Protection Project ("LPV"). *See* Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073. The LPV sought to address the panoply of potential flood risks to a city that lies largely below sea level and that is crisscrossed by natural and manmade waterways.

When Congress authorized the LPV, it was aware of the relationship between that hurricane protection system and the Mississippi River-Gulf Outlet ("MR-GO," pronounced "Mister Go"), a shipping channel that stretches from New Orleans to the Gulf of Mexico and that, like the LPV, was designed by the United States Army Corps of Engineers and authorized by Congress. *See* Pub. L. No. 84-455, 70 Stat. 65 (1956). Among other flood control protections, the LPV authorized the construction of miles of levees alongside MR-GO, to be constructed in part with materials dredged from the channel. *See* 577 F. Supp. 2d 802, 812 n.13, 814 (E.D. La. 2008). It is "pursuant to that authorization that the levees involved in this litigation were created." 647 F. Supp. 2d 644, 652 (E.D. La. 2009).

When Hurricane Katrina struck New Orleans on August 29, 2005, the levees and other flood protection measures that the Corps had constructed pursuant to the LPV failed to contain the flood waters generated by the storm, which wrought devastating damage in many parts of the New Orleans area. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 195-96 (5th Cir. 2007). Many levees breached, and about eighty percent of the city was submerged in water. *See ibid.*

One of the LPV-created levees that breached was the Reach 2 levee, which runs alongside the stretch of MR-GO that extends southeast from the Gulf Intracoastal Waterway to the Gulf of Mexico and is known as Reach 2. *See* 647 F. Supp. 2d at 650-51. As a result of the Reach 2 levee's breach, flood waters inundated the St. Bernard Polder, which includes the neighborhoods of Chalmette and the Lower Ninth Ward. *See* 647 F. Supp. 2d at 679-80, 697.[1] Other levees that had been constructed as part of the LPV also were overtopped or breached, causing flooding in the New Orleans East Polder. *See id.* at 696.

2. Plaintiffs are five residents of the St. Bernard Polder and two residents of the New Orleans East Polder. They filed this suit under the Federal Tort Claims Act, seeking to hold the United States liable for flood damage that they sustained when the levees breached during Hurricane Katrina. Their case was consolidated with

[1] A "polder" is "a track of low land reclaimed from a body of water." *See* 647 F. Supp. 2d at 679.

hundreds of similar lawsuits, and the district court deferred action on the other suits pending the disposition of plaintiffs' claims.

After trial, the district court entered judgment against the United States on the claims of the St. Bernard Polder plaintiffs. *Id.* at 735-36. That judgment is the subject of this appeal by the government. The court concluded that the Reach 2 levee breached due to a loss of levee height and hurricane-generated waves on the MR-GO channel that created a more forceful wave attack on the front of the levee, that is, the side of the levee that faced the channel. *See id.* at 697. The court attributed the force of the waves and the breach of the levee to the Corps' failure to protect the banks of MR-GO against erosion — described interchangeably as a failure to provide "foreshore protection," "bank protection," "armoring," and "riprap" — at an early enough point in time to prevent the channel from widening beyond its original design dimensions. *See id.* at 653-676, 697. The court held that the Corps was 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" that foreshore protection was needed and not "properly prioritizing" requests for congressional funding. *Id.* at 706.

The district court rejected the government's argument that liability is barred by Section 702c of the Flood Control Act of 1928, which 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. *See* 647 F. Supp. 2d at 699; 577 F. Supp. 2d at 819-26. The court recognized that plaintiffs' damage was caused by flood waters that inundated their neighborhoods because a federal flood control project — the LPV — failed. *See* 577 F. Supp. 2d at 821. Nonetheless, the court ruled that the flood damage arose out of negligence that was "'unconnected with flood control projects.'" *Id.* at 820 (quoting *Graci v. United States*, 456 F.2d 20, 26 (5th Cir. 1971)); *see also* 647 F. Supp. 2d at 699.

The district court also rejected the government's argument that this suit is barred by the discretionary function exception of the FTCA, 28 U.S.C. § 2680(a), which bars "[a]ny 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." *See* 647 F. Supp. 2d at 699-732. The court held that the exception does not apply because environmental impacts analyses that the Corps had prepared pursuant to the National Environmental Policy Act ("NEPA") were, in the court's view, inadequate. *See id.* at 730. The court declared that "[h]ad the Corps adequately reported under the NEPA standards, their activities and the effect on the human environment would have had a full airing." *Id.* at 731. The court further held that the government

decisions at issue in this case were not susceptible to the policy judgments that are protected under the discretionary function exception. *Id.* at 706.

3. The district court entered judgment in favor of the United States on the claims of the two plaintiffs (Norman and Monica Robinson) who resided in New Orleans East. Those plaintiffs alleged that the Corps was negligent in failing to construct a "surge protection barrier" that, they claimed, would have counteracted a "funnel effect" caused by the design of MR-GO and the LPV levees. *See id.* at 696-97. The court found that the Robinsons did not establish negligence and that their claims implicated the bars against suit imposed by the Flood Control Act and the discretionary function exception. *See id.* at 696-97, 736. Separately, the court limited the damages awarded to two plaintiffs (Lucille and Anthony Franz) who resided in the St. Bernard Polder. *See id.* at 735-36. These rulings are potentially at issue on plaintiffs' cross-appeal.

STATEMENT OF FACTS

I. Factual Background

A. Congress's Authorization of the MR-GO Shipping Channel

New Orleans is located on the southern shore of Lake Pontchartrain, about 60 miles from the Gulf of Mexico. The Mississippi River snakes west to east through much of the city before turning south toward the Gulf. The Inner Harbor Navigation Canal ("IHNC"), which runs north/south through the City, connects the

Mississippi River to Lake Pontchartrain. In relevant part, the Gulf Intracoastal Waterway runs east/northeast from the IHNC Canal to Rigolets. *See* GRE338-39 (maps).

In 1956, Congress authorized the construction of the Mississippi River-Gulf Outlet ("MR-GO"), a deep-draft shipping channel that extends for 60 miles southeast from New Orleans to the Gulf of Mexico. *See* Pub. L. No. 84-455, 70 Stat. 65 (1956). MR-GO is coextensive with the Gulf Intracoastal Waterway for about six miles; this stretch of MR-GO is referred to as Reach 1. The remainder of MR-GO, which runs southeast from the Gulf Intracoastal Waterway to the Gulf of Mexico, is referred to as Reach 2. *See* 647 F. Supp. 2d at 649-50.

When Congress authorized construction of MR-GO, Congress directed that the channel should be built "substantially in accordance with the recommendation of the Chief of Engineers contained in House Document Numbered 245, Eighty-second Congress[.]" Pub. L. No. 84-455, 70 Stat. 65 (1956). That recommendation called for the channel to be 36 feet deep and 500 feet wide, increasing to 38 feet deep and 600 feet wide at the Gulf of Mexico. *See* GRE313 (H.R. Doc. No. 82-245, at 5 (DX573)).

Although the Corps anticipated that the banks of the MR-GO channel would erode over time, the Corps' design for MR-GO did not provide for "armoring" the banks against erosion or include such "'channel protection in the overall cost of the project.'" 647 F. Supp. 2d at 654 (quoting GRE317 (MR-GO Design Memorandum

1-B, ¶ 19 (May 1959) (PX0699))). The design memorandum stated: "'No channel protection is recommended initially; however, erosion due to wave wash in open areas can be expected in the upper part of the channel slope where the peat and highly organic clays are exposed. Protection for this area can be provided if and when the need for it becomes necessary. No channel protection is included in the overall cost estimate of the project[.]" *Ibid.*; *see also* GRE319 (MR-GO Design Memorandum No. 2, ¶ 47 (June 1959) (DX1042)) ("Bank protection works to prevent this anticipated erosion is not recommended as a project feature, nor included in the costs.").

B. Congress's Authorization of the LPV Hurricane and Flood Protection Project for New Orleans

1. In 1955,"[a]t approximately the same time as the MRGO was on the drawing board," Congress "authorized the Corps to study projects to protect areas along the eastern and southern coasts [of the United States] from hurricane storm surges." 647 F. Supp. 2d at 651. These projects included plans for a hurricane protection system for the New Orleans area.

In October 1965, in the immediate wake of Hurricane Betsy, Congress passed the Flood Control Act of 1965, Pub. L. No. 89-298, which created the Lake Pontchartrain and Vicinity, Hurricane Protection Project ("LPV"). Like MR-GO, the LPV hurricane protection system for New Orleans was to be built "'substantially in

accordance with the recommendations of the Chief of Engineers[.]'" 647 F. Supp. 2d at 652 (quoting the Flood Control Act of 1965).

The LPV was designed to address natural and manmade factors that might contribute to hurricane flooding in New Orleans, including flood risks posed by the new MR-GO shipping channel, and it is "pursuant to that authorization that the levees involved in this litigation were created." *Ibid.* The recommendations of the House and Senate committee reports included the "construction of a new levee along [MR-GO] . . . to prevent entry of lake surges into the developed areas." H.R. Rep. No. 89-973, at 77 (1965); S. Rep. No. 89-464, at 121 (1965). The new flood protection structures that the Corps would construct alongside MR-GO would come in part from the MR-GO channel itself. The levees were to be "constructed of hydraulic material obtained from the Mississippi River and the MR-GO[.]" 577 F. Supp. 2d at 814 (citation omitted).

2. Construction of the LPV hurricane protection system began after Congress provided funds in 1966, three years after MR-GO became operational. *See ibid.* The Chalmette Area Plan "provided the design for hurricane protection levees extending along the south bank of the MRGO from the IHNC to Bayou Lawler and from Bayou Lawler to the Mississippi River at Violet." *Ibid.* The Chalmette Extension "provided protection to a large area by extending the levee southward along the MRGO past Bayou Dupre to Verret and from there westerly to the Mississippi River

levee at Caernarvon." *Ibid.* In total, the LPV levees run alongside MR-GO for about 18 miles, from the channel's origin at the Inner Harbor Navigation Canal to Verret in St. Bernard Parish. *See* GRE34 (Reconnaissance Report 14 (1988) (DX1057)).

To determine the design height for the LPV levees, the Corps, together with the U.S. Weather Bureau, created a model known as the "Standard Project Hurricane" ("SPH"). *See* 647 F. Supp. 2d at 651. A Standard Project Hurricane "is one that may be expected from the most severe combination of meteorological conditions that are considered reasonably characteristic of the region." GRE326 (H.R. Doc. No. 89-231, at 46 (July 1965) (DX0610)). For purposes of the LPV, the Standard Project Hurricane was a hurricane of such severe magnitude that it would be estimated to strike the region once every 200 years. *Ibid.*

"The LPV was to provide a degree of protection equivalent to the surge and wave action predicted to result from the SPH parameters." 647 F. Supp. 2d at 651. Based on the SPH model, the Corps proposed a design height for the levee along MR-GO of 13 to 16 feet, *see* GRE332 (H.R. Doc. No. 89-231, at 65 (July 1965) (DX0610)), which was later raised to 17.5 feet after Hurricane Betsy, *see* GRE335-36 (LPV Design Memorandum No. 3, at A-B (Nov. 1966) (DX1719)). At that height, the levees were designed to withstand a storm surge of 13 feet. *See* GRE337 (LPV Design Memorandum No. 3, at 8 (DX1719)).

3. As discussed above, the Corps' design for MR-GO did not provide for armoring the banks of the channel to prevent erosion. When the Corps subsequently designed the LPV, it proposed to modify MR-GO to provide "[r]iprap foreshore protection against erosion by wave wash from shipping[.]" GRE332 (H.R. Doc. No. 89-231, at 65 (July 1965) (DX0610)); *see also* 647 F. Supp. 2d at 656. In 1967, the Corps' Chief of Engineers wrote to the Chairman of the Senate Appropriations Committee and warned that "'construction of the [MR-GO] navigation project exposed these levees and the foreshore between them and the channel to direct attack with resultant damage from waves generated by seagoing vessel utilizing the waterway.'" 647 F. Supp. 2d at 656-57 (quoting Letter of Nov. 27, 1967, from Brigadier General H.R. Woodbury, Jr., to the Hon. Carl Hayden, Chairman of the Senate Committee on Appropriations). The letter advised the Chairman that "'[t]he [MR-GO] navigation project should have included adequate provisions for protecting these levees and their foreshore from this damage.'" *Ibid.*

In 1985, Congress provided funding to implement foreshore protection for the south (levee-side) bank of MR-GO, and construction of that foreshore protection project was completed in 1986. *See id.* at 658. In 1991, Congress provided funding to implement foreshore protection for parts of the north (un-leveed) bank of MR-GO, and construction of that project was completed in 1993. *See id.* at 663. Additional

foreshore protection work was done after 1996, when Congress directed the Corps to use available operation and maintenance funds for such projects. *See id.* at 664.

II. District Court Proceedings

A. The levees and other flood protection works that were constructed pursuant to the LPV failed to prevent the massive flood damage caused by Hurricane Katrina. "Clearly, Hurricane Katrina was one of the most devastating hurricanes that has ever hit the United States, generating the largest storm surge elevations in the history of the United States." 647 F. Supp. 2d at 678.

Katrina significantly exceeded the parameters of the Standard Project Hurricane that the levees surrounding New Orleans were designed to withstand. When Katrina made landfall, its winds were 125 miles per hour with a radius of 37 miles, which made Katrina "9 to 14 miles larger in size than a normal hurricane." 647 F. Supp. 2d at 678-79. "Obviously, a storm of such intensity creates an immense storm surge that is a wind generated process." *Id.* at 679. Katrina produced a "still water" storm surge that measured as high as 18 feet, *id.* at 681, exceeding even that of a "probable maximum hurricane," which is "the most likely worst case that you'll ever have." USCA5 19902 (Trial Transcript 3651, 3653 (Jarvinen)). The storm overwhelmed numerous levees and floodwalls in the New Orleans area, and at one point in Katrina's aftermath "approximately eighty percent of the city was submerged in water." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 195-96 (5th Cir. 2007).

B. Following Hurricane Katrina, the Corps received approximately 500,000 administrative claims under the FTCA that sought recovery for property damage and personal injury caused by flooding. The vast majority of these claims remain pending before the agency and may be the subject of future litigation.

To date, approximately 400 suits have been filed against the United States or have named the United States as a third-party defendant. One of these cases is *Robinson v. United States*, the subject of this appeal. The suits against the United States, including *Robinson*, were consolidated with suits against private defendants under the caption *In re Katrina Canal Breaches Consolidated Litigation*. *See* GRE1.

In related litigation, the district court denied motions to dismiss claims against private insurers, holding that the claims did not fall within the scope of the flood exclusions in the plaintiffs' insurance policies. On interlocutory appeal, this Court reversed, holding that "the flood exclusions in the plaintiffs' policies unambiguously preclude their recovery." *In re Katrina Canal Breaches Litig.*, 495 F.3d at 196.

C. This case proceeded to trial, and the district court stayed trial in other cases against the United States pending its resolution of the claims presented by the seven plaintiffs here. The court repeatedly rejected the government's threshold contentions that this suit against the United States is barred by the Flood Control Act and the FTCA's discretionary function exception. *See* 471 F. Supp. 2d 684 (E.D. La. 2007) (denying motion to dismiss); Docket No. 2842 (declining to certify order for

interlocutory appeal); 577 F. Supp. 2d 802 (E.D. La. 2008) (denying summary judgment motion); 627 F. Supp. 2d 656 (E.D. La. 2009) (denying renewed motion); 647 F. Supp. 2d 644 (E.D. La. 2009) (rejecting renewed arguments after trial).

After trial, the district court held that the United States is liable for flood damage in the St. Bernard Polder, which includes the neighborhoods of Chalmette and the Lower Ninth Ward. *See* 647 F. Supp. 2d at 679-80, 735-36. On that basis, the court entered judgment for five of the seven plaintiffs. The court held that the United States is not liable for flood damage in New Orleans East, however, *see id.* at 696-97, 736, and also limited the damages awarded to the plaintiffs who resided in the St. Bernard Polder, *see id.* at 734-36. Those rulings are potentially at issue on plaintiffs' cross-appeal.[2]

In imposing liability, the district court held the United States liable for flood damage that occurred when the Reach 2 levee breached during Hurricane Katrina. The court concluded that the Reach 2 levee breached due to the combined effect of a loss of levee height and hurricane-generated waves on MR-GO that created a more forceful wave attack on the front of the levee. *See id.* at 697. The court attributed the

[2] In separate litigation, plaintiffs seek to recover from the United States for flood damage caused by breaches in floodwalls at the 17th Street Canal, the London Avenue Canal, and the Orleans Avenue Canal. *See In re Katrina Canal Breaches Consolidated Litig.*, 533 F. Supp. 2d 615 (E.D. La. 2008). The district court held that the claims are barred by the Flood Control Act and discretionary function exception, and the plaintiffs have appealed. *See* Case No. 10-31054 (5th Cir.).

force of the waves and the breach of the levee to the Corps' failure to armor the banks of MR-GO against erosion at an early enough point in time to prevent the channel from widening beyond its original design dimensions and to protect its banks. *See id.* at 653-676, 697. The court concluded that the widening of the channel reduced the Reach 2 levee's ability to withstand Katrina by causing a reduction in the height of the levee, *see id.* at 671-74, a reduction in berm that extended from the base of the levee to the bank of the MR-GO channel, *see id.* at 674-75, an increase in the intensity of the waves that struck the levee during Katrina, *see id.* at 675, and a reduction in vegetation and wetlands that would have decreased the force of the storm-generated waves, *see id.* at 675-76.

The district court accepted plaintiffs' contention that the Reach 2 levee would not have breached during Katrina if the MR-GO channel had been confined to its original design dimensions, rather than allowed to widen. *See id.* at 681 ("Had the Katrina event occurred with the MRGO as designed, the cataclysmic flooding which occurred in the St. Bernard Polder would not have happened."). The court held that the Corps was 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," in failing "to warn Congress officially and specifically" that foreshore protection was needed, and in not "properly prioritizing" requests for congressional funding. *Id.* at 706.

SUMMARY OF ARGUMENT

Hurricane Katrina visited extreme loss and suffering on the people of New Orleans. The storm "was one of the most devastating hurricanes that has ever hit the United States, generating the largest storm surge elevations in the history of the United States." 647 F. Supp. 2d at 678. The levees and other flood control measures that were constructed as part of the Lake Pontchartrain and Vicinity, Hurricane Protection Project ("LPV") failed to contain the flood waters, and eighty percent of the City was submerged.

Plaintiffs seek to recover from the United States for damages that they sustained during the floods that followed the breach of the Reach 2 levee, which had been constructed as part of the LPV and which runs alongside a stretch of the MR-GO channel. Plaintiffs claim that the effectiveness of the Reach 2 levee was reduced by the failure of the Army Corps of Engineers to armor the banks of the MR-GO channel at an early enough time to prevent the banks from eroding. They contend that if the banks of the channel had not been allowed to widen, the Reach 2 levee would have contained the flood waters. Plaintiffs' claims are barred by two separate provisions of federal law.

I. The Flood Control Act of 1928 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. "It is thus clear from § 702c's plain language

that the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." *United States v. James*, 478 U.S. 597, 605 (1986). The Supreme Court explained that § 702c "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." *Id.* at 608.

Plaintiffs seek to recover damages for flooding that the LPV federal flood control project could not control. Thus, the plain and "most emphatic language" of § 702c requires dismissal of this case.

In ruling to the contrary, the district court declared that the Corps' challenged conduct was "'unconnected with flood control projects.'" 577 F. Supp. 2d at 820 (quoting *Graci v. United States*, 456 F.2d 20, 26 (5th Cir. 1971)) (emphasis omitted). That conclusion is implausible on its face and finds no support in *Graci*, which arose out of flooding caused by Hurricane Betsy in 1965. At that time, the United States had not yet constructed the hurricane protection works at issue here, and the claims were thus "unconnected with flood control projects." *Graci*, 456 F.2d at 27.

Following Hurricane Betsy, Congress authorized the LPV, which, the district court recognized, included the Reach 2 levee that runs alongside the MR-GO channel. *See* 647 F. Supp. 2d at 652. In contrast to *Graci*, the claims made here are very much connected with a flood control project. Indeed, plaintiffs' theory, even

taken on its own terms, involves government conduct that is directly connected to a flood control project. The conduct that lies at the heart of plaintiffs' case — the government's failure to armor the banks of MR-GO at an early point in time — is relevant only because of its asserted subsequent impact on the Reach 2 levee, which forms part of the LPV flood control system. The original design for MR-GO did not include armoring of the channel's banks. Armoring became crucial, in the district court's view, only when the Corps constructed the LPV flood control measures and "recognized or should have recognized" that the failure to armor the banks caused "extreme degradation . . . to the Reach 2 Levee." *Id.* at 706.

Plaintiffs' theory of liability is thus predicated on the existence of the Reach 2 levee that was built as part of the LPV hurricane protection project. Their argument is that the levee would have contained flood waters if not for government negligence. That is precisely the type of claim that the Flood Control Act bars.

II. Plaintiffs' claims are independently barred by the discretionary function exception to the Federal Tort Claims Act, which bars claims that arise from the exercise of an agency's discretionary function, whether or not the discretion was abused. A specific, mandatory directive may dictate employee conduct and thus leave no discretion to exercise, *see Freeman v. United States*, 556 F.3d 326, 337 (5th Cir. 2009), but such discretion is not removed unless "a 'federal statute, regulation, or policy

specifically prescribes a course of action for an employee to follow[.]'" *Ibid.* (quoting *United States v. Gaubert*, 499 U.S. 315, 322 (1991)).

A. The district court did not identify any statute, regulation or other directive that specifically required the Corps to armor the banks of MR-GO at some earlier point in time. Instead, the court declared that the Corps had failed to comply adequately with NEPA requirements for analyzing environmental impacts and opined that this failure somehow removed the Corps' substantive discretion.

The district court correctly recognized, however, that NEPA's requirements do not impose substantive constraints on agency action. NEPA's requirements are "strictly procedural"; they are designed to inform the government's exercise of discretion rather than to mandate a particular government action. *City of Shoreacres v. Waterworth*, 420 F.3d 440, 450 (5th Cir. 2005). An alleged government failure to comply with the procedural requirements of an environmental statute does not vitiate the operation of the discretionary function exception, because the government's substantive conduct is not prescribed by the statute. *See Montijo-Reyes v. United States*, 436 F.3d 19, 26 (1st Cir. 2006). Even if the Corps had prepared different or more detailed environmental analyses, NEPA would not have mandated the course of action that the district court deemed appropriate.

The district court's reasoning is further flawed because NEPA's procedural requirements are themselves imbued with discretion. Determining the "significance"

of environmental impacts "inherently involves some sort of a subjective judgment call" and an agency's determination thus receives "a considerable degree of deference." *Spiller v. White*, 352 F.3d 235, 240, 244 n.5 (5th Cir. 2003). Moreover, NEPA does not permit private damages suits, which, this Court observed, would interfere with an agency's ability to make the judgments that NEPA requires. *See Noe v. Metro. Atlanta Rapid Transit Auth.*, 644 F.2d 434, 435 (5th Cir. 1981).

The district court's reliance on the NEPA also highlights broader failures in its reasoning. Nothing in the NEPA process could have mandated foreshore protection on any timetable. Thus, the district court could only speculate that "[h]ad the Corps adequately reported under the NEPA standards, their activities and the effect on the human environment would have had a full airing." 647 F. Supp. 2d at 731. Such conjecture that more extensive reporting might have stirred more congressional debate which might have led to funding for foreshore protection at an earlier point in time is plainly not a specific mandate to provide foreshore protection.

B. It is equally clear that the planning and oversight of the LPV and MR-GO implicated the type of policy-based judgments that are protected from suit by the discretionary function exception. The district court recognized that the original design for MR-GO was shielded from suit, *id.* at 702, and it provided no basis for ruling that subsequent modifications to the plan, which called for foreshore protection, were any different in that regard. In holding that the discretionary

function exception did not bar the claims here, the court ultimately concluded that the exception does not protect negligent government conduct that endangers human life. The district court declared that the Corps' "failure to maintain the MRGO properly compromised the Reach 2 Levee and created a substantial risk of catastrophic loss of human life and private property" and opined that "Congress would never have meant to protect this kind of nonfeasance" from review in a tort suit. 647 F. Supp. 2d at 711, 723.

There is no doubt, however, that the discretionary function exception applies even if government conduct jeopardizes safety. That principle was established by the Supreme Court decades ago, and this Court already has held that the discretionary function barred suit against the government for failures in implementing its emergency response plan in the aftermath of Katrina — "even its failure to provide food, water, shelter, medical assistance, and transport[.]" *Freeman*, 556 F.3d at 337-38.

The government constructed flood protections for New Orleans to avert or mitigate the impact of a natural disaster. The failure of those protections is tragic. But, like the conduct at issue in *Freeman*, the conduct here involved discretionary, policy-based decisions. Accordingly, as in *Freeman*, plaintiffs' damages claims are barred by the discretionary function exception.

STANDARD OF REVIEW

The question whether this suit is barred by the Flood Control Act of 1928 and the FTCA's discretionary function exception is subject to *de novo* review in this Court. *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840, 841 (5th Cir. 2005); *St. Tammany Parish ex rel. Davis v. Federal Emergency Management Agency*, 556 F.3d 307, 315 (5th Cir. 2009). Fact findings are reviewed for clear error. *Lehmann v. GE Global Insurance Holding Corporation*, 524 F.3d 621, 624 (5th Cir. 2008).

ARGUMENT

I. THE FLOOD CONTROL ACT'S LIMITATION ON GOVERNMENT LIABILITY BARS THIS SUIT.

A. Claims for Damage from Flood Waters That a Federal Flood Control Project Failed To Contain Are Barred by 33 U.S.C. § 702c.

1. The Flood Control Act of 1928 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. The Supreme Court in *United States v. James*, 478 U.S. 597 (1986), declared that this provision "outlines immunity in sweeping terms" and found it "difficult to imagine broader language." *Id.* at 604. The Court concluded: "It is clear from § 702c's plain language that the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control

project for purposes of or related to flood control, as well as to waters that such projects cannot control." *Id.* at 605.

The Supreme Court approved the reasoning of the Eighth Circuit, which explained that "§ 702c's language 'safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language.'" *Id.* at 608 (quoting *National Manufacturing Co. v. United States*, 210 F.2d 263, 270 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954)). The Eighth Circuit there had rejected an attempt to avoid § 702c's bar by a plaintiff who claimed that flood damage resulted from the government's failure to provide adequate warning that the flood control works would fail to prevent flooding. The Eighth Circuit stressed that although § 702c "does not limit the bar against such recovery to cases where floods or flood waters are the sole cause of damages," it does "bar liability of any kind from damages 'by' floods or flood waters" and "for damages that result (even indirectly) 'from' floods." *National Manufacturing*, 210 F.2d at 271.

This Court, in the decision that the Supreme Court reversed in *James*, had adopted a narrow construction of § 702c that explicitly rejected the reasoning of *National Manufacturing*. This Court had concluded that "[o]ur legislative analysis does not bear out the construction that *National Manufacturing* gave the immunity provision" and had declared that "it is simply impossible 'to accept this immunity provision, reasonably related to government involvement in flood control programs,

as an absolute insulation from liability for all wrongful acts in other situations.'" *United States v. James*, 760 F.2d 590, 601 (5th Cir. 1985) (*en banc*) (quoting *Graci v. United States*, 456 F.2d 20, 26 (5th Cir. 1971)). In reversing this Court, the Supreme Court in *James* approved the broader reading of § 702c on which *National Manufacturing* and later decisions of the Eighth Circuit were premised. *See James*, 478 U.S. at 603 n.4 (citing *Portis v. Folk Construction Co.*, 694 F.2d 520, 522 (8th Cir. 1982)).

The Supreme Court more recently explained that § 702c's bar to suit depends on whether the waters that a flood control project failed to contain were in fact "floods or flood waters." *See Central Green Co. v. United States*, 531 U.S. 425 (2001). The Court noted that in *James*, the "fact that the injuries were caused by 'flood waters' was undisputed." *Id.* at 429. By contrast, in *Central Green*, the "damage may have been caused over a period of time in part by flood waters and in part by the routine use of the canal when it contained little more than a trickle." *Id.* at 436. Accordingly, the Court remanded for further proceedings. The Court explained 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.

2. There is no doubt that the waters that caused the damage at issue in this case were flood waters. This Court explained in the parallel suit against insurance companies that "[w]hen a body of water overflows its normal boundaries and

inundates an area of land that is normally dry, the event is a flood. This is precisely what occurred in New Orleans in the aftermath of Hurricane Katrina." *In re Katrina Canal Breaches Litig.*, 495 F.3d at 214. This Court noted that canals overflowed their normal channels, and that "the levees built alongside the canals to hold back their floodwaters failed to do so. As a result, an enormous volume of water inundated the city. In common parlance, this event is known as a flood." *Ibid.* Thus, this Court held that flood control exclusions in the insurance policies applied, and that the district court's contrary conclusion was erroneous. *Id.* at 221; *see also id.* at 212 n.16 (noting that "the scope of the government's immunity may be broader than the [flood] exclusions in the policies before us, which we must strictly construe").

It is similarly incontrovertible that the damage at issue here was caused by flood waters "that a federal project [was] unable to control." *Central Green*, 531 U.S. at 431. Plaintiffs contend, and the district court found, that the flooding of the St. Bernard Polder occurred because of the failure of the Reach 2 levee that was built alongside MR-GO. *See*, *e.g.*, 647 F. Supp. 2d at 679. There is no dispute that the levee was constructed by the Corps as part of a federal flood control project. The district court expressly acknowledged that the levees involved in this litigation were created pursuant to Congress's authorization of the LPV. *See id.* at 652.

These central and undisputed facts require that this case be dismissed. The case falls squarely within the scope of § 702c and the Supreme Court's holding that

suits for damage caused by flood waters that a federal flood control project failed to contain are barred. The district court's imposition of liability under these circumstances is flatly at odds with the terms of the Flood Control Act and the decisions of the Supreme Court.

B. The District Court Misunderstood the Supreme Court's Decision in *Central Green* and This Court's Decision in *Graci*.

The district court allowed plaintiffs' suit to proceed on the theory that the Reach 2 levee would have contained the flood waters if not for the MR-GO channel, which the court repeatedly characterized as "extrinsic" to the LPV. *See, e.g.*, 577 F. Supp. 2d at 805, 822, 825, 826; 647 F. Supp. 2d at 699. The court did not attempt to reconcile its holding with the unambiguous statutory command of the Flood Control Act of 1928 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. Nor did the court identify any case in which recovery was allowed against the government for flood damage that occurred because "a flood control project . . . failed." 577 F. Supp. 2d at 821.

The district court repeatedly declared that its Flood Control Act ruling was based on its reading of the Supreme Court's decision in *Central Green* and this Court's decision in *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971). *See* 647 F. Supp. 2d at 699 (explaining that the court had, throughout the litigation, "consistently rejected

the Government's reliance on § 702c to protect its actions from this suit ... [b]ased on the Court's reading of" *Central Green* and *Graci*). The court misunderstood those two decisions, however, and its Flood Control Act ruling rests on an error of law.

Graci, the district court recognized, did not involve the alleged failure of any federal flood protection measures. The plaintiffs in that case sought to recover for property damage incurred during Hurricane Betsy in 1965 that they claimed was caused by the negligent construction of MR-GO. At the time that Hurricane Betsy struck, Congress had not yet authorized the hurricane flood protection measures at issue here. The issue framed by this Court was thus whether § 702c created "a wholesale immunization of the Government from all liability for floodwater damage *unconnected with flood control projects*." *Graci*, 456 F.2d at 27 (emphasis added). Because MR-GO was a navigation channel that, at that time, had no connection to any federal flood control project, *see id.* at 22, this Court concluded that § 702c did not apply and allowed the suit to proceed.[3]

In this case, the district court repeatedly declared that *Graci* "focused on the precise question that is once again put before this Court" — whether § 702c

[3] On remand in *Graci*, the district court entered judgment for the United States after a trial, finding that the plaintiffs had failed to establish any causal connection between the flooding and MR-GO or any negligence in the design, construction, or operation of MR-GO. *See Graci v. United States*, 435 F. Supp. 189, 196 (E.D. La. 1977).

provides immunity for negligence "'*unconnected with flood control projects.*'" 577 F. Supp. 2d at 820 (quoting *Graci,* 456 F.2d at 26); *see also* 471 F. Supp. 2d at 691 (same). But Hurricane Katrina — unlike Hurricane Betsy — involved the inability of federal flood control works to contain the flood waters. When Congress approved the LPV in the aftermath of Hurricane Betsy, Congress authorized the federal hurricane flood control measures that are at issue in this case. *See* 647 F. Supp. 2d at 652. These protections were explicitly designed to respond to all sources of flooding, including flooding from the MR-GO channel. The Chief of Engineers' report approved by Congress detailed a comprehensive system of levees and floodwalls to combat the flood risk created by these various factors, including "construction of a new levee extending from the Inner Harbor Canal along the south side of the Gulf Outlet Channel to Bayou Dupre, thence westward to the Mississippi River levee at Violet[.]" GRE325 (H.R. Doc. 89-231, at 9 (July 1965) (DX0610)).

These federal flood control measures failed to contain the floods caused by Hurricane Katrina. Accordingly, the district court correctly acknowledged that here, unlike in *Graci*, "there is a flood control project which has failed[.]" 577 F. Supp.2d at 821. It should therefore have been evident that this case does *not* pose the "precise question" that was considered in *Graci.* 577 F. Supp. 2d at 820.

To conclude that this crucial distinction between this case and *Graci* was nevertheless immaterial, the district court invoked the Supreme Court's decision in

Central Green. *See id.* at 822-25. But nothing in *Central Green* suggested that the United States can be held liable for damage caused by the failure of federal levees to contain flood waters. The issue in *Central Green* was whether the Flood Control Act's bar against suit extends to damage from waters that are *not* flood waters, if the waters are carried through a federal project that can be used for flood control. The damage at issue in *Central Green* was caused by subsurface waters from a multi-purpose irrigation canal that also could be used to divert flood waters.

Central Green left no doubt that the Flood Control Act would bar suit if the damage had resulted from diverted flood water, and it explicitly reaffirmed that the Act bars suit for damage that results from flood waters "that a federal project is unable to control." *Central Green,* 531 U.S. at 431. The Court merely ruled that in the case then before it, it was not clear whether the damage had, in fact, resulted from flood water or from "the routine use of the canal when it contained little more than a trickle." *Id.* at 436. Accordingly, the Supreme Court remanded so that the district court could 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.

Central Green thus confirmed that the Flood Control Act bars suit for damage that results from flood "waters that a federal project is unable to control." *Id.* at 431.

The decision also clarified that the Flood Control Act immunity, while very broad, does not bar suit for damages that are not caused by floods or flood waters.

That limitation has no bearing on this case. Plaintiffs' claims indisputably arose from flood waters that a federal flood control project was unable to control. *Central Green* provides no basis to disregard the Flood Control Act's clear bar to suit.

Indeed, far from being "unconnected with flood control projects," *Graci*, 456 F.2d at 27, the claims in this case are predicated on the existence of the Reach 2 levee that was constructed as part of the LPV flood control system. The "armoring" of MR-GO is relevant to the district court's analysis only because of the implications for the Reach 2 levee. The government's purported negligence was the "failure to implement foreshore protection when it recognized or should have recognized the extreme degradation that failure caused to the Reach 2 Levee." 647 F. Supp. 2d at 706. That is another way of saying that the government did not take adequate measures to ensure that the Reach 2 levee would be able to restrain flood waters. *See In re Katrina Canal Breaches Litig.*, 495 F.3d at 218 ("If a levee fails despite not being overtopped by the floodwaters, it is because the levee was not adequately designed, constructed, or maintained. If a levee fails due to the floodwaters overtopping it or loosening its footings, it is because the levee was not built high enough or the footings were not established strongly or deeply enough.").

In sum, plaintiffs' suit seeks to recover for damage from flood waters that a federal flood control project failed to contain, and it is barred by the unambiguous language of § 702c. The district court could not disregard that bar by asserting that the MR-GO channel is like a hypothetical "Navy vessel" that "lost control and broke through a levee." 647 F. Supp. at 648-49, 656, 680-81. Under *James*, the United States cannot be held liable for a flood control project's failure to control flood waters, regardless of the reason. In any event, MR-GO is not a Navy vessel; it is a "body of water" that the LPV levee was built to contain. *In re Katrina Canal Breaches Litig.*, 495 F.3d at 214, 216.

II. PLAINTIFFS' CLAIMS ARE BARRED BY THE FTCA'S DISCRETIONARY FUNCTION EXCEPTION.

A. The FTCA Does Not Waive Immunity for the Discretionary, Policy-Based Conduct at Issue Here.

Independent of the Flood Control Act's bar against suit, plaintiffs' claims are also foreclosed by the discretionary function exception of the FTCA, which bars suit on any claim that is "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). This 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."

United States v. Varig Airlines, 467 U.S. 797, 808 (1984). The "purpose of the exception 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." *Spotts v. United States*, 613 F.3d 559, 568 (5th Cir. 2010) (quoting *United States v. Gaubert*, 499 U.S. 315, 323 (1991)) (other citations omitted).

The discretionary function exception thus protects "the discretion of the executive or the administrator to act according to one's judgment of the best course." *Dalehite v. United States*, 346 U.S. 15, 34 (1953). By its plain terms, the statute protects discretionary conduct "'whether or not the discretion involved be abused.'" *St. Tammany Parish, ex rel. Davis v. Federal Emergency Management Agency*, 556 F.3d 307, 322 n.9 (5th Cir. 2009) (quoting 28 U.S.C. § 2680(a)).

"The Supreme Court has developed a two-part test for determining whether the federal government's conduct qualifies as a discretionary function or duty." *Freeman v. United States*, 556 F.3d 326, 336-37 (5th Cir. 2009). First, the conduct must involve "'an element of judgment or choice.'" *Id.* at 337 (quoting *Gaubert*, 499 U.S. at 322) (other citations omitted). "If a statute, regulation, or policy leaves it to a federal agency or employee to determine when and how to take action, the agency is not bound to act in a particular manner and the exercise of its authority is discretionary." *Ibid.* "On the other hand, '[t]he requirement of judgment or choice is not satisfied" and the discretionary function exception does not apply 'if a federal

statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive.'" *Ibid.* (quoting *Gaubert*, 499 U.S. at 322) (other citations omitted).

Second, the discretionary function exception "protects only governmental actions and decisions based on considerations of public policy.'" *Ibid.* (quoting *Gaubert*, 499 U.S. at 323). The "proper inquiry" is not whether the decisionmaker "in fact engaged in a policy analysis when reaching his decision but instead whether his decision was 'susceptible to policy analysis.'" *Spotts*, 613 F.3d at 572 (quoting *Gaubert*, 499 U.S. at 325). There is a "strong presumption" that "where permitted by the relevant statute or regulation, the exercise of choice or judgment implicates relevant policy." *Freeman,* 556 F.3d at 341 (citing *Gaubert,* 499 U.S. at 324).

Plaintiffs here challenge the government's failure to ensure that the Reach 2 levee would be able to contain flood waters. Whether the analysis focuses on decisions made with regard to the LPV generally or with regard to MR-GO within that broader context, the Corps' actions are quintessentially of the type protected by the discretionary function exception. In designing MR-GO and the LPV, and in implementing those plans, the Corps sought to achieve various congressionally-prescribed policy objectives with the resources that Congress provided.

B. There Was No Requirement That the Corps Implement a Foreshore Protection Project at a Particular Point in Time.

1. Neither the design of MR-GO nor the design of the LPV required foreshore protection on a particular schedule.

The district court concluded that the government should have armored the banks of MR-GO at a sufficiently early point in time to prevent erosion of the banks of the channel that affected the Reach 2 levee. But neither the 1956 authorization of MR-GO, the 1965 authorization of the LPV, nor any subsequent directive by Congress or the Corps specifically required the course of action that the district court later concluded would have been appropriate.

The district court explicitly recognized that the plans for MR-GO contained no requirement to armor its banks. The design for MR-GO did not provide for "armoring" the banks of the channel against erosion or include such "'channel protection . . . in the overall cost of the project.'" 647 F. Supp. 2d at 654 (quoting GRE317 (MR-GO Design Memorandum 1-B, ¶ 19 (May 1959) (PX0699))). The Corps' design memorandum stated: "'No channel protection is recommended initially; however, erosion due to wave wash in open areas can be expected in the upper part of the channel slope where the peat and highly organic clays are exposed. Protection for this area can be provided if and when the need for it becomes necessary. No channel protection is included in the overall cost estimate of the project[.]" *Ibid.*; *see also* GRE319 (MR-GO Design Memorandum No. 2, ¶ 47 (June

1959) (DX1042)) ("Bank protection works to prevent this anticipated erosion is not recommended as a project feature, nor included in the costs."). Thus, although the Corps's design memoranda indicated that bank protection was technologically feasible and might be deemed necessary at some future time, armoring was deliberately omitted from MR-GO's design.

Rather than attempt to prevent anticipated erosion by installing foreshore protection or other bank protective works, MR-GO's design "presumed that sufficient rights of way will be furnished by local interests to preclude use of channel protection or that additional rights of way will be furnished when the need arises." GRE315 (MR-GO Design Memorandum No. 1-A, at ¶ 16 (1957) (JX139)); *see also* GRE321 (MR-GO Design Memorandum No. 1-C, at ¶ 17 (1959) (JX140)) ("[S]ufficient rights-of-way are being provided by local interests to preclude need for channel protection and no protection is included in the overall cost estimate of the project.").

The district court expressly held that these design features were "shielded by the discretionary function exception." 647 F. Supp. 2d at 702. The court recognized that "there was no violation of any mandate," and that "the decisions made in the construction and design of the MRGO were policy driven." *Ibid.* (citing 627 F. Supp. 2d at 689).

That ruling cannot be reconciled with the court's theory of liability. The court concluded that failure to armor MR-GO caused erosion that resulted in the breach of the Reach 2 levee. The court declared that "[h]ad the Katrina event occurred with the MRGO as designed" — that is, confined to its original dimensions — "the cataclysmic flooding which occurred in the St. Bernard Polder would not have happened." *Id.* at 681. But MR-GO's design anticipated that the banks would erode and that the channel would *not* be confined to its original design dimensions, and the design for MR-GO did not provide for armoring of the banks.

The Corps also did not contravene any mandate in the design for the LPV. The Corps' LPV design memorandum stated that "'[r]iprap foreshore protection against erosion by wave wash from shipping will be provided.'" 647 F. Supp. 2d at 656 (quoting GRE332 (H.R. Doc. No. 89-231, at 65 (July 1965) (DX0610)) (emphasis omitted). In 1967, the Corps' Chief of Engineers wrote to the Chairman of the Senate Appropriations Committee and advised that "'construction of the navigation project exposed these levees and the foreshore between them and the channel to direct attack with resultant damage from waves generated by seagoing vessel utilizing the waterway.'" 647 F. Supp. 2d at 656-57 (quoting Letter of Nov. 27, 1967, from Brigadier General H.R. Woodbury, Jr., to the Hon. Carl Hayden, Chairman of the Senate Committee on Appropriations). The letter advised the Chairman that "'[t]he navigation project should have included adequate provisions

for protecting these levees and their foreshore from this damage.'" *Ibid.* In 1985, Congress provided funding to armor the south (levee-side) bank of MR-GO, and the work on that foreshore protection project was completed in 1986. *See id.* at 658. In 1991, Congress provided funding to armor parts of the north (un-leveed) bank, and the work on that foreshore protection project was completed in 1993. *See id.* at 663. Further bank protection work was done after 1996, when Congress directed the Corps to use available operation and maintenance funds for such projects in order to minimize future dredging costs and preserve wetlands. *See id.* at 664. In addition to implementing these foreshore protection projects on the MR-GO channel, the Corps repeatedly raised the height of the federal levees through a series "lifts" constructed between 1967 and 1985, *see id.* at 673 (chart), and also implemented separate projects to address the destruction of wetlands, *see* USCA5 19755-56 (Trial Transcript 3535-36 (Russo)).

Although the district court took issue with the schedule and priorities that the Corps assigned to these projects, the court did not suggest that the Corps' approach contravened any mandate. The court declared that "[p]roper armoring of the banks before 1975 would have been an effective method to stop the lowering of the protective elevation" of the levee. *Id.* at 675. In the court's view, the Corps' attempt to deal with subsidence of the levee through a series of lifts recalled the "myth of Sisyphus and his rock." *Id.* at 674. The court concluded, in other words, that the

Corps was mistaken in the means it chose to deal with the levee's subsidence. But even assuming that it would have been wiser to armor the banks of MR-GO on the district court's timetable (and that funding would have been available), there is no doubt that the Corps had discretion to address the fortification of the Reach 2 levee by the means that it found most appropriate, using the resources that Congress provided. The district court's retrospective critique of the judgments made by the Corps underscores the discretion that was involved. *See, e.g., id.* at 662 ("Even with the knowledge that the erosion problem was potentially cataclysmic for the lives and property of those who lived in St. Bernard Parish, no move was made to use the Chief's discretionary power to supplement the [General Design Memorandum] to provide foreshore protection.").

The district court repeatedly conflated its analysis of the FTCA's discretionary function exception with its belief that the Corps had abused its discretion. In ruling that the discretionary function exception was inapplicable, the court declared that "[t]he most glaring issue the Court sees is in the context of the state negligence claim itself — [the Corps'] failure to implement foreshore protection when it recognized or should have recognized the extreme degradation that failure caused to the Reach 2 Levee." *Id.* at 706. The FTCA makes clear, however, that an inquiry into negligence is proper only if a court is first satisfied that "'the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the

regulatory regime[.]'" *St. Tammany Parish*, 556 F.3d at 315 n.3 (quoting *Gaubert*, 499 U.S. at 324-25).

Negligent implementation of government policy is shielded from suit by the discretionary function exception just as clearly as non-negligent conduct. Thus, in *Freeman*, this Court rejected the contention that the discretionary function exception was inapplicable because the government had negligently executed its National Response Plan ("NRP") in preparing for and responding to Katrina. This Court observed that "critical elements of the NRP were executed late, ineffectively, or not at all." *Freeman*, 556 F.3d at 332. Nevertheless, implementation of the directives involved judgment and choice, and "the government's conduct under the NRP — even its failure to provide food, water, shelter, medical assistance, and transport to the Convention Center and to the Cloverleaf" — was therefore shielded from suit. *Id.* at 337-38.

2. NEPA did not require foreshore protection.

The only government "mandates" that the district court identified were requirements concerning the review of environmental impacts under the National Environmental Policy Act. *See* 647 F. Supp. 2d at 717. The court did not suggest that anything in NEPA mandated foreshore protection or dictated any substantive course of action. NEPA's requirements are "strictly procedural," *City of Shoreacres v.*

Waterworth, 420 F.3d 440, 450 (5th Cir. 2005), and did not curb the Corps' discretion in determining whether to recommend or implement foreshore protection.

Under NEPA, an agency must complete an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." *Department of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004); 42 U.S.C. § 4332(C). "An agency is not required to prepare a full EIS if it determines — based on a shorter environmental assessment (EA) — that the proposed action will not have a significant impact on the environment." *Winter v. Natural Res. Def. Council, Inc.,* 129 S.Ct. 365, 372 (2008); *see also* 40 C.F.R. § 1508.9. If the federal action has not been completed, agencies have an obligation to update an EIS by filing a supplemental environmental impact statement ("SEIS") if there are "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)(ii).

Pursuant to NEPA's requirements, the Corps issued a final environmental impact statement in 1976, *see* 647 F. Supp. 2d at 724; published a supplemental report in 1985, *id.* at 728, and, between 1980 and 2004, prepared 26 environmental assessments that addressed the environmental consequences of particular dredging operations on particular sites along MR-GO. *See id.* at 724-25; *see also* USCA5 19742-43 (Trial Transcript 3522-23 (Russo)) (explaining that 80% of the dredging took place in the open water portion of the channel, which is approximately 35 miles

from the LPV levees bordering MR-GO, and that only 10% of the dredging occurred in the area where LPV levees bordered MR-GO).

The district court acknowledged that NEPA "is a procedural, not a substantive environmental statute." 647 F. Supp.2d at 717. It is "'now well settled that NEPA itself *does not mandate particular results*.'" *City of Shoreacres v. Waterworth*, 420 F.3d 440, 450 (5th Cir. 2005) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (emphasis added). Indeed, "NEPA does not prohibit the undertaking of federal projects patently destructive of the environment; it simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences." *Ibid.* (quoting *Sabine River Authority v. United States Dep't of Interior*, 951 F.2d 669, 676 (5th Cir. 1992)).

NEPA's requirements are triggered *only* when a proposed action involves the exercise of substantial discretion. "Agency decisions which 'do not entail the exercise of significant discretion' do not require an [environmental impact statement]." *American Airlines, Inc. v. United States Dep't of Transp.*, 202 F.3d 788, 803 (5th Cir. 2000) (quoting *Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Commission*, 599 F.2d 1333, 1344-1345 (5th Cir. 1979)); *see also United States Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) (because agency lacked discretion to prevent cross-border operations of Mexican trucks, NEPA analysis was not required).

The district court's reliance on NEPA to vitiate the discretionary function exception parallels the analysis that was rejected by the First Circuit in *Montijo-Reyes v. United States*, 436 F.3d 19 (1st Cir. 2006). In that case, the plaintiffs invoked alleged noncompliance with the Clean Water Act to assert that the government lacked discretion to dispose of dredged material on land adjacent to their properties. Although the Clean Water Act contained a variety of mandates, it did not require the government to select any particular disposal site or to choose any specific course for maintaining the disposal site. *See id.* at 25-26. "Thus, whether or not the Corps obtained a water quality certificate or exemption, the negligent conduct that allegedly caused Plaintiffs' damages was not forbidden." *Id.* at 26.

Because NEPA does not limit an agency's substantive discretion and does not dictate a particular course of conduct, it does not preclude operation of the discretionary function exception. The district court's analysis is further flawed because the NEPA process itself entails the exercise of significant agency discretion. For example, to determine whether to prepare an EIS rather than an Environmental Assessment, an agency must evaluation the "significance" of environmental impacts. That determination "inherently involves some sort of a subjective judgment call," and thus receives "a considerable degree of deference." *Spiller v. White*, 352 F.3d at 244 n.5; *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373, 377 (1989) (agencies must apply a "rule of reason" in deciding whether to file a supplemental

environmental impact statement, and courts must defer to "the informed discretion of the responsible federal agencies") (citation omitted); *Vieux Carre Prop. Owners Residents and Assocs., Inc. v. Pierce*, 719 F.2d 1272, 1279 (5th Cir. 1983) ("There is no hard and fast definition of 'significant' effect.'"). Thus, even if the district court were correct that the Corps' environmental analyses were not entirely adequate, that conclusion would establish, at most, that the Corps erred in exercising the discretion inherent in evaluating environmental impacts under NEPA.

This Court has long recognized that an agency's exercise of discretion in evaluating the environmental impacts of a proposed project should not be constrained by the prospect of a damages action. In holding that NEPA does not permit a suit for damages, this Court explained that NEPA was intended to provide agency decision-makers with the best projections of environmental impacts. *See Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 439 (5th Cir. 1981). This Court observed that such projections are necessarily "scientific approximations," which are unlikely to be "absolutely accurate in all cases." *Id.* at 439. And this Court explained that if agencies faced the prospect of damages actions whenever these predictions proved inaccurate, they would likely "'hedge' their estimates of the impact of a given project," which would distort their recommendations and thereby undermine NEPA's purposes. *Ibid.*

The district court's approach, by contrast, would permit a plaintiff to seek judicial review of an agency's judgments under NEPA "through the medium of an action in tort," *Spotts*, 613 F.3d at 568, and thus accomplish the same infringement on agency discretion that this Court rejected three decades ago in *Noe*. NEPA determinations are, of course, subject to judicial review under the Administrative Procedures Act. Such actions must be timely filed, *see* 28 U.S.C. § 2401(a), and judicial review is based on the administrative record, *see Sierra Club v. Peterson*, 185 F.3d 349, 369-70 (5th Cir.1999), *vacated on other grounds*, 228 F.3d 559 (5th Cir. 2000). Here, however, the district court undertook an evaluation of an environmental impact statement that the Corps issued decades ago, while acknowledging that "the Court does not have the administrative record to determine if the conclusion[s] are supported thereby[.]" 647 F. Supp.2d at 726. And, having failed to recognize the discretionary nature of the agency's determination, the court failed to accord the deference that the Corps' evaluation would have received in an APA suit.

In short, the district court seized on discretionary determinations regarding the Corps' assessment of environmental impacts to conclude that the Corps lacked discretion to armor the banks of MR-GO — conduct that, the court acknowledged, NEPA could not have required. The ruling reflects multiple legal errors and is clearly incorrect.

3. The district court's reliance on NEPA underscored the errors in its theory of causation.

The district court understood that the NEPA process could not have mandated foreshore protection on any timetable. Thus, the district court could only speculate that "[h]ad the Corps adequately reported under the NEPA standards, their activities and the effect on the human environment would have had a full airing." 647 F. Supp. 2d at 731.

That pronouncement underscores the absence of any causal nexus between the Corps' assertedly negligent conduct and the breach of the levee. The crux of the Corps' error, in the district court's view, was its failure to prompt the "full airing" that might have resulted in earlier and greater appropriations to armor the banks of MR-GO: "[T]he Corps' failure to warn Congress officially and specifically and to provide a mechanism to rectify the problem by properly prioritizing the requested funding to alleviate life threatening harm which the MRGO posed is the key." *Id.* at 706. The court elaborated: "[T]he Corps failed to inform Congress of the dangers which it perceived and/or should have perceived in the context of the environmental damage to the wetlands caused by the operation and maintenance of the MRGO; in no manner can that decision be shielded by the discretionary function exception." *Id.* at 717.

It is, to say the least, wholly conjectural to suppose that supplemental or expanded NEPA filings would have resulted in congressional appropriations to armor the banks of MR-GO on the schedule that the court believed might have avoided a breach of the Reach 2 levee. The court declared that the Corps' 1976 environmental impact statement should have addressed the "concept of wave wash" and the impact that "foreshore protection [had] on the viability of the protection that the Reach 2 Levee was to provide." *Id.* at 726-27. But the court did not suggest that Congress was *unaware* that waves on MR-GO were exposing the levee to harm. To the contrary, the court acknowledged that the Chief of Engineers wrote to the Chairman of the Senate Appropriations Committee in 1967 and "stated unequivocally" that "'construction of the navigation project exposed these levees and the foreshore protection between them and the channel to direct attack with resultant damage from waves generated by seagoing vessel[s] utilizing the waterway.'" *Id.* at 656-657 (quoting Letter of Nov. 27, 1967, from Brigadier General H.R. Woodbury, Jr., to the Hon. Carl Hayden, Chairman of the Senate Committee on Appropriations). The letter specifically advised the Chairman that "'[t]he navigation project should have included adequate provisions for protecting these levees and their foreshore from this damage.'" *Ibid.*

Similarly, the district court opined that the Corps should have filed a supplemental environmental impact statement by "no . . . later than 1988," *id.* at 730,

when the Corps' 1988 Reconnaissance Report explained that "[m]ost of the Mississippi River-Gulf Outlet is experiencing severe erosion along its unleveed banks," *id.* at 729; *see also* GRE344. The court did not suggest, however, that Congress was unaware of the conclusions of the Reconnaissance Report which, the court recognized, was prepared at Congress's direction. *See ibid.* Accordingly, the district court's own analysis provided no basis for its imposition of liability.

C. The FTCA's Discretionary Function Exception Bars This Suit Because the Challenged Decisions Were Susceptible To Policy Analysis.

1. Judgments about how to manage the relationship between the complex public works projects at issue here implicate considerations of public policy.

The Flood Control Act of 1965, which created the LPV, authorized "the construction, repair, and preservation of certain public works on rivers and harbors for navigation, flood control, and for other purposes." Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073, 1073. Like previous Flood Control Acts, it requires the Corps to make countless judgments regarding the best means of implementing individual public works projects and achieving diverse goals, while addressing the interrelationship of the various projects and their impact on surrounding lands. *See* Flood Control Act of 1917, Pub. L. No. 64-367, 39 Stat. 948, 949 (authorizing projects for "controlling the floods of the Mississippi River and continuing its improvement" and "controlling the floods, removing the debris, and

continuing the improvement of the Sacramento River"); Flood Control Act of 1936, Pub. L. No. 74-738, 49 Stat. 1570, 1572 (authorizing projects "for the benefit of navigation and the control of destructive flood waters"); Flood Control Act of 1941, Pub. L. No. 77-228, 55 Stat. 638, 639 (same); Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, 891-92 (authorizing "works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes" in the "interest of national security" and "providing an adequate reservoir of useful and worthy public works"); *see also James*, 478 U.S. at 606 (Flood Control Act of 1928 established "a comprehensive ten-year program for the entire [Mississippi River] valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds") (citation omitted).

The district court wrongly concluded that the discretionary function exception's bar against suit is inapplicable when the government undertakes works that are related to public safety. *See* 647 F. Supp. 2d at 662 ("[W]hen the safety of an entire region is at stake, negligence cannot be masked by policy"). The Supreme Court has made clear for fifty years that decisions that implicate safety are squarely within the scope of the discretionary function exception, and that the exception covers not only the "design" or "planning" stage but also the "operational" implementation of broader plans. In the seminal case of *Dalehite v. United States*, 346 U.S. 15 (1953), the Supreme Court held that the discretionary function exception

"barred recovery for claims arising from a massive fertilizer explosion. . . . Not only was the cabinet-level decision to institute the fertilizer program discretionary, but so were the decisions concerning the specific requirements for manufacturing the fertilizer." *Gaubert*, 499 U.S. at 333 (discussing *Dalehite*, 346 U.S. at 19-21, 37-38). In *Gaubert*, the Supreme Court observed that "[n]early 30 years later, in *Varig Airlines*, the Federal Aviation Administration's actions in formulating and implementing a 'spot-check' plan for airplane inspection were protected by the discretionary function exception because of the agency's authority to establish safety standards for airplanes." *Id.* at 323 (citing *Varig*, 467 U.S. at 815). Moreover, the Court emphasized, "[a]ctions taken in furtherance of the program were likewise protected, even if those particular actions were negligent." *Ibid.* (citing *Varig*, 467 U.S. at 820).

This Court has repeatedly applied these controlling principles, most recently in cases involving the government's preparations for and response to Hurricane Katrina. This Court explained that "the government's decisions about when, where, and how to allocate limited resources within the exigencies of an emergency are the types of decisions that the discretionary function exception was designed to shelter from suit." *Freeman v. United States*, 556 F.3d 326, 340 (5th Cir. 2009); *see also Davis v. United States,* 597 F.3d 646, 650 (5th Cir. 2009) (failed rescue attempt fell within discretionary function exception because "[s]afety, efficiency, timeliness, and

allocations of resources were all necessary to consider, the very policy considerations under the *Gaubert* framework that made the acts discretionary").

The district court cited a host of Ninth Circuit rulings in seeking to negate the application of the discretionary function exception — decisions that are neither apposite nor controlling. Moreover, in surveying Ninth Circuit law, the district court omitted that court's most relevant decision, *National Union Fire Insurance v. United States*, 115 F.3d 1415 (9th Cir. 1997), in which the Ninth Circuit held that the discretionary function exception barred tort claims based on the Corps' failure to raise a breakwater after it discovered that the breakwater was two feet shorter than intended. *See id.* at 1417. Rather than raise the breakwater to its intended height of 14 feet, the Corp decided to await the results of a study considering whether to raise the breakwater to 22 feet. During this time, a severe storm caused substantial damage to businesses along the beach that might have been protected by a higher breakwater. The Ninth Circuit held that the conduct at issue "necessarily involved the exercise of discretionary judgment. . . . [Officials] exercised discretionary judgment about what the Corps should do about the breakwater, and decided to do nothing for the time being, because they thought it wise to roll the smaller repair into a bigger improvement later." *Id.* at 1421. Although the breakwater had certain specifications when designed, "there was no regulation or policy requiring the Corps to monitor the breakwater height and assure that it continued to conform to its

design specifications." *Ibid.* The Ninth Circuit rejected the plaintiffs' contention that once the government built the breakwater, it was required to maintain it in a safe condition, declaring that this was not "true as a matter of the discretionary function exception." *Id.* at 1422.

Likewise, in this case, the Corps chose to ensure the effectiveness of the levees by repeatedly raising their height. *See* 647 F. Supp. 2d at 672-73. It did so because, in the Corps' view, maintaining MR-GO through dredging and raising the levees through separate projects allowed the Corps to maximize its limited resources and to continue operating the MR-GO as a shipping channel as Congress charged it to do. Even assuming that such judgments were mistaken or negligent, they are not subject to "judicial 'second-guessing . . . through the medium of an action in tort.'" *Spotts,* 613 F.3d at 568 (quoting *Gaubert*, 499 U.S. at 323); *see also St. Tammany Parish ex rel. Davis v. Federal Emergency Mgmt. Agency*, 556 F.3d 307, 325 (5th Cir. 2009) (holding that "funding decisions related to the extent of debris removal that is necessary to protect improved property, public health, and safety are exactly the type of public policy considerations" that are shielded from scrutiny).

The district court ultimately viewed the very magnitude of the tragic loss and suffering caused by the Katrina flooding as a reason to hold the discretionary function exception inapplicable. The court declared: "The Corps' lassitude and failure to fulfill its duties resulted in a catastrophic loss of human life and property in

unprecedented proportions." 647 F. Supp. 2d at 711. And it concluded that "Congress would never have meant to protect this kind of nonfeasance on the part of the very agency that is tasked with the protection of life and property." *Ibid.*

Contrary to that premise, the application of the discretionary function exception does not turn on the extent of damage alleged to have resulted from government error. "Under the plain language of the FTCA, the severity of the government's conduct is immaterial if the duty that the conduct allegedly violated is discretionary." *In re Katrina Canal Breaches Litig.,* 351 Fed. Appx. 938, 942 (5th Cir. 2009). Thus, in *Freeman*, this Court observed that "[t]he federal government has publicly admitted that it made many mistakes" in responding to Katrina, but held that "even if those mistakes caused decedents' deaths . . . the federal government's negligence does not give rise to tort liability absent the United States's express waiver of sovereign immunity." *Freeman*, 556 F.3d at 343.

2. Executive Branch communications with Congress regarding appropriations for foreshore protection and related matters implicate considerations of public policy.

As discussed above, the district court recognized that no statute or regulation mandated the implementation of foreshore protection projects within a particular time frame. Instead, in seeking to locate a pertinent mandate in NEPA, the court declared that "[h]ad the Corps adequately reported under the NEPA standards, their activities and the effect on the human environment would have had a full airing."

647 F. Supp. 2d at 731. The court faulted the Corps for not "properly prioritizing the requested funding," *id.* at 706, and opined that "when the Corps finally deemed something an emergency, Congress came through," *id.* at 663.

It is difficult to posit policy matters more clearly protected from a lawsuit than the executive branch's decisions about how and when to communicate with Congress. In determining which matters to emphasize in its dealings with Congress, the executive branch must consider the full array of policy issues before both branches. In prioritizing its requests for appropriations, the executive branch must likewise consider the full spectrum of budget requests; the policy and political considerations that they implicate; the extent to which budget requests will be met; and the impact on other programs for which it seeks funding. The district court's willingness to premise tort liability on such public policy judgments of the highest order reflects its fundamental departure from the teachings of the Supreme Court.

CONCLUSION

The judgment of liability against the United States should be reversed, and the case should be remanded with instructions to dismiss the complaint.

Respectfully submitted.

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I hereby certify that:

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