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,
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.)

RESPONSE AND REPLY BRIEF FOR THE UNITED STATES

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SUMMARY OF ARGUMENT

I. Flood Control Act Immunity. Congress vested the Army Corps of Engineers with responsibility for designing, improving, and maintaining navigation routes in and around New Orleans. The navigation system, which comprises works commenced at different times over the last century, is vital to the region's commerce. Congress also vested the Corps with responsibility for designing, improving, and maintaining federal flood control works in the same region. The comprehensive flood and hurricane protection system, undertaken by the Corps in the 1960s, includes flood control protections that border the system of navigational waterways, including federal levees along the Gulf Intracoastal Waterway ("GIWW"), the Inner Harbor Navigation Canal ("IHNC" or "Industrial Canal"), and the Mississippi River-Gulf Outlet ("MR-GO").

The federal flood control protections did not withstand Hurricane Katrina, and hundreds of thousands of individuals, along with corporations and governmental entities, have filed claims against the Army Corps of Engineers for flood damage. That is precisely the result that Congress was at pains to avoid when it enacted Section 702c of the Flood Control Act of 1928, which unequivocally states: "No 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 seven plaintiffs in this suit seek to impose liability on the United States for "damage from or by floods or flood waters" that the federal flood control system failed to contain. But no court has *ever* held the United States liable for damage from "'floods

or flood waters' ... that a federal project is unable to control." *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001) (citing *United States v. James*, 478 U.S. 597 (1986)).

Plaintiffs' claims are flatly at odds with the language and policy of the Flood Control Act. Plaintiffs' argument hinges on their insistence that this case is indistinguishable from *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971), a contention that requires plaintiffs to ignore the holding, reasoning, and facts of that case. The *Graci* Court concluded that the "floodwater damage [was] unconnected with flood control projects," *id.* at 27, for the simple reason that the flood control projects did not yet exist. Thus, in the *Graci* Court's view, the case did not implicate Section 702c, which "was aimed at flooding occurring in areas involved in actual or potential flood control projects." *Ibid.*

By contrast, there is no question that in the present case, unlike in *Graci*, "there is a flood control project which has failed," as the district court explicitly acknowledged. 577 F. Supp. 2d 802, 821 (E.D. La. 2008). That is because during the years since Hurricane Betsy, which was at issue in *Graci,* the Corps built the Lake Pontchartrain and Vicinity, Hurricane Protection Project ("LPV"), which includes all of the "crucial levees" at issue in this case. 647 F. Supp. 2d 644, 652 (E.D. La. 2009).

Plaintiffs' attempt to recover for damage from flood waters that the LPV failed to contain is barred by *Graci*'s holding and reasoning, as well as by the Supreme Court's later decisions in *James* and *Central Green*. These decisions do not permit plaintiffs to

circumvent the bar against suit by framing their complaint as a challenge to the Corps' design and maintenance of the MR-GO channel, rather than as a challenge to the Corps' design and maintenance of the levees that run alongside the channel.

Moreover, even assuming that such recharacterizing of a claim were legally relevant, any alleged negligence by the Corps here was, by plaintiffs' own account, "connected" to the LPV. Pl. Br. 66. The five plaintiffs who lived in the St. Bernard Polder claim that the federal levees that run along the Reach 2 stretch of MR-GO would have held back the Katrina floods if the Corps had addressed the shrinkage of the levees that plaintiffs attribute to the interaction between the channel and the adjoining levees. The two plaintiffs who lived in the New Orleans East Polder claim that federal levees that ring that protected area would not have been overtopped by Katrina's flood waters if the Corps had constructed a surge protection barrier or otherwise acted to reduce the amount of water that flowed through the waterway system. That alleged negligence is directly connected to the federal flood control measures, and the plaintiffs' claims against the United States are barred regardless of whether they are framed as a failure in the design and maintenance of the levees or as a failure to address the impact of the waterways on the levees.

II. Discretionary Function Exception. Plaintiffs' claims against the United States are independently barred by the FTCA's discretionary function exception. The Corps was required to make countless significant judgments over a period of decades

regarding the operation of the waterway systems in and around New Orleans, and the protections against flooding. Plaintiffs argue that the Corps should have made the armoring of Reach 2 of MR-GO a higher priority and should have emphasized to Congress the threat to the efficacy of the Reach 2 levees. Such judgments are precisely the type that are beyond the scope of the government's waiver of sovereign immunity in the FTCA. They are protected from suit by the FTCA's discretionary function exception, which is designed "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).

Plaintiffs' assertion that the National Environmental Policy Act ("NEPA") removed the Corps' discretion in addressing the interaction of MR-GO and the Reach 2 levees is wrong. Plaintiffs recognize that NEPA did not mandate a specific course of conduct with respect to the timetable for armoring MR-GO and also recognize that the timetable depended in part on congressional appropriations. They acknowledge that the Corps necessarily exercised discretion in preparing its 1976 Environmental Impact Statement, a supplemental report in 1985, and 26 environmental assessments between 1980 and 2004. Thus, even assuming that the agency should have filed more or fuller statements, its actions would constitute, at most, an abuse of discretion.

Plaintiffs err even more fundamentally in urging that the Corps could be liable under a theory of negligent failure "'to warn Congress officially and specifically' about the need for foreshore protection," and for failing "to properly prioritize requests for congressional funding." Pl. Br. 12-13 (quoting 647 F. Supp. 2d at 706). The FTCA does not waive sovereign immunity and create a cause of action against the United States for negligent failures to communicate with Congress or to establish budgetary priorities, and the discretionary function exception to the FTCA would preclude liability even if such a claim could properly be asserted.

Plaintiffs also suggest obliquely that the Corps lacked discretion to allow MR-GO to expand beyond the initial dimensions contemplated in the design memorandum that Congress authorized in 1956. The district court did not draw any such conclusion, and plaintiffs offer no coherent explanation for their assertion. They disavow reliance on the "1950s documents" that addressed the design of MR-GO, and cite instead to the design memorandum for the LPV, which did not remotely suggest a duty to confine MR-GO to its initial dimensions. Moreover, plaintiffs' reliance on the LPV design memorandum highlights why the impact of MR-GO cannot be artificially severed from the design and maintenance of the flood control works themselves.

III. Plaintiffs' Cross-Appeal. The claims of the Franz plaintiffs and the Robinson plaintiffs are the subject of the cross-appeal. The district court awarded judgment to the Franz plaintiffs, who lived in the St. Bernard Polder, for flood damage to

the contents of the second flood of their house, but denied recovery for flood damage to the foundation and first floor of the house. The court rejected in its entirety the flood damage claim asserted by the Robinsons, who lived in the New Orleans East Polder.

The arguments that plaintiffs present in their cross-appeal are baseless, but there is also no reason to address those contentions. The claims of the Franz and Robinson plaintiffs — like all of the claims in this suit — are barred in their entirety because the United States is immune from such a suit under the Flood Control Act and also because the discretionary function exception to the FTCA would, in any event, bar the suit. Indeed, the cross-appeals underscore the district court's error in declaring that *any* of the flood damage caused by Hurricane Katrina is outside the scope of the Flood Control Act's immunity provision. The regional flood protection system did not contain Hurricane Katrina's flood waters, resulting in the flooding of approximately 85% of the greater metropolitan New Orleans area. The Flood Control Act bars recovery of *all* of the consequent flood damage and does not permit a mode of analysis that distinguishes between flood damage to an upper level of a building and damage to a lower level of a building.

PART I: REPLY BRIEF AS APPELLANT

I. THE FLOOD CONTROL ACT BARS THIS SUIT.

A. Under *Graci v. United States*, Section 702c Bars Suit Against the United States for Damage Resulting from Flood Waters That a Federal Flood Control Project Could Not Contain.

1. Section 702c of the Flood Control Act provides: "No 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. Plaintiffs do not deny that they seek to hold the United States liable for "damage from or by floods or flood waters," and they make no attempt to explain how the statutory language can be construed to permit their claims to go forward.

Plaintiffs' legal argument reduces to the contention that this case is on all fours with *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971), in which this Court held that the Flood Control Act did not preclude a suit against the United States for damages allegedly caused by MR-GO during Hurricane Betsy in 1965. But in *Graci*, the Court focused on "floodwater damage" that was "unconnected with flood control," and concluded that § 702c did not constitute a wholesale immunization" of the government from liability for such "unconnected" flood damage. *Id.* at 27. The court concluded that Hurricane Betsy's "floodwater damage" did not "aris[e] in connection with flood control works," *id.* at 26, and therefore the Flood Control Act immunity did not apply.

Plaintiffs are constrained to admit — even if only in a footnote — that there were no federal "levees at the time of the Betsy flooding." Pl. Br. 75 n.6. As plaintiffs acknowledge, the Betsy flooding pre-dated the construction of the Lake Pontchartrain and Vicinity, Hurricane Protection Project ("LPV"), which is the "engineered system" that failed to contain Hurricane Katrina's flood waters. *Ibid.*; *see also* Pl. Br. 3 (quoting PX3, at 12-10). Because the Hurricane Betsy damage had no relation to any federal flood control works, this Court analogized the damage to that at issue in *Peterson v. United States*, 367 F.2d 271 (9th Cir. 1966), in which the government had dynamited an ice-jam causing a release of water that destroyed vessels moored downstream. The flooding in *Peterson*, like the flooding in *Graci*, involved no flood control measures.

2. Plaintiffs nevertheless insist that the complete absence of a federal flood control project at the time of Hurricane Betsy had no bearing on *Graci*'s conclusion that the "floodwater damage [was] unconnected with flood control projects." 456 F.2d at 27. Plaintiffs assert, *ipse dixit*, that "the fact [that] there were no LPV levees at the time of the Betsy flooding" is "a distinction without a difference," and that "[t]he existence of levees is irrelevant to *Graci*'s holding." Pl. Br. 75 n.6.

That improbable assertion rests on plaintiffs' contention that "*Graci* did not turn on whether the *floodwaters* were connected to a flood control project"; "it turned on whether *the government's negligent act* causing the damage was connected to a flood control project." Pl. Br. 66 (plaintiffs' emphasis). But this Court in *Graci* drew no such

distinction. This Court referred interchangeably to immunity for "floodwater damage caused by the negligence of the Government unconnected with flood control projects," and immunity from "all liability for floodwater damage unconnected with flood control projects." 456 F.2d at 27. As in *Peterson*, the asserted negligence in *Graci* was "unconnected" to a flood control project because there *was* no flood control project at the time.

Nothing in *Graci* remotely suggested that the government could be held liable for damage resulting from flood waters that a flood control project failed to control. Instead, this Court declared that "the negation of liability of the United States contained in § 702c for flood damage was aimed *at flooding occurring in areas involved in actual or potential flood control projects*." *Graci*, 456 F.2d at 27 (emphasis added). The *Graci* Court reasoned that "immunity from liability for floodwater damage arising in connection with flood control works was the condition upon which the government decided to enter into the area of nationwide flood control programs." *Id.* at 26 (citation omitted). *Graci* thus explicitly recognized that where — as here — "'there is damage "from" or "by" a flood or flood waters in spite of and notwithstanding federal flood control works, no liability of any kind may attach to or rest upon the United States therefor.'" *Id.* at 24 (quoting *National Manufacturing Co. v. United States*, 210 F.2d 263, 270 (8th Cir. 1954)).

Accordingly, when the Supreme Court described the *Graci* holding in *United States v. James*, 478 U.S. 597 (1986), the Supreme Court explained that *Graci* "rejected th[e]

argument" that "§ 702c granted immunity from damages caused by any floodwaters, even those unconnected with flood control projects," and "held that *the provision conferred immunity only for floods or flood waters connected with a flood control project*." *Id.* at 602 n.2 (citing *Graci*) (emphasis added). Plaintiffs' legal argument thus disregards not only the reasoning and the express holding of *Graci,* but also the Supreme Court's understanding in *James*.

3. Plaintiffs themselves recognize that their attempt to have immunity depend on the source of the alleged negligence cannot be squared with *Central Green Co. v. United States*, 531 U.S. 425, 437 (2001). *Central Green* rejected an argument that immunity turns on whether the damage is "related to a flood control project," and instead focused on the plain language of § 702c — "damage from floods or flood waters." The Court stated 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; *see also Boudreau v. United States*, 53 F.3d 81, 86 (5th Cir. 1995) (Smith, J., dissenting) (urging, in advance of *Central Green*, that "[t]he simple question is whether the damages in this case were 'from or by floods or flood waters,'" and criticizing the majority's reasoning for focusing on a nexus between "the injury and 'flood control'" rather than between the injury and "flood waters").

Perceiving the evident tension between their position and *Central Green,* plaintiffs argue at length that "*Central Green* did not overrule *Graci*'s express holding." Pl. Br. 73; *see also id.* at 68-73. This argument is a red herring: for the reasons already discussed,

plaintiffs mischaracterize the "express holding" of *Graci*. Pl. Br. 73. *Graci* distinguished between flood damage that occurs "notwithstanding federal flood control works" and the situation in *Graci* itself, where there was no flood control project at all. *Graci*, by its own terms, compels the rejection of plaintiffs' claims. It leaves no doubt that where "'there is damage "from" or "by" a flood or flood waters in spite of and notwithstanding federal flood control works no liability of any kind may attach to or rest upon the United States therefor.'" *Graci*, 456 F.2d at 24 (quoting *National Manufacturing Co.*, 210 F.2d at 270).

The contrary holding that plaintiffs would attribute to *Graci* is flatly at odds with both *Central Green* and *James*. In both cases, the Supreme Court treated as axiomatic that the government is immune under the Flood Control Act from damage caused by "'floods or flood waters' ... that a federal project is unable to control." *Central Green*, 531 U.S. at 431 (discussing the holding of *James*). In *James*, the Court relied on the plain language of the statute — "damages from or by floods or flood waters" — to hold that the government could not be held liable for injuries caused by the government's failure to warn recreational boaters of the dangers caused by the release of flood waters. *James*, 478 U.S. at 599. The *James* Court thus "held that the phrase 'floods or flood waters' is *not narrowly confined* to those waters that a federal project is unable to control, and that it encompasses waters that are released for flood control purposes when reservoired waters are at flood stage." *Central Green*, 531 U.S. at 431 (emphasis added).

Central Green reaffirmed that the government's immunity under the Flood Control Act applies to "'floods or flood waters' ... that a federal project is unable to control." *Ibid.* Stressing the statutory text, the Court held that the immunity does not apply unless waters that caused a plaintiff's damage were, in fact, "floods or flood waters," and remanded with instructions to 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.

4. Plaintiffs identify no decision of any court holding that § 702c permits suit against the government for damages resulting from flood waters that a federal flood control project failed to control. This Court's decision in *Kennedy v. Texas Utilities*, 179 F.3d 258 (5th Cir. 1999) (cited at Pl. Br. 68), did not involve flood waters; the plaintiff was injured when she stepped on a live electrical cable on dry land. *Id.* at 259, 262. This Court's decision in *Seaboard Coast Line Railroad Co. v. United States*, 473 F.2d 714 (5th Cir. 1973) (cited at Pl. Br. 67), did not even mention § 702c immunity; the property damage occurred when a train derailed, and the alleged negligence arose out of the government's construction of a drainage ditch in furtherance of the building of aircraft maintenance facilities. *See id.* at 715.

The Ninth Circuit precedent on which plaintiffs rely contradicts their position here. In *Morici Corp. v. United States,* 681 F.2d 645 (9th Cir.1982) (cited at Pl. Br. 74 n.5), the Ninth Circuit held that § 702c immunity "does not apply when the *flood damage* is

'wholly unrelated to any act of Congress authorizing expenditure of federal funds for flood control.'" *Id.* at 646 (quoting *Peterson v. United States*, 367 F.2d 271, 275 (9th Cir. 1966); *Aetna Insurance Co. v. United States*, 628 F.2d 1201, 1203 (9th Cir. 1980); and *Pierce v. United States*, 650 F.2d 202, 203 (9th Cir. 1981)) (emphasis added). Thus, in *Morici*, the Ninth Circuit found that the § 702c immunity applied because "the damage was from the presence of flood waters in the Sacramento River which derive from a federal flood control project." *Id.* at 646 (citation omitted). The *Morici* court explained that the government was immune "[e]ven if the project was being operated at the time of the negligence for a purpose other than flood control," and held that "[i]t is the relationship between the flooding and a project Congressionally authorized for flood control which is the controlling factor." *Id.* at 648. The Ninth Circuit thus explicitly rejected the argument that the court "should trace the damage back to the source of the negligence" to determine whether § 702c applied. *Id.* at 647.

B. Plaintiffs' Damage Indisputably Resulted From Flood Waters That Occurred "In Spite of and Notwithstanding Federal Flood Control Works."

It is uncontested that the flood damage at issue in this suit occurred "in spite of and notwithstanding federal flood control works." *Graci*, 456 F.2d at 24 (quoting *National Manufacturing Co.*, 210 F.2d at 270). The district court itself recognized that here, unlike in *Graci*, "there is a flood control project which has failed" to contain the flood waters that

caused the damage. 577 F. Supp. 2d at 821. Plaintiffs' flood damage claims are thus barred under *Graci, James, Central Green,* and the plain language of § 702c.[1]

Although plaintiffs declare "that nothing has changed in the interim four decades to distinguish" this case from *Graci,* Pl. Br. 51, they recognize that the LPV was authorized and constructed after the events that were before this Court in *Graci*, in the wake of the Betsy flooding. Pl. Br. 75 n.6. The Reach 2 levees — like other federal levees that form the New Orleans regional flood protection system — were constructed pursuant to the Flood Control Act of 1965, which was passed in the aftermath of Hurricane Betsy and which created the LPV. *See* Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073; *see also* Pl. Br. 6 (map showing the Greater New Orleans Flood Protection System). "The crucial levees at issue" in this case, 647 F. Supp. 2d at 652, did not exist at the time of Hurricane Betsy and therefore were not at issue in *Graci*.

Indeed, although plaintiffs assert that "nothing has changed" since *Graci*, their own brief explains that "the *Robinson* trial addressed the 'single most catastrophic failure of an engineered system in United States history.' " Pl. Br. 3 (quoting *Investigation of the Performance of the New Orleans Flood Protection Systems in Hurricane Katrina on August 29, 2005*,

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[1] *See Central Green*, 531 U.S. at 431, 437 (reaffirming that the statutory bar applies to "'floods or flood waters' ... that a federal project is unable to control" and explaining that 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").

Final Report of the Independent Levee Investigation Team ("ILIT Report"), at p. 12-10 (2006) (PX3)). The very report that plaintiffs quote explained that the "engineered system" that failed was the LPV, also known as the New Orleans regional flood protection system. ILIT Report, at xix. The report concluded that Hurricane Katrina "grew to a full blown catastrophe ... principally due to the massive and repeated failure of the regional flood protection system and the consequent flooding of approximately 85% of the greater metropolitan area of New Orleans." *Id.* at xx.

Plaintiffs make no attempt to reconcile their own frank acknowledgment of the nature of their claim and the subject of their trial with their inexplicable assertion that the "Catastrophic Flooding Was Unconnected to LPV." Pl. Br. 51.

C. The District Court's Opinion Showed That the Asserted Negligence Was Not "Unconnected" to the LPV Federal Flood Control Works.

As we have shown above, plaintiffs' claim fails as a matter of law because plaintiffs seek to recover against the United States for damage caused by flood waters that a federal flood control project failed to contain. The district court was wrong to believe that immunity under § 702c of the Flood Control Act turns on whether plaintiffs chose to frame their complaint as a challenge to the Corps' design and maintenance of the MR-GO channel, rather than as a challenge to the Corps' design and maintenance of the levees that run alongside the channel.

Even assuming, however, that plaintiffs' recharacterization of the claim were legally relevant, plaintiffs' argument and the district court's own opinion show that any alleged negligence was "connected" to the LPV. Pl. Br. 66. On plaintiffs' theory, the Corps' actions with respect to MR-GO were relevant precisely because of their asserted impact on the Reach 2 levees. Plaintiffs' contention, accepted by the district court, was that the Corps was aware of the interaction between MR-GO and the levees and failed to take adequate measures to ensure that the levees would be able to contain flood waters.[2] Plaintiffs urge that the "'Corps knew at least from the early 1970s that the MRGO was endangering the Chalmette Unit Reach 2 Levees.'" Pl. Br. 16 (quoting 647 F. Supp. 2d at 665) (emphasis omitted). They contend that "'[t]he Corps had knowledge that due to lateral displacement of soil into the channel, the Reach 2 Levee would incrementally lower.'" Pl. Br. 24 (quoting 647 F. Supp. 2d at 654).

The district court credited plaintiffs' "assumption" that the Reach 2 levees would have been at their full 17.5 foot design height when Hurricane Katrina struck, 647 F. Supp. 2d at 685, if there had been "proper armoring of the banks before 1975," *id.* at 675.

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[2] Plaintiffs did not show, and the district court did not find, that New Orleans could have withstood Hurricane Katrina — "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 — if the LPV had never been built, regardless of MR-GO. In *Graci*, following a trial, the district court found that "MRGO did not in any manner, degree, or way induce, cause, or occasion flooding in the Chalmette area." *Graci* v. *United States*, 435 F. Supp. 189, 195 (E.D. La. 1977).

The court made no attempt to square that assumption with plaintiffs' admission that only "25% of the shrinkage of the levee crest or height or 'protective elevation' was caused by lateral displacement that could have been prevented with foreshore protection, among other things." *Id.* at 674. In any event, by the district court's account, the Corps' negligence was its "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 (emphasis added); *see also*, *e.g.*, *id.* at 654 ("the Corps knew that with time foreshore protection would be necessary because of the interaction between the MRGO and the LPV"); *ibid.* ("The Corps was also aware that with the operation of the MRGO, a major force would be at play, threatening the integrity of the channel and the Chalmette Unit Levees"); *id.* at 675 ("Proper armoring of the banks before 1975 would have been an effective method to stop the lowering of the protective elevation" of the levee).

As we explained in our opening brief, "[t]he 'armoring' of MR-GO is relevant to the district court's analysis only because of the implications for the Reach 2 levee," which "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." U.S. Br. 30 (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 218 (5th Cir. 2007)). We noted that this Court had explained in *Katrina Canal Breaches*, that"[i]f 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." U.S. Br. 30. Plaintiffs do not take issue with this characterization of their claim, and their brief fails to include any reference to that opinion by this Court.

Plaintiffs argue that "[t]he government is liable to plaintiffs on the basis of the Corps' negligence in the MRGO's maintenance and operation — regardless of whether the Corps was negligent a *second* time in its design and construction of the LPV, regardless of whether that second negligence was *also* a proximate cause of the Katrina flooding, and regardless of whether the United States is immune from any liability for that *second* negligence." Pl. Br. 76 (plaintiffs' emphases). This assertion is doubly flawed. First, as discussed, the asserted negligence with respect to MR-GO is relevant only to the extent that it purportedly deprived plaintiffs of the benefit of the flood control protections that might otherwise have contained the Katrina flood waters. Second, and more fundamentally, this contention epitomizes plaintiffs' effort to render the Flood Control Act a nullity. In plaintiffs' view, it does not matter that the federal government built a flood control project that failed to hold back flood waters. Plaintiffs' attempt to derive this proposition from *Graci* is baseless as demonstrated above.[3]

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[3] Plaintiffs' assertion that "*all parties* conceded in the district court that the LPV levees' design and performance were not at issue," Pl. Br. 75 (plaintiffs' emphasis), is inexplicable because the government stressed the relevance of the design and performance of the LPV levees on multiple occasions. *See*, *e.g.*, Doc. 19176 at 9 (U.S.

Plaintiffs' attempt to sever MR-GO from its adjoining levees is particularly anomalous because those levees were constructed with materials dredged from MR-GO itself. *See* 577 F. Supp. 2d 802, 814 (E.D. La. 2008). Moreover, the very document that plaintiffs cite to argue that "'riprap foreshore protection'" should have been constructed on an earlier schedule is the design memorandum *for the LPV*. Pl. Br. 81 (quoting 647 F. Supp. 2d at 656) (quoting H.R. Doc. No. 89-231, at 65 (July 1965) (DX0610) (GRE332)). Although plaintiffs declare that the "addition of flood control elements did not retroactively immunize" the construction and maintenance of MR-GO, Pl. Br. 75 (capitalization omitted), the levees and MR-GO have been linked from their inception in the most elemental ways. Plaintiffs' own exhibit recognized that the levees along Reach 2 were composed of "highly erodeable sand and lightweight shell sand fill" as a result of the decision to construct the levees using materials excavated from the MR-GO during the channel's construction. ILIT Report, at xx-xxi (PX3); *see also* 647 F. Supp. 2d at 672

Corrected Post-Trial Br.) ("The Flood Control Act bars this action because the principal factor in determining where breaching occurred was the nature and quality of the LPV levees and floodwalls."); Doc. 10378-2 at 3 (U.S. Motion for Summary Judgment) ("By asserting that the design, construction, operation, maintenance, and repair of the MRGO affected storm surge and caused the breaching of the LPV levees, Plaintiffs make plain that this case is nothing less than an attempt to hold the United States liable for conduct associated with flood control."); Doc. 822-2 at 4 (U.S. Motion to Dismiss) (the government is immune because "[t]he levees and floodwalls that surrounded the plaintiffs' properties were federal flood control structures, and the floodwaters that allegedly harmed the plaintiffs were waters that these federal works failed to contain.").

(noting that the Corps later abandoned the "hydraulic fill method [that] was employed to build the levee along Reach 2" because "the method was less reliable than using compacted fill").

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

A. The FTCA's Discretionary Function Exception Bars This Suit Against the United States Because the Challenged Decisions Were Grounded In Policy Analysis.

1. Congress vested in the Corps responsibility for the complex system of flood control works and navigation routes in and around New Orleans. The Corps was charged with constructing, improving, and maintaining navigable waterways in and around New Orleans. The Corps was also responsible for constructing, improving, and maintaining the federal flood control works in the same region — including the federal levees that border the MR-GO channel, the Gulf Intracoastal Waterway, and the Inner Harbor Navigation Canal — and for addressing the interactions between these navigational waterways and the federal flood control system.

The gravamen of plaintiffs' complaint is that, over a period of decades, the Corps did not properly manage the interaction between MR-GO and the Reach 2 levees. In particular, plaintiffs charge that the government was negligent for failing "'to implement foreshore protection when it recognized or should have recognized the extreme degradation that failure caused to the Reach 2 levee.'" Pl. Br. 12 (quoting 647 F. Supp. 2d

at 706). Plaintiffs acknowledge that the Corps' decisions were framed in part by congressional funding, and they charge the Corps with "gross negligence" for failing "'to warn Congress officially and specifically' about the need for foreshore protection," and for failing "to properly prioritize requests for congressional funding." Pl. Br. 12-13 (quoting 647 F. Supp. 2d at 706).

These claims go to the very heart of the FTCA's discretionary function exception, which prevents "'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). Plaintiffs' description of the challenged conduct shows that the Corps' design and management of MR-GO and the LPV involved not only complex engineering decisions, but also the allocation of limited government resources and the prioritization of requests for congressional appropriations. The district court's opinion shows that execution of the Corps' responsibilities required coordination with local governments and citizens groups and ongoing interactions with Congress.

2. Plaintiffs maintain that, "[b]y their very nature, matters of how to maintain an existing government project are not protected by the exception because they generally do not involve policy-weighing decisions or actions." Pl. Br. 106. They assert that, "'[o]nce the government makes a discretionary decision, the discretionary function exception does

not apply to subsequent decisions in carrying out that policy, "even though discretionary decisions are constantly made as to how those actions are carried out."'" Pl. Br. 107 (quoting *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1484 (5th Cir. 1989) (quoting *Wysinger v. United States*, 784 F.2d 1252, 1253 (5th Cir. 1986))).

These pronouncements are not accurate statements of the governing law and, even if they were, they would have no bearing on the conduct at issue here. Plaintiffs' own description of the purported "gross negligence" shows that the challenged conduct implicated matters of the Corps' judgment and policy.

Plaintiffs' pronouncements are not correct statements of the governing law because they are premised on a dichotomy between decisions at the "planning" and "operational" levels that the Supreme Court has expressly rejected with respect to the FTCA's discretionary function exception. In *Gaubert*, the Supreme Court reviewed a decision of this Court that had "distinguished between 'policy decisions,' which fall within the exception, and 'operational actions,' which do not." *Gaubert*, 499 U.S. at 321 (citing *Gaubert v. United States*, 885 F.2d 1284, 1287 (5th Cir. 1989)). Rejecting this "nonexistent dichotomy between discretionary functions and operational activities," *id.* at 326, the Supreme Court held that "[d]iscretionary conduct is not confined to the policy or planning level." *Id.* at 325 (quoted in *Freeman v. United States*, 556 F.3d 326, 341 n.15 (5th Cir. 2009)).

The Supreme Court explained that "'[a] discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions.'" *Ibid.* (quoted in *Freeman*, 556 F.3d at 341 n.15). Thus, for example, in *Gaubert*, which involved allegedly negligent supervision of a savings association by the Federal Home Loan Bank Board, the Supreme Court made clear that the "'[d]ay-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest.'" *Ibid.* (quoted in *Freeman*, 556 F.3d at 341 n.15). The Supreme Court also emphasized its earlier holding that the discretionary function exception barred recovery against the United States not only for the Federal Aviation Administration's actions formulating a "spot-check" plan for airline inspection, but also for agency "[a]ctions taken in furtherance of the program, ... even if those particular actions were negligent." *Id.* at 323 (citing *United States v. Varig Airlines*, 467 U.S. 797, 815, 820 (1984)). And the Court noted that it had similarly held that the exception barred recovery for claims arising not only out of the federal government's decision to institute a fertilizer program, but also out of the government's "decisions concerning the specific requirements for manufacturing the fertilizer" that caused a massive explosion. *Ibid.* (citing *Dalehite v. United States*, 346 U.S. 15, 37-38 (1953)).

The Supreme Court in *Gaubert* expressly rejected the contention that the challenged actions fall outside the discretionary function exception "because they

involved the mere application of technical skills and business expertise." *Id.* at 331. The Court observed that "this is just another way of saying that the considerations involving the day-to-day management of a business concern ... are so precisely formulated that decisions at the operational level never involve the exercise of discretion within the meaning of § 2680(a)." *Ibid.*; *see also Cranford* v. *United States,* 466 F.3d 955, 960 (11th Cir. 2006) (rejecting dichotomy between "application of professional standards" and "policy decisions" and holding that discretionary function exception barred wrongful death claims arising from the negligent marking of a submerged shipwreck).

Plaintiffs' argument cannot be reconciled with *Gaubert*. Plaintiffs rely heavily on this Court's pre-*Gaubert* decisions to support the discredited distinction between "policy-making" and "operational" functions. Pl. Br. 104-107. And they invoke the Supreme Court's decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), *see* Pl. Br. 61, 104, 105, 106, 113, which, the Supreme Court stressed in *Gaubert*, was *not* a discretionary function case. *Gaubert*, 499 U.S. at 326. Indeed, the Supreme Court in *Gaubert* explained that this Court had misunderstood *Indian Towing* to support "a nonexistent dichotomy between discretionary functions and operational activities." *Ibid.*

Plaintiffs misquote the D.C. Circuit's decision in *Cope v. Scott*, 45 F.3d 445, 452 (D.C. Cir. 1995), to support their assertion that "'[e]ngineering judgment' is not a matter of policy or an 'exercise[] of policy judgment.'" Pl. Br. 105. What the D.C. Circuit actually said is that judgments regarding engineering or aesthetic matters "are not

necessarily protected from suit" under the FTCA. 45 F.3d at 451 (emphasis added). The D.C. Circuit held that the FTCA's discretionary function exception *did* protect the Park Service's failure to pave a road with a skid-resistant surface. The court found no need to engage the debate over whether "the 'failure to maintain adequate skid resistance' is a question of 'design' or 'maintenance,'" because it concluded that the debate "would divert" the court "from the proper analysis — whether the 'failure to maintain adequate skid resistance' is the kind of discretion that implicates 'social, economic, or political' judgment." *Id.* at 450. The court held that the failure to provide adequate skid resistance was protected by the discretionary function exception to the FTCA because "[d]etermining the appropriate course of action would require balancing factors such as Beach Drive's overall purpose, the allocation of funds among significant project demands, the safety of drivers and other park visitors, and the inconvenience of repairs as compared to the risk of safety hazards." *Id.* at 451. The court also concluded that the placement of warning signs was not protected in light of signs already posted along the commuter route. *Id.* at 451-52.

Plaintiffs also cite the Ninth Circuit's decision in *Whisnant* v. *United States*, 400 F.3d 1177, 1181 (9th Cir. 2005), for the proposition that "'[m]atters of scientific and professional judgment — particularly judgments concerning safety — are rarely considered to be susceptible to social, economic, or political policy.'" Pl. Br. 105. On its facts, *Whisnant* is unremarkable; the court found the discretionary function exception

inapplicable to a claim that the plaintiff had allegedly been sickened by toxic mold growing in a navy commissary's meat department. 400 F.3d at 1183. Even plaintiffs do not contend that the failure to clean up mold in a commissary can be likened to decisions regarding the maintenance of a deep-draft shipping channel, the interaction of the channel with the adjoining federal levees, and the overall priorities in the operation of the complex of federal projects in the New Orleans area.

Moreover, this Court has observed that *Whisnant* is "not binding precedent," *Spotts v. United States*, 613 F.3d 559, 573 n.11 (5th Cir. 2010), and, as our opening brief explained (U.S. Br. 48-51), the Supreme Court, this Court, and the Ninth Circuit have found scientific and professional judgments that implicate safety to be protected by the discretionary function exception to the FTCA, and thus beyond the reach of the FTCA's waiver of sovereign immunity. *See*, *e.g.*, *Dalehite v. United States*, 346 U.S. 15 (1953) (deadly fertilizer explosion attributed in part to the temperature at which the fertilizer was stored); *United States v. Varig Airlines*, 467 U.S. 797 (1984) (deaths of commercial aircraft passengers attributed to negligent aircraft safety checks); *Freeman v. United States*, 556 F.3d 326, 347 (5th Cir. 2009) (deaths attributed to allegedly negligent implementation of the Hurricane Katrina emergency response plan, including the "failure to provide food, water, shelter, medical assistance, and transport"); *Davis v. United States,* 597 F.3d 646, 651 (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"); *St. Tammany Parish, ex rel. Davis v. Federal Emergency Mgmt. Agency*, 556 F.3d 307, 325 (5th Cir. 2009) ("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); *National Union Fire Insurance v. United States*, 115 F.3d 1415 (9th Cir. 1997) (damage caused by the Corps' failure to raise a breakwater after it discovered that the breakwater was two feet shorter than intended).

B. The Actions Challenged In This Suit Involved Elements Of Judgment And Choice.

1. NEPA did not deprive the Corps of relevant discretion, and, in any event, there was no causal connection between the asserted NEPA violations and plaintiffs' damage from flood waters.

The FTCA's 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, in such circumstances, "the employee has no rightful option but to adhere to the directive" and there is no discretion to exercise. *Gaubert,* 499 U.S. at 322 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

Plaintiffs attempt to invoke this doctrine but they fail to identify any mandatory directive that dictated the outcome of the Corps decisions that they challenge. Plaintiffs broadly declare that "the Corps spent *decades* wasting resources on failed engineering and

ignoring chronic safety issues," Pl. Br. 111 (plaintiffs' emphasis), and then cite the district court's conclusion that the Corps acted arbitrarily and capriciously with respect to certain filings under the National Environmental Policy Act. This argument fails at every turn.

Plaintiffs themselves recognize that NEPA is a procedural, not a substantive environmental statute, and it is "'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)). Accordingly, plaintiffs expressly concede that NEPA did not require the Corps to construct foreshore protection: "The district court did not find, and Plaintiffs do not argue, that NEPA requires foreshore protection." Pl. Br. 79.

This fact alone is fatal to plaintiffs' argument that the Corps had no discretion in determining whether to provide foreshore protection or in otherwise addressing the interaction of MR-GO and the Reach 2 levees. Discretion is not removed unless "a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'" *Freeman v. United States,* 556 F.3d 326, 337 (5th Cir. 2009) (quoting *Gaubert*, 499 U.S. at 322).

Plaintiffs' reliance on NEPA parallels the arguments rejected by the First Circuit in *Montijo-Reyes v. United States*, 436 F.3d 19, 26 (1st Cir. 2006), in which 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. Because the

Clean Water Act did not require the government to select a particular disposal site, the First Circuit held that "the negligent conduct that allegedly caused Plaintiffs' damages was not forbidden." *Id.* at 26.

In an attempt to rectify this critical flaw in their argument, plaintiffs assert that the asserted NEPA violations are relevant here because additional NEPA filings would have prompted Congress to appropriate funds. They argue that there is a "direct causal connection" between the Corps' alleged violation of NEPA and the damage to plaintiffs. Pl. Br. 36. They contend that the Corps' crucial failure was the failure to provide Congress with information that, in their view, would have resulted in greater and earlier funding to armor the banks of MR-GO. Plaintiffs declare that the Corps committed "gross negligence" in failing "'to warn Congress officially and specifically' about the need for foreshore protection," and in failing "to properly prioritize requests for congressional funding." Pl. Br. 12-13 (quoting 647 F. Supp. 2d at 706). Under the reasoning of plaintiffs and the district court, "'[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.'" Pl. Br. 36 (quoting 647 F. Supp. 2d at 706).

On that basis, plaintiffs then contend that this case is distinguishable from *Montijo-Reyes* because the plaintiffs in *Montijio-Reyes* failed to establish "any causal connection" between the alleged failures to comply with the Clean Water Act and the

conduct that caused plaintiffs' damages. Pl. Br. 102. Plaintiffs argue that here, by contrast, "causation was proven" because the "[t]he trial court identified instances in the MRGO's history in which Congress *did act* when it learned of an exigency." Pl. Br. 101, 103 (plaintiffs' emphasis). Plaintiffs declare that, "'when the Corps finally deemed something an emergency, Congress came through.'" Pl. Br. 37 (quoting 647 F. Supp. 2d at 663).

There are multiple independent flaws in this argument.

First, plaintiffs' argument rests on the incorrect premise that NEPA itself does not involve an "'element of judgment or choice.'" *Freeman,* 556 F.3d at 337 (quoting *Gaubert*, 499 U.S. at 322). In determining whether to issue an Environmental Impact Statement ("EIS"), rather than the more limited Environmental Assessment ("EA"), an agency must evaluate 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 235, 240, 244 n.5 (5th Cir. 2003). The Supreme Court has stressed that agencies must apply a "rule of reason" in deciding whether to file a supplemental EIS, and that courts must defer to "the informed discretion of the responsible federal agencies." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373, 377 (1989). This Court's decision in *Coliseum Square Association v. Jackson*, 465 F.3d 215 (5th Cir. 2006), cited by plaintiffs at Pl. Br. 86, underscores the extent of the discretion accorded agencies in making determinations under NEPA. *See id.* at 241 (holding that agency had

not acted arbitrarily and capriciously in issuing an EA with a finding of no significant impact, rather than an EIS). An agency's exercise of its "informed discretion" under NEPA contrasts sharply with the specific, nondiscretionary directives that have been held to eliminate the element of judgment and choice, and thus to eliminate the immunity from suit provided by the discretionary function exception. *See, e.g., Berkovitz v. United States*, 486 U.S. 531, 547 (1988) (no element of judgment or choice when FDA employees failed to follow specific directions governing release to the public of particular drugs).

Plaintiffs thus fundamentally misstate the issue when they label their argument "The Corps Had No Discretion to Ignore NEPA." Pl. Br. 89. The district court's findings do not remotely suggest that the Corps "ignored" NEPA. To the contrary, the court recognized that, pursuant to NEPA, the Corps issued a final EIS in 1976, *see* 647 F. Supp. 2d at 724, published a supplemental report in 1985, *see id.* at 728, and, between 1980 and 2004, prepared 26 EAs that addressed the environmental consequences of certain dredging operations on various sites along MR-GO, *see id.* at 724-25.

Plaintiffs take issue with particular determinations that the Corps made pursuant to NEPA. They assert, for example, that the Corps should have prepared a supplemental EIS in the late 1980s, *see* Pl. Br. 32-35, and that it should have treated the discrete dredging operations that were the subject of the 26 EAs as if they formed a single operation, *see* Pl. Br. 35-36, even though the dredging operations occurred along different stretches of the MR-GO. USCA5 19742-43 (Trial Transcript 3522-23 (Russo)) (explaining that 80% of

the dredging took place in the open water portion of the channel, 35 miles away from the levee). Plaintiffs do not dispute, however, that the agency's approach in its NEPA filings turned on assessments of "significance" that "inherently involve[] some sort of a subjective judgment call." *Spiller*, 352 F.3d at 244 n.5; *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.").

Plaintiffs point to the district court's conclusion that the Corps' 1976 Final Environmental Impact Statement ("FEIS") should have addressed the "'concept of wave wash'" and that the scope of the agency's discussion of this issue was "'arbitrary and capricious.'" Pl. Br. 30 (quoting 647 F. Supp. 2d at 726-27). Assuming for purposes of argument that a court reviewing the 1976 FEIS would have agreed with that conclusion, that determination would not alter the character of the discretionary judgment entrusted to the agency because an agency's failure to reach the correct regulatory judgment does not mean that the agency did not exercise its judgment. Indeed, NEPA does not permit damages actions for an agency's failures to comply with its provisions, precisely because such liability would impermissibly infringe on an agency's decisonmaking. *Noe v. Metro. Atlanta Rapid Transit Auth.*, 644 F.2d 434, 439 (5th Cir. 1981).

Second, plaintiffs' novel theory of causation — that their damage from flood waters was caused by an agency's communications with Congress and budget priorities — is not a basis for suit against the United States under the FTCA. No court has ever held

the United States liable under the FTCA based on such a theory, which reflects plaintiffs' fundamental misunderstanding of the FTCA's waiver of sovereign immunity and the discretionary function exception. The FTCA waives immunity only to the extent that "'a private individual under like circumstances'" would be subject to tort suit. *Spotts*, 613 F.3d at 566 (quoting 28 U.S.C. § 2674). And this waiver is further qualified by the discretionary function exception, which bars suits that invite judicial "'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Spotts*, 613 F.3d at 568 (quoting *Gaubert*, 499 U.S. at 323).

It is difficult to conceive of claims that more clearly invite such "second-guessing" of government policy than the claims at issue here involving the Corps' provision of information to Congress and its prioritizing of its budget requests. A federal agency such as the Corps "is in a unique — and authoritative — position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1992). Moreover, a budget request, "filtered through the Office of Management and Budget, is the product of a complex set of policy trade-offs." *Ibid.* "[E]ven if the request reflected unsound judgment — a matter on which courts are completely unqualified to pass," *ibid.*, that would provide no ground to impose tort liability or withhold the protection of the discretionary function exception.

Third, plaintiffs' novel theory of causation fails even on its own terms. Plaintiffs' contentions that "[t]he Corps assiduously avoided direct communication with Congress,"

Pl. Br. 36, and kept Congress "in the dark," Pl. Br. 102, are belied by the district court's own findings.

Plaintiffs declare that the Corps' 1976 FEIS did not "'mention the concept of wave wash,'" Pl. Br. 30 (quoting 647 F. Supp. 2d at 726-27), and they assert that the Corps maintained a "Sphinx-like silence" with respect to the "threat of probable erosion" of MR-GO's banks and the potential impact on the Reach 2 levees. Pl. Br. 31. But the district court expressly recognized that the Corps' Chief of Engineers wrote directly to the Chairman of the Senate Appropriations Committee in 1967 to warn of the threat that wave wash posed to the Reach 2 levee. That letter, quoted by the district court, "stated unequivocally" 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[s] utilizing the waterway,'" and further specifically advised the Chairman that "'[t]he navigation project should have included adequate provisions for protecting these levees and their foreshore from this damage.'" 647 F. Supp. 2d 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).

Moreover, the Corps' 1976 final EIS again addressed issues of channel bank erosion and wave wash. The report explained that, "[a]s waves generated by winds or vessel passage reach the shoreline, the shoreline material erodes"; that "[s]ince

construction, the distance between the banks visible above the waterline has increased"; and that "[c]hannel bank erosion has been a significant source of sediment in the channel through the land area." 1976 FEIS, at I-6 (PX187).

Plaintiffs declare that "[t]he Corps' own forecast of potential doom in a 1988 study never made its way into an SEIS [supplemental environmental impact statement]." Pl. Br. 33. But this assertion could not possibly support plaintiffs' contention that "[t]he Corps assiduously avoided direct communication with Congress," Pl. Br. 36, and kept Congress "in the dark," Pl. Br. 102. The "1988 study" on which plaintiffs rely was the Corps' Reconnaissance Report, *see* Pl. Br. 33, which, the district court explained, was prepared by the Corps *at the direction of Congress itself*. 647 F. Supp. 2d at 728-29. "The study was authorized by the Committee on Public Works and Transportation of the United States House of Representatives at the request of Representative Robert L. Livingston 'in light of extensive erosion which has been occurring in St. Bernard Parish along the unleveed banks of the Gulf Outlet Channel.'" *Ibid.*

Thus, the Corps had informed Congress of issues of erosion and wave wash as early as 1967 and addressed these concerns in later reports under NEPA as well as in the 1988 Reconnaissance Report.

Even apart from the many errors in plaintiffs' NEPA theory already discussed, by plaintiffs' own account, NEPA reports issued in or after 1976 would have come too late to prompt funding to armor the banks of MR-GO "before 1975." 647 F. Supp. 2d at 675;

see also Doc. 19051-6, at 8 (Plaintiffs' Corrected Post-Trial Brief) (claiming that foreshore protection "should have been installed contemporaneous with the construction of the MRGO"); Pl. Br. 26 ("Even by 1975, the Corps could have averted the coming disaster by proper armoring of the banks."). Unable to reconcile this chronology with their theory of causation, plaintiffs suggest that additional NEPA reporting would have prompted Congress to close the MR-GO channel before Hurricane Katrina struck. *See* Pl. Br. 37 (declaring that "[a]n informed Congress, after Katrina, swiftly moved to close the MRGO and authorize remedial measures"). The district court, however, did not remotely suggest that Congress would have closed the channel but for purported deficiencies in the Corps' NEPA reports, or that such a closure would have affected the Reach 2 levees. The 2007 report that plaintiffs cite made clear that the Corps' recommendation to de-authorize the channel after Hurricane Katrina struck rested in part on damage to the channel that was inflicted by the hurricane itself. "Sections of the MRGO experienced severe shoaling during Hurricane Katrina, leading to a current controlling channel depth of approximately 22 feet." Integrated Final Report to Congress and Legislative Environmental Impact Statement for the MR-GO Deep-Draft De-authorization Study, at v (2007) (PX11)). That shoaling restricted deep-draft shipping access, and many deep-draft shipping businesses were "severely impacted." *Id.* at xi. Restoring the channel to its authorized dimensions would have cost more than $130 million, *see id.* at v, and the analysis of deep-draft navigation indicated that maintaining the authorized dimensions was not economically

justified. *Id.* at xi. At the same time, the Corps rejected the proposal to fill in MR-GO. *Id.* at ix.

Finally, how and when Congress would have responded to additional information or budget requests is, of course, unknowable. Even if Congress had, in fact, granted the Corps' previous requests for funding, no court could determine how the legislature would have reacted to new funding requests in balancing countless priorities. In any event, plaintiffs are wrong when they assert that, "[p]rior to Katrina, Congress had appropriated funds on the rare occasions when it learned of an exigency." Pl. Br. 37. The ILIT Report on which plaintiffs rely recognized that Congress had declined the Corps' request to provide funding for a critical section of the Reach 2 levees. That report noted that "[t]he northeast flank of the St. Bernard/Ninth Ward basin's protecting 'ring' of levees and floodwalls was incomplete at the time of Katrina's arrival." PX3, at xx. It explained that the "critical 11 mile long levee section fronting 'Lake' Borgne ... was being constructed in stages, and funding appropriation for the final stage had long been requested by the U.S. Army Corps of Engineers," but was not appropriated prior to Katrina. *Ibid.*

2. No mandate required the Corps to confine the MR-GO channel to its original design dimensions.

Plaintiffs alternatively suggest that the FTCA's discretionary function exception does not apply because the Corps was legally mandated to confine the MR-GO channel to its original design dimensions. Pl. Br. 80-83. The district court did not reach that conclusion, which has no support in any statute, regulation, or other mandatory directive.

a. In 1956, Congress authorized the construction of MR-GO to 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). The design plan called for a channel that "'was to be 36 feet deep and 500 feet wide, increasing at the Gulf of Mexico to 38 feet deep and 600 feet wide.'" Pl. Br. 83 (quoting 647 F. Supp. 2d at 702); *see also* DX573, at 5 (GRE313).

Although plaintiffs assert that the Corps "did not have the legal right" to "ignor[e]" what they describe as the "authorized project dimensions," Pl. Br. 77, the district court did not hold that the Corps was legally required to confine the channel to its original width and depth. Plaintiffs seek to imply such a holding from the block quote that they reproduce in their brief (Pl. Br. 83), but that passage formed no part of the court's analysis of the discretionary function exception. Instead, that passage addressed the FTCA's due care exception, *see* 647 F. Supp. 2d at 702, which is not at issue on this appeal.

The district court expressly recognized that the design for the MR-GO expressly contemplated that the channel's banks would erode, and did *not* provide for armoring the banks channels to prevent erosion. "'No channel protection [was] included in the overall cost estimate of the project'" even though "'erosion due to wave wash in open areas [was] expected.'" *Id.* at 654 (quoting MR-GO Design Memorandum 1-B (Revised 1959) ¶ 19, at 5 (PX699)). "Bank protection works to prevent this anticipated erosion [was] not recommended as a project feature, nor included in the costs." GRE319 (MR-GO Design Memorandum No. 2, ¶ 47 (1959) (DX1042)). The MR-GO design memoranda thus recognized that erosion would occur and recommended against including foreshore protection.

The district court held that these design features were "shielded by the discretionary function exception" to the FTCA, 647 F. Supp. 2d at 702, a ruling that plaintiffs do not challenge on appeal. Logically, therefore, the absence of armoring and the erosion that plaintiffs attribute to the absence of armoring cannot be the basis for an FTCA suit. At a minimum, the MR-GO design plan precludes a contention that the Corps was legally required to maintain the channel's initial dimensions.

b. Paradoxically, although plaintiffs insist that the Corps was bound by the dimensions of the MR-GO design plan that was authorized in 1956, they chastize the government for invoking "1950s documents." Pl. Br. 81. Plaintiffs do not dispute that "'armoring was deliberately omitted from MR-GO's design'" as shown by the 1950s MR-

GO design memoranda. Pl. Br. 82 (quoting U.S. Br. 35). They contend, however, that "armoring of the south bank was approved and authorized in the 1960s but inexcusably not completed until 1986." Pl. Br. 81.

The authorization to which plaintiffs refer is the design memorandum for the LPV flood control works. *See* 647 F. Supp. 2d at 656. Plaintiffs' effort to derive mandatory directives from the design memorandum for the LPV flood control works is, to say the least, in considerable tension with their insistence that the LPV and MR-GO are wholly unrelated.

In any event, the LPV design memorandum did not require the Corps to confine MR-GO to its initial dimensions, nor did it establish a particular schedule for a foreshore protection project. Instead, that design memorandum simply stated that "'[r]iprap foreshore protection against erosion by wave wash from shipping will be provided.'" Pl. Br. 81 (quoting 647 F. Supp. 2d at 656 (quoting GRE332 (H.R. Doc. No. 89-231, at 65 (July 1965) (DX0610)))) (emphasis omitted).

Consistent with that design memorandum, the Corps' Chief of Engineers wrote to the Chairman of the Senate Appropriations Committee in 1967 and reported 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. Separately, the Corps addressed the problem of the Reach 2 levees' subsidence through a series of "lifts" constructed between 1967 and 1985, *see id.* at 673 (chart), and also implemented projects to address the destruction of wetlands, *see* USCA5 19755-56 (Trial Transcript 3535-36 (Russo)). Nothing in that course of action contravened any mandatory directive.

c. Plaintiffs contend that the Reach 2 levees would have been higher and stronger in 2005 if foreshore protection had been installed at an earlier date. The district court opined 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 Reach 2 levee, *id.* at 675, and that "a responsible course of action to protect the levee being constructed and its berms from the shoreline's erosion would have included this protection," *id.* at 656.

It may be assumed, for the sake of argument, that "a responsible course of action to protect the levee" would have been to armor the banks of the MR-GO channel before 1975. *Ibid.* That is not the relevant question, however. Rather, the question is whether that course of action was legally mandated. If the course of action was *not* mandated, the discretionary function exception bars plaintiffs' suit because that exception applies to

exercises of discretion "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (quoted in *St. Tammany Parish, ex rel. Davis v. Federal Emergency Management Agency*, 556 F.3d 307, 322 n.9 (5th Cir. 2009)). Negligent exercise of discretion is thus shielded from suit just as clearly as non-negligent conduct. *See*, *e.g.*, *Freeman*, 556 F.3d at 332, 343 (rejecting the argument that the government's negligence in implementing its National Response Plan in preparing for and responding to Hurricane Katrina rendered the discretionary function exception inapplicable).

This Court recently reaffirmed in an analysis of the FTCA's discretionary function exception that where "the statute, regulation, or policy leaves it to a federal agency or employee to determine when and how to take action, the agency or employee is not bound to act in a particular manner and the exercise of its authority is discretionary" for purposes of the statutory exception from an FTCA suit. *MS Tabea v. Board of Commissioners of the Port of New Orleans*, 636 F.3d 161, 166 (5th Cir. 2011) (citing *Gaubert*, 499 U.S. at 329). Here, there is no doubt that the Corps had discretion "to determine when and how to take action." *Ibid.* Its judgments are therefore protected from retrospective "second-guessing" through the medium of tort. *Spotts*, 613 F.3d at 568 (quoting *Gaubert*, 499 U.S. at 323).

PART II: RESPONSE TO PLAINTIFFS' CROSS-APPEAL

I. RULINGS AT ISSUE ON THE CROSS-APPEAL.

A. The Franz Plaintiffs.

Anthony and Lucille Franz are two of the five plaintiffs who lived in the St. Bernard Polder at the time Hurricane Katrina struck. The district court held that the Franzes could recover for the flood damage to the contents of the second story of their house, but not for the destruction of the house itself. The court concluded that the Franz house was flooded by waters that the federal levees along the Inner Harbor Navigation Canal ("IHNC") failed to contain and that such damage was not connected to MR-GO. The court thus held that the government could not be held liable for the destruction of the building. The court also concluded, however, that the flood waters would not have reached the second floor of the Franz house if the MR-GO Reach 2 levees had successfully contained other Katrina flood waters, and that this damage to the second floor contents was recoverable. *See* 647 F. Supp. 2d at 735-36.[4]

On appeal, plaintiffs do not dispute that "the IHNC would have breached without the MRGO." Pl. Br. 124. They contend, however, that they should recover in full for the loss of their house on the theory that the flood waters that breached the MR-GO Reach 2

[4] Mr. and Mrs. Franz died in 2010, and, on April 5, 2011, this Court substituted a personal representative.

levees were a "substantial factor" and "concurrent cause" of the home's destruction. Pl. Br. 124-136.

B. The Robinson Plaintiffs.

Norman and Monica Robinson are the two plaintiffs who lived in the New Orleans East Polder. They seek to recover for flood damage to their house that resulted from flood waters that federal levees along MR-GO Reach 1 failed to contain. 647 F. Supp. 2d at 652-653, 696. Like the Franz plaintiffs, they do not dispute their house would have been flooded even if the Reach 1 levees had succeeded in containing Hurricane Katrina's flood waters. The Robinsons contend, however, that but for the Corps' alleged negligence in constructing and maintaining MR-GO, "the levees would not have failed, and the water level at the Robinsons' home would have been 50% less." Pl. Br. 46.

II. THE CROSS-APPEAL CLAIMS ARE BARRED BY THE FLOOD CONTROL ACT.

The claims presented by the cross-appeal, like all the claims at issue in this case, are barred by the Flood Control Act. For the reasons already discussed, the district court erred in allowing any plaintiffs, including the Franzes, to circumvent Section 702c of the Flood Control Act on the theory that the MR-GO Reach 2 levees would have withheld the Katrina flood waters if the Corps had addressed shrinkage of the levees by armoring the Reach 2 banks. The Robinsons' claim regarding waters that overtopped the Reach 1 levees are likewise barred.

The arguments of both sets of cross-appellants underscore the anomaly of permitting suit based on which part of the flood control system failed to hold back the flood waters that reached particular property. Plaintiffs' own exhibit concluded that the flooding of 85% of New Orleans resulted from the force of Hurricane Katrina and "the massive and repeated failure of the regional flood protection system." PX3, at xx (ILIT Report). The Flood Control Act bar applies to all the damages caused by the flood waters that the system failed to contain, regardless of the exact location of the property in the flooded area.

The Robinsons' attempt to circumvent Section 702c also highlights the error of treating the Corps' asserted negligence in the design or maintenance of MR-GO as if it were unconnected to the Corps' flood control protections. The Robinsons' theory of liability, which is illustrated on plaintiffs' annotated map (Pl. Br. 6), is that there is a "funnel" at the point where MR-GO's north-south leg (Reach 2) meets the Gulf Intracoastal Waterway and feeds into the inland stretch of MR-GO (Reach 1). *See* Pl. Br. 7, 38. Plaintiffs attribute the "funnel" in part to the construction of the levees themselves. *See, e.g.*, Pl. Br. 41 (describing "'the creation of the funnel with levees'") (quoting 647 F. Supp. 2d at 677); Pl. Br. 38 ("One salient feature of the MRGO is the 'funnel' at the point where the MRGO's north-south leg with adjacent levees on the south side (Reach 2) feeds into the Reach 1/GIWW with adjacent levees on both sides."); Tr. 1750 (Kemp) (opining that "there is an enhancement or a hastening of the surge onset

caused by the addition of the very large channel, and there is a hastening caused by the addition of the levees along the channels"). The design and maintenance of MR-GO is thus integrally connected to the design and construction of the flood control system.

The Robinsons' claim that "the Corps was negligent for failing to investigate and install a surge barrier" (or "gate") across the mouth of the funnel after 1966, Pl. Br. 61, illustrates the same connection. There is no doubt that a "surge protection barrier" forms "part of a flood protection system." 647 F. Supp. 2d at 697. Indeed, the surge protection barrier that the Corps is now constructing — at a cost of more than $1 billion — was authorized by Congress, post-Katrina, as one of several flood control projects designed to "maximiz[e], to the greatest extent practicable, levels of protection to reduce the risk of storm damage to people and property" in the greater New Orleans metropolitan area. Pub. L. No. 110-28, § 4302 ("Flood Control and Coastal Emergencies"), 121 Stat. 112, 154 (2007); Pub. L. No. 109-234, § 2203 ("Flood Control and Coastal Emergencies"), 120 Stat. 418, 454-55 (2006).

III. THE CROSS-APPEAL CLAIMS ARE INDEPENDENTLY BARRED BY THE FTCA'S DISCRETIONARY FUNCTION EXCEPTION.

The Franzes' claim, which seeks recovery for flood damage assertedly caused by the failure of the Reach 2 levees, is barred by the FTCA's discretionary function exception for the reasons already set out in our argument as appellant.

The Robinsons' claim for flood damage allegedly resulting from the failure of the Reach 1 levees similarly implicates exercises of discretion in the judgments made by the Corps over decades regarding the interaction between the navigation system and the flood control system in the New Orleans area. Such judgments are immune from suit under the FTCA's discretionary function exception.

In addition, the district court correctly observed that the decision not to construct a surge protection barrier implicates the discretionary function exception. 647 F. Supp. 2d at 697 n.50. As the court explained, a 1967 plan to construct such a barrier was "eventually rejected as not economically justified, detrimental to the economic interests of the local participants, and was so broad that it would require Congressional review." *Id.* at 677. The Corps was not even authorized — much less required — to construct such a barrier until Congress enacted the post-Katrina flood control legislation discussed above.

IV. THE CROSS-APPEAL CLAIMS FAIL EVEN APART FROM THE THRESHOLD BARS TO RECOVERY.

Even assuming, for the sake of argument, that the cross-appeals are not barred by Section 702c of the Flood Control Act and the discretionary function exception, it would

be appropriate to affirm this part of the district court's judgment for reasons stated by the district court.

A. The District Court Correctly Found That the Destruction of the Franz House Was Not Caused by Corps Negligence.

If the Court were to reach the question of which flood waters damaged the Franzes' house, there would be no basis to set aside the district court's allocation of damages. The Franz plaintiffs recognize that their house would have been flooded from the west by flood waters that were not contained by the levees along the IHNC. They argue, however, that they would not additionally have been flooded from the east if the Reach 2 levees had successfully contained flood waters.

The district court rejected the Franzes' claim that "the MRGO was a substantial factor in the breaching of the IHNC floodwalls," explaining that the claim was "directly contradicted by the unequivocal testimony of plaintiffs' own expert, Dr. Robert Bea," who testified that "the east walls of the IHNC would have failed regardless of the MRGO." 647 F. Supp. 2d at 735. Although plaintiffs do not challenge this finding, *see* Pl. Br. 124, they nevertheless argue that the Franz plaintiffs are entitled to recover in full for the destruction of their house on the theory that the breaching of the Reach 2 levee was a "concurrent cause" and "substantial factor" in the destruction of their home. Pl. Br. 124-136.

Even if the failure of the Reach 2 levees could be said to have "caused" any of the Hurricane Katrina flood waters that reach the Franz house, it is settled under Louisiana law that the government would be liable only for "damages that would not have occurred but for his own conduct or omission." *Caldwell v. Let the Good Times Roll Festival,* 717 So.2d 1263, 1272 (La. App. 1998) ("When an Act of God combines or concurs with the conduct of a defendant to produce an injury, the defendant may be held liable for any damages that would not have occurred but for his own conduct or omission that constitutes a breach of a specific legal duty owed by the defendant.") (emphasis omitted).

B. The Robinson Plaintiffs Failed To Establish Negligence By the Corps With Respect to the Reach 1 Levees.

The Corps determined in 1967 not to build a surge protection barrier at the intersection of Reach 1 and Reach 2 of MR-GO. 647 F. Supp. 2d at 677. As the district court explained, the Corps' assessment of potential surge reasonably relied on the 1966 Bretschneider & Collins Report, which concluded that "'the effect of the Mississippi River Gulf Outlet is almost negligible for all large hurricanes accompanied by slow-rising storm surges.'" *Id.* at 696 (quoting the Bretschneider & Collins Report, at 4 (PX-68)).

Plaintiffs "do not challenge" the district court's ruling that "the Corps was not negligent *in 1966* for failing to build a surge barrier across the funnel's mouth." Pl. Br. 61 (plaintiffs' emphasis). They argue instead the "the Corps was negligent for failing to investigate and install a surge barrier *after construction*" of MR-GO. *Ibid.* (plaintiffs'

emphasis). But, as the district court explained, the findings in the Bretschneider & Collins Report were confirmed by the real world experience of Hurricane Camille in 1969. *See* 647 F. Supp. 2d at 678. "[T]he flooding during Hurricane Camille mirrored what the report predicted proving that the study was correct." *Ibid.* (citing JX325); *see also id.* at 696-97 ("[t]he Breitscheider & Collins Report findings were confirmed in relation to the surge that was recorded during Hurricane Camille").

Plaintiffs' assertion that this finding was "plain error," Pl. Br. 121, does not survive even cursory scrutiny. They argue that "a graph in the [Bretschneider & Collins] report demonstrates that surge onset was in fact hastened by the MRGO." *Ibid.* It was eminently reasonable, however, for the Corps to rely on the conclusions reached by the report's authors themselves. Plaintiffs' own expert admitted that Bretschneider and Collins were "two of the leading oceanographic hydraulic engineers of the time." Tr. 1748 (Kemp).

Plaintiffs also state that, by 1973, "at least two experts had raised substantial questions undercutting the proposition that no additional surge was created." Pl. Br. 122. As noted, however, the Bretschneider & Collins conclusions were confirmed by the flooding during Camille. Likewise, the *Graci* trial showed that "MRGO did not in any manner, degree, or way induce, cause, or occasion flooding in the Chalmette area." *Graci v. United States*, 435 F. Supp. 189, 195 (E.D. La. 1977). In 2003, a Corps study found that "the MRGO has a minimal influence upon storm surge propagation." Direct Impact of

the MRGO on Hurricane Storm Surge, at 2-3 (2006) (DX1425) (quoting the 2003 study). And, in 2006, the State of Louisiana Department of Natural Resources found that "[t]he MRGO channel does not contribute significantly to peak surge during severe storms, when the conveyance of surge is dominated by flow across the entire surface of the coastal lakes and marsh." *Id.* at ES-2. Given the repeated confirmations of the Bretschneider & Collins findings, it was plainly reasonable for the Corps to rely on the conclusions set forth in that report.

C. The Robinsons Also Failed To Prove That the Asserted Negligence Caused Their Flood Damage.

In addition to their failure to prove negligence, the Robinsons also failed to prove that the waters that overtopped the levees along Reach 1 — which plaintiffs ascribe to Army Corps negligence — caused their flood damage. The federal levees that protect New Orleans East include New Orleans East Levee, the New Orleans East Back Levee, the Citrus Back Levee, and the IHNC floodwalls. 647 F. Supp. 2d at 652-53; *see also* Pl. Br. 6 (map). The Robinsons' house was flooded from multiple directions, including from the breaches of the New Orleans East Back Levee that runs along the Gulf Intracoastal Waterway. Plaintiffs' expert conceded that, within hours after the Robinsons' house was flooded by waters that overtopped the Reach 1 Citrus Back Levee, those waters receded and the home was flooded to an even higher level by the waters from "the breaches in the

east," *i.e.*, the breaches of the New Orleans East Back Levee. Tr. 1055-1056 (Vrijling); *see also* PX1771 (Figure 2) (chart showing water depth at the Robinson home).

Quoting the government's post-trial brief, plaintiffs stress that the waters that overtopped the Reach 1 levee arrived at the Robinson home "first" and contributed to the "initial flooding" of the Robinson property. Pl. Br. 49 (quoting Doc. 19160-3 at 113 (U.S. Post-Trial Br.)); *see also* Pl. Br. 119-20. But, as the brief that plaintiffs quote explained, "the arrival first of floodwaters from Reach 1 made no difference whatsoever" because "the floodwaters from the overtopping of the Citrus Back Levee peaked and had begun to recede from the Robinson property when the floodwaters from the New Orleans East Back Levee breach reached the property and raised the elevation of the floodwaters even higher than the prior peak." Doc. 19160-3 at 113-14. "Regardless of the MRGO, the Robinson property was going to be flooded to its maximum extent by floodwaters attributable solely to force majeur: Hurricane Katrina." *Id.* at 114.

Furthermore, "[t]o the degree that plaintiffs' claims rest on the proposition that a 'funnel' caused an increase in volume of surge and velocity, that funnel was inherent in the original design" of MR-GO, rather than attributable to the widening of the channel. 647 F. Supp. 2d at 697. Prior to trial, the district court held that the discretionary function exception protects from suit the actions taken by the Corps in connection with the initial design and construction of MR-GO, *see id.* at 702 — a ruling that plaintiffs do not challenge on appeal. Instead, plaintiffs assert that "they proved their negligence case as to

their home in New Orleans East *independent of the original design issues* related to the funnel and failure to install a surge prevention barrier." Pl. Br. 44 (plaintiffs' emphasis). They argue that this "expert testimony as to the cause of flooding in New Orleans East was unchallenged by any defense expert report." *Id.* at 119.

There was, however, no such evidence to rebut. The opinion of one of plaintiffs' experts, Dr. Bea, explicitly assumed the existence of a surge protection barrier (or "gate"). Asked by plaintiffs' counsel what would have happened in "Scenario 3" — which was the scenario that assumed that the MR-GO channel had been confined to its original dimensions — Dr. Bea responded: "The answer is minor flooding for the New Orleans East Polder, only rainfall flooding *if we realize a gate at the funnel*." Tr. 1258-59 (Bea) (emphasis added). Plaintiffs' other expert, Dr. Vrijling, did not address "Scenario 3" at all; he offered opinion on what would have happened if the MRGO had never been built. *See*, *e.g.*, Tr. 834, 838 (opining on the "MRGO neutral" scenario, that is, "the case when MRGO was not present."). Plaintiffs' third expert, Dr. Kemp — upon whose testimony plaintiffs rely for the proposition that the Robinsons' home would have experienced "only" six feet of flooding had MR-GO been confined to its original dimensions — admitted that he was not an expert on levee breaches and that he thus would "hand the waves and surge information off to Bob Bea at the midpoint of the MRGO channel, whereupon [Bea] would then come up with the timing and causation of breaching." Tr. 1827, 1832-33 (Kemp). But, as explained above, Dr. Bea's opinion as to the cause of

flooding in New Orleans East was explicitly predicated on the existence of a surge protection barrier. Thus, plaintiffs' own evidence did not show that the widening of MR-GO had any impact on the flooding in New Orleans East.

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:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), this brief uses proportionately spaced font and contains 13,636 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. Pursuant to Fifth Circuit Rule 25.2.13, I have complied with this Court's privacy redaction requirements;

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USDC No. 2:05-CV-4182
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You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

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