

No. 17A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ST. BERNARD PARISH GOVERNMENT, et al.,

Applicants,

v.

UNITED STATES,

Respondent.

**Application for an Extension of Time To File a Petition for a Writ of
Certiorari to the United States Court of Appeals for the Federal Circuit**

**APPLICATION TO THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE UNITED STATES AND
CIRCUIT JUSTICE FOR THE FEDERAL CIRCUIT**

CARLOS A. ZELAYA, II
MUMPHREY LAW FIRM, LLC
2118 Pakenham Drive
Chalmette, LA 70043

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
VINCENT J. COLATRIANO
WILLIAM C. MARRA
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

Counsel for Applicants

LIST OF PARTIES AND RULE 29.6 STATEMENT

The plaintiffs—cross-appellants in the Court of Appeals were St. Bernard Parish Government, Gwendolyn Adams, Henry Adams, Cynthia Bordelon, Steven Bordelon, Steve’s Mobile Home & RV Repair, Inc., Edward Robin, Sr., Edward “Pete” Robin, Jr., Brad Robin, Robin Seafood Company, Inc., Robin Yscloskey Development #1, LLC, Robin Yscloskey Development #2, LLC, Robin Yscloskey Development #3, LLC, Robin Yscloskey Development #4, LLC, Rocco Tommaseo, Tommoso “Tommy” Tommaseo, Rocky and Carlo, Inc., Port Ship Service, Inc., and Other Owners of Real Property in St. Bernard Parish or the Lower Ninth Ward of the City of New Orleans, each of whom was a plaintiff—cross-appellant on behalf of itself and a class of all others similarly situated.

Each of these plaintiffs—cross-appellants is an Applicant here, both individually and on behalf of all others similarly situated. The defendant-appellant in the Court of Appeals was the United States.

None of the Applicants is a publicly held company, and no publicly held company owns 10% or more of any Applicant’s stock. Robin Capital Holdings, LLC, is the parent company of Robin Yscloskey Development #1, LLC, Robin Yscloskey Development #2, LLC, Robin Yscloskey Development #3, LLC, and Robin Yscloskey Development #4, LLC. None of the other Applicants has a parent company.

The liability class that the Court of Federal Claims certified consists of “owners of real property or ‘immovable property,’ under Louisiana State law as of August 28, 2005, located in St. Bernard Parish, Louisiana and/or the Lower Ninth Ward of the

City of New Orleans, Louisiana, subject to the temporary taking of such property, as a result of increased storm surge, during Hurricane Katrina and/or ‘inevitably recurring’ flooding during subsequent hurricanes and severe storms, as a result of the United States Army Corps of Engineers’ construction, expansions, operation, and failure to maintain the Mississippi River-Gulf Outlet, until it permanently was closed on July 1, 2009. ‘Owners of real property’ does not include the United States government or agencies or instrumentalities thereof.” *St. Bernard Parish Government v. United States*, 126 Fed. Cl. 707, 740 (2016). For purposes of the just compensation inquiry, the Court of Federal Claims also certified two subclasses of the above liability class. *Id.*

TABLE OF CONTENTS

	<u>Page</u>
DISCUSSION	1
CONCLUSION.....	7

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>St. Bernard Parish Government v. United States</i> , 887 F.3d 1354 (Fed. Cir. 2018).....	1, 4, 5
<i>St. Bernard Parish Government v. United States</i> , 121 Fed. Cl. 687 (2015)	2, 3, 4
<u>Statutes</u>	
28 U.S.C. § 1254(1)	1

**APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Federal Circuit:

DISCUSSION

Pursuant to Supreme Court Rules 13.5, 22, and 30.3, Applicants¹ respectfully request an extension of time of forty-three (43) days, to and including August 31, 2018, for the filing of a petition for a writ of certiorari to review the decision and judgment of the Federal Circuit in *St. Bernard Parish Government v. United States*, 887 F.3d 1354 (Fed. Cir. 2018) (attached as Exhibit 1). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1). In support of this Application, Applicants state:

1. The Federal Circuit issued its opinion and judgment on April 20, 2018. Unless an extension is granted, the deadline for filing the petition for a writ of certiorari is July 19, 2018.

2. This case presents a serious candidate for review because the decision below contravenes bedrock Fifth Amendment principles. In 1956, Congress authorized the construction of the Mississippi River-Gulf Outlet (“MRGO”), a 76-mile

¹ The Applicants are each of the Plaintiffs–Cross-Appellants below: St. Bernard Parish Government, Gwendolyn Adams, Henry Adams, Cynthia Bordelon, Steven Bordelon, Steve’s Mobile Home & RV Repair, Inc., Edward Robin, Sr., Edward “Pete” Robin, Jr., Brad Robin, Robin Seafood Company, Inc., Robin Yscloskey Development #1, LLC, Robin Yscloskey Development #2, LLC, Robin Yscloskey Development #3, LLC, Robin Yscloskey Development #4, LLC, Rocco Tommaseo, Tommoso “Tommy” Tommaseo, Rocky and Carlo, Inc., Port Ship Service, Inc., and Other Owners of Real Property in St. Bernard Parish or the Lower Ninth Ward of the City of New Orleans. The Applicants file this application on their own behalf and on behalf of all others similarly situated.

deep-draft waterway intended to shorten the transit distance for ocean-going and other vessels between the Port of New Orleans and the Gulf of Mexico. From the beginning, it was understood that the construction of this navigation channel as designed by the U.S. Army Corps of Engineers (“the Corps”) would pose a significant risk of catastrophic flooding in portions of Greater New Orleans—including the communities at issue in this case, St. Bernard Parish and New Orleans’ Lower Ninth Ward—during hurricanes and other storm events. As early as 1957, for example, the Corps was warned that “[d]uring times of hurricane conditions, the existence of [MRGO] will be an enormous danger to the heavily populated areas of [St. Bernard] Parish due to the rapidity of the rising waters reaching the protected areas in full force through the avenue of this proposed channel.” *St. Bernard Parish Government v. United States*, 121 Fed. Cl. 687, 723 (2015) (quoting 1957 St. Bernard Tidal Channel Advisory Committee report).

3. The Government nevertheless proceeded with the project. Construction of MRGO created a conduit for saltwater intrusion from the Gulf, which, as predicted, destroyed tens of thousands of acres of wetlands that had for millennia acted as natural buffers against storm winds and surge. In addition, and again as predicted, decades of maintenance dredging, and the powerful wakes caused by ocean-going ships using MRGO, severely eroded the unprotected banks of the channel, expanding the channel from its authorized width of 650 feet to as much as 3,000 feet in places. This dramatic widening of the MRGO channel, which was not only foreseeable to but actually foreseen by the Government, provided a critical expanse of open water for

storm waves and surge to build size and momentum before colliding with a separate and independent federal project: the levees designed to protect populated areas from floods. The Corps' MRGO-related actions ultimately did lead to flooding on several occasions, most catastrophically when Hurricane Katrina struck in 2005. During Hurricane Katrina, the Corps' MRGO-related activities caused the devastating early destruction of critical levees that protected Applicants' properties, resulting in massive flooding of the Lower Ninth Ward and St. Bernard Parish that would not have occurred but for the Government's actions.

4. The Applicants brought suit in the Court of Federal Claims ("CFC"), asserting, on behalf of themselves and a class consisting of owners of real property in the affected communities, that MRGO effected the temporary taking of a flowage easement over their properties for which they were entitled to compensation under the Fifth Amendment. Based on voluminous evidence presented in two separate bench trials, one on liability and one on the amount of just compensation, the CFC found the Government liable for the temporary taking of Applicants' property through the catastrophic flooding caused by the Government's MRGO-related activities. The CFC found that MRGO significantly amplified the strength of storms including Katrina, and that the levees protecting the relevant communities would not have suffered catastrophic breaching during Katrina but for the presence of MRGO. Crediting and quoting the Applicants' expert witness, the CFC found that "the onset of breaching and flooding was advanced by the presence of the MRGO," and that this "breaching was initiated by the excess stress applied to [levee] structures," including

“a higher intensity of wave attack [along the relevant levees] than would have occurred if [MRGO] were not there or farther away.” *St. Bernard Parish*, 121 Fed. Cl. at 737. The CFC found that MRGO “spelled the difference” between the mere overtopping of the levees (without breaches) and “catastrophic flooding through breaches” that resulted only because the levees were “exposed to greater stress … for a longer period [of time] than would have occurred during Katrina if the MRGO project had never been built and maintained” as it was. *Id.* at 738 (quoting Applicants’ expert witness). The CFC awarded just compensation to certain Applicants for the physical taking of their property caused by the Government’s design, construction, operation, and maintenance of MRGO.

5. On appeal, the Federal Circuit did not overturn the CFC’s critical factual finding that but for the Government’s construction, operation, and maintenance of MRGO, the levees protecting St. Bernard Parish and the Lower Ninth Ward would not have suffered catastrophic breaching, and those communities would not have suffered the devastating flooding associated with Hurricane Katrina. The Federal Circuit nevertheless reversed. Seizing upon the CFC’s observation that the Government had failed to maintain the MRGO in such a way as to mitigate or remove the flood risk created by the channel, the Federal Circuit observed that “the government cannot be liable for failure to act, but only for affirmative acts by the government.” *St. Bernard Parish*, 887 F.3d at 1360. The court relied on that observation to rule that “[t]he failure of the government to properly maintain the

MRGO channel or to modify the channel cannot be the basis of takings liability.” *Id.* at 1362.

6. The Federal Circuit then suggested that “the sole affirmative acts” which could provide a basis for takings liability “were the construction of MRGO, which was completed by 1968, and the continued operation of the channel.” *Id.* Although the Federal Circuit did not question the CFC’s finding that these affirmative acts caused independently-constructed levees to suffer catastrophic breaching, the court nevertheless ruled that Applicants could not establish causation because the Government had built these levees. The Federal Circuit held that Applicants had to compare the amount of flooding sustained during Hurricane Katrina to “the flood damage that would have occurred *if there had been no government action at all,*” including not only the Government’s MRGO-related activities but also separate, unchallenged, and independent Government activities, such as the construction of the levees, that would have taken place whether or not MRGO had ever been built. *Id.* at 1363 (emphasis added). Because, according to the Court, Applicants’ properties would have flooded during Katrina if there were no levees protecting their properties from hurricanes, the Federal Circuit held that the Government did not commit a taking, regardless of whether its actions caused those levees to breach. *Id.* at 1368.

7. Applicants believe the Federal Circuit’s decision warrants this Court’s review. The Federal Circuit’s decision radically recasts the relevant inquiry in takings law, which heretofore has always asked the simple question whether the

challenged governmental action caused a taking of the plaintiff's property. Under the Federal Circuit's novel and highly restrictive approach, challenges that can be characterized as premised on the government's failure to mitigate the effects of government action are transformed into challenges to government inaction, for which the government is categorically immune. The Federal Circuit's ruling thus threatens a sea-change in takings law, since virtually any challenge to government *action* that results in a taking (here, the government's MRGO-related actions that caused the levees to breach) can equally be characterized as challenges to the government's failure to mitigate the effects of those actions (here, the government's failure to mitigate the flood risk caused by its actions). Moreover, under the Federal Circuit's approach, the relevant takings inquiry focuses on whether *the entire totality of governmental action*, aggregated across wide swaths of time and across entirely unrelated government projects, caused a net negative effect on a landowner's property. Here, the Federal Circuit did not disturb the CFC's finding that the Government's MRGO-related activities caused Plaintiffs' property to flood and suffer damage that would not have happened but for those MRGO-related activities. Nevertheless, the Federal Circuit found no taking because the Government had separately built the levees that it later breached. In addition to contravening this Court's takings decisions, the Federal Circuit's ruling has troublesome policy implications. Under this decision, federal and state governments effectively now have a permanent flowage easement over any property that is protected by flood protection

systems that those governments have built, no matter what destructive impact other, separate actions by those governments may have on those properties.

8. An extension of time is warranted because between now and the due date of the petition, Applicants' counsel have substantial briefing and oral argument obligations, including merits briefing in *Virginia Uranium, Inc. v. Warren*, No. 16-1275 (U.S.), which brief is due on July 19; a brief in opposition to a petition for interlocutory review of a question certified pursuant to 28 U.S.C. § 1292(b) due on July 2 in *In re Blue Cross Blue Shield Antitrust Litigation*, No. 18-90020-E (11th Cir.) (petition filed June 22, 2018); oral argument on July 11 in *Reyes v. Sessions*, No. 17-1643 (D.D.C.); summary judgment briefing due July 6 and August 17, and oral argument on August 22, in *ODonnell v. Harris County*, No. 4:16-CV-01414 (S.D. Tex.); and summary judgment briefing due June 29, and oral argument on August 1, in *Boeing v. United States*, No. 17-1969 (Fed. Cl.). Applicants therefore need additional time to adequately address the reasons why this Court should grant certiorari and consider the important and far-reaching Fifth Amendment issues raised by the Federal Circuit's decision.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that an extension of time, to and including August 31, 2018, be granted within which Applicants may file a petition for a writ of certiorari.

Dated: June 26, 2018

Respectfully submitted,

CARLOS A. ZELAYA, II
MUMPHREY LAW FIRM, LLC
2118 Pakenham Drive
Chalmette, LA 70043



CHARLES J. COOPER

Counsel of Record

MICHAEL W. KIRK

VINCENT J. COLATRIANO

WILLIAM C. MARRA

COOPER & KIRK, PLLC

1523 New Hampshire Ave., N.W.

Washington, D.C. 20036

(202) 220-9600

ccooper@cooperkirk.com

Counsel for Applicants