17-1201

In The
Supreme Court of the United States

GARY THACKER,
VENIDA L. THACKER,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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1. Engrafting a Discretionary-Function Exception Onto the TVA's Suability Clause Would Thwart Statutes and Thus Abrade the Separation of Powers

The TVA argues that tacking a discretionary-function exception onto the TVA's sue-and-be-sued statute upholds the separation of powers. The TVA contends: "For the TVA, discretionary[-]function immunity arises not from the FTCA but from an implied exception — based on constitutional separation-of-powers principles — to the waiver of sovereign immunity in the TVA's organic statute . . ."[1]

But the TVA gets things backward. It is adding a discretionary-function exception to the TVA's sue-and-be-sued clause that would contravene the statutory framework, thwart Congressional intent and enactment, and thus erode the separation of powers. (The TVA also rewrites this Court's longstanding precedent defining how immunity is tested for such entities. *Infra*, Part 2.)

The TVA brushes aside several statutes. The core statute — the TVA's sue-and-be-sued clause (16 U.S.C. § 831c(b)) — contains no discretionary-function exception. By statutory directive, that clause is restricted only by other parts of the Tennessee

[1] Cert. Opp. 12.

Valley Authority Act.[2] None applies here. None appends a discretionary-function test to the sue-and-be-sued clause. The FTCA — from which the Eleventh Circuit has borrowed the discretionary-function exception[3] — excludes the TVA from its compass.[4] More generally, the FTCA aims at *waiving* immunity for the sort of garden-variety personal-injury claims raised here.

This Court has said that, "when Congress establishes" a sue-and-be-sued entity, "*it cannot lightly be assumed that restrictions on that authority are to be implied.*" *Fed. Housing Admin. v. Burr*, 309 U.S. 242, 245 (1940) (emphasis added). Absent a "clear" showing under *Burr*, "agencies 'authorized to "sue and be sued" are *presumed to have fully waived immunity*.'" *FDIC v. Meyer*, 510 U.S. 471, 481 (1994) (quoting *Int'l Primate Protection League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 86 (1991)) (emphasis added).

This consequently is not (as the TVA would have it) a case of keeping the judiciary from interfering with the executive. It is rather a case of the TVA's asking this Court to override Congress — to reshape the character that Congress gave the "broad[ly]" suable TVA. Due regard for the separation of powers lies in upholding the statutes by which

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[2] 16 U.S.C. § 831c(b) (Pet. App. 18a) ("Except as otherwise specifically provided *in this chapter* [the TVA Act], the [TVA] . . . [m]ay sue and be sued in its corporate name.") (emphasis added).

[3] Pet. App. 6a.

[4] 26 U.S.C. § 2068(l).

Congress formed the TVA as a sue-and-be-sued entity.

Furthermore, the TVA is *not* a full-blown executive "agency" like the FBI or IRS. The TVA is "a corporate entity, separate and distinct from the Federal Government itself."[5] The TVA "operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington." *Nat'l Resources Defense Council, Inc. v. TVA*, 459 F.2d 255, 257 (2d Cir. 1972). When it created the TVA, Congress "intend[ed] that" it would "have much of the essential freedom and elasticity of a private business corporation." *N.C. ex rel. Cooper v. TVA*, 515 F.3d 344, 349 (4th Cir. 2008) (quoting H.R. Rep. No. 73-130 at 19 (1933)).

The Fourth Circuit has thus held that suits against the TVA do not raise separation-of-powers concerns. *Id.* at 348–49. That court has pointed to numerous ways in which Congress has separated the TVA from the government. For example, Congress has

> exempted the TVA from the civil service laws, 16 U.S.C. § 831b; exempted the TVA from the purchasing requirements otherwise applicable to federal entities, 16 U.S.C. § 831h(b); and provided the TVA with authority to issue bonds which are not obligations of the United States, 16 U.S.C. § 831n-4(b). Moreover, the

[5] *See Pierce v. United States*, 314 U.S. 306, 310 (1941).

> TVA funds its power-generating programs itself rather than with congressional appropriations. 16 U.S.C. § 831n-4.

Id. at 349. "This degree of independence which the TVA possesses in large part alleviates" separation-of-powers concerns. *Id.* "A lawsuit against the TVA

> is not a suit against the United States itself *or one of its agencies subject to the direct executive control which is granted to the President by Article II of the Constitution*. Rather, a suit against the TVA is against "a governmental agency in[] the commercial world," [*Loeffler v. Frank*, 486 U.S. 549, 555 (1994)] . . . Because *the TVA is so far removed from the control of the Executive Branch*, operating as the functional equivalent of a private corporation, the judiciary does not run the same risk of overstepping its bounds and "prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions," [*McMellon v. United States*, 387 F.3d 329, 341 (4th Cir. 2004) (*en banc*)] . . .

Id. at 349 (emphases added).

2. The TVA Mishandles *Burr*

This Court has explained — since 1940 — how to analyze sue-and-be-sued immunity. "[W]aivers by Congress of governmental immunity . . . should be

liberally construed," the Court has said, "notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign."[6] To impliedly reduce a "sue and be sued" clause's waiver of immunity, "it must be clearly shown" that one of *Burr's* three criteria is satisfied.[7] Absent that showing, sue-and-be-sued entities "are presumed to have fully waived immunity.'"[8]

Against this, the TVA simply insists on the Eleventh Circuit's analytical approach. Which is to say, the TVA forces discretionary-function cases to the front of the analysis, while relegating sue-and-be-sued doctrine (under *Burr*) by silent fiat to a vague, subordinate role as somehow "consistent with" *United States v. Smith*, 499 U.S. 160 (1991).[9]

This is question-begging. The TVA assumes (or asserts) what it is supposed to be proving. Exactly what is in question is whether a discretionary-function exception (obliquely referenced in *Smith* and tested under *Gaubert*[10]) displaces the long-governing sue-and-be-sued framework of *Burr*.

The TVA leans heavily on *Smith's* reference to "exceptions" to TVA suability.[11] But that reference is dicta. It is ancillary to *Smith's* discussion under the Federal Employees Liability Reform and Tort

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[6] *Burr*, 309 U.S. at 245; *Meyer*, 510 U.S. at 480. (emphasis added)
[7] *Burr*, 309 U.S. at 245.
[8] *Meyer*, 510 U.S. at 481 (quoting *International Primate*, 500 U.S. at 86).
[9] *See* Cert. Opp. 8.
[10] *United States v. Gaubert*, 499 U.S. 315 (1991).
[11] *See* Cert. Opp. 5, 8.

Compensation Act of 1988.[12] The two cases that *Smith* cites do not help the TVA. *Meredith* was decided before *Loeffler* and *Meyer* reaffirmed *Burr*; and *Burr* was not raised.[13] The defamation case of *Queen* turned, not on discretionary-function immunity, but on absolute immunity for good-faith speech.[14]

* * *

The TVA contends that, at all lengths, "the first ground [of the *Burr* test] is satisfied here, because the TVA regularly exercises governmental functions."[15]

Burr's first prong says that sue-and-be-sued entities may be immune from suit if it is "clearly shown" that the given "type[] of suit[]" is "not consistent with the statutory or constitutional scheme."[16]

This again begs the question. The TVA argues that "governmental functions" satisfy this head because "immunity . . . for discretionary actions . . . arises from fundamental separation-of-powers principles."[17] But whether a discretionary-function test applies to the TVA at all is exactly what is in issue.

Put differently, the TVA is here secreting a discretionary-function exception into the *Burr* sue-

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[12] *See Smith*, 499 U.S. at 168–69.
[13] *Peoples Nat. Bank of Huntsville, Ala. v. Meredith*, 812 F.2d 682 (11th Cir. 1987).
[14] *Queen* v. *TVA*, 689 F.2d 80, 85 (6th Cir. 1982).
[15] *Id.* at 9.
[16] *Burr*, 309 U.S. at 245.
[17] Cert. Opp. 9.

and-be-sued test. This is no different from the "engraft[ed]" discretionary-function test that this Court rejected in *Meyer*.

Furthermore, if "governmental functions" and "discretionary actions" are immune because they meet *Burr's* first prong, then *Burr's* second prong is obviated. The second head of *Burr* already contemplates immunity for "governmental functions." Specifically, under its second head, *Burr* permits an "implied" immunity to arise if it is "clearly shown" that an "implied restriction of the general authority [to sue and be sued] is *necessary* to avoid *grave interference* with . . . a governmental function."[18] If discretionary, "governmental functions" are immune under *Burr's first* head, though, then this second prong is made superfluous. Worse, the TVA's position erases *Burr's* further requirements that implied immunity be proven (1) "necessary" to (2) avoid "grave interference" with a "governmental function."

3. Circuit Split

The TVA denies that the conflict between how the Sixth and Eleventh Circuits have (incorrectly) analyzed its immunity, and how the Second and Fourth Circuit have done so, "warrants this Court's review."[19] The latter circuits supposedly "do not commonly hear claims against the TVA."[20] The TVA thus advocates different rules for people living in different federal circuits. That is facially unpersuasive. Moreover, the TVA claims that the

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[18] *Burr*, 309 U.S. at 245 (emphases added).
[19] Cert. Opp. 7.
[20] *Id.* at 16.

Sixth and Eleventh Circuits "encompass the vast majority of the Tennessee Valley region."[21] The TVA thus argues for a rule in those circuits that not only departs from this Court's precedent, but — as evidenced by this case — would, in all but the most marginal suits, leave the "vast majority" of its customers without normal tort remedies.

The TVA also complains that the Second and Fourth Circuits' "cramped understanding" of this Court's precedent would "push the courts" into the "quagmire" of distinguishing "governmental" from "non-governmental" functions.[22] Yet the *TVA's* discretionary-function test would ask the courts to divide the "governmental" and "discretionary" from the "non-governmental." The wholly different schema of *Burr-Loeffler–Meyer* largely avoids that "quagmire."

Finally, the TVA distinguishes the most salient Second and Fourth Circuit cases (*American Electric* and *Cooper*) as having dealt with acts that were "considered 'commercial' rather than governmental."[23] But this observation cuts against the TVA. Both those cases were pollution-nuisance suits that challenged the TVA's general operation of coal-fired power plants.[24] That is higher-level, more "policy"-laden activity than the component work of installing power lines. Yet, if those higher-level

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[21] *Id.* at 8.
[22] *Id.* at 16.
[23] *See id.* at 7, 15–16 (discussing *Cooper, supra,* and *Conn. v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009)).
[24] *See American Electric*, 582 F.3d at 325; *Cooper*, 515 F.3d at 346.

decisions were "commercial" and not immune (because part of the TVA's essentially private power-generation business), then even more clearly non-discretionary and not immune is the on-the-ground labor that is challenged here. The TVA might equally argue that managing an entire company is "commercial" and hence not immune, but removing a tripping hazard from the floor of the company's break room is somehow "policy"-laden, discretionary, and immune.

4. The Plaintiffs' Claims Do Not Fall Under the Suits in Admiralty Act

4.1 The TVA Has No "Capital Stock"

The Suits in Admiralty Act (SIAA)[25] waives maritime immunity only for corporations in which the government owns "*all the outstanding capital stock*."[26] The TVA has no "capital stock." The word "stock" is not found in the TVA Act, nor does that Act authorize the sale of any part of the TVA. The TVA "is not a corporation created under the general laws of some state or territory, whose stock the United States happen to own . . ."[27]

Congress could have subjected the TVA to suit under the SIAA, or made the SIAA applicable to government "corporations" without capital stock. It did not. The Thackers' claims thus do not fall under the SIAA, but under the TVA's sue-and-be-sued statute.

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[25] 46 U.S.C. §§ 30901–18.
[26] 46 U.S.C. §§ 30902–03 (emphasis added).
[27] *Posey v. TVA*, 93 F.2d 726, 727 (5th Cir. 1937).

4.2 The TVA Act "Repealed" Any Conflicting SIAA Immunity Exception

The SIAA was enacted in 1920.[28] Thirteen years later, Congress passed the TVA Act with its "broad," immunity-waiving sue-and-be-sued clause.[29] Nothing in the TVA Act restricts that waiver. Crucially, the TVA Act also provided: "[A]ll Acts or parts of Acts in conflict herewith are hereby repealed, so far as they affect the operations contemplated by this Act."[30] If the SIAA had a discretionary-function (or any other) exception that limited the TVA's sue-and-be-sued waiver, then the TVA Act "repealed" and negated that conflicting SIAA term.

4.3 Even if the SIAA Applied, It Would Not Immunize the TVA

The SIAA would not immunize the TVA from tort liability. The opposite is true. Congress and this Court have recognized that governmentally created corporations are broadly suable under the SIAA.

The SIAA was enacted to adjust the suability of the Emergency Fleet Corporation. The Corporation was created through the U.S. Shipping Board (itself a Congressionally formed entity) in the run-up to World War I.[31] The Corporation had outstanding stock and

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[28] Pub. L. No. 66-156, 41 Stat. 525–26 (1920) (current version at 46 U.S.C. § 30903).
[29] Pub. L. No. 73-17, 48 Stat. 58 (1933).
[30] *Id.*, ch. 32, § 28, 48 Stat. 71 (codified at 16 U.S.C. § 831aa).
[31] *See* 39 Stat. 728 (1916); *Sloan Shipyards Corp. v. U.S. Shipping Bd. Emer. Fleet Corp.*, 258 U.S. 549, 565 (1922).

contemplated that "private persons might be stockholders."[32] In the end, the federal government bought all the Corporation's stock.[33] When it passed the SIAA in 1920, Congress barred *in rem* but allowed *in personam* suits against corporations whose stock is wholly owned by the United States.[34] (Thus allowing maritime suits without the need or ability to attach United States-owned vessels.[35]) Congress provided no exception to the SIAA's immunity waiver.[36] No exception was added when Congress twice amended the SIAA[37] *after* the FTCA created the discretionary-function exception.[38] Nor has this Court created any SIAA exception.

This Court's precedent is to the contrary. Despite the "enormous powers"[39] given to the Emergency Fleet Corporation by statute and executive order, this Court declined to extend immunity to that entity. In *Sloan Shipyards, supra*, the Court said through Justice Holmes:

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[32] *Sloan Shipyards*, 258 U.S. at 565.
[33] *Id.*
[34] *See* Pub. L. No. 66-156, ch. 95, §§ 1–2, 41 Stat. 525–26 (1920) (codified as amended at 46 U.S.C. § 30908) (forbidding "arrest or seizure" of federally owned ships).
[35] *E. Transp. Co. v. United States*, 272 U.S. 675, 684 (1927) (no U.S.-vessel seizures given recognition of *in personam* claims).
[36] 41 Stat. 525 (1920).
[37] 74 Stat. 912 (1960) and 110 Stat. 3967 (2006).
[38] The same legislation that created the FTCA's discretionary-function exception expressly excluded SIAA claims and claims against the TVA. *See* Pub L. No. 79-601, ch. 753, § 421(d), (l), 60 Stat. 845–46 (1946).
[39] *Sloan Shipyards*, 258 U.S. at 566.

> [T]he general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. . . . An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, *does not cease to be answerable for his acts*. . . .
>
> The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law. . . . *The plaintiffs are not suing the United States but the Fleet Corporation*, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. . . .[40]

The Court reaffirmed this principle in *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943):

> [W]hen it comes to the utilization of corporate facilities in the broadening phases of federal activities in the commercial or business field, *immunity from suit is not favored*. Congress adopted that policy when it made corporations wholly owned by the United States suable on maritime causes of action under § 2 of the Suits in

[40] *Id.* at 566–68 (emphases added).

> Admiralty Act. That it had the power to grant or withhold immunity from suit on behalf of governmental corporations is plain. . . .[41]

Moreover, this Court rejected the "performance of a governmental function" as a defense under the SIAA in *Eastern Transportation, supra.*[42]

The TVA cites cases that (it says) have recognized a discretionary-function exception under the SIAA.[43] But every one of these cases involved a suit against the United States itself for the conduct of a true federal agency. Not one involved a sue-and-be-sued entity whose own enabling statute waived immunity.[44] The TVA's cases are thus inapposite.

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[41] *Brady*, 317 U.S. at 580 (citing *Sloan Shipyards* and *Burr*, among others) (emphasis added).

[42] *See* 272 U.S. at 682–83, 687–93.

[43] Cert. Opp. 11–12 n. 2.

[44] *McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004) (Corps of Engineers); *Graves v. United States*, 872 F.2d 133 (6th Cir. 1989) (same); *Wiggins v. United States*, 799 F.2d 962 (5th Cir. 1986) (same); *Drake Towing Co. v. Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985) (same); *Tew v. United States*, 86 F.3d 1003 (10th Cir. 1996) (same; Coast Guard); *Canadian Transp. Co. v. United States*, 663 F.2d 1081 (D.C. Cir. 1980) (Coast Guard); *Bearce v. United States*, 614 F.2d 556 (7th Cir. 1980) (same); *Gercey v. United States*, 540 F.2d 536 (1st Cir. 1976) (same); *Cranford v. United States*, 466 F.3d 955 (11th Cir. 2006) (same); *Earles v. United States*, 935 F.2d 1028 (9th Cir. 1991) (Navy); *Baldassaro v. United States*, 64 F.3d 206 (5th Cir. 1995) (employment action against U.S.); *Sea-Land Serv. v. United States*, 919 F.2d 888 (3d Cir. 1990) (against U.S. for ships built with asbestos); *In re Joint E. & S. Dist. Asbestos Litig.,* 891 F.2d 31 (2d Cir. 1989) (same).

* * *

For the TVA's garden-variety malfeasance, the Eleventh Circuit has left the Thackers without a remedy. Even if the TVA is largely correct, it would still need this Court to harmonize the circuits, rewrite precedent, and clarify the new rules governing sue-and-be-sued immunity. Even if the TVA is mostly correct, the Court should still review this case.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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