No. 22-629

In the Supreme Court of the United States

DAVID HOLBROOK, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY; BVU AUTHORITY

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the dismissal of petitioner's challenge to the resale rates set by the Tennessee Valley Authority for the electricity that it produces and sells in the marketplace.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 48 F.4th 283. The opinion of the district court (Pet. App. 31a-41a) is reported at 527 F. Supp. 3d 853.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2022. On November 16, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 5, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1933, the Tennessee Valley region was experiencing dire economic and living conditions. See Information Office, Tennessee Valley Authority, *A History*

of the Tennessee Valley Authority 9 (1983).[1] Annual per capita income in the region was well below the national average; prevailing agricultural practices had damaged millions of acres of farmland and forests; the Tennessee River was prone to flooding and was difficult to navigate in places; and access to electricity was sparse in the region's vast rural areas. See *id.* at 5, 9-10, 12, 15, 23, 45. Against that backdrop, in the first 100 days of President Franklin Roosevelt's first term, Congress enacted the Tennessee Valley Authority Act of 1933 (Act), ch. 32, 48 Stat. 58 (16 U.S.C. 831 *et seq.*).

The Act created the Tennessee Valley Authority (TVA), which is "an agency of the federal government," *Ashwander* v. *TVA*, 297 U.S. 288, 315 (1936), and a "wholly owned public corporation of the United States," *TVA* v. *Hill*, 437 U.S. 153, 157 (1978). The members of TVA's board of directors are appointed by the President with the advice and consent of the Senate. See 16 U.S.C. 831a(a)(1). The members of the board may be removed "at the pleasure of the President." *TVA* v. *United States EPA*, 278 F.3d 1184, 1203 (11th Cir. 2002), withdrawn in part on other grounds, *TVA* v. *Whitman*, 336 F.3d 1236 (11th Cir. 2003), cert. denied, 541 U.S. 1030 (2004); see *Morgan* v. *TVA*, 115 F.2d 990, 994 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941). The Act also provides that a member of the board may be removed "by a concurrent resolution of the Senate and the House of Representatives." 16 U.S.C. 831c(f); but see *Myers* v. *United States*, 272 U.S. 52, 161 (1926).

TVA's broad responsibilities "relate to navigability, flood control, reforestation, marginal lands, and

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[1] https://tva-azr-eastus-cdn-ep-tvawcm-prd.azureedge.net/cdn-tvawcma/docs/default-source/about-tva/history/a-history-of-the-tennessee-valley-authority.pdf?sfvrsn=4307c423_2.

agricultural and industrial development of the whole Tennessee Valley." *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 553 (1946); see, *e.g.*, 16 U.S.C. 831, 831c, 831n-4(h), 831dd. From TVA's earliest days, its development efforts have included constructing and operating an electric power system. The Act specifically authorizes TVA "[t]o produce, distribute, and sell electric power," 16 U.S.C. 831d(*l*), and "to sell the surplus power not used in its operations * * * to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies" set forth in the Act, 16 U.S.C. 831i.

TVA has the authority to set the price of both the initial sale of power and any resale by the initial purchaser. See 16 U.S.C. 831i (authorizing TVA "to include in any contract for the sale of power such terms and conditions, including resale rate schedules, * * * as in its judgment may be necessary or desirable for carrying out the purposes of this chapter"). Pursuant to that authority, TVA has modified its rates over time to accommodate changing conditions. In modifying rates, the agency distinguishes between "'rate adjustment[s],'" which alter the total revenue TVA's operations produce, and "'rate change[s],'" which alter the rates paid by different customers "while keeping [the agency's] overall revenue goal the same." Pet. App. 6a.

TVA rate-setting encompasses a variety of considerations, including the need to "produce gross revenues sufficient to provide funds for operation, maintenance, and administration of its power system" and "such additional margin as the Board may consider desirable." 16 U.S.C. 831n-4(f). The Act also includes various declarations of "policy" relevant to rate-setting, *e.g.*, 16 U.S.C. 831j, including that TVA set prices with "due

regard for the primary objectives of the chapter, including the objective that power shall be sold at rates as low as are feasible," 16 U.S.C. 831n-4(f). And the Act declares that TVA projects "shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity." 16 U.S.C. 831j; see Pet. 20 n.3 (noting that "load factor" refers to utilization of existing capacity).

2. Petitioner is a residential customer of BVU Authority, a local power company that purchases power from TVA and resells it at TVA-approved resale prices. Pet. App. 4a-5a. Petitioner asserts that the policy declaration contained in Section 831j is "a command to the TVA to subsidize consumers from the pockets of industry," and he claims that various pricing decisions by TVA since 2010 have impermissibly lowered industry rates and raised consumer rates in contravention of that asserted command. *Id.* at 2a; see *id.* at 7a-8a. Petitioner initiated this putative class action alleging that TVA's ratemaking decisions: (1) are contrary to law under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; (2) breach a contract between TVA and BVU Authority that incorporates the Act's policy declarations and that petitioner claims renders him a third-party beneficiary able to enforce the contract; and (3) constitute an illegal exaction. Pet. App. 7a-8a.

The district court dismissed the suit. Pet. App. 31a-41a. The court explained that TVA's ratemaking decisions are "committed to agency discretion by law" and thus unreviewable under the APA. *Id.* at 37a-38a (quoting 5 U.S.C. 701(a)(2)). The court further concluded that petitioner "cannot escape dismissal" merely by reframing his APA claim as a claim for breach of contract or illegal exaction. *Id.* at 40a; see *id.* at 40a-41a.

3. The court of appeals affirmed. Pet. App. 1a-30a. It agreed with the district court that TVA rate-setting is committed to agency discretion by law under Section 701(a)(2). Examining this Court's precedents, the court of appeals recognized that its "main task" was "to determine when there are or are not 'judicially manageable standards' for judging an agency's exercise of discretion." *Id.* at 11a (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)). The court explained that identifying "manageable standards" requires a review of whether the challenged agency decision falls within a category of "administrative action that 'courts traditionally have regarded as 'committed to agency discretion,'" *id.* at 13a (quoting *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2568 (2019)), and, if so, whether Congress has chosen to "'limit an agency's exercise'" of discretion "by setting guidelines or otherwise providing a limit," *id.* at 14a (quoting *Chaney*, 470 U.S. at 833).

The court of appeals emphasized that, like other decisions committed to agency discretion, TVA's setting of the rates for the sale and resale of the power it produces depends on a "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." Pet. App. 16a (quoting *Lincoln* v. *Vigil*, 508 U.S. 182, 193 (1993)) (brackets in original). Consistent with

the discretionary character of that task, the court identified a "long tradition" "going on a century old" of courts declining to review TVA rate-setting. *Id.* at 19a; see *id.* at 17a-20a (collecting cases). And the court rejected petitioner's argument that the Act circumscribes TVA's "traditional discretion" over its pricing decisions. *Id.* at 21a. The court explained that, to the contrary, Section 831j contains "general policy statement[s]" and a "mass of discretionary lingo" that "acknowledges and accentuates [TVA's] discretion." *Id.* at 23a-24a (citing *Webster* v. *Doe*, 486 U.S. 592, 600 (1988)).

The court of appeals also affirmed the dismissal of petitioner's claims for breach of contract and illegal exaction. Because the contract between TVA and BVU Authority parrots the "statutory obligations as boilerplate," the court held that petitioner's "breach of contract suit alleging violation of those statutory-but-also-contractual provisions 'is in essence a suit to enforce the statute itself'"—"which has no private cause of action." Pet. App. 28a (quoting *Astra USA, Inc.* v. *Santa Clara Cnty.*, 563 U.S. 110, 118 (2011)). The court rejected the illegal exaction claim on the grounds both that any exaction was not illegal and that, in any event, "a voluntary payment for services rendered is not an exaction, illegal or otherwise." *Id.* at 29a.

ARGUMENT

Petitioner renews his contention (Pet. 18-26) that the TVA Act's general declarations of policy create a judicially enforceable duty for TVA to sell electricity to residential consumers "at the lowest possible rates." Pet. 19. The court of appeals correctly rejected that contention under well-settled precedent, and petitioner's assertion (Pet. 20-26) that the court created a new test is mistaken. To the extent petitioner renews his claims

for breach of contract and illegal exaction, see Pet. 26-28, the court correctly rejected those too. And even if petitioner's claims had merit, review would still be unwarranted. There is no conflict in the circuits on either the APA or exaction claim, and any nascent tension on the contract claim, see *ibid.*, is not ripe for this Court's review. The Court should deny the petition for a writ of certiorari.

1. The courts below correctly dismissed each of petitioner's three claims.

a. The APA generally provides for review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. "But before any review at all may be had" under the APA, "a party must first clear the hurdle of § 701(a)." *Heckler* v. *Chaney*, 470 U.S. 821, 828 (1985). As relevant here, Section 701(a)(2) provides that review is unavailable "to the extent that * * * agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2).

This Court has "read the § 701(a)(2) exception for action committed to agency discretion 'quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2568 (2019) (quoting *Weyerhaeuser Co.* v. *United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)). It has "generally limited the exception to 'certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,'" *ibid.* (quoting *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993)), which often "involve[] a complicated balancing of a number of factors

which are peculiarly within [the agency's] expertise," *Chaney*, 470 U.S. at 831.

Under these standards, the court of appeals correctly concluded that the nature of TVA's decisions concerning the prices to be charged for the power it produces forecloses judicial review. Like other types of agency decisions that the Court has found "general[ly] unsuitab[le]" for judicial review, *Chaney*, 470 U.S. at 831—such as decisions not to undertake enforcement, see *ibid.*, or decisions to allocate funds from a lump-sum appropriation, *Lincoln*, 508 U.S. at 192—TVA's decision to set rates for electricity that it sells on the open market implicates judgments about policy and resource allocation that fall within the core of its discretion and expertise. All of those decisions involve "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," and "the 'agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.'" *Id.* at 193 (quoting *Chaney*, 470 U.S. at 831-832).

The Act identifies a welter of policy objectives that TVA is to balance in setting rates. Among other things, Congress has declared that TVA should "distribute and sell" power "equitably" among different regions. 16 U.S.C. 831j. The Act also declares a policy that sales of electric power for industrial use are "principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity." *Ibid.* More generally, the Act states that TVA should act with "due regard for the primary objectives of the chapter, including the objective that power shall be sold at rates as low as are feasible." 16 U.S.C. 831n-4(f). And

Congress has instructed TVA to generate "gross revenues sufficient to provide funds for operation, maintenance, and administration of its power system," as well as for the fulfillment of various other financial obligations. *Ibid.*

In balancing those objectives, TVA has developed extensive expertise in economic and technical areas, including "'distributed generation, energy efficiency, technological advances, shifts in customer behavior,'" and "the interplay between price * * * and demand." Pet. App. 16a (citation omitted). Courts are not well-situated to supplant that expertise as to TVA's setting of appropriate prices at which its own electric power will be sold. "Setting a price is complicated, and it is not a task on which judges are traditionally expected to be experts." *Ibid.* Even assuming petitioner were correct (Pet. 19) that TVA must structure its operations to lower residential consumer prices to the maximum extent practicable, achieving that goal would not be a simple matter of raising industry rates and lowering consumer rates. As petitioner observes (Pet. 20 n.3), "[i]ncreasing 'load factor' might tend towards reducing rates for industry, which can attract more industrial users and thereby reduce rates overall."

For those reasons, and as the court of appeals explained, TVA's determination of the prices to be charged has traditionally been immune from judicial review. See, *e.g.*, *Mobil Oil Corp.* v. *TVA*, 387 F. Supp. 498, 507 (N.D. Ala. 1974) (citing *Tennessee Elec. Power Co.* v. *TVA*, 21 F. Supp. 947 (E.D. Tenn. 1938)). The Sixth Circuit—where TVA primarily operates—has recognized that "[a] long line of precedent exists establishing that TVA rates are not judicially reviewable." *McCarthy* v. *Middle Tenn. Elec. Membership Corp.*,

466 F.3d 399, 405 (2006) (citation omitted). Indeed, although TVA has been setting rates for nearly 90 years, petitioner "has not provided * * * *any* case in which a federal court has subjected the TVA's ratemaking to judicial scrutiny in the way that is requested here." Pet. App. 18a.

That precedent accords with a broader tradition of courts declining to review the government's commercial judgments. TVA's sale of power is a "typically commercial" activity resembling that of "privately owned power companies," *Thacker* v. *TVA*, 139 S. Ct. 1435, 1439 (2019), and courts have repeatedly refused to review rate-setting and related commercial choices not just by TVA, but also by other government utilities. See Pet. App. 19a-20a (collecting examples); see also, *e.g.*, *Electricities of N.C., Inc.* v. *Southeastern Power Admin.*, 774 F.2d 1262, 1266 (4th Cir. 1985); *Brazos Elec. Power Co-Op., Inc.* v. *Southwestern Power Admin.*, 819 F.2d 537, 544 (5th Cir. 1987). Unlike situations in which the government, performing a regulatory function, specifies the prices that other parties may charge for their goods and services, see Pet. 24, when the government sets the prices for its own goods or services in the marketplace, "it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Chaney*, 470 U.S. at 832 (emphasis omitted).

The Act's "'broad terms'" do not provide the clear "legislative direction" that would be necessary to displace the discretionary character of TVA rate-setting. *Chaney*, 470 U.S. at 830, 833 (citation omitted). To the contrary, the Act "fairly exudes deference." Pet. App. 24a (quoting *Webster*, 486 U.S. at 600). The Act

authorizes TVA to adopt such "resale rate schedules * * * as *in its judgment* may be necessary or desirable for carrying out the purposes of this chapter." 16 U.S.C. 831i (emphasis added). That language parallels the statute in *Webster*, where the Court found review precluded by Section 701(a)(2). 486 U.S. at 600 (observing that the relevant provision "allows termination of an Agency employee whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States' * * * , not simply when the dismissal *is* necessary or advisable to those interests").

Other features of the Act are to the same effect. Far from imposing a command on TVA, Section 831j is "a general policy statement" reflecting, at most, an "aspiration about what Congress hopes will be accomplished." Pet. App. 23a; see 16 U.S.C. 831j ("This *policy is further declared* to be that the projects herein provided for *shall be considered* primarily as for the benefit of" certain groups) (emphasis added); see also pp. 3-4, 8-9, *supra* (discussing broad, and sometimes conflicting, policies enumerated in the Act). And the Act superimposes yet another layer of discretion on those policies by hedging them with numerous qualifications. See, *e.g.*, 16 U.S.C. 831j ("primarily"; "economically"; "sufficiently"); 16 U.S.C. 831n-4(f) ("feasible").

The contrast between Section 831j and adjacent provisions confirms that the Act commits TVA's pricing decisions to its discretion. For example, a separate provision of the Act generally prohibits "TVA from expanding its sales outside 'the area for which the Corporation (TVA) or its distributors were the primary source of power supply on July 1, 1957.'" *Hardin* v. *Kentucky Utils. Co.*, 390 U.S. 1, 2 (1968) (quoting 16 U.S.C. 831n-4(a)) (brackets omitted). That provision contains "clear

guidelines" constraining TVA's discretion to enter power contracts. *Chaney*, 470 U.S. at 831; see *Hardin*, 390 U.S. at 8. The Act's various general statements of policy cited by petitioner do not.

Petitioner's contrary arguments are unavailing. He contends that the court of appeals purported to "overrul[e]" or "at least depart[ ]" from this Court's "modern precedent" by "erroneously substitut[ing] a new * * * approach" for determining whether agency action is committed to agency discretion by law under Section 701(a)(2). Pet. 20-21, 23 (capitalization and emphasis omitted). But the court of appeals' analysis followed well-established precedent, and petitioner's critique of its supposed novelty is misplaced.

Petitioner contends that the court of appeals failed to consider whether the Act supplies a "meaningful standard against which to judge" TVA's "exercise of [its] discretion." Pet. 22 (quoting *Weyerhaeuser*, 139 S. Ct. at 371-372); see Pet. 22 n.4. To the contrary, the court stated that its "main task" was "to determine when there are or are not 'judicially manageable standards' for judging an agency's exercise of discretion." Pet. App. 11a. Petitioner criticizes the court for assessing whether TVA's setting of the rates for the sale of its own electric power "involves balancing," Pet. 23, but this Court has sensibly looked to the same consideration, see, *e.g.*, *Chaney*, 470 U.S. at 831 (evaluating whether the decision involved a "complicated balancing of a number of factors").

Petitioner further contends (Pet. 2, 22) that the court of appeals erred in relying on "pre-APA common law" to conclude that a "'presumption of unreviewability' attaches to certain agency decisions." Again, that conclusion flows directly from this Court's precedents, which

recognize that "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,'" *Department of Commerce*, 139 S. Ct. at 2568 (citation omitted), are "presumptively unreviewable" under the APA—subject to contrary direction from Congress, *Chaney*, 470 U.S. at 832; see *id.* at 833. Petitioner argues (Pet. 3) that the court of appeals erred in allowing that presumption to be overcome "[o]nly if mandamus lies," but the court never mentioned mandamus. Instead, consistent with this Court's cases, it recognized that "Congress may overcome the presumption against review by providing 'guidelines for the agency to follow in exercising its enforcement powers,' by 'setting substantive priorities, or by otherwise circumscribing an agency's power.'" Pet. App. 21a (quoting *Chaney*, 470 U.S. at 833). The court of appeals simply found that the "general policy statement" contained in Section 831j, *id.* at 23a, does not provide the requisite direction.

b. Petitioner also briefly suggests (Pet. 26-28) that the court of appeals erred in affirming dismissal of his claims for breach of contract and illegal exaction. At the outset, neither claim adds anything to petitioner's APA claim: because the statute does not impose the "command," Pet. App. 23a, that petitioner asserts it does, petitioner's claims that TVA breached its contract with BVU Authority and imposed an illegal exaction fail for that reason alone. Regardless, the two claims also fail on independent grounds.

The court of appeals' contract holding turned on *Astra USA, Inc.* v. *Santa Clara County*, 563 U.S. 110 (2011), which dismissed a third-party action brought against a pharmaceutical company that had entered a contract with the government. *Id.* at 113. The Court

held that the third party could not enforce statutory requirements incorporated into the contract where the statute itself provided no private cause of action. *Id.* at 118. Petitioner contends (Pet. 27) that *Astra* should not be read to bar claims seeking to enforce contractual duties *against* the government, since such suits do not displace the government's enforcement role. But *Astra* does not articulate such a distinction. The third-party suit here, as in *Astra*, "is in essence a suit to enforce the statute itself," 563 U.S. at 118, and the *Astra* Court could "infer no * * * authorization [to sue] where a contract simply incorporates statutorily required terms and otherwise fails to demonstrate any intent to allow beneficiaries to enforce those terms," *id.* at 119 n.4.

The court of appeals rested its dismissal of petitioner's illegal-exaction claim on the commonsense proposition that "a voluntary payment for services rendered is not an exaction, illegal or otherwise." Pet. App. 29a. Petitioner offers no basis for doubting that conclusion.

2. Even if the decision below were incorrect, it would not warrant this Court's review. The Court denied review on virtually the same question presented over 30 years ago, see *Matthews* v. *Greeneville Light & Power Sys.*, 502 U.S. 938 (1991), and nothing has changed in the intervening decades to merit a different outcome now.

a. The decision below does not conflict with the decision of any other court of appeals. Petitioner does not allege a conflict on the question whether TVA's setting of the prices at which its own power will be sold is insulated from review under Section 701(a)(2); to the contrary, the decision below is consistent with the decision of every other court to address that issue. See Pet. App.

17a-18a. Petitioner suggests (Pet. 29) that the absence of a circuit conflict is attributable to the limited scope of TVA's geographic jurisdiction. But TVA's operations extend to the Fourth, Fifth, Sixth, and Eleventh Circuits. See TVA, *FY 2024 Budget Proposal & Management Agenda and FY 2022 Annual Performance Report* 7 (Mar. 9, 2023).[2] And petitioner cannot identify even a single decision subjecting the setting of rates by federal government utilities—much less such determinations by TVA—to judicial review. The problem for petitioner is not the lack of opportunities for a circuit conflict to develop, but the fact that the courts of appeals have consistently rejected his position.

Petitioner alleges (Pet. 27) that the court of appeals' contract holding conflicts with the decision in *Columbus Regional Hospital* v. *United States*, 990 F.3d 1330 (Fed. Cir. 2021), which permitted a third-party claim to enforce statutory obligations contained in a government contract, *id.* at 1347. But *Columbus* did not address TVA or even government determinations concerning prices for the sale of goods and services more generally; instead, it dealt with the recovery of funds distributed by the Federal Emergency Management Agency (FEMA). *Id.* at 1335-1336. And unlike in *Columbus*, where the class of third-party beneficiaries was not "unbounded" but rather required a case-by-case approval of subgrantees by FEMA, *id.* at 1346, petitioner's theory in this case would apparently accord a right to sue as a third-party beneficiary on potentially every resale purchaser of electric power sold by TVA.

In any event, to the extent there is tension between *Columbus*'s reading of *Astra* and the reading of the

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[2] http://www.tva.gov/cj.

court of appeals in this case, that shallow, nascent tension is not ripe for this Court's review. And this case would be a poor vehicle for resolving that tension, since the court of appeals' contract holding could be affirmed on the alternative ground that the rates in this case fell within TVA's statutory discretion.

Petitioner also contends that the court of appeals' exaction holding conflicts with the decision in *National Veterans Legal Services Program* v. *United States*, 968 F.3d 1340 (Fed. Cir. 2020), which permitted an action to recover excessive PACER fees to proceed on a theory of illegal exaction, *id.* at 1349. But *National Veterans* did not directly address the question here, namely, whether the price paid in a voluntary commercial transaction can form the basis for an illegal exaction. See *ibid.* And again, the rates in this case were not illegal, providing an alternative ground for affirmance.

b. Petitioner fails to identify any other meaningful basis for further review. He contends that declining to review TVA's setting of the prices at which its power will be sold or resold "contraven[es]" "the separation-of-powers doctrine," Pet. 30 (capitalization and emphasis omitted), but he does not identify any constitutional provision or precedent that he believes precludes the approach taken unanimously by federal courts since TVA's inception. Tellingly, petitioner presented no arguments below based on the separation of powers or the Constitution, and the court of appeals accordingly did not address any such arguments. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (noting this Court's role as "a court of review, not of first view").

In any event, contrary to petitioner's assertion (Pet. 31), the decision in this case does not render TVA "unaccountable." The members of TVA's board of directors

are appointed by the President with the advice and consent of the Senate, see 16 U.S.C. 831a(a)(1), and may be removed "at the pleasure of the President," *TVA* v. *United States EPA*, 278 F.3d 1184, 1203 (11th Cir. 2002), withdrawn in part on other grounds, *TVA* v. *Whitman*, 336 F.3d 1236 (11th Cir. 2003), cert. denied, 541 U.S. 1030 (2004). Moreover, Congress is free to amend the Act at any time to impose directives on TVA. See, *e.g.*, Act of Aug. 6, 1959, Pub. L. No. 86-137, 73 Stat. 280, 284 (identifying additional objectives for TVA to consider in setting rates). But despite decades of judicial decisions declining to review TVA ratemaking, Congress has never cast doubt on TVA's discretionary authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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