No. 22-629

IN THE

Supreme Court of the United States

DAVID HOLBROOK,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY;
BVU AUTHORITY,

Defendants.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Federal Respondent confirms that absent certiorari in this very case, the 100-word second sentence of Section 831j will be rendered a dead letter, ignored by the TVA and without hope of enforcement in any forum. TVA will have successfully usurped Congress' role in determining the purposes for which the government's $50 billion investment in power plants are to be utilized, and how the utility bills sent each month to millions of people across eight states are to be calculated.

Congress enacted the APA, and this Court adopted its "meaningful standard" jurisprudence, precisely to prevent agencies like the TVA from misusing the authority Congress provides them. Certiorari is necessary to address the exceptionally important question whether TVA has unreviewable authority to establish rates for its millions of customers in disregard of the meaningful standard set out in Section 831j.

Certiorari is necessary for additional reasons. The Federal Respondent acknowledges that the Fourth Circuit's judgment and rationale support a general "commercial activities" exception to judicial review. This conclusion confirms the danger identified by Petitioner, in which government-empowered, commercially operated and financially independent federal instrumentalities like the TVA may amass property and power and operate autocratically, without any judicial check on their potentially vast power over the lives of individual citizens.

The Federal Respondent also acknowledges a circuit split regarding the viability of third-party beneficiary

claims against federal agencies; a split warranting this Court's resolution also exists regarding the viability of unlawful-exaction claims against such entities.

ARGUMENT

POINT I

CERTIORARI IS NECESSARY TO HOLD TVA ACCOUNTABLE FOR COMPLYING WITH CONGRESS' SPECIFIC INSTRUCTIONS ON HOW TO ALLOCATE RATES.

A. No Special Deference Rules Prevent Courts from Ensuring TVA Fidelity to Congress' Instructions.

1. TVA rate setting, even broadly defined, is not one of the "rare instances" in which a presumption of unreviewability should apply. Agency decision-making is subject to review under the APA even when agencies are charged to engage in open-ended balancing. *See, e.g.*, *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (statute providing Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area" subject to review); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568-69 (2019) (citizenship question developed under authority to make decennial census "in such form and content as [Secretary] may determine" subject to review); *Judulang v. Holder*, 565 U.S. 42 (2011) (Attorney General's discretionary authority to exempt certain immigrants from deportation subject to review).

A presumption of unreviewability nonetheless may arise when Congress specifically intended *not* to restrain an agency's choices in balancing competing options. *See Lincoln v. Vigil,* 508 U.S. 182, 192 (1993) ("the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."). The only other instance in which this Court has found a presumption of unreviewability based upon the need for agency balancing involved the unique, specific concerns relating to prosecutorial discretion. *Heckler v. Chaney,* 470 U.S. 821, 831 (1985) (discretion not to prosecute unreviewable "due to general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many.")

This Court has not added to the list of "rare instances" of unreviewability in more than three decades. This Court does not, as the lower court did here in error, rely on stray lower court findings or unbounded common law in making such additions; instead, this Court looks to what Congress intends and the proper role of courts in enforcing its enactments. The determination whether to make TVA rate-setting one of the "rare instances" of unreviewable agency decisions, and if so on what basis, is itself worthy of plenary review. This is especially true given the millions of people affected by TVA actions.

2. Petitioner here does not challenge TVA's Rate Adjustments (which calculate the total revenues TVA needs to generate). He challenges only TVA's Rate Changes (which address the allocation of costs among different classes of users). TVA's Rate Changes are subject to the specific directives and standards of Section

831j. *See Dep't of Commerce v. New York*, 139 S. Ct. at 2600 ("if there is tension between a specific provision . . . and a general one [,] . . . the specific provision must take precedence").

Whether or not a presumption of unreviewability attaches to the conceptual category of rate setting, TVA's compliance with Section 831j is subject to review under this Court's meaningful-standard test. Under that test, agencies may not take refuge in broadly crafted categories of unreviewability to disregard specific Congressional directives. As the Court explained in *Heckler*:

> even in those classes of cases that are presumptively unreviewable the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers . . . . If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is law to apply . . . and courts may require that the agency follow that law.

Heckler, 470 U.S. at 832–35; *see also Lincoln,* 508 U.S. at 193 ("an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion").

Federal courts readily can review TVA Rate Changes for compliance with Section 831j to determine whether TVA takes account of it in setting rates, and whether

the rates themselves bear a rational relationship to the goals that Section 831j describes. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Petitioner's claim therefore "is the familiar one in administrative law that the agency did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its discretion. [It] is the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion under § 706(2)(A)." *Weyerhaeuser*, 139 S. Ct. at 371.[1]

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1. TVA also analogizes the statutory text in Section 831*i*, which directs the Board to set rates "as in its judgment may be necessary or desirable for carrying out the purposes of this chapter," to that in *Webster v. Doe*, 486 U.S. 592 (1988). In *Webster*, the Court found there was no meaningful standard to apply when Congress authorized the CIA director to terminate employees "whenever he shall deem such termination necessary or advisable in the interests of the United States." But in *Webster*, there were no standards to apply other than the director's judgment; as the Court explained, "short of permitting cross-examination of the Director concerning his views of the Nation's security and whether the discharged employee was inimical to those interests, we see no basis on which a reviewing court could properly assess an Agency termination decision." *Webster*, 486 U.S. at 600.

Here, Congress supplied a specific 100-word policy and directive, which Section 831i incorporates as part of the Board's charge. *Id.* (". . . necessary or desirable for carrying out the purposes of this chapter"). *See Pet.* 10 (comparing unlimited discretion afforded to TVA for sales at wholesale with limited authority for resale rates). Section 831j provides the direction and guidelines necessary for reviewing TVA's actions. Courts readily can review TVA Rate Changes, which are adopted by the TVA Board through a process that should be open and transparent, not by the executive agency official responsible for national security.

3. Federal Respondent argues that Section 831j's utilization of terms affording the TVA discretion should place its Rate Changes beyond the reach of judicial review. Fed. Resp. 10-11. But Congress has set the goals TVA must try to achieve and specified the levers it must use to achieve them; TVA has discretion only within those guidelines. This grant of discretion is the ordinary stuff of agency decision-making, and readily can be reviewed under the statutory "arbitrary and capricious" or "otherwise not in accordance with law" standards that Congress devised for that purpose. *See* 5 U.S.C. §§ 702, 706; 28 U.S.C. §§ 1331, 1361.

B. Absent Review, TVA Will Be Empowered to Perform Its Core Rate Allocation Function in Disregard of Congress' Express Directives.

Federal Respondent does not dispute that absent review in this very case, TVA's decision to supplant Congress' articulated goals is likely never to be subject to judicial review. *See* Fed. Resp. 15. TVA argues that it nevertheless is accountable, because its board is accountable to the President and Congress. Fed. Resp. 16-17.

All federal agencies are accountable to the President and Congress, more or less. But TVA is structured to be uniquely independent of the President and Congress, operating with a staggered board, an independent CEO and with no need of federal appropriations. Pet. 6-8. TVA may in any event not take refuge in potential review by other branches; Congress passed the APA to make TVA and other agencies accountable specifically to the judiciary. *See Mach Mining, LLC v. E.E.O.C.*, 575

U.S. 480, 488–89 (2015) (Congress' enactment of APA created strong presumption favoring judicial review as necessary prophylaxis to ensure agency violations face consequences).

POINT II

THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS THE SCOPE AND APPLICATION OF THE MEANINGFUL STANDARD TEST.

A. Certiorari Is Necessary to Resolve a Conflict Between the Circuits Regarding Creating and Reviewing Presumptively Unreviewable Agency Decision-Making.

While TVA attempts to paint the Fourth Circuit's approach as "follow[ing] well established precedent" (Fed. Resp. 12), the Fourth Circuit's approach to creating and reviewing presumptively unreviewable agency decisions is at odds with that of other courts, including the D.C. Circuit.

1. Under the generally prevailing approach, such as in the D.C. Circuit, a claim is presumptively unreviewable only if it is within the limited class of categories for which this Court has recognized such a presumption, or where there are no standards for courts to apply at all. *See, e.g., Pol'y & Rsch., LLC v. United States Dep't of Health & Hum. Servs.*, 313 F. Supp. 3d 62 (D.D.C. 2018). The presumption reflects this Court's recognition that Congress enacted the APA, and crafted the "abuse of discretion" standard, so that courts could serve as a check

on the power of federal agencies and ensure that they operate within Constitutional constraints. *See, e.g, Dep't of Com. v. New York*, 139 S. Ct. at 2568.

The Fourth Circuit opinion rejects this understanding of the APA, interpreting it instead to freeze in place the federal common law regarding administrative action that preceded its passage. Pet. 13a, n.7. Under its approach, judicial review of agency decision-making is subject to an *ad hoc* case-by-case analysis, which turns on amorphous factors such as "practical consequences" and whether the decision "involves inherently discretionary judgment calls." *See* Pet. 23-24. It is only through application of this *ad hoc* analysis that the Fourth Circuit concluded TVA's Rate Changes are not subject to judicial review.

2. The Fourth Circuit's method of *reviewing* presumptively unreviewable agency decisions also conflicts with that of the D.C. Circuit. Under the Fourth Circuit approach, only a Congressional command akin to mandamus warrants judicial review. A statute enacting guidelines and standards but signaling deference, as in section 831j, would not warrant review. *See* Pet. 25-26. In contrast, under the D.C. Circuit's approach, review is available under the terms described by *Heckler v. Chaney*: if the statute provides "clear guidelines by which to do so, or otherwise evince[s] an intent to constrain an agency's authority." *Pol'y & Rsch.,* 313 F.Supp. 3d at 74.

3. The Fourth Circuit did not merely supply its own standard for creating and reviewing presumptively unreviewable agency decisions, but also held that its approach has been incorporated into this Court's precedents, through Justice Scalia's dissenting opinion in *Lincoln*. *See* Pet. 21.

The Fourth Circuit's opinion undermines this Court's administrative law jurisprudence. Under its approach, courts do not merely defer to agencies, as under the *Auer* and *Chevron* doctrines; they withhold review entirely. The Fourth Circuit's approach enables agencies to create review-free zones in which they can disregard Congressional instructions without fear of judicial review. Here, for example, TVA's presumption of unreviewability evolved through lower court decisional law, in unrelated cases, to become a shield TVA could deploy to avoid complying with specified Congressional directives. *See* Pet. 25a. The Fourth Circuit opinion opens a pathway, inconsistent with precedent, for creating broad categories of unreviewable agency decision-making.

B. This Case Presents an Excellent Vehicle to Address Constitutional Limitations on Economically Independent Agencies.

Federal Respondent accurately interprets the Fourth Circuit opinion to mean that TVA's commercial rate-setting is unreviewable precisely because TVA is engaged in commercial activities resembling that of a private company. Fed. Resp. 10. This view confirms that certiorari is necessary to ensure judicial review is available as a check on the potential abuse of power by economically independent agencies such as the TVA, and the inherent threat to Liberty posed by economically independent agencies not constrained by judicial review. *See* Pet. 33.

There is no basis for such an exemption in the APA. To the contrary, in the case of foreign sovereigns, Congress specifically made commercial activities subject to federal court review even while generally granting immunity. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2).

A commercial activities exception is all the more surprising in the case of the TVA, in view of the express "sue and be sued" statutory authorization. TVA Act § 4, 16 U.S.C. § 831c(b). Certiorari therefore is warranted to reverse the Fourth Circuit's ruling that judicial review is unavailable to check abuses by federal agencies when they engage in commercial activities.

POINT III

CERTIORARI IS NECESSARY TO RESOLVE CIRCUIT CONFLICTS REGARDING PRIVATE CAUSES OF ACTION AGAINST FEDERAL AGENCIES.

Certiorari also is necessary to resolve conflicts between the Federal Circuit and the Fourth Circuit regarding the viability of causes of action brought against federal agencies. Such claims typically must be brought in the Federal Circuit, but claims against the TVA are exempt from that court's exclusive venue. 28 U.S.C. 1491(c). The identified conflicts therefore present a fortuitous opportunity to review important issues that otherwise will escape review.

TVA acknowledges that the Fourth Circuit's dismissal of Petitioner's third-party beneficiary claim is in conflict with the Federal Circuit's decision in *Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330 (Fed. Cir. 2021). Fed. Resp. 15-16; *see* Pet. 26-27. While TVA denies that the Fourth Circuit's dismissal of Petitioner's illegal-exaction claim conflicts with *Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340 (Fed. Cir. 2020), the Federal Circuit in that case specifically authorized the type of private cause-of-action that the Fourth Circuit

dismissed here. *See Nat'l Veterans*, 968 F.3d at 1349 (illegal exaction claim authorized "where the statute authorizes the government to collect a fee for certain purposes, and it is alleged that the government collected fees in excess of the statutory authorization"). Certiorari is warranted to resolve these conflicts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted. In the alternative, the writ should be granted and held for possible vacatur and remand. The decision below freeing TVA from complying with Congressional directives in its rate-setting activities merits further review.

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Respectfully submitted,

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