No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

This Court tests the immunity of governmental "sue and be sued" entities (like the Tennessee Valley Authority) under *Fed. Housing Amin. v. Burr*, 309 U.S. 242 (1940). The Court has declined to borrow rules from the Federal Tort Claims Act (FTCA) to narrow that immunity. *FDIC v. Meyer*, 510 U.S. 471 (1994). Did the Eleventh Circuit err by using an FTCA-derived "discretionary-function exception," rather than *Burr*, to immunize the TVA from the plaintiffs' claims?

2.

Did the Eleventh Circuit, in any case, correctly apply the discretionary-function test? Did that court correctly hold that safely raising a downed power line from the Tennessee River constitutes the sort of "policy"-laden discretionary work that this exception was designed to immunize from suit?

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JURISDICTION

This Court has subject-matter jurisdiction of this suit under Article III, Section 2 of the U.S. Constitution and under 28 U.S.C. § 1254(1). The Eleventh Circuit's decision was entered on August 22, 2017. Pet. App. 10a. That court denied the plaintiffs' timely petition for a panel rehearing on November 28, 2017. Pet. App. 17a. The Solicitor General of the United States has been served with a copy of this petition in accordance with Supreme Court Rule 29.4(a).

STATUTES INVOLVED

The following statutes, due to their length, are set out at Pet. App.18a–37a. Sup. Ct. R. 14(f), (i)(v).

16 U.S.C. § 831c
28 U.S.C. § 1346
28 U.S.C. § 2679
28 U.S.C. § 2680

STATEMENT OF THE CASE

This petition seeks review of an Eleventh Circuit decision. The underlying suit is a personal-injury action against the defendant Tennessee Valley

Authority (TVA). The district court thus has subject-matter jurisdiction of this suit under 28 U.S.C. § 1331. *E.g., Jackson v. TVA*, 462 F. Supp. 45, 50 (M.D. Tenn. 1978) (suits against TVA come within federal-question jurisdiction) (citing *Pac. R.R. Removal Cases*, 115 U.S. 1 (1885) (claims against entities incorporated by Act of Congress fall within general federal-question jurisdiction)).

1. Facts — A Tragic Accident on the Tennessee River

The Eleventh Circuit concisely and accurately recounted the facts giving rise to the Thackers' claims:

> Gary and Venida Thacker sued the [TVA] . . . for its alleged negligence involving a tragic accident on the Tennessee River. On July 30, 2013, while Gary Thacker and his friend Anthony Szozda were participating in a local fishing tournament, TVA was attempting to raise a downed power line that was partially submerged in the river. The power line, which crossed the river, had become lax earlier in the day when a pulling cable failed during a conductor-replacement project. At the same moment that TVA began lifting the conductor out of the water, the fishing partners' boat passed through the area at a high rate of speed, and the conductor struck both Thacker and Szozda. As a result, according to the

> complaint, Thacker suffered serious physical injuries, his wife suffered loss-of-consortium damages, and Szozda was killed instantly.

Pet. App. 2a. On these facts, the Thackers claimed that the TVA had not used reasonable care in assembling and installing its power lines, in warning boaters of the hazard it had created, and in responding to the resulting emergency.[1]

2. The District Court's Decision

On the TVA's motion, the district court dismissed the Thackers' case under Rule 12(b)(1) for lack of subject-matter jurisdiction. Pet. App. 12a–16a. More precisely, the district court held that the TVA was immune from this suit under the "discretionary function" rule. *Id.* The TVA had argued that "because the complaint concerns personal injuries arising out of [its] response to an emergency created during maintenance of its electrical power lines," the district court "lack[ed] subject[-]matter jurisdiction under the discretionary[-]function doctrine." Pet. App. 12a–13a.

The district court agreed. Citing the TVA's organic statute — specifically, 16 U.S.C. § 831c(b), which authorizes the TVA to "sue and be sued in its corporate name" — the district court first allowed that "the TVA does not enjoy sovereign immunity." Pet. App. 13a. Nonetheless, it reasoned that the TVA

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[1] Compl. – Br. of Appellants App. 15–16 (¶¶ 21, 25–26). This cite is to the appendix in the Eleventh Circuit. *See* Fed. R. App. P. 28(e).

"cannot be subject to liability" where it is "engaged in a governmental function that is discretionary in nature." Pet. App. 13a–14a (quoting *Hill v. TVA*, 842 F. Supp. 1413, 1420 (N.D. Ala. 1993)). The district court then found that the TVA here was engaged in a "response to an emergency" and that such "safety decisions represent an exercise of discretion giving rise to governmental immunity." *Id.* The court granted TVA's motion and dismissed the case. Pet. App. 14a–15a.

3. The Intermediate Appeal — Borrowing the FTCA's Discretionary-Function Test

The Eleventh Circuit upheld the dismissal. It, too, held the TVA immune from the Thackers' claims. The appeals court started by discussing the immunity enjoyed, not by the TVA specifically, but by the United States:

> The United States enjoys sovereign immunity from suit unless it unequivocally waives it in statutory text. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citation omitted). When Congress waives sovereign immunity, we must strictly construe that waiver, in terms of its scope, in favor of the United States. *See id.* (citation omitted).

Pet. App. 3a. At the same time, the court recognized that, under 16 U.S.C. § 831c(b), the TVA is "expressly" authorized to "sue and be sued" in its own name. Pet. App. 4a.

The Eleventh Circuit's analysis then took a decisive turn. The court wrote: "Though 'sue-and-be-sued' waivers are liberally construed," they are "subject to certain exceptions." *Id.* (citing cases). The operative exception, in the Eleventh Circuit's view, was the "discretionary-function exception." *See id.* The court explained that it had applied this exception "in cases arising out of TVA's commercial, power-generating activities." *Id.* The court expressly borrowed this limitation from the Federal Tort Claims Act (FTCA). Pet. App. 5a–6a. The Eleventh Circuit said that the discretionary-function exception that it applies to the TVA is the "same test" that applies under the FTCA. Pet. App. 6a. The court then held that the TVA's challenged acts — which it described as the "assembly and installation of power lines" and inadequately "warning boaters . . . of the hazards the TVA [had] created" — "plainly involved public-policy considerations." Pet. App. 6a, 8a. The acts were thus discretionary. Pet. App. 6a–9a. They fell outside the TVA's sue-and-be-sued clause and could not undergird a claim against the TVA. *Id.* The appeals court thus agreed that the TVA was immune from the Thackers' suit. *Id.* It affirmed the jurisdictional dismissal. Pet. App. 9a.

The Eleventh Circuit entered its decision on August 22, 2017. Pet. App. 1a, 10a. The Thackers timely sought a panel rehearing, but, on November 28, 2017, their request was denied. Pet. App. 17a. The Thackers now bring this petition for a writ of certiorari.

ARGUMENT

The Eleventh Circuit applied the wrong legal test — and thus reached the wrong result. Using its own precedent, rather than this Court's, the Eleventh Circuit tested the TVA's sue-and-be-sued immunity under a "discretionary-function" test borrowed from the Federal Tort Claims Act (FTCA). But the FTCA does not apply to the TVA. And this Court's long-established precedent does not recognize a discretionary-function exception to limit sue-and-be-sued entities' amenability to suit. This Court has instead expressly *declined* to borrow rules from the FTCA to diminish sue-and-be-sued clauses like the one that "broad[ly]" opens the TVA to suit.

The Eleventh Circuit's analysis thus departs from this Court's rules — from both the deeper principles and the overt test, which have been in place since at least 1940 — describing the narrow immunity of federal "sue and be sued" entities. It also conflicts with the (correct) approach taken by the Second and Fourth Circuits. Both of those grounds would, of course, justify this Court's granting a writ of certiorari. *See* Sup. Ct. R. 10(a), (c).

In the end, after applying the (misplaced) discretionary-function test, the lower courts took what should have been a "broad" and "liberal[]" amenability to suit — and inverted it to yield a nearly impregnable immunity. For, if the TVA cannot be sued for the workaday accident that it caused here, then it is hard to see what it could ever be sued for. Its notionally "broad" suability will have all but vanished.

The Thackers ask the Court to confirm and thus clarify the immunity rules that govern the TVA's sue-and-be-sued liability. And, ultimately, to hold that — contrary to the lower courts' decisions — the district court does have subject-matter jurisdiction to hear their claims against the TVA.

1. The Largely Commercial TVA Is "Broadly" Amenable to Suit

The TVA's organic statute empowers it to "sue and be sued" in its own name. 16 U.S.C. § 831c(b) (Pet. App. 18a).[2] The TVA is not the United States; it is "a corporate entity, separate and distinct from the Federal Government itself." *Pierce v. United States*, 314 U.S. 306, 310 (1941). 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 (2nd Cir. 1972); *accord, e.g., North Carolina ex rel. Cooper v. TVA*, 439 F. Supp. 2d 486, 490 (W.D.N.C. 2006). The TVA may be the preeminent example of a governmentally created entity that, over time, has grown into a distinct commercial corporation.[3]

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[2] "Except as otherwise specifically provided *in this chapter* [the Tennessee Valley Authority Act of 1933], the [TVA] . . . [m]ay sue and be sued in its corporate name." 16 U.S.C. § 831c(b) (Pet. App. 18a) (emphasis added). No limitation on the TVA's sue-and-be-sued clause, arising from the TVA Act, is involved in this case.

[3] When it created the TVA in 1933, Congress "intend[ed] that [the TVA] shall 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.

The Federal Tort Claims Act does not apply to the TVA. The FTCA expressly excludes the TVA from its purview. 28 U.S.C. § 2680(l) (Pet. App.34a, 36a).[4] Furthermore, "[b]y permitting [the TVA] to sue and be sued, Congress effected a 'broad' waiver" of any governmental immunity that the TVA might have otherwise enjoyed. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992)). This Court has elsewhere put these same points thus:

> By launching 'the [TVA] into the commercial world,' and including a sue-and-be-sued clause in its charter, Congress has cast off the [TVA]'s 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.' [*Library of Congress* v. *Shaw*, 478 U.S. 310, 317 n. 5 (1986)]. It follows that Congress is presumed to have waived any otherwise existing immunity of the [TVA] . . . .

Loeffler v. Frank, 486 U.S. 549, 556 (1988) (discussing the U.S. Postal Service).

73-130 at 19 (1933)). The TVA has since become the largest public-power company in the nation, supplying electricity to more than 9 million customers in 7 states, and generating more than $11 billion in annual revenue. TVA Annual 10-K Report 2015 (available at http://www.snl.com/IRW/FinancialDocs/4063363) (last accessed Feb. 9, 2018).

[4] The FTCA states: "The provisions of this chapter [28 U.S.C. §§ 2671–80] and section 1346(b) of this title shall not apply to . . . [a]ny claim arising from the activities of the Tennessee Valley Authority." 28 U.S.C. § 2680(l) (Pet. App. 34a, 36a).

2. This Court's Correct Suability Test: *Burr–Loeffler–Meyer*

Sue-and-be-sued entities like the TVA are immune from suit in only a few circumstances. This Court defined those circumstances in 1940's seminal *Fed. Housing Admin. v. Burr*, 309 U.S. 242 (1940). The Court there wrote — in language that should have controlled the lower courts' analyses in this case:

> [W]aivers by Congress of governmental immunity . . . should be *liberally construed*. . . . Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be *clearly shown* [1] that certain types of suits are not consistent with the statutory or constitutional scheme, [2] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [3] that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense.

Burr, 309 U.S. at 245 (emphases added). "Absent such a showing, agencies 'authorized to "sue and be sued"

are presumed to have fully waived immunity.'" *Meyer*, 510 U.S. at 481 (quoting *Int'l Primate Protection League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 86 (1991)).[5]

The Court has confirmed that sue-and-be-sued clauses "are to be 'liberally construed,' notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign." *Id.* at 480 (quoting *Burr*, 309 U.S. at 245 and citing *Nordic Village,* 503 U.S. at 34). This Court has further explained: "[W]hen Congress launche[s] a governmental agency into the commercial world and endow[s] it with authority to 'sue or be sued,' *that agency is not less amenable to judicial process than a private enterprise* under like circumstances would be." *Id.* at 481 (quoting *Burr*, 309 U.S. at 245) (emphasis in *Meyer*).[6]

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[5] *International Primate* was superseded by statute on other grounds. *See, e.g.*, *City of Cookeville v. Upper Cumberland Elec. Mbrshp. Corp*., 484 F.3d 380, 389–90 (6th Cir. 2007); *Neb. ex rel. Dep't of Soc. Servs. v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998).

[6] *Accord Franchise Tax Bd. of Cal. v. USPS*, 467 U.S. 512, 520 (1984) ("Under *Burr* not only must we liberally construe the sue-and-be-sued clause, but also we must presume that the [Postal] Service's liability *is the same as that of any other business*") (emphasis added); *Loeffler,* 486 U.S. at 557 (through a sue-and-be-sued clause, "Congress waived [the Postal Service's] immunity . . . , authorizing recovery of interest from the Postal Service *to the extent that interest is recoverable against a private party* . . . .") (emphasis added). These parentheticals are taken from *Meyer*, 510 U.S. at 481.

3. The Decisive Effect of *Meyer*

This Court's decision in *Meyer* is conclusive. The Eleventh Circuit's sue-and-be-sued jurisprudence has walked the very path that *Meyer* declined to tread. More exactly, the *Meyer* Court held that *Burr's* immunity test could not be modified — that sue-and-be-sued clauses could not be pared back — by FTCA-based, immunity-broadening alterations of the sort that the Eleventh Circuit applied to the TVA here. *Meyer*, 510 U.S. at 480–83. *Meyer* alone warrants reversing the decisions below.

In *Meyer*, the Federal Savings and Loan Insurance Corporation (FSLIC), a sue-and-be-sued entity,[7] served as a thrift institution's receiver. The FSLIC fired Meyer, a senior thrift officer. Meyer then sued the FSLIC, claiming that his discharge violated his due-process rights under the Fifth Amendment. *Id.* at 473–74. The FSLIC argued that sovereign immunity barred Meyer's claims. *Meyer v. Fidelity Sav.*, 944 F.2d 562, 566 (9th Cir. 1991).

This Court disagreed. The Court first held that immunity had to be tested, not under the FTCA, but under *Burr*. *Meyer*, 510 U.S. at 476–81. More fully, the Court held that, because the United States has not made itself suable under § 1346(b) of the FTCA for constitutional torts, Meyer's Fifth Amendment claim was not cognizable under the FTCA and was properly brought against the FSLIC "in its own

[7] Congress empowered the FSLIC "to sue and be sued, complain and defend, in any court of competent jurisdiction." 12 U.S.C. § 1725(c)(4) (repealed 1989).

name." *Id.* at 477–78. The question thus became "whether the FSLIC's sue-and-be-sued clause waive[d] sovereign immunity for [that] claim." *Id.* at 479. The Court explained that that clause's "liberal[]" immunity waiver could "[]not be limited . . . unless" the FSLIC made a "clear showing" that satisfied one of *Burr's* three grounds for invoking immunity. *Id.* at 480 (citing cases). "Absent such a showing, agencies authorized to 'sue and be sued' are presumed to have fully waived immunity." *Id.* at 481 (quoting *International Primate*, 500 U.S. at 86 n. 8).

We now reach the crucial point: The *Meyer* Court rejected arguments, and approaches to sue-and-be-sued analysis, that are substantively indistinguishable from the Eleventh Circuit's precedent and its analysis in this case. The FSLIC had argued in *Meyer* that its amenability to suit should be "limited" to cases in which a private person could be sued. *Id.* at 480. "In essence," the Court explained, the FSLIC wanted to "engraft a portion of . . . § 1346(b) [of the FTCA] . . . onto [its] sue-and-be-sued clause," to diminish the clause's immunity waiver. *Id.*[8] This Court rejected that approach — in a way that speaks directly to the Eleventh Circuit's analysis here. The *Meyer* Court explained that "sue-and-be-sued clauses cannot be limited by implication" without a "clear showing" under *Burr*. *Id.* at 480. The Court thus expressly declined to *"engraft language from § 1346(b) [of the FTCA] onto the [FSLIC's] sue-*

[8] Specifically, the FSLIC sought to "engraft" onto its suability clause "a portion of the sixth element of § 1346(b) — liability 'under circumstances where the United States, if a private person, would be liable to the claimant.'" *Meyer*, 510 U.S. at 480 (quoting 28 U.S.C. § 1346(b)(1)).

and-be-sued clause." *Id.* at 480, 483 (emphasis added). The Court reasoned that the FSLIC's position, "taken to its logical conclusion . . . *would render coextensive the scope of the waivers contained in §1346(b) [of the FTCA] and sue-and-be-sued clauses generally*." *Id.* at 483 (emphasis added). The Court refused to presume that Congress had intended that. *Id.*[9]

Because the FSLIC had made "no showing . . . to overcome [the] presumption" that the sue-and-be-sued clause "fully waived" the FSLIC's immunity, this Court held "that FSLIC's sue-and-be-sued clause [had] waive[d] the agency's sovereign immunity for Meyer's constitutional tort claim." *Id.* (quoting *Franchise Tax Board,* 467 U.S. at 520; and *International Primate*, 500 U.S. at 86 n.8).

The Eleventh Circuit has run afoul of all this. It "engrafts" an FTCA-derived limitation (the

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[9] More fully — though in a way that is just outside present concerns — *Meyer* found the FSLIC's immunity-broadening argument inconsistent with the FTCA's exclusive-remedy provision (28 U.S.C. § 2679(a)), which expressly adjusts the sue-and-be-sued characteristics of "federal agenc[ies]" when claims against them are made under the FTCA (28 U.S.C. § 1346(b)). The *Meyer* Court thus would not presume that immunity under the FTCA, and under sue-and-be-sued clauses "generally," could be made "coextensive" when Congress had declared otherwise. *Meyer*, 510 U.S. at 483. This particular aspect of *Meyer* does not apply perfectly here, and does not affect our main analysis: Claims against the TVA are not cognizable under the FTCA; and the TVA is not a "federal agency" of the type that *Meyer* and § 2679(a) have in mind. So this case does not directly implicate § 2679(a) and its relationship to sue-and-be-sued rules. Our point is simply that *Meyer* rejected borrowing from the FTCA to modify sue-and-be-sued immunity under *Burr* where there is no extrinsic warrant for doing so.

discretionary-function exception) onto the TVA's "broad" sue-and-be-sued immunity waiver. (That waiver is limited only by other provisions of the Tennessee Valley Authority Act; it is not limited by anything in FTCA law. *See* 16 U.S.C. § 831c(b) (Pet. App. 18a); *supra*, n. 2.) The Eleventh Circuit thereby reads an implicit limitation into the TVA's sue-and-be-sued clause — one that the TVA's organic statute does not expressly contain or hint at. *See id.* Furthermore, the Eleventh Circuit applies this limitation *before* the TVA has made the "clear showing" that *Burr* requires to invoke immunity. Finally, roughly as in *Meyer*, the Eleventh Circuit's imported "discretionary-function exception" — embodying the "same test" as applies under the FTCA itself — would make sue-and-be-sued immunity waivers largely "coextensive" with such waivers under the FTCA. Yet neither the TVA's suability clause, nor the FTCA, suggests that Congress intended that equivalence. *See id.*; 28 U.S.C. § 2680(l) (Pet. App. 34a, 36a) (FTCA does not govern claims against TVA). The Court rejected this whole mode of reasoning in *Meyer*; it should reject it again here.

4. Circuit Split and Further Problems in the Eleventh Circuit's Analysis

4.1 The Circuit Split

The Eleventh Circuit's sue-and-be-sued analysis — and, if the TVA is correct, the Sixth Circuit's, as well — conflicts not only with this Court's precedent, but also with the correct approach taken by other circuits. The Fourth Circuit has thus assessed the TVA's immunity for claims arising from its

commercial, power-generating activities (like the claims here) and has said: "We . . . hold that the broad waiver of sovereign immunity effected by the TVA's 'sue-and-be-sued' clause *is not restricted by a discretionary function exception* in this case." *N.C. ex rel. Cooper v. TVA*, 515 F.3d 344, 350 (4th Cir. 2008) (emphasis added).[10] The Second Circuit agrees. In *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd in part on other grounds,* 564 U.S. 410 (2011), that court declined to apply a discretionary-function exception to the TVA's suability. *Id.* at 389–92. It instead correctly tested the TVA's immunity under the *Burr–Loeffler–Meyer* standard and held that the TVA's power-related activities were not exempt from suit. *Id.*

This situation denies citizens in the Sixth and Eleventh Circuits the rights that citizens of the Second and Fourth Circuits enjoy. The TVA is a sprawling entity, whose commercial activity is continuously affecting Americans across the country — and affects them in much the same way. Given the TVA's expansive reach, and the fact that the rights in question are basic, garden-variety tort rights to seek remedies for harmful misconduct, it is hard to imagine why the TVA should not be equally open to civil lawsuits wherever it operates.

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[10] The Fourth Circuit in *Cooper* did "not . . . reach" the question of whether the TVA ever "retains a measure of . . . immunity" when it otherwise "engages in a governmental function." *Cooper*, 515 F.3d at 350 n.4.

4.2 Other Problems in the Eleventh Circuit's Analysis

This may be the best place to notice two additional problems in the Eleventh Circuit's analysis. The first is plain enough, and may be only a matter of reframing what we have already said. The point is simply that, by importing a discretionary-function exception from the FTCA, to constrict the TVA's sue-and-be-sued clause, the appeals court undermines the statutory scheme. The FTCA expressly puts the TVA outside its reach (28 U.S.C. § 2680(l)); while the TVA's sue-and-be-sued clause (16 U.S.C. § 831c(b)) recognizes only limits that are located inside the Tennessee Valley Authority Act. The Eleventh Circuit's reasoning ignores and abrades both statutes.

The second problem is this: Both formally and substantively, the Eleventh Circuit reversed key underlying principles. In short, that court transposed key elements of this Court's established guidance on how broadly or narrowly to shape governmental immunity. The Eleventh Circuit took as its leading rule the directive that immunity waivers are to be read narrowly. *See* Pet. App. 3a ("When Congress waives sovereign immunity, we must strictly construe that waiver . . . in favor of the United States.") It then reasoned in a limiting way about how normally "broad" sue-and-be-sued clauses — which open entities like the TVA to suit — have "exceptions." Pet. App. 4a. And, again, it then grafted the FTCA's discretionary-function exception onto the TVA's sue-and-be-sued rules. The Eleventh Circuit's first tenets thus biased its analysis toward broadening immunity and constricting sue-and-be-sued liability.

But this gets the doctrinal priority backward — in a way that matters. This Court has said that sue-and-be-sued clauses are to be "liberally construed" — to permit suits — "*notwithstanding* the general rule" that narrows immunity waivers in the sovereign's favor. *Meyer*, 510 U.S. at 480–81 (citing *Burr*) (emphasis added); *see Loeffler*, 486 U.S. at 554–55 ("[W]hen Congress establishes such an agency . . . and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied.") (citing cases). The intermediate court's guiding principle should have been one of "liberally" expecting that the TVA was open to suit. The Eleventh Circuit rewrote, reversed, and thus largely gutted that rule.

5. The TVA Made No Showing Under *Burr*–*Loeffler*–*Meyer*

5.1 The TVA Did Not Try to Satisfy *Burr*

The TVA never even tried to show that this case meets one of *Burr's* three criteria for invoking immunity despite a sue-and-be-sued clause. Much less did the TVA make a "clear showing" that it is immune under *Burr*. For this reason alone, the jurisdictional dismissals should be reversed. *Cf. Meyer*, 510 U.S. at 481 (dismissing in one sentence defendant agency's failure to "attempt . . . the 'clear' showing . . . necessary to overcome the presumption that immunity has been waived").

5.2 The TVA's Innate-Limitation Argument — and Its Errors

The TVA instead brushed aside *Burr*, *Loeffler*, and *Meyer*, and put all its chips on the notion that its sue-and-be-sued clause simply *is* limited by a judicially created discretionary-function exception. (Br. of Appellee TVA at 22–30.)[11] It invoked precedent from the Sixth and Eleventh Circuits that had used the exception to limit its amenability to suit. (*Id.* at 23–24, 30.)

The TVA's analysis does nothing to override this Court's precedent — not only *Burr, Loeffler*, and *Meyer* themselves, but the statutes, cases, and principles upon which they drew. Its argument moreover is largely inscrutable. What does it mean, for instance, when, ostensibly commenting on *Burr's* three-part test, the TVA writes that,

> the scope of a Federal agency's sue-and-be-sued waiver with respect to a specific incident of suit is not a matter susceptible to textual parsing; rather, it is a matter to be resolved by legal policy analysis . . . [?]

(*Id.* at 27.) And what impact is that . . . insight . . . supposed to have on this analysis? It is far from clear.

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[11] This citation refers to the TVA's main brief, filed in the Eleventh Circuit on September 29, 2017. Pinpoint citations are to the page numbers generated by that court's electronic-docketing system. That system did not assign the parties' filings unique document numbers, so this is the fullest cite that the Thackers can provide this Court.

> Elsewhere, the TVA contends:
>
> > In [*Meyer*], the Court held that the [FSLIC]'s sue-and-be-sued clause did not bar a potential tort claim for an alleged constitutional violation . . . but nonetheless refused to recognize such a claim against Federal agencies as a matter of policy.
>
> (*Id*. at 28) (citing *Meyer*, 510 U.S. at 480–86).

As a thumbnail description of *Meyer*, with no particular implication for this case, this passage is superficially accurate — as far as it goes. That is the most charitable reading one can give of this passage. But if, as seems the case, the TVA means to draw from *Meyer* a substantive lesson for this case, then its mistake is deep. The TVA in fact proffers a gross *non sequitur*. One that *Meyer expressly pointed out*. Like the FSLIC in *Meyer*, the TVA here "conflates" two different things. *See Meyer*, 510 U.S. at 483–84. Whether the *Meyer* plaintiff had a viable claim was one thing; but this had nothing to do with whether the FSLIC's sue-and-be-sued clause made the agency *amenable* to such a claim. *See Meyer*, 510 U.S. at 480–86. More to the present point, whether the *Meyer* plaintiff posed an actionable theory says nothing about whether a discretionary-function rule limits the TVA's suability. The *Meyer* Court expressly pointed out the distinction and the error. First, again, the Court "h[e]ld that FSLIC's sue-and-be-sued clause *waives the agency's sovereign immunity* for Meyer's constitutional tort claim." *Id.* at 483 (emphasis added). The Court then turned to the "second

inquiry": "whether the . . . substantive law" recognized the posited claim. *Id.* at 484. For reasons entirely unrelated to the immunity waiver, the Court declined to recognize the novel theory that the *Meyer* plaintiff advanced. *Id.* at 483–86.[12] The breadth of the FSLIC's sue-and-be-sued clause, and the viability of the plaintiff's substantive claim, were two different things. *Meyer* itself called them "analytically distinct." *Id.* at 484. Returning to the identical error in the TVA's reasoning here, we can more precisely observe that the words "but nonetheless" in the TVA's explanation suggest a logical connection between the two parts of *Meyer* that simply does not exist. Again, the TVA presses its case on the strength of a plain *non sequitur*.

The TVA's clearest argument insists (in sum) that waivers of governmental immunity — embodied here in its sue-and-be-sued clause — are innately limited by a discretionary-function exception. (*See* Br. of Appellee TVA at 28–29.) That discretionary acts are always immune — regardless of what a sue-and-be-sued statute says. (*See id.*) The TVA, in other words, sees a discretionary-function rule inherent in the notion of sovereign immunity. The Sixth and Eleventh Circuits, in the TVA's view, have merely recognized that fact.

Problems with that position leap off the page. Before anything else, the TVA's reasoning collides

[12] Specifically, the *Meyer* Court refused to expand constitutional-tort claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) so that they could be brought "directly against a federal agency." *Meyer*, 510 U.S. at 483–86.

with, and then tramples over, *Meyer's* overt refusal to "engraft" a discretionary-function limitation onto sue-and-be-sued clauses "generally." More strikingly, the TVA's position implies that, since at least 1940, this Court has failed to understand the correct bounds of sovereign immunity. That, had the Court rightly grasped the shape of that immunity, it would never have written *Burr*, *Loeffler*, and *Meyer*, but instead would have appended a discretionary-function exception to all such sue-and-be-sued clauses.

* * *

At most, the TVA's argument points to the conflict in how the appellate courts have handled sue-and-be-sued entities — and the TVA in particular. Even if the TVA's argument is minimally cogent, then, the Court should still grant this petition to resolve any misunderstanding at the intermediate-appellate level, and to again confirm that sue-and-be-sued clauses like the TVA's are tested under the rules that flow through *Burr*, *Loeffler*, and *Meyer*.

6. This Court Has Said That Acts Like These Are Not Discretionary

Even if a discretionary-function exception did apply here, though, the TVA's misconduct would not fall within it. The challenged acts would not be "discretionary" under that test, in other words, and thus would not be immunized. The second prong of the discretionary-function test under 28 U.S.C. § 2680(a) asks whether the challenged acts are "of the kind that the discretionary function exception was designed to shield." *E.g., Berkovitz v. United States*,

486 U.S. 531, 536 (1988). The wrongs alleged here — in short, unsafely installing power lines, creating a hazard, failing to warn of or guard against the hazard, and failing to safely fix the hazard — are not the sort of "policy"-laden, "discretionary" acts that the discretionary-function exception was meant to immunize. This is an independent reason for reversing the decisions below.

6.1 *Gaubert* — The Centrality of Policy

This Court's decision in *U.S. v. Gaubert*, 499 U.S. 315 (1991) alone shows this to be true. *Gaubert* shows that, in this case, the TVA is subject to suit. "[W]hen properly construed," *Gaubert* explains, "the [discretionary-function] exception 'protects only governmental actions and decisions based on considerations of public policy.'" *Id.* at 323 (quoting *Berkovitz*, 486 U.S. at 537). The TVA's misconduct here centrally involves installing power lines. Not the managerial decisions behind that work. But, very precisely, the nuts-and-bolts, on-the-ground, mostly physical work of safely raising a power line.[13] That work did not involve the assessment of "social, economic, [or] political policy." *See id.* Nor would the Thackers' lawsuit involve the "judicial 'second-guessing' of legislative and administrative decisions." *See id.* (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)). The TVA's challenged acts were not "policy"-related in any meaningful sense. Rather,

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[13] "Before applying the [discretionary-function] test," a court "must first identify 'exactly what conduct is at issue.'" Pet. App. 6a (quoting *Swafford v. United States*, 839 F.3d 1365, 1370 (11th Cir. 2016)).

those acts were garden-variety safety work. That is not the type of work that the discretionary-function exception was "designed to shield."

6.2 Analogies from *Gaubert*

Analogies from *Gaubert* confirm this conclusion. The TVA's work here is like conduct that the *Gaubert* Court expressly said does not fall within the discretionary-function exception — and that therefore does not enjoy immunity. In this respect, *Gaubert* should have controlled the lower courts' analyses.

First, *Gaubert* explained that the discretionary-function exception would not shield a government agent who negligently caused a car accident. *Gaubert*, 499 U.S. at 325 n.7. The *Gaubert* Court wrote:

> There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion *can hardly be said to be grounded in regulatory policy*.

Id. (emphasis added). The Court's language applies here. Although installing power lines and raising downed ones "requires the constant exercise of [ground-level] discretion," carrying out that work — *i.e.*, physically putting lines up or getting them safely out of the water — "can hardly be said to be grounded in regulatory policy." *See id*. Safely driving a car involves essentially the same sort of functional judgment that raising power lines does. Neither is work that § 2680(a) was designed to immunize.

A second concrete analogy lies in *Gaubert's* discussion of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). *See Gaubert*, 499 U.S. at 326. In *Indian Towing*,

> the Coast Guard had negligently failed to maintain a lighthouse by allowing the light to go out. The United States was held liable . . . because *making sure the light was operational did not involve any permissible exercise of policy judgment*.

Gaubert, 499 U.S. at 326 (quoting *Berkovitz*, 486 U.S. at 538 n. 3) (emphasis added). The relevance to this case is again plain. It is hard to see how "operational[ly]" ensuring that a lighthouse worked is pertinently different from ensuring that a fallen power line is raised safely. Both embody wholly functional, on-the-ground work. Neither "can be said to be grounded in the policy of the regulatory regime," *id*. at 325, in any significant way.

6.3 Qualifications

Some points should now be emphasized. This analysis does not fall into mistakes that *Gaubert* identified. We thus recognize with *Gaubert* that some "operational"-level conduct can embody "discretionary functions" under § 2680(a). *See id.* at 325–27. We are not arguing that "discretionary" work is limited "exclusively to policymaking or planning functions." *Id.* at 325. We are arguing only that the ground-level work in this case was not the type that the discretionary-function exception was "designed to . . . shield[]."

But a converse point also holds. It cannot be the case — given the *Gaubert* Court's reasoning — that *all* "acts of negligence which occur in the course of day-to-day activities" are necessarily discretionary. That would be as coarse and unwarranted a rule as the "nonexistent" discretionary–operational "dichotomy" that *Gaubert* rejected. *See id.* at 325–26. Here, too, doctrine must be more nuanced. Some operational activities may be discretionary — like the bank-management work in *Gaubert*. *See id.* at 327–29. Other ground-level operations may not be meaningfully discretionary — such as the negligent car driving that *Gaubert* gives as an example; or the faulty lighthouse maintenance in *Indian Towing*; or the TVA's safety work here.

Run-of-the-mill light-industrial work — like the on-the-ground work that the TVA did here — is not the sort of thing that is meant to escape the FTCA's immunity waiver. The core point of the FTCA, and its discretionary-function exception, is indeed to the

contrary. Such wholly functional work — of just the sort that would attract a cogent tort claim if done negligently by a private actor — is exactly where the FTCA meant to extend governmental liability. If the TVA's challenged work in this case does fall into the discretionary-function exception, moreover, then it is hard to imagine what falls outside it. The Court will pardon the worn term — but it does apply: Under the lower courts' holdings, the discretionary-function exception threatens to swallow the TVA's normally "broad" sue-and-be-sued clause. The lower courts' analyses are mistaken and should be vacated.

CONCLUSION

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

Respectfully submitted,

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