No. 17-1201

In The
Supreme Court of the United States

GARY THACKER and
VENIDA L. THACKER,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

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

BRIEF FOR PETITIONERS

Franklin Taylor Rouse
Counsel of Record
Craig N. Rosler
Kenneth Bridges Cole, Jr.
Gary Vestal Conchin
CONCHIN, CLOUD & COLE, LLC
2404 Commerce Court, S.W.
Huntsville, Alabama 35801
(256) 705-7777
taylor@conchincloudcole.com

Counsel for Petitioners ***Dated: November 13, 2018***

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QUESTION PRESENTED

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?

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The opinion of the Eleventh Circuit is reported at 868 F.3d 979 (11th Cir. 2017). The decision of the district court is reported at 188 F. Supp. 3d 1243 (N.D. Ala. 2015). These decisions appear in the Appendix to the petition for writ of *certiorari* at 1a–16a.

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. 1a, 10a–11a). That court denied the plaintiffs' timely petition for a panel rehearing on November 28, 2017. (Pet. App. 17a).

STATUTES INVOLVED

The following statutes, due to their length, are set out in the Appendix to the petition for writ of certiorari at 18a–37a. Sup. Ct. R. 14(f), (i)(v).

16 U.S.C. § 831c (Pet. App. 18a–23a).

28 U.S.C. § 1346 (Pet. App. 24a–27a).

28 U.S.C. § 2679 (Pet. App. 28a–33a).

28 U.S.C. § 2680 (Pet. App. 34a–37a).

STATEMENT OF THE CASE

This appeal seeks the reversal of an Eleventh Circuit decision concerning the immunity of the Tennessee Valley Authority (TVA). The underlying suit is a personal-injury action against the defendant TVA. The district court thus had 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.

Thacker v. TVA, 868 F.3d 979, 980 (11th Cir. 2017) (per curiam) (Pet. App. 2a).[1] 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.[2]

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. *Thacker v. TVA*, 188 F. Supp. 3d 1243, 1244–46 (N.D. Ala. 2015) (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

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[1] Throughout this brief, citations in the form "Pet. App. __a" are to the Appendix to the petition for a writ of *certiorari*; that appendix contains the decisions under review and the statutes involved. *See* Sup. Ct. R. 24.1 ("Any . . . items already reproduced in a petition for a writ of certiorari, . . . or any appendix to the foregoing, . . . need not be reproduced again in the joint appendix."). Citations in the form "JA__" are to the Joint Appendix filed in connection with this brief.

[2] *E.g.,* JA 29–31 (Compl. ¶¶ 20–21, 25).

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." *Id.* at 1244 (Pet. App. 12a–13a).

The district court agreed. Citing the TVA's organic statute — specifically, 16 U.S.C. § 831c(b) (Pet. App. 18a), 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." *Thacker*, 188 F. Supp. 3d at 1245 (Pet. App. 13a). Nonetheless, it reasoned that the TVA "cannot be subject to liability" where it is "engaged in a governmental function that is discretionary in nature." *Id.* (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 the TVA's motion and dismissed the case. *Id.* at 1245–46 (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).

Thacker, 868 F.3d at 981 (Pet. App. 3a). At the same time, the court recognized that, under 16 U.S.C. § 831c(b) (Pet. App. 18a), the TVA is "expressly" authorized to "sue and be sued" in its own name. *Id.* (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.* at 981–82 (Pet. App. 4a). The court explained that it had applied this exception "in cases arising out of TVA's commercial, power-generating activities." *Id.* at 981 (Pet. App. 4a) (citing *Johns v. Pettibone Corp.*, 843 F.2d 464, 466–67 (11th Cir. 1988)). The court expressly borrowed this limitation from the Federal Tort Claims Act (FTCA). *Id.* at 981–82 (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. *Id.* at 982 (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." *Id.* at 982–83 (Pet. App. 6a, 8a). The

acts were thus discretionary. *Id.* (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. *Id.* at 983 (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 then sought certiorari review in this Court, which was granted on September 27, 2018.

SUMMARY OF THE 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 no other statute affords the TVA discretionary-function immunity. Nor has this Court's long-established precedent recognized 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. 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. To resolve the difference in how the appellate circuits have analyzed the TVA's highly limited immunity. 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.

ARGUMENT

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

The TVA's organic statute states: "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).[3] The TVA Act contains no provision that grants immunity to or limits the liability of the TVA for discretionary decisions. Thus, "[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." *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] . . . .

[3] No limitation on the TVA's sue-and-be-sued clause, arising from the TVA Act, is involved in this case.

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

This Court has said that 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). 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. 73-130 at 19 (1933)). The TVA may be the preeminent example of a governmentally created entity that, over time, has grown into a distinct commercial corporation.[4] Indeed, 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." *Natural 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).

2. The TVA Is Expressly Excluded from the FTCA

The Eleventh Circuit immunized the TVA from the Thackers' claims based on a discretionary-function exception that it borrowed from the FTCA. (Pet. App. 6a). It is therefore worth emphasizing, near

[4] 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 nearly $11 billion in annual revenue. *See* TVA Annual 10-K Report 2017 (available at http://www.snl.com/Cache/c391106979.html (last accessed Nov. 6, 2018)).

the start of this discussion, that the FTCA does not cover the TVA, so that claims against the TVA are tested under its sue-and-be-sued clause.

In 1946, Congress passed the FTCA, which waived the sovereign immunity of the United States for certain torts committed by federal employees. *See* 28 U.S.C. § 1346(b) (Pet. App. 25a–26a); *Meyer*, 510 U.S. at 475–76. "In order to place torts of 'suable' agencies upon precisely the same footing as torts of 'nonsuable' agencies, Congress, through the FTCA, limited the scope of sue-and-be-sued waivers." *Meyer*, 510 U.S. at 476 (quoting *Loeffler*, 486 U.S. at 562). The limitation provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under [28 U.S.C.] section 1346(b) . . . , and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. § 2679(a) (Pet. App. 28a).

"Thus, if a suit is 'cognizable' under § 1346(b) of the FTCA, the FTCA remedy is 'exclusive' and the federal agency cannot be sued 'in its own name,' despite the existence of a sue-and-be-sued clause." *Meyer*, 510 U.S. at 476. However, § 2679(a) limits the scope of sue-and-be-sued waivers only "in the context of suits for which [Congress] *provided a cause of action* under the FTCA." *Id.* at 477 (quoting *Loeffler*, 486 U.S. at 562) (emphasis in *Meyer*).

Congress has not provided a cause of action under the FTCA against the TVA. The TVA, in fact, is expressly exempted from the FTCA. *See* 28 U.S.C. § 2680(l) (Pet. App. 36a) ("The provisions of this chapter [28 U.S.C. §§ 2671 *et seq*.] and [28 U.S.C.] section 1346(b) . . . shall not apply to . . . [a]ny claim arising from the activities of the Tennessee Valley Authority."). By the FTCA's express terms, the United States cannot be held liable for the TVA's actions. The Thackers' claims are thus not "cognizable" under § 1346(b). *See Meyer*, 510 U.S. at 476. As the FTCA does not constitute the Thackers' exclusive remedy, their claims are "therefore properly brought against [the TVA] 'in its own name.'" *Id.* at 478.

3. 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 (footnote omitted) (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*

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[5] *International Primate* was superseded by statute on other grounds. *See*, *e.g.*, *City of Cookeville v. Upper Cumberland Elec. Membership 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).

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]

4. 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. *Id.* 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.

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[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.

[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).

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 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-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 result. *Id.* "Had Congress wished to achieve that outcome," the Court explained, "it surely would not have employed the language it did in § 2679(a)." *Id.*

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 discretionary-function exception) onto the TVA's

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[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)).

"broad" sue-and-be-sued immunity waiver. By its express terms, 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).[9] 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 or impliedly contain. *See id.* Furthermore, the Eleventh Circuit applied this limitation *before* the TVA 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" that 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. 36a) (FTCA does not govern claims against TVA). The Court rejected this whole mode of reasoning in *Meyer*. It should reject it again here.

5. The Eleventh Circuit Reversed Key Underlying Principles

The Eleventh Circuit's departure from *Burr–Loeffler–Meyer* embodies several component errors. Both formally and substantively, for instance, the Eleventh Circuit reversed key underlying principles. That court transposed key elements of this Court's established guidance on how broadly or narrowly to

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

shape governmental immunity. The Eleventh Circuit took as its leading rule the directive that immunity waivers are to be read narrowly. *See Thacker*, 868 F.3d at 981 (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." *Id.* 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.

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 Eleventh Circuit reversed, rewrote, and thus effectively gutted that rule. The intermediate court's guiding principle should have been one of "liberally" expecting that the TVA was open to suit.

6. The Eleventh Circuit Thwarted Statutes and Abraded Separation of Powers

By importing a discretionary-function exception from the FTCA to constrict the TVA's sue-and-be-sued clause, moreover, the appeals court thwarted the statutory framework, stymied Congressional intent and enactment, and thus eroded the separation of powers.

The Eleventh Circuit first brushed aside several statutes. The core statute — the TVA's sue-and-be-sued clause (16 U.S.C. § 831c(b) (Pet. App. 18a)) — contains no discretionary-function exception. By statutory directive, that clause is restricted only by other parts of the Tennessee Valley Authority Act. *Id.* 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[10] — excludes the TVA from its compass.[11]

Congress had "full power to endow the [TVA] with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process." *Burr*, 309 U.S. at 245–46. It could have included claims against the TVA in the FTCA, or amended the TVA Act to include discretionary-function immunity. It instead launched "the [TVA] into the commercial world" with a sue-and-be-sued clause and gave it the "status of a private commercial enterprise." *Loeffler*, 486 U.S. at 549. This Court has said that, "when Congress establishes" a

[10] Pet. App. 6a.

[11] 26 U.S.C. § 2680(l) (Pet. App. 36a).

sue-and-be-sued entity, "*it cannot lightly be assumed that restrictions on that authority are to be implied*." *Burr*, 309 U.S. at 245 (emphasis added). Absent a "clear" showing under *Burr*, "agencies 'authorized to "sue and be sued" are *presumed to have fully waived immunity*.'" *Meyer*, 510 U.S. at 481 (quoting *International Primate*, 500 U.S. at 86) (emphasis added). It is clear that Congress did not intend for the TVA's sue-and-be-sued clause be used in a narrow sense.

This consequently is not a case of keeping the judiciary from interfering with the executive. It is rather a case of the judiciary overriding 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 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." *Pierce*, 314 U.S. at 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." *Natural Resources Defense Council*, 459 F.2d at 257. When it created the TVA, Congress "intend[ed] that" it would "have much of the essential freedom and elasticity of a private business corporation." *Cooper*, 515 F.3d at 349 (quoting H.R. Rep. No. 73-130 at 19 (1933)).

The Fourth Circuit has thus correctly 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 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*, 486 U.S. at 555] . . . 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. (emphases added).[12]

Last in this vein, a judicial decision on the lawfulness of the TVA's actions giving rise to the Thackers' claims would not strip the TVA of its authority or burden its ability to execute its functions. At most, it would subject the TVA to the same failure-to-warn tort principles to which every private power company is subject. *See* 79 Cong. Rec. 6563-64 (1946) (statement of Sen. Hill) (Congress intended that legal claims "be exercised against the Tennessee Valley Authority exactly as they could have been exercised against . . . private utility companies.") Reversing the lower courts, and holding that the TVA can be liable for failing to reasonably warn of a downed power line, would certainly not "gravely interfere" with the TVA's multibillion-dollar power-generating business.

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[12] The TVA's separation-of-powers argument is further discussed below. *Infra*, Parts 8.2.2, 9.

7. The Circuit Split and Preemptive Replies

7.1. The Circuit Split

The Eleventh Circuit's sue-and-be-sued analysis — and, if the TVA is correct, the Sixth Circuit's, as well[13] — 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." *Cooper*, 515 F.3d at 350 (emphasis added).[14] The Second Circuit agrees. In *Connecticut v. American Electric 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

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[13] *See, e.g., Edwards v. TVA*, 255 F.3d 318 (6th Cir. 2001) (holding that discretionary-function exception applies to the TVA).

[14] 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.

sprawling entity, whose commercial activity is continuously affecting Americans across the country — and affecting 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.

7.2 Preemptive Replies

Numerous replies may be made regarding the TVA's position on how the Second and Fourth Circuits have (correctly) analyzed its immunity under *Burr-Loeffler-Meyer*.

First, 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."[15] But this observation cuts *against* the TVA. Both *American Electric* and *Cooper* were pollution-nuisance suits that challenged the TVA's general operation of coal-fired power plants.[16] If that higher-level conduct is "commercial" and not immune (because part of the TVA's essentially private power-generation business), then even more clearly not immune is the on-the-ground labor that is challenged here. The TVA might equally argue that managing an entire retail company is "commercial" and hence not immune, but removing a tripping hazard from the

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[15] *See* Cert. Opp. at 7, 15–16 (discussing *Cooper*, *supra*, and *American Electric*, *supra*).

[16] *See American Electric*, 582 F.3d at 325; *Cooper*, 515 F.3d at 346.

floor of the company's break room is somehow "policy"-laden, discretionary, and immune.

Second, the TVA has pointed out that the Sixth and Eleventh Circuits — whose use of a discretionary-function test the TVA asks this Court to uphold — "encompass the vast majority of the Tennessee Valley region."[17] The TVA thus argues for a rule in those circuits that not only abrades its organic statute and 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.

Third, the TVA 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.[18] This is backward. It is the *TVA's* discretionary-function test that would more surely push courts into parsing the discretionary from the merely ministerial (and so on). Such finely grained characterization is the whole aim of the discretionary-function test. The different framework of *Burr-Loeffler-Meyer* offers more inflection points for judicial decision, and so better avoids any "quagmire."

Furthermore, in its "quagmire" point, the TVA cites *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).[19] But *Indian Towing* was an FTCA case; it

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[17] *See* Cert. Opp. at 8.

[18] *Id.* at 16.

[19] *Id.*

involved a claim against the United States where no sue-and-be-sued clause was at issue. Here, where the TVA was "launched" into the commercial world with a sue-and-be-sued clause, Congress clearly indicated its intention that the TVA be subject to suit as if it were privately owned. The starting point is thus assuming that the TVA performs private, rather than governmental, functions. The sue-and-be-sued entity then has the burden to clearly show the challenged conduct was committed in the course of a "governmental function."

Finally on this head, it is not the Second and Fourth Circuits that have distinguished the "governmental" from the "commercial" and "non-governmental" in this area, it is this Court. "[W]hatever principle" has animated the TVA's distaste for this distinction, moreover, it is "not controlling here." *Cooper*, 439 F. Supp. 2d at 491. "Where, as here, the question is one of recognizing implied limitations on an otherwise broad waiver of sovereign immunity for an entity like TVA, . . . the plain language of the *Loeffler–Burr* line of cases requires that a 'governmental' versus 'non-governmental' distinction be made." *Id.* at 491–92 (citing *Loeffler*, 486 U.S. at 555) ("[T]his Court has recognized that authorization of suits against federal entities engaged in *commercial* activities may amount to a waiver of sovereign immunity . . . .") (emphasis added).

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

8.1 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. 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").

8.2 The TVA Mishandles *Burr*

8.2.1 Question-Begging & Dicta

Against this Court's longstanding *Burr–Loeffler–Meyer* test, 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" the FTCA case of *United States v. Smith*, 499 U.S. 160 (1991).[20]

This is question-begging. The TVA assumes (and asserts) what it is supposed to be proving. Exactly what is in question is whether a

[20] *Id.* at 8.

discretionary-function exception displaces the long-governing sue-and-be-sued framework of *Burr*.

The TVA has leaned heavily on *Smith's* fleeting reference to "exceptions" to TVA suability. And to the fact that, in noting that some courts have found such "exceptions," *Smith* pointed to Sixth and Eleventh Circuit decisions in *Queen v. TVA*, 689 F.2d 80 (6th Cir. 1982) and *Peoples Nat'l Bank v. Meredith*, 812 F.2d 682 (11th Cir. 1987).

This does not persuade. *Smith's* reference to "exceptions" to TVA suability is dicta. More exactly, perhaps, that reference is ancillary to *Smith's* operative discussion under the FTCA (as modified by the Federal Employees Liability Reform and Tort Compensation Act of 1988). *See Smith*, 499 U.S. at 168–69. The *Smith* Court was not centrally discussing — never mind rendering definitive statements on — the limits of TVA immunity. *See id.*[21] From *Smith's* brief "exceptions" comment, it is not possible to reach conclusions about the extent of TVA suability — to say nothing of the precise conclusion that the TVA urges (that its suability is limited by a discretionary-function rule). It is moreover possible to read this section of *Smith* to yield the opposite conclusion. In this same passage, *Smith* also noted that "lower court cases" had "establish[ed] the TVA's own tort liability *independent of the FTCA*." *Id.* at 169 (emphasis added). Which resonates with *Meyer's* express refusal

[21] *Smith's* whole statement on this point is: "Courts have read this 'sue or be sued' clause [16 U.S.C. § 831c(b)] as making the TVA liable to suit in tort, subject to certain exceptions." *Smith*, 499 U.S. at 168–69.

to borrow from the FTCA to diminish the TVA's openness to suit.

The two cases that *Smith* cites — *Queen* and *Meredith* — do not help the TVA. These cases merely confirm what no one disputes: that the Sixth and Eleventh Circuits eschew *Burr–Loeffler–Meyer* and instead use a discretionary-function test to determine when the TVA can be sued. Whether that approach is correct is the question that is now before this Court.

Furthermore, in applying a discretionary-function test, *Queen* and *Meredith* mainly just echo Sixth and Eleventh Circuit precedent. That is to say, on this question, *Queen* and *Meredith* mainly find the Sixth and Eleventh Circuits mutually amplifying each other. These cases draw on precious little authority from beyond their own jurisdictions: Three cases from the former Fifth Circuit[22] — which became binding Eleventh Circuit precedent when the latter court was created[23] — and one district-court case from Virginia.[24] So that the question again returns to whether the Sixth and Eleventh Circuits are correctly

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[22] *See Meredith*, 812 F.2d at 985 (citing *J.H. Rutter Rex Mfg. Co. v. United States*, 515 F.2d 97 (5th Cir. 1975)); *Queen*, 689 F.2d at 85 (citing *Painter v. TVA*, 476 F.2d 943 (5th Cir. 1973); *Lynn v. United States*, 110 F.2d 586, 590 (5th Cir. 1940)).

[23] *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*) (adopting as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981).

[24] *Queen*, 689 F.2d at 86 (citing *Pac. Nat'l Fire Ins. Co. v. TVA*, 89 F. Supp. 978 (W.D. Va. 1950)).

testing TVA immunity under an approach other than that marked out by *Burr–Loeffler–Meyer*.[25]

Finally, *Smith* certainly does not endorse the "exceptions" that are obliquely noted in *Queen* and *Meredith* in a way that would *sub silentio* overturn the whole line of *Burr–Loeffler–Meyer* precedent. Though that is what the TVA's position implies.

8.2.2 Mishandling *Burr*

The TVA contends that, at all lengths, "the first ground [of the *Burr* test] is satisfied here, because the TVA regularly exercises governmental functions, and immunity from suit for discretionary actions undertaken in that capacity arises from fundamental separation-of-powers principles."[26]

Again, *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."[27]

Three problems infect the TVA's reasoning here. First, it is also true that the TVA "regularly exercises" non-governmental, *commercial* functions. And the TVA conduct that is at issue here — power generation, and specifically the work of safely raising power lines — is very much commercial. The TVA is

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[25] It may be worth nothing that *Queen* and *Meredith* were both decided before *Loeffler* and *Meyer* reaffirmed *Burr's* sue-and-be-sued analysis.

[26] *See* Cert. Opp. at 9.

[27] *Burr*, 309 U.S. at 245.

not acting here as some part of a sovereign government. It is not executing an Article II power. It is acting as a utility company. Even more exactly, its work in raising a power line is the work of an electrical contractor. There is nothing significantly "governmental" in that.

Second, the TVA here makes a deep error about the separation of powers. The Thackers discuss this point at greater length below. *Infra*, Part 9. For the moment, a summary should suffice: Congress has "absolute" and "plenary" power to shape sovereign immunity[28] — and it need not use a discretionary-function rule to widen that immunity. By adding a discretionary-function exception to alter the statutory scheme by which Congress created the TVA, it is the TVA's (and the Eleventh Circuit's) approach that runs afoul of separation of powers.

Third, 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."[29] If discretionary, "governmental functions" are immune under *Burr's first* head, though, then this second

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[28] *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) ("plenary"); *Schillinger v. United States*, 155 U.S. 163, 166 (1894) ("absolute").

[29] *Burr*, 309 U.S. at 245 (emphases added).

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."

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

The TVA 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[30]; Cert. Opp. at 7, 9–12). It invoked precedent from the Sixth and Eleventh Circuits that had used the exception to limit its amenability to suit. (Br. of Appellee TVA at 23–24, 30); Cert. Opp. at 8).

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 at times 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

[30] 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.

> is a matter to be resolved by legal policy analysis . . . [?]

(Br. of Appellee TVA at 27). And what impact is that . . . insight . . . supposed to have on this analysis? It is far from clear. Whatever it means, though, it seems a fair rejoinder that the relevant "legal policy" is embedded in the "text[s]" that for decades have described the contours of TVA suability. From the terms of the Tennessee Valley Authority Act, and those of the FTCA, to the precedent from this Court, no governing text declares the TVA's sue-and-be-sued clause reduced by an implicit discretionary-function exception.

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 Id.* 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.[31] 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*.

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[31] 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.

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.[32] That discretionary acts are always immune — regardless of what a sue-and-and-be-sued statute says. 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 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.

9. Congress Has "Absolute" Power to Shape Sovereign Immunity — The TVA Thus Asks This Court to Violate Separation of Powers

The TVA's most central argument is that discretionary-function immunity is innately entwined in separation-of-powers principles.[33] It argues that a discretionary-function exception is necessary to

[32] *See* Cert. Opp. at 9–12.

[33] *See id.*

"prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[34] This argument goes in several wrong directions at once.

First, the TVA mistakes how the relevant power is allocated. This Court has long recognized that defining the jurisdiction of the federal courts — what claims the courts can and cannot hear, and defining the associated breadth of sovereign immunity — are both within Congress's "absolute" and "plenary" power. "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination." *Schillinger*, 155 U.S. at 166. "So long as Congress does not violate other constitutional provisions, its 'control over the jurisdiction of the federal courts' is 'plenary.'" *Patchak*, 138 S. Ct. at 906 (citing *Trainmen v. Toledo, Peoria & W. R.R.*, 321 U.S. 50, 63–64 (1944) and *Bowles v. Russell*, 551 U. S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.")) This Court has also repeatedly held that "Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations." *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 264 (1992) (citing cases).

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[34] *Id*. at 6, 9.

An immediate corollary of these rules is that (contrary to the TVA's understanding) the separation of powers does *not* innately entail a non-waivable discretionary-function exception to otherwise broad waivers of sovereign immunity. Separation of powers is perfectly consistent with whatever description of immunity Congress chooses to enact. Congress may enact a discretionary-function exception in some contexts; it may withhold it in others; and it may, in its "plenary" power, enact another immunity framework entirely — such as creating sue-and-be-sued entities that are open to liability in the same manner as private actors.

By authorizing the TVA to sue and be sued – by waiving any sovereign immunity the TVA may have enjoyed — Congress "submitted" cases against the TVA "to the courts for judicial determination." And Congress placed no discretionary-function "contingencies" on the TVA's broad waiver of immunity. It instead launched the TVA into the commercial world with a sue-and-be-sued clause, making it "*not less amenable to judicial process than a private enterprise* under like circumstances would be." *Meyer*, 510 U.S. at 481 (quoting *Burr*, 309 U.S. at 245) (emphasis in *Meyer*). An abrasion of separation of powers therefore lies in the lower courts' refusing to exercise the jurisdiction conferred by Congress and in creating a "contingency" (the discretionary-function exception) where Congress did not.

Second, the TVA's whole separation-of-powers argument is misplaced. The TVA's complaint should be directed, not at the courts for exercising the jurisdiction that Congress conferred, but rather to Congress for conferring that jurisdiction in the first

place. Again, Congress has "absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination." *Schillinger*, 155 U.S. at 166. That discretion is "plenary" so long as it does not "violate other constitutional provisions." *Patchak*, 138 S. Ct. at 906. Given Congress's power to define the jurisdiction of the federal courts, the TVA's complaint can be lodged only against Congress for waiving its sovereign immunity without adding back a discretionary-function exception — for the claim that this somehow violates the Constitution. But the TVA makes no such argument. Its complaint is directed instead toward the courts and their exercise of jurisdiction — a jurisdiction that the lower courts clearly had.

CONCLUSION

The lower courts erred by failing to apply the suability test that this Court set forth in *Burr*, *Loeffler*, and *Meyer*. And the TVA failed to meet its burden under that test in all respects. The Eleventh Circuit's use of a "discretionary-function exception" borrowed from the FTCA is at odds with both this Court's longstanding precedent, and the correct approach taken by other circuits. The Thackers thus ask the Court to reverse the lower courts' sovereign-immunity dismissal of this suit.

Respectfully submitted,

Franklin T. Rouse
Counsel of Record
CONCHIN CLOUD & COLE, LLC
2404 Commerce Court, S.W.
Huntsville, Alabama 35801
(256) 705-7777
taylor@conchincloudcole.com
Counsel for Petitioners

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