No. 17-1201

In the Supreme Court of the United States

GARY THACKER AND VENIDA L. THACKER, PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

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

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

SHERRY A. QUIRK
General Counsel
DAVID D. AYLIFFE
Associate General Counsel
JAMES S. CHASE
Senior Attorney
Tennessee Valley Authority
Knoxville, TN 37902

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Tennessee Valley Authority (TVA), a wholly owned corporate agency and instrumentality of the United States, may under certain circumstances invoke immunity for its performance of governmental, discretionary functions, including the TVA's statutory authority to construct and repair electric power-transmission infrastructure.

2. Whether the court of appeals correctly held that the TVA is immune for its activities in the specific facts of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulations, and rules:

In the Supreme Court of the United States

No. 17-1201

GARY THACKER AND VENIDA L. THACKER, PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

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

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 868 F.3d 979. The opinion of the district court is reported at 188 F. Supp. 3d 1243 (Pet. App. 12a-16a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a-11a) was entered on August 22, 2017. A petition for rehearing was denied on November 28, 2017 (Pet. App. 17a). The petition for a writ of certiorari was filed on February 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Tennessee Valley Authority (TVA) is "a wholly owned public corporation of the United States," *TVA* v. *Hill*, 437 U.S. 153, 157 (1978), created by the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. 831

et seq. Congress has directed the TVA to act "in the interest of the National defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins." 16 U.S.C. 831; see 16 U.S.C. 831n-4(h), 831dd; *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 553 (1946).

As part of the TVA's mission, Congress has authorized the TVA to construct and repair electric power infrastructure in the Tennessee Valley "for the advancement of the national defense and the physical, social and economic development of the area in which it conducts its operations." 16 U.S.C. 831n-4(h). The TVA may thus construct hydroelectric power plants at dams on the Tennessee River, thereby enabling "the generation of electric energy" in addition to "regulat[ing] the stream flow * * * for the purposes of promoting navigation and controlling floods." 16 U.S.C. 831h-1. Congress also has authorized the TVA to "construct * * * transmission lines * * * in the Tennessee River and its tributaries." 16 U.S.C. 831c(j). As part of that authority, the TVA may "exercise the right of eminent domain" and "condemn all property that it deems necessary" for its purposes. 16 U.S.C. 831c(i). Title to all real property deemed necessary to accomplish the purposes of the Act is held in the name of the United States and the property is "entrusted to [the TVA] as the agent of the United States to accomplish the purposes of [the TVA Act]." 16 U.S.C. 831c(h).

The TVA's operations are an essential part of the Nation's electric power supply. See Pet. 7 n.3. As of 2015, the TVA supplied power to more than nine million customers in seven states. See *ibid.*

2. On July 30, 2013, the TVA was replacing an overhead conductor on a transmission line spanning Wheeler Reservoir—a body of water created by the Wheeler Dam—on the Tennessee River. Compl. ¶ 8. At approximately 2:40 p.m., a pulling cable failed, releasing the tension on the line and allowing it to fall into the water between the towers. *Id.* ¶ 10.

At 3:10 p.m., the TVA informed the U.S. Coast Guard of the situation, and the Coast Guard established a Marine Safety Zone prohibiting all vessels from entering the Tennessee River between miles 297 and 298. C.A. App. 48, ¶ 5 (Carman Declaration). At 3:40 p.m., the Coast Guard broadcast notice of the Marine Safety Zone and the closure of the River on marine radio. *Ibid.* The Coast Guard reissued the Notice hourly thereafter in accordance with the regular schedule for such notices. *Ibid.* Entry into the area without Coast Guard authorization was a violation of federal law. See 33 C.F.R. 165.20, 165.23.

At 5:30 p.m., Petitioner Gary Thacker and a passenger began travelling downstream from Ingalls Harbor, approximately five miles upriver from the downed conductor. Compl. ¶ 16. Thacker's boat travelled at high speed, reaching the downed conductor in about five minutes. *Id.* ¶ 17.

The TVA had two patrol boats at the site of the downed conductor. Compl. ¶ 15. But Wheeler Reservoir is over one mile wide at that location. *Id.* ¶ 14. As a result of the speed of Thacker's boat and the patrol patterns of the patrol boats, neither patrol boat was able to stop Thacker's boat from reaching the downed line. *Id.* ¶ 12; C.A. App. 48-49, ¶¶ 6-7. At the time, the TVA was in the process of pulling the conductor out of the water, and the line was still low over the surface of

the water. Compl. ¶ 18. Thacker's boat struck the line, "[i]nstead of being able to pass safely over it." *Ibid.* His passenger was killed and Thacker suffered physical injuries. *Ibid.*

3. Thacker and his wife filed suit under common-law theories of negligence and wantonness. Compl. ¶¶ 27, 30. The complaint alleged that the "TVA should have instituted heightened and stringent criteria for contractors to qualify to perform boat patrol activities," and that it "should have instituted and/or required training for contractors in the proper procedures to patrol boat traffic on the Tennessee River in the event of any emergency situation." *Id.* ¶ 6. The complaint further alleged that the TVA had breached a "duty to exercise reasonable care in warning boaters on the Tennessee River of the hazards it created," and "to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River." *Id.* ¶ 25.

The district court granted the TVA's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), holding that the TVA is immune from petitioners' suit.[1] Pet. App. 13a-14a, 16a. The court noted that while the TVA Act authorizes the TVA to "sue and be sued in its corporate name," 16 U.S.C. 831c(b), thereby generally waiving sovereign immunity to tort suits, that liability is "subject to certain exceptions," Pet. App. 14a (quoting *United States* v. *Smith*, 499 U.S. 160, 169 (1991)). One exception recognized by the Eleventh Circuit is im-

[1] The Eleventh Circuit has held, unlike some other circuits, that the application of immunity results in a dismissal for lack of subject matter jurisdiction. See, *e.g.*, *United States Aviation Underwriters, Inc.* v. *United States*, 562 F.3d 1297, 1299 (11th Cir.) (per curiam), cert. denied, 558 U.S. 1024 (2009).

munity for the TVA for its performance of certain governmental, discretionary functions. See *ibid.* Applying this Court's two-part test from *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991), and *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988), the district court then held that the TVA was immune because the conduct challenged here—including the TVA's safety decisions in response to a water-hazard emergency—(1) did not violate a mandatory statute, regulation, or policy that allowed no judgment or choice; and (2) was the kind of conduct protected by the discretionary function exception. Pet. App. 14a-15a. The court stated that it is "axiomatic 'that safety decisions represent an exercise of discretion giving rise to governmental immunity.'" *Ibid.* (quoting *Johns* v. *Pettibone Corp.*, 843 F.2d 464, 467 (11th Cir. 1988)).

The court of appeals affirmed. Pet. App. 1a-11a. The court recognized this Court's holdings in *Loeffler* v. *Frank*, 486 U.S. 549, 554 (1988), and *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940), that "'sue-and-be-sued' waivers are liberally construed," Pet. App. 4a (citation omitted), as well as this Court's statement in *Smith* that the TVA is "liable to suit in tort, subject to certain exceptions," *ibid.* (quoting *Smith*, 499 U.S. at 168-169). The court of appeals also noted its own precedent—cited by this Court in *Smith*—that the TVA is immune "when engaged in governmental functions that are discretionary in nature." *Ibid.* (citing *Peoples Nat'l Bank* v. *Meredith*, 812 F.2d 682, 685 (11th Cir. 1987)). The court of appeals concluded that, here, the "TVA's challenged actions occurred in the context of its performance of a governmental function." *Ibid.* Specifically, the TVA "acts as an agency of the United

States when constructing power-transmission lines" because Congress has given the TVA authority to exercise the power of eminent domain when performing that function, and only the United States has eminent domain power. *Id.* at 5a. The court thus held that the TVA was entitled to assert discretionary function immunity against petitioners' allegation that the TVA had "failed to exercise reasonable care in the assembly and installation of power lines across the Tennessee River." *Ibid.* Furthermore, the court held that petitioners' allegations that the TVA had "failed to exercise reasonable care in warning boaters on the Tennessee River of the hazards the TVA created" concerned activities that were also "incident to TVA's construction of power-transmission lines," and thus within the TVA's governmental functions. *Ibid.*

The court of appeals then applied this Court's two-step analysis from *Gaubert* and *Berkovitz* and held that the alleged conduct in this case fell within the TVA's immunity for discretionary actions. Pet. App. 6a-8a. The court of appeals stated that petitioners had "point[ed] to no specific federal statute, regulation, or policy that sets forth a particular course of action for employees raising a power line from a river to follow, either in the construction of the line or in safety precautions to undertake to protect the public." *Id.* at 7a. At the second step, the court stated that the discretionary function exception is designed "to prevent judicial 'second-guessing' of . . . administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 8a (quoting *Gaubert*, 499 U.S. at 322). The court concluded that that test was satisfied here because "[t]he challenged actions and decisions in this case could require TVA to consider, among other

things, its allocation of resources (such as personnel and time), public safety, cost concerns, benefits, and environmental impact." *Ibid.*

The court of appeals denied petitioners' petition for panel rehearing. Pet. App. 17a.

ARGUMENT

The court of appeals correctly rejected petitioners' contention that the TVA cannot assert immunity even for its discretionary, governmental functions because the TVA Act's sue-and-be-sued clause does not expressly incorporate a discretionary function exception. As this Court has explained, the discretionary function exception preserving immunity for governmental activities is a longstanding rule implied from separation-of-powers principles, and the exception properly applies here under this Court's precedents. Contrary to petitioners' contention, there is no genuine circuit conflict that warrants this Court's review: the two circuit court decisions cited by petitioners holding that the TVA was not entitled to immunity involved different legal claims arising from different TVA functions that the courts of appeals considered "commercial" rather than governmental. Petitioners have not identified any case rejecting immunity for the TVA in circumstances analogous to the emergency-management protocols challenged here. Moreover, this case would not be a suitable vehicle for resolving the scope of immunity under the TVA Act because the TVA is immune from this suit in any event under the Suits in Admiralty Act (SIAA), 46 U.S.C. 30901 *et seq.*

Petitioners also argue that the court of appeals erred in its application of this Court's two-part discretionary function test to the facts of this case. That fact-bound

conclusion was correct and does not warrant this Court's review.

1. a. The court of appeals correctly concluded that the TVA may assert immunity for its governmental, discretionary actions in this case. That is, the TVA, like other government agencies and entities, is immune for decisions that are not compelled by any statute or regulation and that implicate governmental policy functions.

The TVA Act provides that the TVA may "sue and be sued in its corporate name," 16 U.S.C. 831c(b), which, as this Court has explained, "[c]ourts have read" to "mak[e] the TVA liable to suit in tort, *subject to certain exceptions*." *United States* v. *Smith*, 499 U.S. 160, 168-169 (1991) (emphasis added). The Court in *Smith* cited decisions from the Eleventh and Sixth Circuits—the two circuits that encompass the vast majority of the Tennessee Valley region—authorizing the TVA to assert immunity for discretionary, governmental functions. *Ibid.* (citing *Peoples Nat'l Bank* v. *Meredith*, 812 F.2d 682, 684-685 (11th Cir. 1987); *Queen* v. *TVA*, 689 F.2d 80, 85 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983)). Subsequent decisions from the Eleventh and Sixth Circuits adhere to the holding that the TVA may invoke the discretionary function exception. See *Bobo* v. *TVA*, 855 F.3d 1294, 1309 (11th Cir. 2017); *Edwards* v. *TVA*, 255 F.3d 318, 320 (6th Cir. 2001).

i. The court of appeals' conclusion that the TVA may assert immunity under certain circumstances for discretionary actions taken in a governmental capacity is consistent with this Court's decisions addressing implied exceptions to sue-and-be-sued clauses, such as *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940), *Loeffler* v. *Frank*, 486 U.S. 549, 554-556 (1988), and *FDIC* v. *Meyer*, 510 U.S. 471, 480 (1994).

Those decisions establish that the "general authority to 'sue and be sued' [may] be delimited by implied exceptions" if it is "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). At least the first ground 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.

The discretionary function exception is a crucial and longstanding form of immunity—recognized by this Court since at least *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170-171 (1803)—that protects the government from "tort liability for errors * * * in the exercise of discretionary functions." *Dalehite* v. *United States*, 346 U.S. 15, 26-27 (1953); see *id.* at 34 & n.30 (citing, among others, *Marbury*, 5 U.S. (1 Cranch) at 170-171 ("Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.")). The exception's purpose is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States* v. *S.A. Empresa de Viacao Rio Grandense (Varig*

Airlines), 467 U.S. 797, 814 (1984). "A contrary principle would indeed be pregnant with the greatest mischiefs." *Kendall* v. *Stokes*, 44 U.S. (3 How.) 87, 98 (1845).

Today, the discretionary function exception is applied most frequently under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which codifies the exception by barring "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). But the concept of immunity for "the discretion of the executive or the administrator to act according to one's judgment of the best course" long predates the FTCA and has a "substantial historical ancestry in American law." *Dalehite*, 346 U.S. at 34 & n.30; see *Kendall*, 44 U.S. (3. How.) at 98 ("[A] public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake."); *Coates* v. *United States*, 181 F.2d 816, 818 (8th Cir. 1950) (citing cases from the 19th and early 20th centuries "in which the courts have had occasion to consider the meaning of 'discretionary functions' and to disclaim judicial power to interfere with, to enjoin or mandamus, or inquire into the wisdom or unwisdom or 'negligence' in their performance within the scope of authority lawfully granted").

Indeed, this Court explained in *Dalehite* that the discretionary function exception was included in the FTCA as a mere "clarifying amendment." 346 U.S. at 26. Congress "believed that claims of the kind embraced by the discretionary function exception [to the FTCA] would

have been exempted from the waiver of sovereign immunity by judicial construction." *Varig Airlines*, 467 U.S. at 810 (citing *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29 (1942) (statement of Assistant Attorney General Francis M. Shea); *id.* at 37-46 (Memorandum with Appendixes, Federal Torts Claims Act—Explanatory of Comm. Print of H.R. 5373)). See also, *e.g.*, *Sea-Land Serv., Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990), cert. denied, 500 U.S. 941 (1991) (the discretionary function exception "merely makes explicit what would otherwise be implicit") (citing *Varig Airlines*, 467 U.S. at 810). The Eighth Circuit observed shortly after the FTCA was enacted that Congress had adopted the discretionary function exception "in recognition of the separation of powers among the three branches of the government and the considerations of public policy which have moved the courts to refuse to interfere with the actions of officials at all levels of the executive branch who, acting within the scope of their authority, were required to exercise discretion or judgment." *Coates*, 181 F.2d at 818.

Because the discretionary function rule is so venerable and so essential to the effectiveness of governmental activities, multiple courts have interpreted immunity waivers in other statutes besides the FTCA to include an implied discretionary function exception. For example, the Suits in Admiralty Act broadly waives the government's sovereign immunity in admiralty suits, and it contains no textual discretionary function exception. See 46 U.S.C. 30903(a). Yet every court of appeals to

have considered the question has recognized a discretionary function exception under the SIAA.[2]

ii. For the TVA, discretionary function immunity arises not from the FTCA but from an implied exception—based on constitutional separation-of-powers principles—to the waiver of sovereign immunity in the TVA's organic statute, the TVA Act. See *Burr*, 309 U.S. at 245. When Congress enacted the FTCA, it exempted the TVA, see 28 U.S.C. 2680(*l*), and instead left in place the scope of the TVA's existing liability to suit under the TVA Act (except in admiralty cases against the TVA where the SIAA's exclusive-remedy provision applies, as discussed below). See H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945) ("[T]he [FTCA] does not affect the existing liability of [the TVA] to be sued in tort.").

The discretionary function exception is properly implied under the TVA Act for the same reason that courts have implied such an exception under the SIAA and that Congress considered it a mere clarification to

---

[2] See *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989); *Sea-Land Service*, 919 F.2d at 891 (3d Cir.); *McMellon* v. *United States*, 387 F.3d 329, 338 (4th Cir. 2004) (en banc), cert. denied, 544 U.S. 974 (2005); *Wiggins* v. *United States*, 799 F.2d 962, 966 (5th Cir. 1986); *Baldassaro* v. *United States*, 64 F.3d 206, 208 (5th Cir. 1995), cert. denied, 517 U.S. 1207 (1996); *Graves* v. *United States*, 872 F.2d 133, 137 (6th Cir. 1989); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Earles* v. *United States*, 935 F.2d 1028, 1031-1032 (9th Cir. 1991); *Tew* v. *United States*, 86 F.3d 1003, 1005 (10th Cir. 1996); *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060, 1063-1064 (11th Cir. 1985), abrogated on other grounds by *Cranford* v. *United States*, 466 F.3d 955, 959 (11th Cir. 2006), cert. denied, 552 U.S. 810 (2007); *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980).

the immunity waiver in the FTCA: absent the exception, "all administrative and legislative decisions concerning the public interest" would be subjected "to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries." *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989) (discussing the SIAA) (citations omitted). "Such an outcome is intolerable under our constitutional system of separation of powers." *Ibid.*

The TVA is "an agency of the Federal Government," *Ashwander* v. *TVA*, 297 U.S. 288, 315 (1936), and "a wholly owned public corporation of the United States," *TVA* v. *Hill*, 437 U.S. 153, 157 (1978), charged with pursuing defined public purposes, 16 U.S.C. 831. The TVA is vested with the eminent domain power, 16 U.S.C. 831c(h), and law enforcement authority, 16 U.S.C. 831c-3(a) and (b). In exercising those responsibilities, the TVA undertakes many activities that are not materially distinguishable from those of other agencies, including activities protected by the discretionary function exception. For example, judgments regarding the control of the water level in a reservoir implicate the purposes of the discretionary function exception equally whether they are made by officials of the TVA or the Army Corps of Engineers. And likewise, judgments about the best way to warn boaters of an emergency in the water implicate government authority whether made by the TVA or the Coast Guard.

iii. Petitioners mistakenly seek to analogize this case to *Meyer*, in which this Court rejected a request "to engraft a portion of the [FTCA]"—its limitation of liability to "'circumstances where the United States, if a private person, would be liable to the claimant'"—"onto the

[FDIC's] sue-and-be-sued clause." 510 U.S. at 480 (citation omitted). The issue here is not whether the courts should "import" the discretionary function exception from the FTCA. The issue is whether the same separation-of-powers principles that prompted codification of the exception in the FTCA warrant reading the TVA Act to preserve immunity in similar circumstances, in much the same way that courts have construed the immunity waiver in the SIAA. Moreover, this case implicates a particular kind of governmental activity—emergency response—that *Meyer* did not. Nothing in the FTCA or the TVA Act suggests that the TVA was uniquely outside Congress's expectation that such discretionary functions "would [be] exempted from the waiver of sovereign immunity by judicial construction." *Varig Airlines*, 467 U.S. at 810. Congress exempted the TVA from the FTCA because it wished to maintain the scope of the TVA's existing tort liability under the TVA Act, not because it wished to abrogate the TVA's immunity for discretionary functions.

Petitioners also err in urging (Pet. 7-8) that the TVA's corporate status militates against implying a discretionary function exception. The FTCA extended the discretionary function exception to "corporations primarily acting as instrumentalities or agencies of the United States," 28 U.S.C. 2671; see 28 U.S.C. 2680(a), which suggests that such government-owned corporations would also have been immune by judicial construction prior to the FTCA. The SIAA similarly extends to "federally-owned corporation[s]," 46 U.S.C. 30903, and as mentioned above, the courts of appeals uniformly interpret the immunity waiver in that statute to include the discretionary function exception. The TVA is not

like other corporations because it performs governmental functions that other market participants do not—including engaging emergency response protocols, as happened in this case.

b. Petitioners assert (Pet. 14-15) that the court of appeals' decision in this case conflicts with two decisions from the Second and Fourth Circuits, but those decisions do not squarely address the questions presented here. In *North Carolina* v. *TVA*, 515 F.3d 344, 347 (4th Cir. 2008), the State of North Carolina alleged that the TVA's operation of coal power plants, pursuant to its authority to produce and sell electric power, 16 U.S.C. 831d(*l*), produced harmful pollution and constituted a common-law nuisance. The Fourth Circuit held that the TVA was not entitled to assert discretionary function immunity in that case, reasoning that those "power-generating activities are commercial in nature and thus are not immune to suit." 515 F.3d at 350 n.4. The court expressly reserved the question, however, whether the TVA could assert immunity "when it engages in a governmental function." *Ibid.* In this case, by contrast, the Eleventh Circuit held that the "TVA's challenged actions occurred in the context of its performance of a governmental function"—the exercise of its statutory authority to construct and repair electric power infrastructure—and that the TVA "acts as an agency of the United States when" doing so. Pet. App. 4a-5a.

The Second Circuit's decision in *Connecticut* v. *American Electric Power Co.*, 582 F.3d 309 (2009), rev'd on other grounds, 564 U.S. 410 (2011), similarly involved a suit by several States alleging a public nuisance based on emissions from coal power plants, including TVA plants. The Second Circuit held that the TVA could not assert discretionary function immunity, citing *Cooper*

and its conclusion that the "TVA had not established that its production of electricity by operating coal-burning power plants was a 'governmental function.'" *Id.* at 391. The Second Circuit did not address whether the TVA activities at issue here constitute a governmental function, and if so whether they would entitle the TVA to assert discretionary function immunity.

In short, *Cooper* and *Connecticut* involved different theories of liability lodged against different activities of the TVA. Those circuits' cramped understanding of the difference between commercial and governmental activities is contrary to this Court's precedents, which have rejected efforts to "push the courts into the 'non-governmental'–'governmental' quagmire that has long plagued the law of municipal corporations." *Indian Towing Co.* v. *United States*, 350 U.S. 61, 65 (1955); see *Varig Airlines*, 467 U.S. at 812. But that issue is separate from the question presented here. It is also not sufficiently important to warrant this Court's review given that the Second and Fourth Circuits do not commonly hear claims against the TVA. Petitioners have identified no case holding that the TVA would be categorically prohibited from asserting discretionary function immunity in a case, like this one, implicating the TVA's initiation of safety protocols in response to an emergency in the water.

c. In any event, it is not necessary for this Court to decide the scope of immunity under the TVA Act in this case, because the TVA is immune from this suit under the Suits in Admiralty Act.[3]

---

[3] The TVA did not invoke the SIAA in the district court because, pursuant to Eleventh Circuit precedent, the TVA had a valid immunity defense through the TVA Act and the discretionary function exception, and because Eleventh Circuit precedent established that

The SIAA waives sovereign immunity to suits in admiralty against the United States "or a federally-owned corporation" where such an action could be maintained if a private person or property were involved. 46 U.S.C. 30903(a). Crucially, where the SIAA applies, an action under it is "exclusive of any other action * * * against * * * the United States or the federally-owned corporation." 46 U.S.C. 30904. That exclusive remedy-provision governs petitioners' suit.

The SIAA's definition of a covered "federally-owned corporation" is "a corporation in which the United States owns all the outstanding capital stock." 46 U.S.C. 30902. The TVA satisfies that definition because it is "a wholly owned public corporation of the United States." *Hill*, 437 U.S. at 157.

Moreover, this suit arises in admiralty within the meaning of the SIAA because the two requirements "of location and of connection with maritime activity" are satisfied. *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). The location requirement is satisfied if "the tort occurred on navigable water," *ibid.*, and here the accident occurred on the navigable waters of the Tennessee River. The connection requirement "raises two issues." *Ibid.* First, a court "must 'assess the general features of the type of incident involved,' to determine whether the incident has 'a potentially disruptive impact on maritime commerce.'" *Ibid.* (quoting *Sisson* v. *Ruby*, 497 U.S. 358, 363, 364 n.2 (1990)). Here, a collision between a vessel and infrastructure spanning a navigable body of water plainly has the potential to disrupt maritime commerce—

---

a motion to dismiss based on such immunity should be brought under Rule 12(b)(1). The TVA would assert SIAA immunity in a Rule 12(b)(6) motion or in its answer.

indeed, the Coast Guard responded by temporarily closing the Tennessee River to maritime commerce. "Second, a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" *Ibid.* (quoting *Sisson*, 497 U.S. at 365, 364 & n. 2) (citations omitted). This test requires only that "one of the arguably proximate causes of the incident originated in the maritime activity of a tortfeasor." *Id.* at 541. Here, one of the alleged proximate causes of the incident is the TVA's alleged negligence in operating patrol boats on the river and in warning river traffic of a hazard to navigation. That activity has a substantial relationship to traditional maritime activity. And even if that were not enough, the construction and repair of infrastructure spanning navigable waters, like the power line at issue here, also has a substantial relationship to traditional maritime activity. See, *e.g.*, *Good* v. *Ohio Edison Co.*, 149 F.3d 413, 416 (6th Cir. 1998) (exercising admiralty jurisdiction where "a pleasure craft traveling through Sandusky Bay collided with the concrete and steel platform base of a transmission tower owned by Ohio Edison"); *Grab* v. *Traylor Bros.*, No. 09-3439, 2011 WL 1703181, at *3 (E.D. La. May 4, 2011) ("The activity of ensuring compliance with laws regarding maritime safety during the building of a bridge over navigable water has a 'substantial relationship to traditional maritime activity.'").

Thus, although petitioners attempted to plead in their complaint that they are permitted a remedy by the TVA's sue-and-be-sued provision, because the SIAA applies, petitioners were required to proceed under that statute—including the limitations on the SIAA's remedy—or not to proceed at all. And as mentioned,

every court of appeals to consider the question has held that the SIAA's waiver of immunity contains an exception for discretionary functions. See pp. 11-12 & n.2, *supra*. It is therefore unnecessary to decide in this case whether the TVA Act's sued-and-be-sued provision abrogates immunity for the TVA's discretionary functions.

2. Petitioners also argue (Pet. 21-26) that, assuming discretionary function immunity is sometimes available to the TVA, the court of appeals erred in holding that immunity applied to the specific activities alleged in this case—the TVA's choice of measures to warn vessels of the hazard in the water, the time and manner in which the TVA installed and then raised the downed conductor, and the TVA's qualification, training, and instruction of its employees in relation to those activities. Petitioners do not dispute that the court applied the correct test set out in *United States* v. *Gaubert*, 499 U.S. 315, 324-325 (1991), and *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). They simply take issue with the application of that test to the facts of this case. That fact-bound question does not warrant this Court's review.

Petitioners do not argue that any other court of appeals has rejected discretionary function immunity in analogous circumstances. On the contrary, other courts have applied immunity to bar suits raising similar allegations. For example, in *Edwards* v. *TVA*, 255 F.3d 318 (6th Cir. 2001), after the plaintiff's son slipped on a rocky shoreline and drowned near a TVA dam on the Tennessee River, the court of appeals held that the discretionary function exception barred the plaintiff's suit alleging that the TVA had failed to maintain adequate safety measures to protect the public. See *id.* at 320-325.

The decision below applying immunity is correct. Under *Gaubert*, the discretionary function exception

applies if (1) "the challenged conduct involves an element of judgment" and (2) "that judgment is of the kind that the discretionary function exception was designed to shield," especially to "prevent judicial 'second-guessing' of * * * administrative decisions grounded in social, economic, and political policy." 499 U.S. at 322-323 (citations omitted).[4] Petitioners do not dispute that the first element is satisfied here, see Pet. 21-22, but they contend that the second is not satisfied because the challenged conduct is "garden-variety safety work," "nuts-and-bolts, on-the-ground, mostly physical work of safely raising a power line," and "wholly functional work." Pet. 22-24.

Petitioners' contention lacks merit. The TVA's decisions regarding how to warn river traffic of the hazard, and its decisions regarding when and how to raise the downed power line, both involved balancing multiple policy considerations, including the expected location, volume, and nature of river traffic at the times the TVA might raise the conductor; the cost and inconvenience to the public of closing the river or portions of it; the likelihood that vessels would ignore broadcast notices and other warnings of the potential hazard; and the importance to the power grid of promptly restoring the downed conductor's transmission capacity. Such decisions fall well within the scope of the discretionary function exception. See *Dalehite*, 346 U.S. at 23 (the discretionary function exception applied where "[t]he negligence charged was that the United States * * * shipped or permitted shipment [of highly explosive fertilizer] to a congested area without warning of the possibility of explosion under certain conditions"); *Edwards*, 255 F.3d

[4] That same test applies in SIAA cases. See, *e.g.*, *McMellon*, 387 F.3d at 349.

at 325 ("courts have ruled that where a federal agency . . . must balance competing needs when deciding how to run a federal facility, the discretionary function exception * * * has been held to apply") (citation omitted).

Petitioners' allegation that the TVA was negligent in hiring and training its employees fares no better. Courts have repeatedly held that the discretionary function exception precludes tort claims based on the government's alleged negligent hiring, retention, training, and assignment of individuals to perform government work, absent an unambiguous requirement like a mandatory certification. See, *e.g.*, *Santana-Rosa* v. *United States*, 335 F.3d 39, 43-44 (1st Cir. 2003) ("Turning to the second segment of the *Gaubert* inquiry, the court must also conclude that decisions regarding * * * work assignments are susceptible to policy-related analysis."); *LeRose* v. *United States*, 285 Fed. Appx. 93, 97 (4th Cir. 2008) ("[D]ecisions regarding the hiring, supervision and retention of [government employees] are precisely the type of decisions that are protected under the discretionary function exception."), cert. denied, 555 U.S. 1170 (2009); *Snyder* v. *United States*, 590 Fed. Appx. 505, 509-510 (6th Cir. 2014) ("This Circuit has consistently held that agency supervisory and hiring decisions fall within the discretionary function exception. * * * This conclusion is consistent with the precedent of our sister Circuits."); *Dovenberg* v. *United States*, 407 Fed. Appx. 149, 149 (9th Cir. 2010) ("Decisions regarding the training and supervision of government employees 'fall squarely within the discretionary function exception'") (citation omitted); *Burkhart* v. *Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997) ("The hiring, training, and supervision choices

that WMATA faces are choices 'susceptible to policy judgment.'").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SHERRY A. QUIRK
General Counsel
DAVID D. AYLIFFE
Associate General Counsel
JAMES S. CHASE
Senior Attorney
Tennessee Valley Authority

JUNE 2018