No. 22-1590

In the United States Court of Appeals
for the Sixth Circuit

Daniel Allen, et al.,

Plaintiffs-Appellants,

v.

United States of America,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 21-cv-10449 (Hon. Thomas L. Ludington)

Brief for the United States

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Request for Oral Argument

This case presents a question of statutory interpretation that is an issue of first impression in this Circuit. Because the Court's decision-making process would benefit from further discussion, the United States concurs in the plaintiffs' request for oral argument.

Introduction

From 1998 until 2018, the owners of the Edenville Dam in Michigan operated the dam under a license from the Federal Energy Regulatory Commission. For the last ten years of that period, the owner and operator of the dam, Boyce Hydro, failed to comply with the FERC's maintenance and safety orders. So the FERC revoked Boyce Hydro's license in 2018, and the state of Michigan assumed jurisdiction over the owner's operation of the dam.

In May 2020, the dam failed, and the subsequent flooding damaged the plaintiffs' property. Shortly after the flood, Boyce Hydro filed for bankruptcy. Left without a remedy against Boyce Hydro, the plaintiffs sued the United States under the Federal Tort Claims Act, alleging that the FERC had negligently licensed and regulated the dam.

The district court correctly held that the plaintiffs' claims were barred by sovereign immunity. Even before getting to the merits of the plaintiffs' claims under the Federal Tort Claims Act or Michigan law, the plaintiffs had to overcome the United States' broad grant of sovereign immunity in the Federal Power Act, 16 U.S.C. § 803(c). Section 803(c) imposed a stringent series of duties on Boyce Hydro, the

licensee responsible for maintaining and operating the Edenville Dam. It then made Boyce Hydro liable for "all damages" caused by its maintenance and operation of the dam—while simultaneously affirming that the United States retained sovereign immunity from suits for those same damages.

The plaintiffs' claims for damages against the United States were barred by this provision. The plain language and structure of § 803(c)—especially when reading the two sentences of that subsection together—show that Congress intended to impose liability on the licensee, and grant mirror-image immunity to the United States, for exactly what happened here. The broader statutory framework and historical context of the Federal Power Act point in the same direction. And the plaintiffs' contrary interpretation would not only mean that § 803(c) somehow failed to impose liability on Boyce Hydro, but also suggest that Congress passed a statute that applied to virtually no one when it was first enacted. The plaintiffs' interpretation is unsound and unsupported by authority, and the district court properly rejected it.

Issue Presented

Is the United States immune from the plaintiffs' claims under the Federal Power Act when the statute imposes all liability for damages caused by the operation or maintenance of hydroelectric dams on dam owners while preserving the United States' coextensive immunity from such claims?

Statement of the Case

Four dams were constructed on a 39-mile stretch of the Tittabawassee River in the 1920s for the purpose of flood control and to generate hydroelectricity. (R. 1: Compl., 7, 15 ¶¶ 18, 50); *Wolverine Power Corp.*, 85 FERC P 61,063, 1998 WL 721604, at *6 (1998). Beginning with the farthest upstream, the dams are the Secord, Smallwood, Edenville, and Sanford. (R. 1: Compl., 8, ¶¶ 19–23); *Wolverine Power Corp.*, 85 FERC P 61,063, 1998 WL 721604, at *1 (1998). The Edenville Dam spans two rivers and creates a reservoir known as Wixom Lake. (R. 1: Compl., 6–8, ¶¶ 16–22); *Wolverine Power Corp.*, 85 FERC P 61,063, 1998 WL 721604, at *2 (1998); The plaintiffs, Daniel and Cathleen Allen, reside downstream from the Edenville Dam. (R. 1: Compl., 21 ¶ 81).

In 1998, the FERC issued a 30-year license to Wolverine Power Corporation to generate hydropower at the Secord, Smallwood, and Edenville Dams. *See Wolverine Power Corp.*, 85 FERC P 61,063, 1998 WL 721604, at **1 (1998). Five years later, Synex Energy, a Canadian corporation with more than fifteen years of experience developing hydropower projects in Canada, obtained title to the dams by

foreclosure sale. (R. 1: Compl., 6, ¶¶ 12–15); *Wolverine Power Corp. Synex Energy Res., Ltd. Synex Michigan, LLC*, 107 FERC P 62,266, 2004 WL 1400137 (2004) ("*Transfer Order*"). Synex Energy assigned title to its United States subsidiary, Synex Michigan, because the FERC may only grant licenses to United States corporations. *Transfer Order*, 2004 WL 1400137, at *1 n.6; *see also* 16 U.S.C. § 797(e). Synex Energy did not obtain FERC approval before assigning its rights to its American subsidiary. *Transfer Order*, 2004 WL 1400137, at *1 n.4.

In 2004, Synex formally requested that the FERC transfer Wolverine Power Corporation's license to Synex Michigan. *Transfer Order*, 2004 WL 1400137, at *1. After providing public notice and reviewing Synex's application materials, the FERC approved the transfer. *Id.* Synex Michigan later changed its name to Boyce Hydro Power, LLC. (R. 1: Compl., 6, ¶¶ 14–15); *Boyce Hydro Power, LLC*, 124 FERC P 62,041, 2008 WL 2752954 (2008). Despite the change of name, "there was no change in the legal entity that is the licensee" and no further FERC approval was necessary. *Boyce Hydro Power, LLC*, 2008 WL 2752954, at *1 n.1.

Between 2004 and 2017, Boyce Hydro engaged in a "long history" of regulatory violations at the Edenville Dam. *Boyce Hydro Power, LLC*, 164 FERC P 61,178, 2018 WL 4350809, at *4 (2018) ("*Order Revoking License*"); (R. 1: Compl., 9 ¶¶ 29–31, 36). These violations included failing to timely design and construct an auxiliary spillway, performing unauthorized repairs, engaging in unauthorized dredging and land-clearing, failing to file a public safety plan, failing to construct proper recreation facilities, and failing to properly employ water quality monitoring equipment. *Order Revoking License*, 2018 WL 4350809, at *2–5; (R. 1: Compl., 9–13, ¶¶ 25–41).

In June 2017, after a "multi-year effort to bring Boyce Hydro into compliance," the FERC ordered Boyce Hydro to address those violations. *Order Revoking License*, 2018 WL 4350809, at *6. Boyce Hydro failed to comply with the FERC's order, and the FERC ordered Boyce Hydro to cease electric generation at the Edenville Dam on November 20, 2017. *Id.* at *7. Boyce Hydro appealed the FERC's cease-generation order to the D.C. Circuit, and that court stayed the FERC's order, allowing Boyce Hydro to resume generation at the dam. *Id.* at *8.

A week after the D.C. Circuit's decision, the FERC "concluded that there was no reason to believe that Boyce Hydro intended to come into compliance, and therefore, proposed revoking the license" for the Edenville Dam. *See Order Revoking License*, 2018 WL 4350809, at *8; (R. 1: Compl., at 12–13, ¶¶ 38–41). As required by the Federal Power Act, the FERC provided notice of its proposed revocation, gathered comments from numerous community stakeholders, and gave Boyce Hydro an opportunity for an evidentiary hearing. *Order Revoking License*, at *9–16 (2018); *see also* 16 U.S.C. § 823b(b). At the conclusion of that process, the FERC revoked Boyce Hydro's license to generate electric power at the Edenville Dam. *Id*. The effective date of the revocation was September 25, 2018. *Order Revoking License*, 2018 WL 4350809, at *16.

The revocation of the license terminated the FERC's jurisdiction over the Edenville Dam, and authority over the site passed to the Michigan Department of Environment, Great Lakes, and Energy (EGLE) for dam safety regulatory purposes. *Order Revoking License*, at *15; (R. 1: Compl., 12, ¶ 39; R. 15-2: Prelim. Report on Edenville Dam Failure, 1; R. 15-3: Mich. State Ct. Order, 3). Michigan EGLE "regulates

over 1,000 dams and has extensive regulatory authority to ensure that dams are constructed, operated, and maintained safely" and has "the ability to commence a civil action for appropriate relief, including injunctive relief, for violations." *Order Revoking License*, at *14.

Once EGLE obtained regulatory authority over the Edenville Dam, it inspected the dam, found it to be in "fair" condition, and permitted Boyce Hydro to continue operating the dam. (R. 15-3: Mich. State Ct. Order, 3). Boyce Hydro, the state of Michigan, and the Four Lakes Task Force, a nonprofit organization, subsequently disputed the proper water levels in the lake and a state court ultimately issued an order requiring that Boyce Hydro maintain the lake at specific water levels throughout the year. (*See* R. 15-3: Mich. State Ct. Order, 119–21; R. 15-4: Order Setting Water Levels, 134–38).

On May 19, 2020, a storm flooded the Tittabawassee and Tobacco Rivers. *Boyce Hydro Power, LLC*, 175 FERC P 61,143, 2021 WL 2029674, at *2 (2021). The floodwaters breached the Edenville Dam and later overtopped the Sanford Dam. *Id.* The floodwaters damaged the surrounding communities and forced the plaintiffs and others to evacuate their homes and businesses. *Id.*; (R. 1: Compl., 12 ¶ 41–42).

Within a few months of the flood, Michigan EGLE filed a civil suit against Boyce Hydro in the Western District of Michigan, numerous citizens filed suit against Michigan EGLE in the Michigan Court of Claims, and Boyce Hydro declared bankruptcy. *Mich. Dep't of Env., Great Lakes, and Energy v. Mueller, et al.*, Case No. 20-528, (W.D. Mich.); (R. 15-3: Krieger Order, 117–33); *Boyce Hydro Power, LLC*, 175 FERC P 61,143, 2021 WL 2029674, at *3 (2021). After Boyce Hydro declared bankruptcy, the state reclaimed the Smallwood, Sanford, and Secord dams by condemnation, and the FERC terminated Boyce Hydro's licenses to generate hydropower at those dams. *Boyce Hydro Power, LLC*, 175 FERC P 61,143, 2021 WL 2029674 (May 20, 2021). The Four Lakes Task Force now owns all four dams. *Id.*, at *3–4.

In February 2021, the plaintiffs filed this suit against the United States under the Federal Tort Claims Act. (R. 1: Compl., 4). The plaintiffs asserted two counts against the United States alleging that the FERC negligently licensed and monitored Boyce Hydro's operation of the Edenville Dam and failed to order Boyce Hydro to lower the water levels at the upstream dams before the storm. (*See* R. 1: Compl., 15–21).

They sought compensation for "major property damage" caused by the flood. (*Id.* at 21–23).

The United States moved to dismiss on three grounds. (R. 15: MTD; R. 24: MTD Reply). First, the United States argued that it was immune under the Federal Power Act, 16 U.S.C. § 803(c), and the Flood Control Act, 33 U.S.C. § 702c. (R. 15: MTD, 71–75; R. 24: MTD Reply, 225–28). Second, the United States argued that the Federal Tort Claims Act's discretionary function exception, 28 U.S.C. § 2680(a), barred the plaintiffs' claims. (R. 15: MTD, 76–80; R. 24: MTD Reply, 228–30). Third, the United States argued that the plaintiffs failed to state a claim because federal statutes do not create a duty actionable under the Federal Tort Claims Act and because the plaintiffs cannot establish the elements of a state law negligent entrustment claim. (R. 15: MTD, 80–83; R. 24: MTD Reply, 230–31).

The district court granted the motion to dismiss based on the United States' immunity under the Federal Power Act and did not address any of the other grounds for dismissal. (R. 28: Order, 279–304). The district court applied several canons of statutory construction to the statute, such as the "series-qualifier canon," the "rule of the last

antecedent," and the "rule against surplusage," but found them inconclusive. (*Id.* at 290–97). Therefore, the district court considered the statute's broader context and legislative history and found that they demonstrated Congress's intent for § 803(c) to impose all liability on the licensee, whether or not the dam was constructed under a license. (*Id.* at 297–303).

The plaintiffs filed a motion for reconsideration, which the district court denied. (R. 31: Order, 333–44). The plaintiffs argued that the district court incorrectly applied several canons of statutory construction. (*Id.*). However, the district court again rejected the plaintiffs' interpretation of the statute, "which was essentially based solely on the comma," because it would be inconsistent with the rest of the statute. (*Id.*). The plaintiffs timely appealed. (R. 32: Notice of Appeal, 345–46).

Summary of the Argument

The Court should affirm the district court's decision and hold that the United States is immune from the plaintiffs' claims under the Federal Power Act, 16 U.S.C. § 803(c). There is no dispute that the first sentence of § 803(c) imposes all responsibility for safely operating and maintaining hydroelectric dams ("the project works") on licensees regardless of when the dam was constructed. Then, in the sentence immediately following this imposition of responsibility on licensees, the Act then states that licensees "shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor." *Id.*

Reading this statutory language as a whole shows that § 803(c) imposes all liability for damages caused by hydroelectric dams on licensees and grants the United States reciprocal immunity from such claims, regardless of when the project was built. The broader statutory framework and historical context demonstrate the same thing. Prior to the Federal Power Act, dam owners were subject to tort suits by private

citizens in state courts under state law. The Federal Power Act was enacted to promote hydropower development and replace an existing scheme of hydroelectric dam regulation while preserving that state law system of tort liability for maintaining and operating the dams. For accessory or appurtenant works, by contrast, Congress limited licensees' liability to works "constructed under the license," because that was the best way to protect the Federal Power Act from constitutional challenges under the then-existing understanding of the Commerce Clause.

The plaintiffs' reading would mean that Congress passed a self-defeating statute. Because virtually all dams initially licensed under the Federal Power Act were built under the previous regulatory scheme, the plaintiffs' interpretation would mean that § 803(c) did not preserve licensees' state law tort liability for any dams then in existence, because none of those dams were "constructed under the license." The plaintiffs' interpretation would also conflict with Congress's intent to promote hydropower development, because it would impose greater liability on owners seeking to construct new dams.

The only court of appeals to address this issue has reached the same conclusion, holding that the Act grants the United States immunity even though the dam in that case was not constructed under a license. *See Skokomish Indian Tribe v. United States*, 410 F.3d 506, 512 (9th Cir. 2005). No court since the enactment of the Federal Power Act more than a century ago has interpreted the statute to limit licensees' liability to damages caused by dams constructed under a license. And the legislative history supports, rather than undermines, the district court's conclusion that § 803(c) applied here.

Accordingly, the Court should affirm the district court's dismissal of the plaintiffs' suit.

Argument

The United States is immune from the plaintiffs' claims under the Federal Power Act.

The district court correctly dismissed the plaintiffs' complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). (R. 28: Order, 285). This Court reviews de novo a dismissal under Rule 12(b)(1). *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). The plaintiffs bear the burden of proving jurisdiction. *Id.*

"The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citations omitted); *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Under the Federal Tort Claims Act, Congress has waived the United States' sovereign immunity for certain types of tort actions. *See Brownback v. King*, 141 S. Ct. 740, 746 (2021). But under the Federal Power Act, 16 U.S.C. § 803(c), the United States retains its sovereign immunity for most tort claims involving dams. Thus, even before addressing the specifics of the plaintiffs' claims under

the Federal Tort Claims Act or Michigan Law, the plaintiffs were required to overcome the immunity provision of the Federal Power Act. *See Skokomish*, 410 F.3d at 512.

The Federal Power Act gives the FERC exclusive authority to issue licenses for "the purpose of constructing, operating, and maintaining dams" in waterways within the reach of the Commerce Clause. 16 U.S.C. § 797(e). Licenses are conditioned upon the licensee's acceptance of the terms of the Act. 16 U.S.C. § 799.

The general conditions of all licenses under the Federal Power Act are described in 16 U.S.C. § 803. Section 803(c), titled "[m]aintenance and repair of project works; liability of licensee for damages," describes the licensee's obligations and liability. 16 U.S.C. § 803(c). The first sentence details the licensee's obligations, requiring each licensee to accept all responsibility for maintaining and operating the hydroelectric project. *See id.* The second sentence then makes the licensee "liable"—and grants the United States mirror-image immunity— "for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license." *Id.*

The question presented here is the extent to which the clause "constructed under the license" limits a licensee's liability (and the United States' coextensive immunity) for damages. If the clause modifies both "the project works" and "the works appurtenant or accessory thereto," as the plaintiffs have argued, a licensee is never liable under § 803(c) for damages caused by the licensee's maintenance or operation of a structure like the Edenville Dam, because the dam was built long before the FERC licensed the facility under the Federal Power Act. Conversely, if the clause modifies only the last antecedent—"the works appurtenant or accessory thereto"—the licensee remains liable (and the United States retains its coextensive immunity) under § 803(c) for all damages caused "by the construction, maintenance, or operation of the project works."

As the district court held, the latter construction is most consistent with the statute's language and structure, the broader statutory context, and the legislative history. (R. 28: Order, 279–304; R. 31: Order, 333–344). The licensee here, Boyce Hydro, was thus liable under § 803(c) for all damages caused by its maintenance and operation of the Edenville Dam, even if its subsequent bankruptcy thwarted the

plaintiffs' claims. And because the United States' immunity under § 803(c) was coterminous with Boyce Hydro's liability, the district court correctly held that the United States was immune from suit under that same statutory provision.

A. The language and structure of § 803(c) make the licensee liable (and the United States immune) for all damages caused by the maintenance and operation of project works like the Edenville Dam.

The plain language and structure of § 803(c) support the district court's reading. "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). It is also "a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

A proper reading of § 803(c) shows that the limiting clause "constructed under the license" modifies only the last antecedent—"the works appurtenant or accessary theretore"—and does not limit a licensee's liability (or the United States' immunity) for damages caused

by the maintenance or operation of "the project works." 16 U.S.C. § 803(c). Under the "rule of the last antecedent," "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021) (cleaned up). This rule, of course, is "context dependent," and there is an exception to the rule if the limiting clause "immediately follows a concise, integrated clause," if the limiting clause is separated by a comma, and if applying the rule of the last antecedent would be inconsistent with the plain intent of the statute. *See id.* at 1169–73; *see also Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 343 (2005); *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 389–90 (1959).

That exception does not apply here. Although the limiting clause—"constructed under the license"—is separated from what it modifies by a comma, that limiting clause does not modify a "concise, integrated clause." *See Facebook*, 141 S. Ct. at 1169–70. Rather, as the district court explained, the two phrases preceding the limiting clause—"the project works" and "the works appurtenant or accessory thereto"—form "a complex noun clause." (R. 31: Order, 339).

More importantly, the other language and structure of § 803(c), along with the rest of the statutory scheme, confirm that "constructed under the license" modifies only "the works appurtenant or accessory thereto." The first sentence of § 803(c) imposes a series of duties on each licensee to maintain and operate "the project works" in a manner that is consistent with "the protection of life, health, and property." 16 U.S.C. § 803(c). And under the Federal Power Act, every licensee is required to "accept[]" those "terms and conditions" as a condition of having a license. 16 U.S.C. § 799. It would make little sense to impose those detailed obligations on *every* licensee in the first sentence of § 803(c)—regardless of when the project works were constructed—but then turn around in the very next sentence and make the licensee's liability for damages hinge on whether the project works were "constructed under the license." Reading both sentences together, then, the better reading of § 803(c) is that the licensee's liability for damages mirrors its obligations to maintain and operate the "project works," whereas its liability for "the works appurtenant or accessary thereto" is limited to anything "constructed under the license." *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("The cardinal rule [is] that a statute is

to be read as a whole, since the meaning of statutory language, plain or not, depends on context.").

Authority from the time of the Federal Power Act's enactment supports this reading. When interpreting a regulatory or statutory provision, the key question is the "ordinary meaning" at the time of the provision's enacement. *Wisconsin Cent. Ltd. v. United States,* 138 S. Ct. 2067, 2072 (2018) ("But even if 'scrip' is capable of bearing this meaning, at the time the IRS promulgated the regulation in 1938 that was not its ordinary meaning."); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[W]e look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961.").

Here, the most closely contemporaneous controlling case construing a grammatically similar provision is *Johnson v. Sayre*, 158 U.S. 109 (1895). In *Johnson*, the Court considered the meaning of the Fifth Amendment's grand jury guarantee, which states that "'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.'" *Id.* at 113–14. The parties

there disputed whether the phrase "'when in actual service in time of war or public danger,'" referred "not merely to the last antecedent, 'or in the militia,' but also to the previous clause, 'in the land or naval forces.'" *Id.* at 114. Ultimately, the Court rejected the argument that the modifying phrase "when in the actual service in time of war" applied to both anteceding terms and held that it applied only to members of "the militia" based on the plain language and intent of the amendment. *Id.* at 115.

Johnson supports the district court's construction of § 803(c) and refutes the plaintiffs' argument. The phrasing of the second sentence of § 803(c) is similar to the phrasing of the Fifth Amendment. Both contain two nouns that do not form a concise integrated clause—"land or naval forces" and "the militia" in *Johnson*, and "project works" and "works appurtenant or accessory thereto" in § 803(c). *Johnson v. Sayre*, 158 U.S. at 113–15; 16 U.S.C. § 803(c). In both, the nouns are followed by a comma and a modifying clause—"in time of war" in *Johnson* and "constructed under a license" in § 803(c). *Johnson v. Sayre*, 158 U.S. at 113–15; 16 U.S.C. § 803(c). And in both cases, the language and context makes clear that the modifying clause applies only to the last

antecedent. *See Johnson v. Sayre*, 158 U.S. at 113–15; 16 U.S.C. § 803(c).

B. Applying § 803(c) equally to all "project works" is most consistent with the Federal Power Act's broader statutory framework and the historical context of its enactment.

The broader statutory framework of the Federal Power Act and the context of its enactment similarly support the district court's interpretation of § 803(c). When interpreting a statute, courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Mastro Plastics Corp. v. Nat'l Lab. Rels. Bd.*, 350 U.S. 270, 285 (1956) (quoting *United States v. Boisdore's Heirs*, 49 U.S. 113, 121–22 (1850)); *accord Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101–02 (2012).

Congress enacted the Federal Power Act to promote hydropower development by replacing an inefficient licensing scheme with a centralized procedure. *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, & Pala Bands of Mission Indians*, 466 U.S. 765, 773 (1984) ("In 1920, Congress passed the Federal Water Power Act in order to eliminate the inefficiency and confusion caused by the 'piecemeal, restrictive, negative approach' to licensing prevailing under

prior law.") (quoting *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n*, 328 U.S. 152, 179–81 (1946)); *State of Cal. ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1554–55 (9th Cir. 1992). At the time, virtually all hydropower projects initially licensed under the Federal Power Act had been constructed before the Act's passage. *See, e.g.*, *Escondido*, 466 U.S. at 768 (applying the Federal Power Act to an application to license a hydroelectric dam constructed before the Act's enactment); *Henry Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369, 374 (1930) (applying the Federal Power Act to determine the availability of damages caused by a dam constructed before the Act's enactment); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 68 (1913) (involving a dispute about "dams, dykes, and forebays" used for "selling water power" before the enactment of the Federal Power Act); *Wisconsin Valley Improvement Company*, 21 F.P.C. 785, 787–88, 1959 WL 3347, 2–3 (May 28, 1959) (issuing a license under the Federal Power Act to a dam constructed before the Act's enactment).

Indeed, Congress was aware that most dams initially licensed would be constructed before licensing because the Act replaced an

existing licensing scheme and because the licensing process for the construction of new projects was designed to take many years. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 398 (1940) (describing 15-year saga of issuing license to construct new hydropower project); *First Iowa*, 328 U.S. 152, 156–58, 180 (1946) (describing a six-year process to obtain a license to construct a new hydropower project under the Federal Power Act and explaining that the Act replaced an existing licensing scheme); 16 U.S.C. § 797 (describing a lengthy process to approve a license involving public notice and comment and a "trial-type hearing" in some circumstances). So virtually all of the "project works" initially covered by the Federal Power Act's licensing scheme—and virtually all of the initial licensees who operated and maintained those "project works" under § 803(c)— involved hydroelectric projects not "constructed under the license."

Congress would not have passed a liability provision that excluded virtually all of the dams originally licensed under the Federal Power Act. As the Supreme Court has stressed, courts "should not lightly conclude that Congress enacted a self-defeating statute." *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019). That is especially true here,

because a self-defeating interpretation of § 803(c) would have undermined, rather than vindicated, the Federal Power Act's expressed intent to impose all costs directly and peripherally related to hydroelectric projects on licensees. *See, e.g.*, 16 U.S.C. §§ 797(b), 803(c), 16 U.S.C. § 811, 814, 816 (requiring that licensees bear all costs for obtaining property necessary to construct projects, obtaining the rights to existing projects, constructing hydropower projects, constructing additions to existing projects, and constructing features necessary for navigation or wildlife preservation). It would also have discouraged new hydropower development by penalizing licensees who constructed new projects, making the licensees of new projects more liable for damages than the operators of existing projects. (*See* R. 28, Order, 301–2); Warren A. Seavey, Principles of Torts, 56 Harv. L. Rev. 72 (1942) (stating that one purpose of tort liabilitiy is to deter the challenged conduct).

Indeed, under the plaintiffs' interpretation of § 803(c), the most culpable party here—Boyce Hydro—would not be covered by the Federal Power Act's liability provision. The plaintiffs' reading would mean that Congress imposed a stringent set of obligations on Boyce

Hydro in § 803(c) to maintain and operate the Edenville Dam, but at the same time opted to exempt Boyce Hydro from the concomitant liability provision in the very next sentence. It would also mean that that the United States gave private entities the privilege of developing hydropower on U.S. waters and profiting thereby, while assuming liability for the actions of those entities. That reading cannot be reconciled with the statutory language and structure.

Rather, as several courts have explained, although Congress overhauled the rules and procedures governing hydropower licensing and regulation with the Federal Power Act, it intended to preserve state laws and rights affecting the liability of dam owners. *See First Iowa*, 328 U.S. at 174 ("In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States . . . ."); *S.C. Pub. Serv. Auth. v. FERC*, 850 F.2d 788, 795 (D.C. Cir. 1988) (holding that the Federal Power Act did not a "encroach upon this state domain by engrafting its own rules of liability."). Congress thus enacted § 803(c) "to preserve existing state laws governing the damage liability of licensees"—and to provide a coextensive shield for the United States

against that same liability. *S.C. Pub. Serv. Auth*, 850 F.2d at 794–95; *see also Skokomish*, 410 F.3d at 512; *DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 78 (2d Cir. 1992); *Seaboard Air Line R. Co. v. Cnty. of Crisp of State of Ga.*, 280 F.2d 873, 876 (5th Cir. 1960); *Pike Rapids Power Co. v. Minneapolis, St. P. & S.S.M.R. Co.*, 99 F.2d 902, 911–12 (8th Cir. 1938). The plaintiffs' reading of § 803(c), by contrast, would have the opposite effect: excluding most licencees' liability for damages from the very provision intended to preserve that liability.

The historical context of the Federal Power Act's enactment also explains why Congress limited licensees' liability for appurtenant or accessory works to only those works that were "constructed under the license." The originally proposed version of § 803(c) "provided that: [n]o license hereunder shall have the effect of relieving the licensee from liability for any injury or damage occasioned by the construction, maintenance, or operation of said project works; and the United States shall in no event be liable therefor." *S.C. Pub. Serv. Auth.*, 850 F.2d at 794. But before the Act's passage, that provision was amended to add the segment "works appurtenant or accessory thereto, constructed under the license" as a discrete unit. *See id.* This provision was added to

expand the reach of the statute, not limit it. It added a new source of liability for licensees (damages caused by appurtenant or accessory works), but explicitly limited its regulation of those peripheral structures to those "constructed under the license."

The main reason Congress included that limitation on licensees' liability for appurtent or accessory works was because it would have been the best way to ensure that the statute survived a constitutional challenge. The Commerce Clause is the constitutional authority for the Federal Power Act. 16 U.S.C. §§ 796(8), § 817. And when the Federal Power Act was drafted, Congress and the courts understood the Commerce Clause much more narrowly than modern courts do. *See United States v. Lopez*, 514 U.S. 549, 552–58 (1995) (explaining how Congress's power under the Commerce Clause remained limited until the late 1930s). For instance, shortly before Congress began drafting the Act, the Supreme Court struck down a federal statute making common carriers liable to their employees for negligently caused injuries because the statute did not explicilitly limit its scope to activities relating to interstate commerce. *Howard v. Illinois Cent. R. Co.*, 207 U.S. 463, 498–504 (1908). Therefore, when Congress enacted

the Federal Power Act, it knew that its provisions had to be based on an obvious interstate nexus. Otherwise, they would be invalidated by the courts. *See id.*

Against this backdrop, Congress took care to ensure that the scope of the Federal Power Act remained within the then-existing understanding of the Commerce Clause. The core provisions of the Federal Power Act are limited to projects on navigable waters and involving the interstate transmission of electricity, both of which were well-accepted uses of the federal government's power to regulate commerce at that time. 16 U.S.C. §§ 796(8), 813, 817; *see United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 63–65 (1913); *Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 86 (1927). However, the Act also contemplated that hydroelectric dams, especially those constructed before they were licensed under the Act, would be used for additional, solely local purposes traditionally within the jurisdiction of the States, such as distribution or use of "water for agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, drinking water, or flood control purposes." 16 U.S.C. § 823e(e)(3); *see also* 16 U.S.C. §§ 797(e), 803(a).

And Congress defined the term "works appurtenant or accessory thereto" to include a wide variety of structures beyond those strictly necessary for the generation and transmission of hydroelectricity, such as public recreation structures, 16 U.S.C. § 796(11) (including "navigation" and "storage" facilities), or even the "accessory" construction of a highway three miles from the project. *See Feltz v. Cent. Nebraska Pub. Power & Irr. Dist.*, 124 F.2d 578, 582 (8th Cir. 1942); *see also State of La., Through Sabine River Auth. v. Lindsey*, 524 F.2d 934, 939 (5th Cir. 1975) (holding that recreation areas unrelated to hydroelectric generation were part of a "project" under the Federal Power Act).

Therefore, in attempting to impose all liability on the licensee in § 803(c)—while still remaining within the contemporaneous bounds of the Commerce Clause—Congress included a provision that made licensees liable for damages caused by the construction, operation, or maintenance of these appurtenant or accessory works, while limiting that liability based on whether the appurtenant or accessory works were constructed under the license. *Cf. Howard*, 207 U.S. at 498–504. By striking this balance, Congress attempted to guard its expansion of

licensees' liability against the inevitable constitutional challenge that accompanied essentially all new legislation at that time by combining it with an explicit federal nexus. *See* Max Pam, Powers of Regulation Vested in Congress, 24 Harv. L. Rev. 77, 78 (1910) ("New legislation, and new application of existing legislation, are therefore certain to be the subject of searching judicial inquiry.").

Especially given this framework and history, the district court's interpretation is the best reading of § 803(c). The first sentence of § 803(c) imposes every conceivable duty and responsibility for maintaining and operating hydroelectric projects on licensees. 16 U.S.C. § 803(c). The second sentence then focuses on the liability of the licensee, imposing liability for damages caused by the licensee's conduct. *See id.* As all courts considering the issue have concluded, the intent of the second sentence was to ensure that licensees remained liable for damages as they had been under state law and to ensure that the United States would not become a guarantor for those same damages. *Skokomish*, 410 F.3d at 512; *DiLaura.*, 982 F.2d at 78; *S.C. Pub. Serv. Auth*, 850 F.2d at 794–95; *Seaboard Air Line*, 280 F.2d at 876; *Pike Rapids*, 99 F.2d at 911–12.

Conversely, the plaintiffs' interpretation is directly contrary to this language, structure, and historical context. The plaintiffs argue that § 803(c) relieves licensees from any claims for damages caused by projects constructed before they were licensed under the Federal Power Act. (Pl. Brief, 11–19). But the plaintiffs make no attempt to explain how this would preserve the status quo of state law liability and cannot do so because their interpretation would abrogate, rather than preserve, all state law claims for damages that had accrued at the time of the Federal Power Act's enactment. (*See id.*). Accordingly, the plaintiffs' interpretation of the statute would defeat Congress's intent in enacting § 803(c) and should be rejected.

C. The only court of appeals to address this issue has held that the Federal Power Act grants the United States immunity whether or not the project was constructed under a license.

No court has adopted the plaintiffs' interpretation of the statute, which would prevent § 803(c) from applying—both for liability and immunity purposes—to any hydroelectric project constructed before the FERC began issuing licenses. The Ninth Circuit, the most recent court of appeals to review § 803(c), has rejected the plaintiffs' reading. *See Skokomish Indian Tribe v. United States*, 410 F.3d 506, 510 (9th Cir.

2005). This Court should follow the Ninth Circuit's unanimous, en banc opinion on this issue.

In *Skokomish*, an Indian tribe sought damages from the United States under the Federal Tort Claims Act for flooding caused by the Cushman Hydroelectric Project. *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 510 (9th Cir. 2005). The Cushman Project was constructed without a license. *Id.* at 512 n.4. The Ninth Circuit heard the case en banc and issued a unanimous decision on the portion of the opinion relating to the Federal Power Act. *See id.* at 512. The court acknowledged that "the license did not authorize the construction, operation, and maintenance of the Cushman Project." *Id.* at 512 n.4 (citing *City of Tacoma*, 67 FERC P 61,152 (F.E.R.C.) 1994 WL 170164, at *5–6 (1994)). Nevertheless, the court held that the "plain language" of § 803(c) was "clear" in "unequivocally exempt[ing] the United States from liability." *Id.* at 512.

The plaintiffs here attempt to distinguish *Skokomish* by arguing that the Ninth Circuit was unaware of "the fact that the hydropower plant at issue was constructed in the 1920s and operated for decades without a project license." (Pl. Brief, 14). But the Ninth Circuit

expressly acknowledged that the Cushman Project was constructed without a license and still found that the plain language of § 803(c) barred the Indian tribe's claim for damages against the United States. *See id.* at 512 n.4. The Indian tribe also emphasized this fact in its briefing on appeal. *See, e.g.*, Reply Brief, *Skokomish Indian Tribe v. U.S.*, 2002 WL 32641460 (9th Cir. Jun. 11, 2002), 3–4 (presenting the issue in emphasized type). On that record, it is implausible that the en banc Ninth Circuit reached the holding that it did without understanding the history of the Cushman Project. Because the relevant facts of this case and *Skokomish* are identical—both dams were constructed prior to licensing—the plaintiffs cannot prevail on the statutory question here without creating a circuit split.

D. The Federal Power Act's legislative history does not support the plaintiffs' reading.

The plaintiffs devote eight pages of their brief to describing the legislative history of § 803(c). (Pl. Brief, 20–28). However, they fail to explain how their proposed interpretation would serve any interest expressed during the legislative process.

The courts that have reviewed the legislative history of § 803(c) have noted that there were two primary concerns raised during the legislative process. *S.C. Pub. Serv. Auth.*, 850 F.2d 788, 794–95 (D.C. Cir. 1988); *DiLaura v. Power Authority of State of N.Y.*, 982 F.2d 73, 78 (2d Cir. 1992); (R. 28: Order, 297–303). First, Congress was concerned with ensuring "that any liability for damages resulting from the construction, maintenance or operation of power works would be borne by the licensees and that the substantive law to be applied in determining liability for, and the amount of, damages would be state tort law." *DiLaura v. Power Auth. of State of N.Y.*, 786 F. Supp. 241, 248 (W.D.N.Y. 1991), aff'd, 982 F.2d 73 (2d Cir. 1992). Second, with the "Graham amendment," Congress was concerned with ensuring that licensees would compensate their neighbors for damages caused by new construction "according to the laws of the state where the project was to be built." *S.C. Pub. Serv. Auth.*, 850 F.2d at 794. Ultimately, the final Committee Report accompanying the current text of the provision explained: "The purpose of this amendment is to provide that the licensee shall pay all damages caused to the property of others." H.R. REP. No. 65-1147 (1919), at 16; *Garcia v. United States*, 469 U.S. 70, 76

(1984) (". . . the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . . .").

Nothing in this legislative history supports the plaintiffs' argument that § 803(c) limits licensees' liability—or limits the United States' coextensive immunity—in any way. Instead, the legislative history reflects Congress's intent to preserve state law claims for damages against dam owners as they existed before the enactment of the Federal Power Act. *S.C. Pub. Serv. Auth.*, 850 F.2d at 794; *DiLaura v. Power Auth. of State of N.Y.*, 786 F. Supp. at 248. Existing state law claims for damages would invariably include claims based on the operation of projects constructed before the Act's enactment. *See, e.g., Escondido*, 466 U.S. at 768; *Henry Ford & Son*, 280 U.S. at 374; *Chandler-Dunbar Water Power Co.*, 229 U.S. at 68; *Wisconsin Valley Improvement Co.*, 21 F.P.C. at 787–88. It would thus be inconsistent with the legislative history to interpret § 803(c) as applying only to dams constructed after the enactment of the Federal Power Act. Just as the language, structure, and historical context of § 803(c) conflict with the plaintiffs' narrow reading of the statute, so does the legislative history.

E. Section 803(c) bars the plaintiffs' claims for damages against the United States, no matter how they try to frame those claims.

A straightforward application of the statutory language bars the plaintffs' claims in this case. The plaintiffs allege that the FERC failed to compel the owner of the Edenville Dam to safely maintain and operate the Dam and, as a result, the dam failed and the resulting flood damaged their home. (*See, e.g.*, R. 1, Compl., 19–20). Thus, plaintiffs' damages arise from the "maintenance, or operation of the project works," and they seek compensation for "damages occasioned to the[ir] property." Under the plain terms of § 803(c), "in no event shall the United States be liable" for such claims. *See* 16 U.S.C. § 803(c); *see also Skokomish Indian Tribe*, 410 F.3d at 512.

It does not matter that the plaintiffs have tried to frame their claims as involving negligent entrustment and "negligent licensing." (Pl. Brief, 29–30). The application of § 803(c) does not hinge on the particular cause of action that the plaintiffs have brought. All that matters under § 803(c) is whether the plaintiffs' claims seek "damages occasioned to the property of others by the construction, maintenance, or operation of the project works." 16 U.S.C. § 803(c). In those

circumstances, regardless of the plaintiffs' particular cause of action, § 803(c) makes the licensee liable and grants the United States immunity for "all damages." That is the case here.

Conclusion

The Court should affirm the district court's dismissal of the plaintiff's complaint.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 6,983 words. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

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Dated: February 8, 2023

Certificate of Service

I certify that on February 8, 2023, I caused this Brief for the United States to be electronically filed with the Clerk of the United States Court of Appeals for the Sixth Circuit using the ECF system, which will send notification of the filing to the following attorney of record:

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Relevant District Court Documents

The United States of America designates as relevant these documents in the district court's electronic record, Eastern District of Michigan case number 21-cv-10449:

Record No.	Document Description	Page ID Range
1	Complaint	1–24
15	Motion to Dismiss	53–85
15-2	Preliminary Report on Edenville Dam Failure	86–116
15-3	Michigan State Court Order	117–33
24	Reply in Support of Motion to Dismiss	221–74
28	Opinion & Order Granting Motion to Dismiss	1–26
31	Opinion & Order Denying Motion for Reconsideration	1–12
32	Notice of Appeal	345–46