No. 21-1368

IN THE
Supreme Court of the United States

OLD DOMINION ELECTRIC COOPERATIVE,
Petitioner,

v.

PJM INTERCONNECTION, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petition purports to present the following question: "Do state-law claims that allegedly conflict with federally filed tariffs involve a substantial federal question; or does the filed-rate doctrine merely operate as a federal preemption defense that, under the well-pleaded complaint rule, does not confer arising-under jurisdiction?" Pet. i.

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceedings below beyond those identified in the petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, PJM Interconnection L.L.C. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings, within the meaning of Rule 14.1(b)(iii), beyond those identified in the petition.

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BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Petitioner Old Dominion Electric Cooperative ("ODEC") provides electricity to the mid-Atlantic power grid under federal tariffs administered by PJM Interconnection, a regional transmission organization designated by the Federal Energy Regulatory Commission ("FERC"). PJM's federal tariffs carry the force of federal law and exclusively define the rights and duties of PJM and its member utilities, including ODEC. In particular, PJM's federal tariffs define, and limit, the payment members may receive for wholesale energy services they provide in response to PJM directives.

ODEC previously petitioned FERC to permit it to recover $14,925,669.58 in costs it allegedly incurred when following PJM directives during the 2014 polar vortex

cold-weather event. Because PJM's federal tariffs forbid the recoupment ODEC seeks, ODEC asked FERC to *waive* the tariffs to recover that amount. FERC refused that request and the D.C. Circuit affirmed, holding that allowing the recoupment ODEC sought would impermissibly rewrite the terms of PJM's federal tariffs. ODEC petitioned this Court for a writ of certiorari, but the Court denied review.

This action seeks to recover the same $14,925,669.58, for the same categories of costs. ODEC filed a state-court action demanding the precise relief, down to the penny, that it sought before FERC: $14,925,669.58 in additional costs allegedly incurred when following PJM directives during the 2014 polar vortex. This time, ODEC purported to ground its demand in state law, asserting state-law claims for unjust enrichment, breach of contract, and negligent misrepresentation. Following removal, both the district court and the court of appeals recognized that ODEC's complaint was a thinly veiled attempt to attack PJM's federal tariffs—and demand the waiver of their terms that FERC and the D.C. Circuit denied—clothed in state-law garb. Simply put, the complaint seeks to challenge and alter the terms of the relationship set by PJM's federal tariffs by obtaining greater payment for tariffed services than the tariffs allow. Consistent with "multiple decisions of [its] sister circuits," the Fourth Circuit held that ODEC's "challenges to federal tariffs present questions of federal law" supporting federal subject-matter jurisdiction. Pet. App. A30.

Nothing about that decision warrants this Court's review. ODEC's petition rests on the premise that the Fourth Circuit conflated the substantial-federal-question doctrine (which provides federal-court jurisdiction over ODEC's claims) with the filed-rate doctrine (which

forecloses ODEC's claims on the merits). See Pet. i. But that premise is false. ODEC ignores the Fourth Circuit's express admonition that those doctrines are *not* coterminous and that a claim does *not* necessarily present a federal question just because it is barred by the filed-rate doctrine. Pet. App. A26 n.10. The court recognized that the doctrines are distinct—even though, in this case, they "work in tandem to render [ODEC's] claims nonviable." Pet. App. A34.

ODEC fares worse still in asserting a circuit conflict. It invokes cases observing that a filed-rate defense does not create federal-question jurisdiction. But the Fourth Circuit and other federal courts *agree* on that point. ODEC primarily asserts a conflict with the Seventh Circuit's decision in *Northeastern Rural Electric Membership Corp.* v. *Wabash Power Association, Inc.*, 707 F.3d 883 (7th Cir. 2013). *Northeastern*, however, expressly recognized that claims that "challenge terms of a federally-filed tariff aris[e] under federal law." *Id.* at 891; see *id.* at 893 n.5. That is why the Fourth Circuit identified *Northeastern* as one of the many "decisions of [its] sister circuits" that are "in accord with" the decision below. Pet. App. A30-A31. ODEC has no response.

The asserted conflict with this Court's precedents likewise falters. The Fourth Circuit expressly and faithfully applied this Court's four-factor "*Gunn-Grable*" test for federal-question jurisdiction. It also explained at length why its precedents "and *Gunn-Grable* share a common foundation and spell out harmonious legal principles." Pet. App. A32. ODEC does not address any of that careful analysis.

This case, moreover, would be an exceedingly poor vehicle for addressing any conceivably debatable issue, because ODEC's case is doomed regardless. ODEC

(erroneously) argues that federal-question jurisdiction turns exclusively on mechanical examination of the elements of its state-law claims. But that examination—which ODEC's petition does not even try to conduct—reveals that at least one element of *each* of ODEC's claims requires resort to federal law. This case also arises in a decidedly unusual posture: ODEC *already sought* exactly the same relief before FERC and the D.C. Circuit, which squarely held ODEC is forbidden from recovering the $14,925,669.58 it seeks here. That binding judgment ensures that ODEC could not prevail even if the case were returned to state court—and indeed would warrant a federal anti-suit injunction to protect the D.C. Circuit's prior judgment from ODEC's machinations. Any one of those obstacles would be reason enough to deny the petition—together, they compel that conclusion.

STATEMENT

I. Statutory And Regulatory Framework

A. The Federal Power Act

The Federal Power Act ("FPA") grants FERC exclusive regulatory authority over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(a). While once the domain of individual, vertically integrated companies, today the transmission of electricity from generators to utilities is mostly the domain of "regional transmission organizations" ("RTOs") that operate the electrical grid on a non-discriminatory basis. See *Midwest ISO Transmission Owners* v. *FERC*, 373 F.3d 1361, 1363-1365 (D.C. Cir. 2004) (Roberts, J.); Pet. App. A4. Respondent PJM, for example, is the RTO that administers the electrical grid for a region spanning 13 States and the District of Columbia. Pet. App. A4.

RTOs have "broad responsibility relating to the supply of wholesale electric power" in their regions, including "ensuring that at all times sufficient electrical power is available to meet customer demands." Pet. App. A87 ¶¶ 7-8. Each RTO exercises "exclusive authority for maintaining the short-term reliability of the grid that it operates" and coordinating the movement of electricity throughout its market area. 18 C.F.R. § 35.34(j)(4), (k). In fulfilling those duties, RTOs have operational control over the transmission facilities of their member utilities. 18 C.F.R. § 35.34(j), (k).

B. FERC's Use of RTO Tariffs To Establish Nondiscriminatory Terms

The FPA directs FERC to ensure that all "rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy" be "just and reasonable." 16 U.S.C. §§ 824(a), 824d(a). To meet that requirement, FERC requires RTOs to file schedules of proposed rates and terms for the agency's approval. Pet. App. A4. Once approved by FERC, the filed rates are set forth in "tariffs," which carry the force of federal law. Pet. App. A5; *AT&T* v. *Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998). The tariffs set the "'only lawful'" rates for the services they cover. *AT&T*, 524 U.S. at 222. The "filed rate doctrine" thus "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981).

PJM is the RTO responsible for the mid-Atlantic electrical grid and related wholesale energy markets. Pet. App. A86-A87 ¶¶ 5, 9. Accordingly, PJM has filed—and FERC has approved—two tariffs to cover the wholesale electricity market in that region: the Open

Access Transmission Tariff ("Tariff") and the Amended and Restated Operating Agreement ("Operating Agreement") (collectively "PJM's federal tariffs"). C.A. App. 80-139, 141-145.

By their terms, PJM's federal tariffs exclusively define the "rights, duties, and relationship of" PJM and its member utilities, including ODEC. C.A. App. 141 (§ 2.1(c)); see Pet. App. A5. Among other things, they "affor[d] PJM expansive powers to take 'measures appropriate to alleviate'" emergencies, including calling on member utilities to start, shutdown, or change output levels of their facilities "at any time." Pet. App. A5. PJM's energy markets operate by having generators bid to sell energy that they can produce, either that day or in the future. See C.A. App. 98 (§ 1.7.1), 110-111 (§ 1.7.20). Under PJM's federal tariffs, certain generators, termed Generation Capacity Resources, must be available to provide energy to PJM when called upon. See *Old Dominion Elec. Coop.*, 151 FERC ¶ 61,207 (2015) ("*ODEC I*"). Among other responsibilities, Generation Capacity Resources must "respond to [PJM] directives to start, shutdown or change output levels of generation units." C.A. App. 110-111 (§ 1.7.20(b)).

PJM has discretion whether to call on any particular generator depending on demand and other factors. Where PJM directs a generator not to operate or cuts short its operation period, certain costs are recoverable under PJM's federal tariffs. C.A. App. 130 (§ 1.10.2(d)), C.A. App. 120 (§ 1.9.7(b)). Otherwise, as relevant here, all bidders are paid the same price for energy generation. At the time of the events underlying this case, PJM's federal tariffs capped the price at which generators may offer their energy production at $1,000 per megawatt-hour. C.A. App. 127 (§ 1.10.1A(d)(viii)).

II. Factual Background

A. The January 2014 Polar Vortex

ODEC is a utility that operates three energy generation facilities (power plants) in Virginia and Maryland. Pet. App. A85-A86. As a PJM member utility and participant in PJM's energy markets, Pet. App. A85-A86, ODEC subscribes to PJM's federal tariffs. As Generation Capacity Resources during the events in question, ODEC's three facilities were required to provide energy when called upon by PJM. Generation Capacity Resources receive additional compensation for agreeing to be ready to provide electricity on demand. See *ODEC I*, 151 FERC ¶61,207 at 62292. To the extent those facilities were called upon and "unable to deliver the requested energy," they would be deemed to have experienced a "forced outage" and ODEC would "incu[r] a monetary penalty." Pet. App. A93 ¶50; C.A. App. 116 (§1.9.4(a)), 131 (§1.10.4(a)), 138-139 (§§8.1-8.2).

In January 2014, there was a "Polar Vortex" in the region where PJM and ODEC operate. Pet. App. A88 ¶15. Extreme cold caused demand for electricity to spike. Pet. App. A88 ¶¶15-17. Exercising its responsibility under its federal tariffs and FERC regulations to "maintain [system] reliability," PJM took steps to "ensure the supply of sufficient power generation resources" to meet increased demand. Pet. App. A88 ¶17; 18 C.F.R. §35.34.

As relevant here, PJM directed ODEC to ensure its facilities were available to generate electricity when called upon, consistent with their obligations as Generation Capacity Resources under PJM's federal tariffs. Pet. App. A89-A91 ¶¶23, 27, 34, 37, 41. This included purchasing sufficient quantities of natural gas to operate the facilities. At the time, natural gas prices allegedly had risen to many times normal levels. Pet. App. A92 ¶45. ODEC alleges

that PJM promised to "make ODEC whole for its fuel and other costs associated with purchasing the natural gas" needed to run the facilities. Pet. App. A88-A89 ¶18. The promises were allegedly made in "tape recorded" and "writ[ten]" communications. Pet. App. A91-A92 ¶44.

When consumer demand was less than expected, PJM cancelled or scaled back some operational requests, leaving ODEC with unused fuel. Pet. App. A7. Other times, ODEC's facilities ran as scheduled, but ODEC's operational costs for that electricity allegedly rose above the $1,000/megawatt-hour cap set by PJM's federal tariffs. *Ibid.* As a result, ODEC allegedly "incurred an aggregate sum of $14,925,669.58 in costs that exceeded the rate that it could legally charge PJM under the Tariff." *Ibid.*

III. LEGAL PROCEEDINGS

A. Proceedings Before FERC and the D.C. Circuit

1. Having incurred $14,925,669.58 in costs not recoverable under PJM's federal tariffs, ODEC sought that sum, for specified categories of costs, in an administrative action before FERC. C.A. App. 147-234; see *ODEC I*, 151 FERC ¶61,207. "Relying on its facility operation expenses and the excessive costs of natural gas purchased but not burned, [ODEC] petitioned FERC for the full amount of its excess costs and damages—again, $14,925,669.58." Pet. App. A7. ODEC "did not dispute that its January sales to PJM fell within the scope of the Tariff and Operating Agreement that control the entities' relationship." *Ibid.* Nor did ODEC dispute that the reimbursement it sought was barred by PJM's federal tariffs, specifically the $1,000/megawatt-hour cap. C.A. App. 150, 161-162, 168-179, 189-194, 213, 228-229. Instead, ODEC sought a "waiver" of PJM's federal tariffs so that it could be "made whole." *ODEC I*, 151 FERC ¶61,207 at 62285-62287.

In support of its request, ODEC submitted transcripts of calls and emails between its agents and PJM employees—the "tape recorded" and "writ[ten]" communications in which PJM had allegedly promised to "make ODEC whole." Pet. App. A88-A89 ¶18, A91-A92 ¶44; see C.A. App. 204-205. According to those transcripts, PJM promised to reimburse ODEC "according to [a PJM] manual"—specifically, "PJM Manual 11, Attachment C," which contains procedures for seeking reimbursement available under PJM's federal tariffs. C.A. App. 204-205.

Although PJM supported ODEC's request, FERC denied ODEC relief—just as it had with other utilities making similar claims arising out of the polar vortex. See *Duke Energy Corp.*, 151 FERC ¶61,206 (2015); *Duke Energy Corp.* v. *FERC*, 892 F.3d 416 (D.C. Cir. 2018) (affirming FERC's decision).[1] The agency held that allowing PJM to reimburse ODEC would retroactively alter rates set by filed tariffs, which federal law forbids. *ODEC I*, 151 FERC ¶61,207 at 62294; *Old Dominion Elec. Coop.,* 154 FERC ¶61,155 (2016) ("*ODEC II*") (denying rehearing). FERC also held that there was "no contract between ODEC and PJM providing for ODEC's recovery of the costs at issue" and that PJM's "generally applicable tariffs" could not, in any event, be modified through "a bilateral contract with a single generator" or any other "informal, private agreement." *ODEC II*, 154 FERC ¶61,155, P22.

2. The D.C. Circuit affirmed. It held there was "no dispute that the PJM Tariff's filed rate did not allow the cost of recovery" ODEC sought. *Old Dominion Elec.*

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[1] Before FERC, PJM recognized that its federal tariffs did not permit the reimbursement ODEC sought. Nonetheless, "in consideration of its desire to fairly compensate [ODEC]," PJM "supported [ODEC's] waiver request." Pet. App. A8.

Coop. v. *FERC*, 892 F.3d 1223, 1231 (D.C. Cir. 2018) ("*ODEC III*"). It further held that awarding ODEC relief would "retroactively rewrite the terms" of PJM's federal tariffs in violation of federal law. *Id.* at 1232. This Court denied review. 139 S. Ct. 794 (2019).

B. ODEC Files Its State-Court Action

Unable to recover before FERC, ODEC sought the "same relief" in state court. Pet. App. A2. In particular, once this Court denied ODEC's petition for a writ of certiorari, ODEC filed the operative amended complaint in Virginia state court. C.A. App. 53, 72-73. The complaint asserted state-law claims for breach of contract, unjust enrichment, and negligent misrepresentation. Pet. App. A94-A97. In support, it recited "the same factual contentions at issue in the FERC proceedings." Pet. App. A10. ODEC again alleged that "PJM induced ODEC to enter into binding commitments to purchase natural gas to run its units" by "promising to make ODEC whole for its fuel and other costs associated with purchasing the natural gas," but did not fulfill that alleged promise. Pet. App. A88-A89 ¶ 18.

ODEC's claims sought to recover the same categories of "operational and fuel costs" ODEC unsuccessfully sought to recover before FERC. Compare Pet. App. A89-A91 ¶¶ 24-43 with C.A. App. 157. The complaint demanded "damages in the sum of $14,925,669.58—the precise amount [ODEC] sought in petitioning FERC for a waiver of the PJM Tariff's rate cap." Pet. App. A10; see Pet. App. A97; C.A. App. 164.

C. The District Court Upholds Removal and Dismisses on the Merits

PJM removed the lawsuit to the U.S. District Court for the Eastern District of Virginia. The removal notice as-

serted federal jurisdiction because ODEC's claims, by seeking to alter the terms of the parties' relationship under PJM's federal tariffs, necessarily raised a substantial federal question and arose under federal law. Pet. App. A78-A81. PJM also moved to dismiss on the merits because ODEC's claims violated the filed-rate doctrine. ODEC moved to remand, arguing that the court lacked jurisdiction.

The district court denied ODEC's motion to remand. Pet. App. A35. Applying this Court's "*Gunn-Grable* framework," the district court held it had subject-matter jurisdiction because ODEC's claims necessarily raised a substantial federal question appropriately resolved in federal court, and therefore arose under federal law. Pet. App. A67-A69.

Having confirmed its jurisdiction, the district court addressed the merits. It granted PJM's motion to dismiss, finding ODEC's claims were barred by PJM's federal tariffs and the filed-rate doctrine. Pet. App. A68, A69. The court emphasized that, in different circumstances, "parties bound under a federal tariff might be able to bring state law claims that do not implicate the tariff rate." Pet. App. A68. But this "is not that case." *Ibid.*

D. The Court of Appeals Affirms

ODEC appealed to the Fourth Circuit. ODEC did not deny that, if the court had subject-matter jurisdiction, ODEC's claims were barred on the merits. See ODEC C.A. Br. 11-40 (C.A. Dkt. #19). ODEC challenged only the district court's jurisdictional ruling. See *id.* at 3.

The Fourth Circuit affirmed. Pet. App. A3. Under this Court's "*Gunn-Grable*" test, it explained,

> "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually

> disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."

Pet. App. A15-A16 (quoting *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013)); see *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 313-314 (2005)). Because ODEC's claims satisfied those factors, they arose under federal law and established federal subject-matter jurisdiction. Pet. App. A15-A34.

1. ODEC's claims necessarily raised a federal question, the Fourth Circuit held, because ODEC's "asserted right to relief necessitates recourse to the [federal] Tariff that controls the utility's relationship with PJM." Pet. App. A17. That conclusion followed from the court's earlier decision in *Bryan* v. *BellSouth Communications, Inc.*, 377 F.3d 424 (4th Cir. 2004). In *Bryan*, the Fourth Circuit recognized that a claim necessarily raises a federal question where "'the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Id.* at 429 (quoting *Franchise Tax Bd.* v. *Constr. Laborers Vacation Trust*, 463 U.S. 1, 28 (1983)). In this context, "a federally filed and approved regulatory tariff 'carries the force of federal law'" and "controls the entirety of [the] relationship" between the contracting parties. Pet. App. A16, A23 (quoting 377 F.3d at 428-429). A "'claim that seeks to *alter* the terms of the relationship . . . set forth in a filed tariff therefore presents a federal question.'" Pet. App. A16 (quoting 377 F.3d at 429) (emphasis added). *Bryan* thus held that "*challenges* to federal tariffs present questions of federal law." Pet. App. A30 (emphasis added). That ruling, the court observed below, is "in accord with" "multiple decisions of [its] sister circuits." Pet. App. A30-A31 (citing, *inter alia*, *North-*

eastern Rural Elec. Membership Corp. v. *Wabash Power Ass'n, Inc.*, 707 F.3d 883, 891-892, 893 n.5 (7th Cir. 2013)).

The Fourth Circuit readily concluded that ODEC's claims sought to "challenge" and "'alter the terms of the relationship set forth in the federally filed PJM Tariff,'" such that ODEC's "right to relief in the first instance require[d] consideration and construction of the federal tariff that controls the entirety of [ODEC's] relationship with PJM." Pet. App. A22-A24. The prior FERC proceedings made that especially clear: "There can be no good faith contention that the relief [ODEC] now seeks is different in character than it was during the utility's administrative proceedings." Pet. App. A24. ODEC had "petition[ed] FERC for a *waiver* of the Tariff" to recover "$14,925,669.58" for "costs incurred during the 2014 polar vortex" that "are not compensable under the PJM Tariff." Pet. App. A24-A25 (emphasis added). ODEC now sought "precisely the [same] sum," for exactly the same costs, under the guise of state law. Pet. App. A24. ODEC thus was asking "a court to stand in the shoes of FERC and set a reasonable tariffed rate specifically for purposes of compensating it for its polar vortex-related losses." Pet. App. A25. That would "'alter the rate paid'" for wholesale energy services falling "squarely within the scope of the PJM Tariff, such that the utility's right to relief is inextricably intertwined with federal law." Pet. App. A25, A29.

2. The court also found the remaining *Gunn-Grable* factors satisfied. The federal question was "actually disputed" because the parties "disagree[d] whether the PJM Tariff precludes [ODEC's] ability to recover." Pet. App. A33. The question was also "substantial" in terms of its "'importance * * * to the federal system as a whole.'" *Ibid.* (quoting *Gunn*, 568 U.S. at 260). ODEC

sought "to have a state court circumvent FERC's exclusive authority to regulate electric utilities"—a "maneuver" of "'substantial' significance to the federal government." *Ibid.*

By the same token, ODEC's claims were "most appropriately pursued in the federal administrative setting"—as ODEC had in fact already done before FERC and the D.C. Circuit. Pet. App. A33. The claims thus could be resolved in federal court without disrupting Congress's intended division of labor between state and federal courts. *Ibid.* Indeed, "if anything, the removal [of ODEC's claims to federal court] could best be said to have righted that intended division." *Ibid.*

The Fourth Circuit rejected ODEC's argument that the court's analysis, or its earlier decision in *Bryan*, was inconsistent with "the Supreme Court's *Gunn-Grable* test." Pet. App. A18. Examining those precedents at length, the court explained that "*Bryan* and *Gunn-Grable* share a common foundation and spell out harmonious legal principles." Pet. App. A32.

3. The Fourth Circuit then turned to the merits. Although ODEC had not squarely challenged the district court's decision granting PJM's motion to dismiss, the Fourth Circuit agreed with the district court that ODEC's claims must be dismissed under the filed-rate doctrine. Pet. App. A26 n.10, A34.

The Fourth Circuit emphasized, however, that its decision "should *not* be taken to imply that the filed-rate doctrine is 'conterminous with the scope of federal question jurisdiction.'" Pet. App. A26 n.10 (quoting *Bryan*, 377 F.3d at 430 n.8) (emphasis added). The court recognized there are cases where a claim is "barred by the filed-rate doctrine" but does "not raise a federal question."

Bryan, 377 F.3d at 430 n.8. On the facts here, however, "the substantial federal question doctrine and the filed-rate doctrine work in tandem to render [ODEC's] claims nonviable." Pet. App. A34.

REASONS FOR DENYING THE PETITION

Far from creating a circuit conflict, the decision below is in accord with the law of every court of appeals to have addressed the issue. It is also consistent with this Court's precedents. Petitioner attributes to the decision below a meaning, and impact, the decision does not have. As a result, the question the petition purports to present for review is not even presented in this case.

I. THIS CASE DOES NOT PRESENT THE QUESTION ON WHICH ODEC SEEKS REVIEW

ODEC's petition rests on a fundamental misunderstanding of the decision below. ODEC repeatedly accuses the Fourth Circuit of conflating federal-question jurisdiction with the filed-rate doctrine. The Fourth Circuit, ODEC declares, "has held that the existence of a federally filed tariff means that *any* state-law claim that *potentially conflicts* with [a federal] tariff presents a substantial federal question." Pet. 11 (emphasis added); see Pet. 14-15 (alleging conflict with decisions recognizing "'the filed-rate doctrine is [not] a jurisdictional doctrine'").[2] ODEC's Question Presented thus asks the Court to decide whether federal-question jurisdiction exists whenever "state-law claims * * * allegedly conflict with federally filed tariffs"—that is, whenever the defendant has a "defense" under the "filed-rate doctrine." Pet. i; see Pet. 16.

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[2] See also Pet. 19-20 (alleging conflict with decisions stating that "the filed-rate doctrine is a federal preemption defense" and that "federal preemption defenses do not create arising-under jurisdiction").

That is not what the Fourth Circuit held. The Fourth Circuit applied the well-established principle that *efforts to challenge a federal tariff* give rise to federal jurisdiction—and made clear that it was *not* holding that *filed-rate defenses* give rise to federal jurisdiction. Responding to ODEC's arguments, the court emphasized that its ruling "should *not* be taken to imply that the filed-rate doctrine is 'conterminous with the scope of federal question jurisdiction.'" Pet. App. A26 n.10 (emphasis added).

The Fourth Circuit's actual reasoning began with the universally accepted principle that a tariff filed with the appropriate federal agency "controls the entirety of [the] relationship" between the contracting parties. Pet. App. A23; see, *e.g.*, *Marcus* v. *AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998) (federal tariffs "'*conclusively and exclusively* enumerate the rights and liabilities of the contracting parties'"); *Northeastern Rural Elec. Membership Corp.* v. *Wabash Valley Power Ass'n*, 707 F.3d 883, 893 n.5 (7th Cir. 2013) (tariff is "a federal regulation [that] forms the basis of the contractual relationship"). As the Fourth Circuit explained—and ODEC concedes—"a federally filed and approved regulatory tariff 'carries the force of federal law.'" Pet. App. A16; see Pet. 2. The court then held that "'a claim that seeks to *alter* the terms of the relationship . . . set forth in a filed tariff'"—*i.e.*, a claim that seeks to alter federal law—necessarily "'presents a federal question.'" Pet. App. A16 (quoting *Bryan* v. *BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004)) (emphasis added). In other words, "in accord" with "multiple decisions of [its] sister circuits," the Fourth Circuit held that "*challenges to* federal tariffs"—efforts to overturn the tariff—"present questions of federal law" supporting federal-question jurisdiction. Pet. App. A30-

A31 (collecting cases from Seventh, Eleventh, and Second Circuits).

The Fourth Circuit was emphatic that its rulings, in this and prior cases, "should not be taken to imply that the filed-rate doctrine is 'conterminous with the scope of federal question jurisdiction.'" Pet. App. A26 n.10 (quoting *Bryan*, 377 F.3d at 430 n.8). As the court had previously acknowledged, claims challenging federal tariffs often "also run afoul of the filed-rate doctrine," requiring dismissal on the merits. *Bryan*, 377 F.3d at 430 n.8. But the court was unequivocal that the presence of a filed-rate defense—even a meritorious one—does not itself create federal-question jurisdiction. See *ibid.* To drive the point home, the Fourth Circuit cited with approval authority finding (on different facts) that "a claim did not raise a federal question" for jurisdictional purposes *even though* it conflicted with a federal tariff and thus "was barred by the filed-rate doctrine" on the merits. *Ibid.* (citing *Fax Telecommunicaciones, Inc.* v. *AT&T*, 138 F.3d 479, 486 (2d Cir. 1998)); see also *Northeastern*, 707 F.3d at 892 (providing other examples); pp. 19-20, *infra*.

The Fourth Circuit's decision thus unequivocally distinguishes federal-question jurisdiction from the filed-rate doctrine. ODEC's petition never mentions that distinction, much less tries to explain why it is wrong. ODEC likewise overlooks the Fourth Circuit's extensive discussion of other cases where that court had held federal preemption defenses do *not* create federal-question jurisdiction—as well as the court's explanation why the "PJM Tariff * * * cannot be construed simply as a defense to the claims' allegations" here. Pet. App. A26-A27; see Pet. App. A27-A30.

Consequently, this case does not present ODEC's Question Presented. The Fourth Circuit simply did not

hold that state-law claims "involve a substantial federal question" just because they "allegedly conflict with federally filed tariffs." Pet. i. Nor did the court deny that "the filed-rate doctrine" is a "federal preemption defense" that does not itself "confer arising-under jurisdiction." *Ibid.* ODEC seeks review of holdings that do not exist. That is reason enough to deny the petition.

II. ODEC Identifies No Conflict Warranting This Court's Review

Once the Fourth Circuit's decision is properly described and understood, ODEC's claim of a circuit conflict evaporates. As the Fourth Circuit explained, the fact that "challenges to federal tariffs present questions of federal law" is "in accord with" "multiple decisions of [its] sister circuits." Pet. App. A30-A31 (citing *Cahnmann* v. *Spring Corp.*, 133 F.3d 484, 488 (7th Cir. 1998); *Northeastern Rural Elec. Membership Corp.* v. *Wabash Valley Power Ass'n*, 707 F.3d 883, 891-892, 893 n.5 (7th Cir. 2013); *Hill* v. *BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004); *Marcus* v. *AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998)); see also *Bryan*, 377 F.3d at 429 & n.6; *City of Osceola* v. *Entergy Ark., Inc.*, 791 F.3d 904, 907 (8th Cir. 2015); *California ex rel. Lockyer* v. *Dynegy, Inc.*, 375 F.3d 831, 843, amended on denial of reh'g, 387 F.3d 966 (9th Cir. 2004).

Like the Fourth Circuit, those courts recognize that federal tariffs "are the equivalent of federal regulations" that "'conclusively and exclusively enumerate the rights and liabilities of the contracting parties.'" *Northeastern*, 707 F.3d at 892; *Marcus*, 138 F.3d at 56; see *Dynegy*, 375 F.3d at 843, 853. Because "a federal regulation forms the basis of the [parties'] contractual relationship," efforts to challenge the regulation "necessarily aris[e] under federal law." *Northeastern*, 707 F.3d at 893 n.5. That is true not

only when a plaintiff openly attacks a federal tariff, but also when—as here—that attack is cloaked "in state garb." *Marcus*, 138 F.3d at 55; see Pet. App. A29.

A. ODEC's Asserted Conflict with *Northeastern* Lacks Merit

ODEC's claim of circuit conflict rests primarily on the Seventh Circuit's decision in *Northeastern*. See Pet. 14-15. But *Northeastern* shows consistency, not conflict. It *agrees* with the Fourth Circuit that "a state law action seeking to enforce or challenge terms of a federally-filed tariff arises under federal law." *Northeastern*, 707 F.3d at 891; see *id.* at 893 n.5; *Cahnmann*, 133 F.3d at 488. The Fourth Circuit thus identified *Northeastern* as a decision "in accord with" its determination that "challenges to federal tariffs present questions of federal law." Pet. App. A30-A31.

In *Northeastern*, the Seventh Circuit simply applied that principle to find federal jurisdiction lacking. In that case, there was a "'crucial'" "point of timing"—not implicated here—that defeated jurisdiction. 707 F.3d at 892. Although "there [wa]s a federally-filed tariff" by the time of suit, "the complaint allege[d] a contract and breach of that contract that both *predate[d]* the federal tariff." *Ibid.* (emphasis added). As a result, the court reasoned, "the rights at issue cannot be said to arise out of the federal tariff"—no such tariff existed when rights were allegedly invaded—and "the complaint does not necessarily raise a federal question." *Ibid.* This case presents the opposite circumstance: ODEC's claims are "based on conduct that occurred *after* [PJM's] federal tariff was submitted for regulation." *Ibid.* Indeed, the conversations on which ODEC's claims are premised invoke the very manuals PJM adopted to implement the tariffs' terms. C.A. App. 204-205. In *that* situation, the

Seventh Circuit recognized, "a federal regulation forms the basis of the contractual relationship, so any claim necessarily arises under federal law." *Northeastern*, 707 F.3d at 893 n.5. Far from conflicting with the Fourth Circuit's analysis, *Northeastern* confirms it.

Like the Fourth Circuit here, the Seventh Circuit in *Northeastern* recognized that, although federal tariffs might provide a valid filed-rate defense, that defense did not itself "provide a basis for jurisdiction." 707 F.3d at 892. That aptly illustrates the Fourth Circuit's point that federal-question jurisdiction and the filed-rate doctrine are *not* "'conterminous,'" and that federal jurisdiction does *not* extend to every case involving an alleged conflict with a filed tariff. Pet. App. A26 n.10; see p. 17, *supra*.

B. ODEC Shows No Conflict with Third or Ninth Circuit Law Either

Petitioner's claimed conflict with *Metropolitan Edison* v. *Pennsylvania Public Utility Commission*, 767 F.3d 335 (3d Cir. 2014) (cited Pet. 15), fares no better. That case did not involve federal-court jurisdiction, removal from state court, or challenges to federal tariffs. See *id.* at 363. It rejected an argument that "a *state tribunal* lacked even an *arguable basis for jurisdiction*," such that an earlier state judgment should be denied preclusive effect in later federal litigation. *Id.* at 359 (emphasis added). Here, the Fourth Circuit never suggested that *state* courts *lack* jurisdiction over ODEC's claims; it held only that *federal* courts *have* jurisdiction. And contrary to ODEC's contention, the Fourth Circuit *agrees* with the Third Circuit that "merits-based pre-emption arguments" like the filed-rate doctrine are not "jurisdictional arguments." *Id.* at 367 (quoted Pet. 15); see p. 17, *supra*.

The purported conflict with rulings "in" the Ninth Circuit, Pet. 7, rests on a single, unreviewed district-court

decision from 2001. Pet. 15-16 (citing *Hendricks* v. *Dynegy Power Mktg., Inc.*, 160 F. Supp. 2d 1155, 1165 (S.D. Cal. 2001)). Even a "direct conflict" "with a decision rendered by a district court" would not warrant this Court's review. S. Shapiro *et al.*, *Supreme Court Practice* § 4.8 (10th ed. 2013); see S. Ct. R. 10(a). Regardless, there is no conflict. ODEC invokes *Hendricks*'s observation that a "'filed rate defense'" does not create federal-court "'"jurisdiction."'" Pet. 15-16 (quoting 160 F. Supp. 2d at 1165). The Fourth Circuit agrees. See p. 17, *supra*.

C. ODEC's Purported Intra-Circuit Conflict Lacks Merit As Well

Unable to muster a plausible inter-circuit conflict, ODEC invokes Judge Luttig's dissent in *Bryan*, 377 F.3d at 432. See Pet. 12-13, 18. But the existence of a dissent in an earlier case on different facts is no basis for review. This Court does not grant review even to resolve intra-circuit conflicts between *different panels* of the same court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of *a Court of Appeals* to reconcile its internal difficulties." (emphasis added)); Shapiro *et al.*, *Supreme Court Practice*, *supra*, § 4.6; *Davis* v. *United States*, 417 U.S. 333, 340-341 (1974).[3]

Regardless, the *Bryan* dissent casts no doubt on the decision below. In *Bryan*, the dissent and the majority *agreed* that "claims requiring the court to second-guess the reasonableness of [federal-agency rate determinations] are properly said to require the court to resolve a substantial federal question." 377 F.3d at 435 (Luttig, J., dissenting); see *id.* at 430 n.8 (majority). ODEC's claims plainly meet that standard. Pet. App. A26 n.10. ODEC

[3] The two-sentence dissent in *Hill*, 364 F.3d at 1317 (Edmondson, C.J., dissenting) (cited Pet. 13-14), is irrelevant for the same reason.

previously petitioned FERC to recover "$14,925,669.58" in wholesale energy-related "costs incurred during the 2014 polar vortex." Pet. App. A24. But FERC determined (and the D.C. Circuit affirmed) that those costs are "not compensable under the PJM Tariff" FERC had approved. *Ibid.*; see pp. 8-10, *supra*. ODEC's present claims seek "precisely" the same recovery, for precisely the same costs, that FERC denied. Pet. App. A24-25. It is hard to imagine a more blatant plea for a court to "second-guess" a federal agency's rate determination.

Judge Luttig's critique of the *Bryan* majority's "effective challenge" language, see Pet. 12-13, has no bearing here. Unlike here, the claim in *Bryan* did *not* challenge tariff terms as unjust, too generous, or too stingy; it alleged *deceptive disclosures* in violation of state unfair-trade-practices law. Pet. App. A22 n.7; see 377 F.3d at 426. The *Bryan* majority found the claim was nonetheless an "effectiv[e] challenge" to the tariff—and presented a federal question—because it sought damages that would effectively alter the tariff rate. 377 F.3d at 430-432. The dissent disagreed, arguing that an "'effective challenge'" was insufficient to trigger federal jurisdiction. *Id.* at 434. That debate, however, does not matter here. ODEC's claims do not merely "effectively challenge" PJM's federal tariffs. They *directly* challenge the payment ODEC actually received for tariffed services by (as Judge Luttig put it) asking a court to "second-guess" FERC's rate determination.

III. The Decision Below Is Consistent With This Court's Precedents

ODEC urges that the Fourth Circuit "misapplie[d] this Court's standard for determining substantial-federal-question jurisdiction," set forth in *Gunn* and *Grable*. Pet. 16; see *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013); *Grable*

& Sons Metal Prod. v. *Darue Eng'g*, 545 U.S. 308, 314 (2005). But ODEC cannot dispute that the decision below correctly stated the standard from those cases. See Pet. App. A15-A16 (block-quoting *Gunn*, 568 U.S. at 258). A supposed "misapplication of a properly stated rule of law" is poor fodder for this Court's review. S. Ct. R. 10. Regardless, no misapplication occurred.

A. The Fourth Circuit Correctly Applied *Gunn* and *Grable*

ODEC does not dispute that under the standard from *Gunn* and *Grable*:

> Federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.

Gunn, 568 U.S. at 258. The Fourth Circuit expressly recited and applied that standard. Pet. App. A31. And it addressed the relevant factors at length, finding them all "readily established." Pet. App. A32-A34.

1. ODEC nowhere challenges the court's analysis of three of the four *Gunn-Grable* factors, and unsurprisingly so. ODEC's challenge to PJM's federal tariffs is "of course" "actually disputed" between the parties. Pet. App. A33. The issue is also "substantial." That factor "looks to 'the importance of the issue to the federal system as a whole' and 'the broader significance of the . . . question for the Federal Government." *Ibid.* (quoting *Gunn*, 568 U.S. at 260). Here, ODEC "seeks to have a state court circumvent FERC's exclusive authority to regulate electric utilities and the interstate electricity transmission market." *Ibid.* Indeed, ODEC seeks to overturn FERC's and the D.C. Circuit's decision that it is not entitled to the

payment it now demands. Pet. App. A8-A9, A24. And ODEC's complaint concedes its claims have "staggering" "public policy implications" for PJM's FERC-conferred duty to administer the mid-Atlantic power grid. Pet. App. A89 ¶22. The Fourth Circuit properly found the case "poses an issue of 'substantial' significance to the federal government." Pet. App. A33.

The Fourth Circuit also correctly concluded that ODEC's "claims may appropriately be resolved in federal court" without disrupting the federal-state balance. Pet. App. A33. ODEC's request for relief from "federal regulatory rules" is not merely "most appropriately pursued in the federal administrative setting"—ODEC *already* "previously pursued" that exact relief before FERC (and the D.C. Circuit). *Ibid.* "The Government's 'direct interest in the availability of a federal forum to vindicate its own administrative action' ma[kes] the question 'an important issue of federal law that sensibly belong[s] in a federal court.'" *Gunn*, 568 U.S. at 260-261.

2. ODEC challenges the Fourth Circuit's analysis only as to the first *Gunn-Grable* factor: whether ODEC's claims "necessarily raised" a federal question. Pet. 17. The Fourth Circuit held they did. Following its decision in *Bryan* and the law of multiple other circuits, it held that "challenges to federal tariffs present questions of federal law." Pet. App. A30. ODEC is thus left to argue that *Bryan*—and presumably the indistinguishable rulings from multiple circuits—conflicts with this Court's later decisions in *Gunn* and *Grable*. Pet. 17-18. But the Fourth Circuit explained at length that "*Bryan*'s explicit standard 'closely tracks the *Gunn-Grable* framework,'" that "*Bryan* and *Gunn-Grable* * * * spell out harmonious legal principles," and that "the latter did no harm to the

former." Pet. App. A31-A32. ODEC addresses none of that careful analysis.

ODEC urges that *Gunn* and *Grable*'s "necessarily raised" inquiry is strictly limited to the formal "elements of ODEC's state-law claims." Pet. 17. As explained below, jurisdiction is proper here even under that blinkered approach. See pp. 27-30, *infra*. But ODEC identifies nothing in *Gunn* or *Grable* requiring such a limited inquiry. Those cases broke no new ground on the "necessarily raised" factor. Their innovation was clarifying the role of the *other* three factors, see *Grable*, 545 U.S. at 313-314—which ODEC does not challenge here.[4]

ODEC instead derives its state-law-elements-only rule from a *different* decision, *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). See Pet. 17. That cannot help ODEC. For one thing, ODEC overlooks that both *Bryan* and the decision below *expressly applied* the test set forth in *Franchise Tax Board*: whether "'the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Bryan*, 377 F.3d at 429 (quoting *Franchise Tax Bd.*, 463 U.S. at 27-28); see Pet. App. A31. ODEC thus (again) asserts at most a purported "misapplication of a properly stated rule of law," S. Ct. R. 10, unworthy of review.

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[4] ODEC's claimed conflict is further undermined by the fact that a petition for certiorari in *Bryan* was pending when this Court granted certiorari in *Grable*. See No. 04-705. If *Bryan* were potentially inconsistent with *Grable*, this Court's usual practice would have been to hold the petition and GVR once *Grable* was decided—as the brief in opposition observed. See Brief in Opposition in No. 04-705, 2005 WL 226921, at *14 n.13 (U.S. Jan. 26, 2005); Shapiro *et al.*, *Supreme Court Practice*, *supra*, § 5.9. Instead, the Court denied the petition before *Grable* was even argued. 543 U.S. 1187 (2005).

ODEC also misunderstands *Franchise Tax Board*. ODEC purports to quote that case as holding that "'[a] federal issue is "necessarily raised" . . . *only if it is a "necessary element of one of the well-pleaded state claims*."'" Pet. 17 (citing 463 U.S. at 13).[5] In full, however, *Franchise Tax Board* said federal jurisdiction is appropriate where "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, *or that one or the other claim is 'really' one of federal law*." 463 U.S. at 13 (emphasis added). It also emphasized that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Id.* at 22. Accordingly, the ultimate inquiry turns not on a mechanistic review of formal state-law elements, but on whether "the plaintiff's *right to relief* necessarily" raises a federal question. *Id.* at 28 (emphasis added). To prevent jurisdictional manipulation through artful pleading, courts must look to the record as a whole "to reveal the true nature of the plaintiff's claim." 14C C. Wright *et al.*, *Federal Practice & Procedure* § 3734 (rev. 4th ed. 2020). In doing so, the circuits consistently hold that challenges to federal tariffs present federal questions, notwithstanding efforts to cloak those challenges "'in state garb.'" Pet. App. A14; see pp. 18-20, *supra*. ODEC has no response.

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[5] The quoted language does not actually appear in *Franchise Tax Board*. ODEC is apparently quoting the Fourth Circuit's decision in *Burrell* v. *Bayer Corp.*, 918 F.3d 372, 381 (4th Cir. 2019), which in turn quoted *Franchise Tax Board*. Cf. ODEC C.A. Br. 18-19. The Fourth Circuit explained why the decision below is consistent with *Burrell*—and, concomitantly, *Franchise Tax Board*. Pet. App. A27-A31.

B. The Elements of ODEC's State-Law Claims Require Recourse to Federal Law

ODEC loses even under its own approach. Indeed, while ODEC says the Fourth Circuit "ignored" its argument that "none of the elements of its state-law causes of action * * * hinged on a question of federal law," Pet. 17, the Fourth Circuit found it "apparent that weighing the merits of [ODEC's] tort and contract claims—under either Virginia or North Carolina law—would require resort to federal law." Pet. App. A26 n.11.[6] While ODEC disputes that conclusion, this Court does not ordinarily grant review to examine the details of a complaint for compliance with the legal standard; such fact-bound applications of law to fact do not warrant review. But the Fourth Circuit's decision is correct regardless. At least one element of each claim requires resort to federal law.

1. *Unjust Enrichment*

As an equitable remedy available only where the plaintiff has no remedy at law, unjust enrichment requires the plaintiff to show there is "no enforceable express contract between the parties covering the same subject matter." *Mongold* v. *Woods*, 677 S.E.2d 288, 292 (Va. 2009); see *Whitfield* v. *Gilchrist*, 497 S.E.2d 412, 415 (N.C. 1998). The "absence of an express agreement" is thus a necessary element, *Whitfield*, 497 S.E.2d at 415, without which a "Plaintiff [can]not show a right to relief on [its] unjust enrichment cause of action," *Musselwhite* v. *Cheshire*, 831 S.E.2d 367, 179 (N.C. App. 2019).

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[6] ODEC concedes there is no material difference between Virginia and North Carolina law with respect to its asserted claims. ODEC C.A. Br. 19-21 & n.5.

ODEC attempted to satisfy that element by asserting (incorrectly) that its claim falls "outside the scope of any tariff or other regulated PJM policy or process." Pet. App. A92 ¶48. Whether something falls within the scope of PJM's federal tariffs—express contracts with the force of federal law—is indisputably a federal question. The claim thus necessarily requires recourse to federal law.[7]

Unjust enrichment would also require ODEC to prove that "PJM retained the benefit" of ODEC's wholesale energy services "without paying for its value." Pet. App. A96 ¶67; see *Schmidt* v. *Household Financial Corp., II*, 661 S.E.2d 834, 838 (Va. 2008). But the "value" of those services can be determined only by reference to PJM's federal tariffs, which provide the "only lawful" rate. *AT&T* v. *Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998); see Pet. 2. And it goes without saying that whether a party's failure to pay more for wholesale energy services is "unjust" is a federal question reserved to FERC's judgment. 16 U.S.C. §824e(a).

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[7] In the court below, ODEC asserted that absence of an express contract is not an "element" of unjust enrichment. That contention wilts under the slightest scrutiny. Myriad cases make clear that *the plaintiff* bears the burden of showing, as a "condition precedent" to equitable unjust-enrichment relief, that "no express contract exists between the parties." *Butts* v. *Weltman, Weinberg & Reis Co., LPA*, No. 1:13CV1026, 2013 WL 6039040, at *3 (E.D. Va. Nov. 14, 2013) (collecting cases); see *Southern Biscuit Co.* v. *Lloyd*, 6 S.E.2d 601, 606 (Va. 1940) (affirming dismissal of unjust-enrichment claim in light of "express contract"). However labeled, that requirement is in substance an "element" of the plaintiff's right to relief. Regardless, any putative dispute over issues of *state* law would only further counsel against this Court's review. See Shapiro *et al.*, *Supreme Court Practice*, *supra*, §4.10.

2. *Breach of Contract*

ODEC's breach-of-contract claims likewise require resort to federal law. PJM's federal "'tariffs *conclusively and exclusively* enumerate the rights and liabilities between the contracting parties'" as a matter of law. *Marcus*, 138 F.3d at 56. Because federal tariffs with the force of "federal regulation[s] for[m] the basis of the contractual relationship" underlying the contract claim, "any claim necessarily arises under federal law." *Northeastern*, 707 F.3d at 893 n.5.

At the very least, that is the case *here*. ODEC alleged that the asserted contracts consist of "promises" PJM made in "tape recorded" and "writ[ten]" communications. Pet. App. A91-A92 ¶ 44. Those communications—incorporated into the complaint by reference—make clear that the alleged promise was to reimburse ODEC "according to" "PJM Manual 11, Attachment C," which can be used *only* for claims under PJM's federal tariffs. C.A. App. 204-205; see *Radford's Run Wind Farm, LLC*, 165 FERC ¶ 61,121, P24 (2018). The complaint further alleges that the supposed breach occurred after ODEC "made a request for reimbursement in accordance with the procedures PJM requested"—*i.e.*, procedures under the tariffs. Pet. App. A92 ¶ 46. The specific facts ODEC has pleaded confirm that neither the alleged contract nor the alleged breach can be adjudicated without referring to PJM's federal tariffs.[8]

[8] The complaint's assertion that the alleged contracts arose "outside the scope" of PJM's federal tariffs, Pet. App. A92-A93 ¶¶ 48-49, is thus not merely "'a legal conclusion'" entitled to no weight, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009); it is contradicted by facts alleged and incorporated in the complaint.

3. *Negligent Misrepresentation*

Negligent misrepresentation requires ODEC to prove it "justifiably relied" on PJM employees' alleged representations about reimbursement. *Cobb* v. *Pa. Life Ins. Co.*, 715 S.E.2d 541, 549 (N.C. App. 2011). Whether reliance is justifiable depends on "context," including "relevant documents." *Sweely Holdings, LLC* v. *SunTrust Bank*, 820 S.E.2d 596, 606 (Va. 2018) (affirming dismissal for failure to state a claim). A plaintiff "cannot establish that [it] justifiably relied on [alleged] misrepresentations" about the terms of a transaction where "the terms * * * were unambiguously expressed in" a governing document the plaintiff had a "duty to read." *Cobb*, 715 S.E.2d at 549. Accordingly, ODEC would have to prove it justifiably relied on PJM's alleged representations in light of the controlling (and contrary) terms of PJM's federal tariffs—again requiring reference to federal law.

* * *

Federal jurisdiction is proper if *any* of ODEC's claims arise under federal law. See *Chicago* v. *Int'l College of Surgeons*, 522 U.S. 156, 165 (1997). Here, *all* of ODEC's claims arise under federal law—under any conceivable standard.

IV. This Case Is An Exceedingly Poor Vehicle

Finally, the question presented would make no difference to the outcome, four times over. That makes this petition an exceedingly poor vehicle for review. See Shapiro *et al.*, *Supreme Court Practice*, *supra*, §§ 4.3(f), 6.37(i)(1).

First, ODEC's Question Presented asks the Court to hold that a filed-rate preemption defense does not create federal-question jurisdiction. Pet. i. But the Fourth Circuit did not hold otherwise. See pp. 15-18, *supra*.

Answering the question on which ODEC seeks review would not disturb the decision below. Nor can ODEC expand its narrow Question Presented later on: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. R. 14(a).

Second, ODEC loses under its own preferred tests. ODEC endorses the dissent in *Bryan*. See Pet. 12-13, 18. But the dissent *agreed* that "claims requiring the court to second-guess the reasonableness of [a federal agency's rate-making] determination are properly said to require the court to resolve a substantial federal question." *Bryan*, 377 F.3d at 435 (Luttig, J., dissenting); see pp. 21-22, *supra*. ODEC nowhere disputes that its claims call for precisely such second-guessing, by seeking to recover the exact same $14,925,669.58 in costs that FERC has *already held* ODEC is forbidden to recover. See Pet. App. A24-A25. And insofar as ODEC would limit the analysis to a formalistic "examin[ation of] the elements" of its state-law claims, Pet. 17, at least one element of each of ODEC's claims *does* requires resort to federal law. See pp. 27-30, *supra*. Either way, there is federal jurisdiction.

Third, even if the case were remanded to state court, the suit could only end with ODEC's defeat. Before both the Fourth Circuit and this Court, ODEC has never offered any reason why PJM's federal tariffs do not bar ODEC's recovery on the merits. Nor could it, given that FERC and the D.C. Circuit have *already held* that those tariffs foreclose the relief ODEC seeks. See pp. 8-10, *supra*. When asked below what the practical effect of a remand would be, ODEC's only meaningful response was that it could exploit state procedural rules that (purportedly) would prevent PJM from asserting its federal tariffs until after "discovery" and a "jury trial." C.A. Oral Arg.

at 11:50-12:37.[9] Invoking this Court's review just to drag out already-doomed litigation would squander scarce judicial resources.

Fourth, any state-court litigation would be subject to an anti-suit injunction under 28 U.S.C. § 2283. That provision authorizes a federal court to "protect or effectuate its judgments," *ibid.*, by enjoining state-court proceedings that seek to relitigate "an issue that previously was presented to and decided by the federal court," *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 147 (1988) (rule implements "well-recognized concepts of *res judicata* and collateral estoppel").

Here, the D.C. Circuit previously decided that allowing ODEC "recoupment" of the $14,925,669.58 in additional costs it allegedly incurred during the 2014 polar vortex "would retroactively rewrite the terms" of PJM's federal tariffs, and that the "filed rate doctrine * * * flatly forbid[s] such a result." *Old Dominion Elec. Coop.* v. *FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018). The D.C. Circuit would be entitled to prevent ODEC from undermining that judgment by demanding exactly the same forbidden recoupment in state court. See *Thomas* v. *Powell*, 247 F.3d 260, 263 (D.C. Cir. 2001) (approving injunction against state-court suit foreclosed by previous federal-court ruling); *United States* v. *District of Columbia*, 654 F.2d 802, 810 (D.C. Cir. 1981) (anti-suit injunction available even if state-court action does not raise same "formal causes of action" as federal-court proceeding).

Those obstacles make this case a particularly poor vehicle. If there truly were lower-court confusion meriting this Court's intervention (and there is not), the issue

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[9] Available at https://www.ca4.uscourts.gov/OAarchive/mp3/20-1483-20211028.mp3.

surely will arise in a more suitable case. There is no reason to grant review—and every reason to deny review—where all the claims require resort to federal law under any standard, the plaintiff is bound by a previous agency order and federal-court judgment denying the same relief, and the plaintiff merely seeks to drag out the litigation without any hope of recovery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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