No. 21-1368

In The Supreme Court of the United States

OLD DOMINION ELECTRIC COOPERATIVE,
Petitioner,

v.

PJM INTERCONNECTION, LLC,
Respondent.

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

REPLY BRIEF OF PETITIONER

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I. PJM'S RELIANCE ON MATERIALS OUTSIDE THE AMENDED COMPLAINT IS IMPROPER.

In its opposition brief, PJM—like the Fourth Circuit before it—relies heavily on materials outside the Amended Complaint. In particular, PJM relies on materials from a separate administrative proceeding before FERC, and the later appeal of that proceeding.

This is improper. Under the well-pleaded complaint rule, a federal question must appear on the face of the plaintiff's complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987). Because the plaintiff is the "'the master of the complaint,'" he can keep a case in state court "'by eschewing claims based on federal law.'" *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002).

ODEC does not base its claims on the administrative proceedings that took place before FERC. Those proceedings are relevant, if at all, only to potential defenses or counterclaims that PJM may assert. Defenses and counterclaims cannot give rise to federal-question jurisdiction. *See, e.g.*, *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 478 (1998) (holding that res judicata defense based on prior federal judgment does not create arising-under jurisdiction); *Holmes*, 535 U.S. at 830–31 (2002) (holding that a federal counterclaim does not create arising-under jurisdiction). Accordingly, PJM's reliance on the FERC proceedings—both below, and in opposition to the present Petition—is improper.

II. THE QUESTION PRESENTED IN THE PETITION PROPERLY FRAMES THE FEDERAL-QUESTION JURISDICTION ISSUE.

ODEC's Petition frames the issue as whether a defendant's assertion of the filed-rate doctrine supplies a basis for subject-matter jurisdiction or whether, instead, it is merely an affirmative defense that—under this Court's long-established precedent—does not create federal-question jurisdiction. (Pet. at i.) In its response, however, PJM claims that "ODEC repeatedly accuses the Fourth Circuit of conflating federal-question jurisdiction with the filed rate doctrine." (Opp. 15.) PJM then notes that the Fourth Circuit did not conflate the two.

PJM attacks a straw man. Contrary to PJM's argument, ODEC does not claim that the Fourth Circuit has "conflated" the filed-rate doctrine with the substantial-federal-question rule. Rather, ODEC asserts that the Fourth Circuit has failed to recognize that the filed-rate doctrine is a preemption defense that, under settled law, cannot provide the basis for substantial-federal-question jurisdiction.

As ODEC explains in its Petition, the key misstep in the Fourth Circuit's analysis is to conceptualize a claim allegedly *barred* by a conflicting federal tariff as one that "effectively challenges" that tariff. This is no different from saying that a state-law claim preempted by a conflicting federal law necessarily arises under federal law. So if the Fourth Circuit's "effectively challenges" formulation is sufficient to establish federal-question jurisdiction in the present case,

then it would supply federal-question jurisdiction in *any* conflict-preemption context. This, however, conflicts with the rule that conflict preemption is a federal defense that does not ground federal-question jurisdiction. *Caterpillar*, 482 U.S. at 393 (1987) (citing *Franchise Tax Bd.*, 463 U.S. at 12). It is this fundamental point—not any "conflation" of the filed-rate doctrine with the substantial-federal-question doctrine—that Petitioner articulates in its Question Presented.

PJM, however, cites the Fourth Circuit's disavowal of the proposition that the filed-rate doctrine is "coterminous" with the scope of federal question jurisdiction. (Opp. at 3) (citing Pet. App. 34a). PJM says that this demonstrates that the Fourth Circuit did *not* base federal-question jurisdiction on the filed-rate doctrine. This conclusion does not follow. In stating that the two doctrines are not "coterminous," the Fourth Circuit simply acknowledges the obvious point that the filed-rate doctrine is not coextensive with federal-question jurisdiction. Plainly, there are some filed-rate-doctrine cases over which federal courts have jurisdiction; and the federal courts have jurisdiction over some cases that do not involve the filed-rate doctrine.

But, again, that is not the question raised in this case. Rather, the issue is whether there is federal-question jurisdiction over a complaint that asserts state-law causes of action where the *defendant* alleges that those causes of action conflict with federal tariffs. The Fourth Circuit held that there was federal-question jurisdiction in such cases,

which is the ruling that ODEC challenges in its Question Presented.

If anything, it is PJM—not ODEC—who mischaracterizes the import of the Fourth Circuit's decision. PJM claims that "[t]he Fourth Circuit applied the well-established principle that *efforts to challenge a federal tariff* give rise to federal jurisdiction." (Opp. at 16) (emphasis in original). This is not so. ODEC's Amended Complaint did not challenge the tariff. Nor did the Fourth Circuit hold that it did—making instead the much weaker claim that the Amended Complaint "*effectively* challenges" the FERC-filed tariff. And it did not base this holding on "well-established" authority, but on its earlier split decision in *Bryan v. BellSouth Commc'ns, Inc.*, 377 F.3d 424 (4th Cir. 2004), which antedated this Court's controlling decisions in *Gunn v. Minton*, 568 U.S. 251 (2013), and *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

In describing the Fourth Circuit's holding, however, PJM conspicuously omits the qualifier "effectively." But that is exactly where the lower court's opinion founders. Although the Fourth Circuit apparently recognized that the Amended Complaint does not *truly* challenge PJM's FERC-filed tariff, it held that it "effectively" does so. By using this semantic dodge—the nebulous term "effectively"—the Fourth Circuit tries to transmute a federal preemption defense into an affirmative federal question, a move that is inconsistent with this Court's longstanding federal-question jurisprudence. *See Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

III. THE COURTS OF APPEALS DIFFER ON WHETHER A DEFENDANT'S ASSERTION OF THE FILED-RATE DOCTRINE CREATES FEDERAL-QUESTION JURISDICTION.

PJM ignores the qualifier "effectively" once again when it discusses how the different circuits have analyzed federal-question jurisdiction in cases involving the filed-rate doctrine. To show purported harmony among the circuits, for example, it cites cases in which the complaint directly and explicitly seeks to enforce, alter, or challenge a FERC-filed tariff. In *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998), unlike the present case, the contract claim itself was based on "rights granted to [the plaintiff] by the original tariff." In *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998), unlike the present case, the "only possible" contract was the "the tariffs filed in accordance with the FCA." In *City of Osceola, Ark. v. Entergy Arkansas, Inc.*, 791 F.3d 904, 907 (8th Cir. 2015), unlike the present case, "[t]he contract Osceola seeks to enforce is its Power Coordination, Interchange, and Transmission Agreement with Entergy," a FERC-filed tariff. And in *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 843 (9th Cir. 2004), unlike the present case, "California's state claim represented a naked attempt to enforce these federal obligations [i.e., the tariff]."

These cases are not germane because, unlike the plaintiffs in those cases, ODEC does not seek to enforce, alter, or otherwise challenge a FERC-filed tariff. The representations, promises, and assurances upon which ODEC bases its contract claims are *separate and distinct from any federally*

filed tariff—a point ODEC makes expressly in ¶ 58 of the Amended Complaint. (Pet. App. 92a) ("The agreements, understandings, promises and assurances described herein were made outside the scope of any tariff or other regulated PJM policy or process"). That the circuits agree that a claim *based on* a FERC-filed tariff is federal in nature is irrelevant. The question presented in this case is whether a state-law claim allegedly *barred by* the filed-rate doctrine is necessarily federal in nature. As ODEC pointed out in its Petition, the circuits *are* in conflict on this latter proposition. (Pet. at 13-19.) (citing *Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 707 F.3d 883 (7th Cir. 2013) and *Metro. Edison Co. v. Pennsylvania Pub. Util. Comm'n*, 767 F.3d 335, 367 (3d Cir. 2014)).

PJM attempts to dissolve the differences between the Seventh Circuit and the Fourth Circuit by reciting the statement in *Northeastern* that "a state law action seeking to enforce or challenge terms of a federally-filed tariff arises under federal law." (Opp. at 19.) But, again, the Amended Complaint does not attempt to enforce or challenge any tariff—ODEC's claims rest on statements and actions that are not part of any federally-filed tariff. Tellingly, PJM ignores the statement in *Northeastern* that the filed-rate doctrine is "properly treated as a federal defense rather than an affirmative basis for jurisdiction." 707 F.3d at 896. And as the Seventh Circuit further explains, where courts find federal jurisdiction over cases involving tariffs, this is due to "*rights created by a federal tariff itself* . . . not by the fact that the suit pertains

to the same subject matter as a filed rate." *Id.* (emphasis added).

As for *Metro Edison*, PJM claims "[t]hat case did not involve federal-court jurisdiction." (Opp. at 20.) This is not true. Although the overarching issue was whether state-court administrative and judicial proceedings had res judicata effect in a later federal suit, resolving the res judicata issue required the First Circuit to examine whether the state tribunals had subject-matter jurisdiction in the first place or whether, instead, there was exclusive federal jurisdiction over questions implicating the filed-rate doctrine. *See Metro Edison*, 767 F.3d at 357-64.

Finally, PJM incorrectly asserts that the Fourth Circuit's opinion in this case is consistent with the analysis in *Hendricks v. Dynagy Power Mktg., Inc.*, 160 F. Supp. 2d 1155 (S.D. Cal. 2001). (Opp. at 20-21.) This is so, PJM claims, because (1) the district court in *Hendricks* held that a filed-rate defense did not create federal jurisdiction, and (2) the Fourth Circuit's opinion in the present case recited the proposition that a filed-rate defense does not create federal-question jurisdiction. *Id.* Once again, PJM relies on the Fourth Circuit's description of its holding, rather than the holding itself. None of ODEC's state-law claims rely on a tariff filed with FERC. Contrary to the Fourth Circuit's statements, the present case *does*, in fact, involve a filed-rate defense: ODEC does not base any of its affirmative claims on the FERC-filed tariff; the FERC-filed tariff is relevant only insofar as PJM raises it to contest ODEC's state-law claims. Although the Fourth

Circuit resists the characterization, this is at bottom a filed-rate defense.

IV. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *GUNN* AND *GRABLE*.

A. The Fourth Circuit's "effectively challenges" standard is over-broad and would greatly expand substantial-federal-question jurisdiction.

In further opposition to the Petition, PJM contends that the lower court's decision is consistent with this Court's approach to that "special and small category" of cases involving substantial-federal-question jurisdiction. *Gunn*, 568 U.S. at 258. *See also Grable*, 545 U.S. at 313–14 (explaining that "the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331."). PJM asserts that the "decision below correctly stated the standard from" *Gunn* and *Grable*. (Opp. at 23.)

Although the lower court accurately quotes passages from *Gunn* and *Grable*, its holdings are inconsistent with the standards enunciated in those cases. The decision below hinges on the Fourth Circuit's determination that a state-law claim necessarily presents a federal question where it "effectively challenges" federal law, i.e., where the "right to relief necessarily depends on resolution of a substantial question of federal law." (Pet. App. 16a.) This Court has never adopted such standard. A

plaintiff's "right to relief" may "necessarily depend on resolution" of a federal issue raised in an affirmative defense. But it is hornbook law that an affirmative defense cannot ground federal-question jurisdiction. So the "right to relief" rubric would find federal-question jurisdiction in circumstances where there plainly is not such jurisdiction. The test is over-inclusive.

Finally, the lower court's "effectively challenge" standard—grounded, as it is, on whether a federal issue determines a plaintiff's right to relief—is inconsistent with this Court's characterization of substantial-federal-question cases as a "special and small category" of cases. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). As Judge Luttig aptly pointed out in his dissent in *Bryan*, "a claim can easily be characterized as an 'effective challenge' to rates set in a tariff filed with a federal agency." 377 F.3d at 434. The Fourth Circuit's "effective challenge" standard would expand the scope of substantial-federal-question jurisdiction far beyond the narrow confines delimited in *Gunn* and *Grable*.

B. None of the elements of ODEC's state-law claims hinges on a question of federal law.

Adopting a belts-and-suspenders approach, PJM attempts to defend the lower court's ruling by arguing that, on close scrutiny—a scrutiny not

exercised by the lower court[1]— certain elements of ODEC's state-law claims hinge on questions of federal law. Again, this is not so.

Relying on materials outside the Complaint, PJM claims that Counts I & II, for breach of contract, depend on the tariff because PJM said that ODEC needed to follow standard procedures for submitting its reimbursement claim. (Opp. at 29.) PJM then makes the wholly unsubstantiated claim that only expenses approved by the tariff could be submitted using those procedures. (*Id.*)

There is no support for this argument—either in the Amended Complaint or in the outside materials that PJM (improperly) relies on. Furthermore, the argument does not concern the actual promise to reimburse ODEC; at most, it concerns the mechanism for ODEC to obtain payment. But ODEC's Amended Complaint does not assert that PJM made a procedural error in handling the reimbursement. It claims that PJM breached the parties' separate oral contract by reneging on its promise that it would make ODEC whole.

PJM next claims that Count III, for unjust enrichment, relies on a question of federal law because, it claims, establishing the absence of an existing contract is an "element" of an unjust enrichment claim. Once again, PJM has confused an element of a claim with a defense to a claim.

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[1] The Fourth Circuit mentions the elements of ODEC's state-law claims in a cursory fashion, buried in a footnote. (Pet. App. 26a n.11.)

To state a claim for unjust enrichment, a plaintiff must show that it conferred a benefit on the defendant, that the defendant was aware of this, that payment was expected, and that the defendant retained the value of the services without paying the plaintiff. *See Schmidt v. Household Fin. Corp., II*, 661 S.E.2d 834, 838 (Va. 2008); *JPMorgan Chase Bank, Nat'l Ass'n v. Browning*, 750 S.E.2d 555, 559 (N.C. Ct. App. 2013). Although a defendant may assert an existing agreement as a defense to an unjust enrichment claim, the complaint need not allege a negative—the absence of any such agreement—to establish a claim for unjust enrichment. *Id.*

Finally, PJM claims that Count IV, for negligent representation, relies on federal law because determining justifiable reliance will depend on the terms of the tariff. Not so. Because PJM assured ODEC that it would make ODEC whole for any excessive fuel costs, it is barred from claiming that ODEC was negligent in failing to ascertain the terms of the tariff. *See Nationwide Ins. Co. v. Patterson*, 229 Va. 627, 631 (1985) ("[T]he cases are clear that, in Virginia, one cannot, by fraud and deceit, induce another to enter into a contract to his disadvantage, then escape liability by saying that the party to whom the misrepresentation was made was negligent in failing to learn the truth."). Nor would it have been reasonable under the exigent circumstances for ODEC to flyspeck the tariff to validate PJM's assertions. So the terms of the tariff are not essential to ODEC's negligent representation claim.

V. THIS CASE PRESENTS AN IDEAL VEHICLE TO CLARIFY THAT THE FILED-RATE DOCTRINE IS A FEDERAL PREEMPTION DEFENSE AND, AS SUCH, NOT A BASIS FOR ASSERTING FEDERAL-QUESTION JURISDICTION.

Finally, PJM argues that present case is an "exceedingly poor vehicle." To begin with, it claims that—contrary to the Question Presented—the Fourth Circuit did *not* hold that the filed-rate doctrine creates federal question jurisdiction. But the Fourth Circuit's "essentially challenges" test is tantamount to a holding that the filed-rate doctrine confers federal-question jurisdiction.

PJM further claims that ODEC's reliance on Judge Luttig's dissent in *Bryan* is flawed because Judge Luttig agrees 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." The unstated premise is that ODEC's state-law claims require second-guessing of the terms of PJM's tariff. Again, this is not so. As noted above, it is only PJM's filed-rate *defense* that raises the issue of the FERC-filed tariff.

Lastly, PJM asserts that the present case is a poor vehicle because "the suit could only end with ODEC's defeat." ODEC disagrees with that conclusion. But regardless, that is a merits question that has nothing to do with the properly presented jurisdiction issue. Similarly, PJM claims that the case is a poor vehicle because, if remanded, the state-court proceeding could be enjoined under 28 U.S.C. § 2283 because, PJM asserts, this would be

necessary to protect or effectuate the D.C. Circuit's judgment affirming the earlier FERC proceedings. Basically, PJM claims that the FERC proceedings are *res judicata* to the present claims. Again, this is not so. Yet even if 28 USC § 2283 were to apply, this is in the nature of an affirmative defense. It raises *substantive* issues that do not cloud the important *jurisdictional* issues that the Petition squarely presents.

The present case is, instead, an ideal vehicle to clear up lower-court confusion about federal-court jurisdiction in cases implicating the filed-rate doctrine. It cleanly presents a single issue regarding federal-question jurisdiction—i.e., whether the filed-rate doctrine can confer federal jurisdiction even where the plaintiff asserts only state-law claims. This Court should accept the Petition to clarify that the filed-rate doctrine is a substantive preemption *defense* that does not create federal-question jurisdiction.

CONCLUSION

For the foregoing reasons, ODEC respectfully requests that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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