No. 24-1074

IN THE

Supreme Court of the United States

ENTERGY ARKANSAS, LLC,

Petitioner,

v.

DOYLE WEBB, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE ARKANSAS PUBLIC SERVICE COMMISSION; KATIE ANDERSON, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE ARKANSAS PUBLIC SERVICE COMMISSION; JUSTIN TATE, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE ARKANSAS PUBLIC SERVICE COMMISSION,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Unable to dispute that this Court and several circuits do not defer absolutely to a federal agency on the preemptive effect of the agency's decision, Respondents re-imagine the Eighth Circuit's decision as not granting such deference and instead independently analyzing "the specific circumstances of the case." BIO 1. But the decision speaks for itself:

> First, we conclude that the filed rate doctrine does not apply because *FERC made no preemptive decision* regarding the refund's cost allocation. Though FERC decided the amount of the refund and how it should be divided among members of the System, *it declined to decide how the costs should be allocated … [as between] the shareholders [and] the ratepayers*. … In short, FERC made no decision that even arguably could have preempted the APSC's order.

Pet. App. 7a-8a (internal citations omitted; emphasis added).[1]

Three *amicus* briefs agree with EAL that the plain meaning of the Eighth Circuit's decision is that, "unless FERC opines that its decision has preemptive effect, the filed-rate doctrine can be completely

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[1] The remaining paragraph of the Eighth Circuit's decision on preemption (beginning "Second,") addressed only the "bandwidth adjustment" (aka Bandwidth Offset) component of the FERC-ordered "refund." App. 8a. But there too, the Eighth Circuit rested on the fact that "*neither FERC* nor the filed rate *decided how the cost of any part of the refund should be allocated*—bandwidth adjustment or otherwise." *Id.* (emphasis added). As explained *infra*, contrary to the Eighth Circuit, *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003), addressing the same filed rate and a FERC order that did not opine on preemption, applied preemption, *id.* at 49-50.

disregarded." Br. of *Amicus Curiae* Edison Electricity Institute at 8; *see also* Br. of *Amici Curiae* Former Members of the Federal Energy Regulatory Commission at 4 ("The Eighth Circuit decision would deny pass-through of the wholesale costs flowing from a FERC-approved rate on the thin rationale that FERC did not proclaim federal preemption in its orders setting the wholesale rate in question …."); Br. of *Amici Curiae* MISO Transmission Owners at 2 (similar).

The Eighth Circuit's total deference to FERC on preemption squarely conflicts with this Court's precedents on preemption generally and the filed rate doctrine specifically. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) ("[W]e have not deferred to an agency's conclusion that state law is pre-empted."); *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 50 (2003) ("*ELI*") ("[T]he 'view that the pre-emptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings' has been 'long rejected." (quoting *Mississippi Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988)).

The Eighth Circuit's decision threatens the ability of utilities within that circuit to invest in the grid and to recover their costs in the face of a national energy emergency when such investment is needed more than ever. *Accord*, *e.g.*, Br. of *Amici Curiae* MISO Transmission Owners at 3. This Court should summarily vacate and correct the Eighth Circuit's clear error, remanding for the Eighth Circuit to decide preemption instead of entirely deferring to FERC. Alternatively, this Court should grant the petition and set the case for plenary review.

I. RESPONDENTS DISREGARD THE PLAIN LANGUAGE OF THE EIGHTH CIRCUIT'S DECISION AND FAIL TO DISPEL THE CONFLICT OF AUTHORITY

While Respondents argue that "[t]he case below presented a set of circumstances distinct from the filed rate doctrine cases cited by Petitioner" (BIO 9), the Eighth Circuit did not rely on any such circumstances or distinctions. Rather, the Eighth Circuit's rule was simple: FERC's decision cannot have preemptive effect unless FERC itself affirmatively states that it should have preemptive effect, which FERC did not do here. *See, e.g.*, Pet. App. 7a-8a ("FERC made no preemptive decision" because, "[r]ather than deciding in favor of either the shareholders or the ratepayers, 'FERC merely declined to address how damages would be distributed between the two.'" (citation omitted)); *supra*, at 1.

Respondents quote (BIO 13) two other sentences of the Eighth Circuit's decision in an attempt to suggest that the Eighth Circuit did not rest on its deference to FERC. The first—"we conclude that the allocation of the bandwidth adjustment was also not part of the filed rate," Pet. App. 8a—is a bare statement of the Eighth Circuit's conclusion, which the following sentences make clear rested on the Eighth Circuit's reasoning that preemption does not apply if FERC's order did not affirmatively state that the order should have preemptive effect. Indeed, one of those sentences is the second one quoted by Respondents: "*neither FERC* nor the filed rate *decided how the cost of any*

part of the refund should be allocated—bandwidth adjustment or otherwise." Pet. App. 8a (emphasis added).[2]

Once Respondents' effort to mischaracterize the Eighth Circuit's decision is set to the side, the conflict between that decision and this Court's and other circuits' precedents is unavoidable. Whereas the Eighth Circuit ended its analysis upon observing that "FERC … declined to decide" preemption, Pet. App. 7a, this Court "ha[s] not deferred to an agency's conclusion that state law is preempted," *Wyeth*, 555 U.S. at 576, and has unanimously held in the Federal Power Act context that "the view that the pre-emptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings has long been rejected," *ELI*, 539 U.S. at 50 (citation and internal quotation marks omitted). Those holdings are reinforced by *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024) (cited at Pet. 2, 13), which the BIO ignores.

Respondents fail (BIO 10-14) to distinguish other precedents. Respondents say that *Wyeth* is inapposite because the question there was whether a federal court

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[2] The district court did not defer entirely to FERC but rather independently addressed preemption, holding that preemption does not apply. *See* Pet. App. 30a-34a. On appeal to the Eighth Circuit, EAL argued that this was error, citing, *inter alia*, *Boston Edison Co. v. FERC*, 856 F.2d 361, 369 (1st Cir. 1988) (under "[t]he filed-rate doctrine," FERC "can enforce the terms of a filed rate and order refunds for past violations of one"), and *Kansas v. Nebraska*, 574 U.S. 445, 455-56 (2015) (similar in context of interstate compacts). *See* C.A. Appellant Br. 43-44; C.A. Reply 5-6, 10-15. That the relevant portion of the Eighth Circuit's decision, Pet. App. 8a-9a, did not address those authorities, or include any reasoning akin to the paragraph at BIO 11-12, underscores that the Eighth Circuit was not deciding the merits of preemption, but rather was deferring entirely to FERC.

should defer to an agency's "conclusion" regarding preemption, as opposed to here, FERC's *non*-position. But *Wyeth* clearly rejected that distinction, holding that "[t]he weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." 555 U.S. at 577. There can be no less "thoroug[h]" explanation than an agency's refusal (as here) even to take a position.

Respondents barely address *ELI*, even though it involved the same filed rate at issue here (the Entergy System Agreement), FERC's orders did not state FERC's position on preemptive effect, the filed rate also did not address preemptive effect, and this Court unanimously applied preemption. 539 U.S. at 50. Respondents' assertion that the "cost-incurrence that had the preemptive effect [in *ELI*]… was *dictated by the FERC-filed rate itself*" (BIO 10 (emphasis added)), does not reconcile *ELI* with the Eighth Circuit's decision below, which relied on whether *FERC's order* (as opposed to the filed rate) addressed preemptive effect. Pet. App. 7a-8a (paragraph beginning "First,").

In any event, the distinction is factually wrong. Just as the filed rate "delegate[d] discretion" to an Entergy operating committee to characterize reserve units in a manner that impacted cost allocations among Entergy operating companies in *ELI*, 539 U.S. at 42, the same filed rate delegated discretion to an Entergy operating company to make wholesale sales that impacted cost allocations among Entergy operating companies at issue here. As FERC explained, "the System Agreement grants the right to Operating Companies to make opportunity sales for their own accounts …[,]" Opinion No. 521, 139 FERC ¶ 61,240, at P 106 (2012), and a company's decision to do so impacts "cost allocation"

among the operating companies, *id.* at P 124. *See also id.* at P 136 ("the Opportunity Sales were made and priced in good faith").

That the filed rate granted EAL authority to make the Opportunity Sales likewise undermines Respondents' attempt (BIO 11) to distinguish *AEP Texas North Co. v. Texas Industrial Energy Consumers*, 473 F.3d 581, 584 (5th Cir. 2006), which summarized this Court's precedents and applied them to find preemption: "Pursuant to the [filed rate doctrine], the Supreme Court has determined that federal law preempts states from second-guessing FERC's allocations of electric power and from conducting prudence inquiries into FERC's cost allocations, *even when FERC has not conducted such an inquiry*," *id.* at 584 (emphasis added).

Respondents acknowledge that *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963-73 (1986), held that the "state's allocation of more low cost power to a utility than was allowed under [the] FERC-approved wholesale rate was preempted by [the] filed rate doctrine." BIO 11.[3] So too here, FERC ordered an allocation requiring EAL to make a payment to other Entergy operating companies "to put the parties as close as possible to the position they would have been in" had they predicted and originally followed FERC's interpretation of the filed rate, Opinion No. 548, 155 FERC ¶ 61,065, at P 90 (2016), and while other state commissions adhered to FERC's allocation, APSC did not, *see* Pet. 7 & n.3.

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[3] FERC's order prior to this Court's decision in *Nantahala*, like FERC's order here, did not state FERC's conclusion on the preemptive scope of its order. *See Nantahala Power & Light Co.*, 19 FERC ¶ 61,152, *on reh'g*, 20 FERC ¶ 61,430 (1982).

Finally, the BIO conspicuously fails to address the D.C. Circuit's holding, on the same FERC record that was before the Eighth Circuit here, that APSC would be free to "*litigat[e]* the issue [of the preemptive effect of FERC's orders] in another forum." *Entergy Servs., Inc. v. FERC*, No. 17-1251, 2021 WL 3082798, at *11 (D.C. Cir. July 13, 2021) (emphasis added). That conflicts with the Eighth Circuit's holding that no further litigation of the merits of preemption was possible because FERC had declined to opine on preemption.

II. RESPONDENTS FAIL TO REFUTE THE IMPORTANCE OF THE QUESTION PRESENTED

The petition and three *amicus* briefs—including one by the nationwide industry organization of investor-owned utilities (Edison Electric Institute), and a second by a group of transmission owners in a Mid-West region that includes most states in the Eighth Circuit—discuss the substantial practical impact of the Eighth Circuit's decision below. Since, under that decision, the filed rate doctrine often will not apply (because FERC rarely states in its order that the order should have preemptive effect), utilities have no right to recover their investments from retail customers and will be discouraged from making such investments. *See, e.g.*, Br. of *Amici Curiae* MISO Transmission Owners at 7-8 ("Of the $97 billion total MISO Board-approved transmission investment, $32 billion has been approved since 2021 in two large portfolios of regional transmission projects (designated Tranche 1 and Tranche 2.1) specifically to help ensure a reliable and resilient future grid to address the Reliability Imperative in MISO."); *id.* at 9 ("[T]he potential the Eighth Circuit decision presents for a substantial portion of their investment to be trapped and therefore

unrecoverable cannot help but deter investment."). The Nation cannot afford that outcome in the midst of a "precariously inadequate and intermittent energy supply, and an increasingly unreliable grid." Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025).

Respondents' main counter (BIO 14-16) is their same mischaracterization of the Eighth Circuit's decision addressed above. Respondents also myopically say that state utility commissions are not "likely to seize on [the Eighth Circuit's decision] to deny retail rate recovery of prudently incurred wholesale costs." BIO 17. But the whole point of the filed rate doctrine is that state commissions do not always allow utilities to recover their wholesale costs through rates charged to their retail customers, and numerous examples exist where they refused to do so and were reversed. *See, e.g.*, *ELI*, 539 U.S. at 50; *Nantahala*, 476 U.S. at 963-73.[4]

III. RESPONDENTS' ARGUMENT ON THE MERITS OF PREEMPTION IS PREMATURE BECAUSE THE EIGHTH CIRCUIT DID NOT ADDRESS THEM, AND IN ANY EVENT IS WRONG

As shown above, the Eighth Circuit did not independently address the merits of preemption, instead deferring entirely to FERC. Respondents' effort (*e.g.*, BIO 11-12, 18-19) to argue those merits is therefore premature. *See, e.g.*, *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76-77 (2022) ("'[W]hen we reverse on a threshold question, we

[4] Respondents' observation that "no court or regulatory agency … has so much as cited the Eighth Circuit's decision on preemption issues" (BIO 17 n.4) does not impress because barely six months have passed since the decision, and as the *amici* make clear, utilities' incentives to invest have already been impacted.

typically remand for resolution of any claims the lower courts' error prevented them from addressing.'" (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)). Given the Eighth Circuit's clear error on the threshold issue that it did address, summary vacatur or plenary review is warranted, with a remand for the Eighth Circuit to consider the merits.

In any event, Respondents are wrong on the merits. FERC's remedy here was part and parcel of the filed rate, and therefore subject to the filed rate doctrine, because its purpose was "to put the parties as close as possible to the position they would have been in" had they predicted and originally followed FERC's interpretation of the filed rate. Opinion No. 548, 155 FERC ¶ 61,065, at P 90. Courts of appeals have held that FERC's remedial power in such circumstances—which FERC exercises using "a general policy of granting full refunds for overcharges," *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (internal quotation marks omitted)—is within "the filed rate doctrine," *Boston Edison v. FERC*, 856 F.2d 361, 369 (1st Cir. 1988). Similarly, even though an interstate compact did not delineate the remedy later formulated by this Court in an exercise of its "discretion," *Kansas v. Nebraska*, 574 U.S. 445, 465 (2015), this Court held that its "remedial authority … counts as federal law" with preemptive effect, *id.* at 455; *see also, e.g.*, *New York v. New Jersey*, 598 U.S. 218, 224 (2023) (an interstate "compact … preempts contrary state law").

Respondents' unprecedented position, on the other hand, would have the absurd result that the filed rate doctrine applies where parties comply with the filed rate in the first instance, but not where they violate it

and later are brought into compliance with it by a FERC-ordered compensatory remedy.[5]

IV. RESPONDENTS DO NOT PERSUASIVELY ADDRESS THE PETITION'S ALTERNATIVE REQUEST TO HOLD THE PETITION FOR *COTTER CORP. V. MAZZOCCHIO*, NO. 24-1001

Cotter arises from an Eighth Circuit decision that acknowledged it was departing from five other circuits on whether a federal law preempted state law. *Cotter* Pet. App. 10a. The decision reasoned, *inter alia*, that "the NRC [federal Nuclear Regulatory Commission] doesn't maintain that federal dosage regulations preempt state standards of care." *Cotter* Pet. App. 10a (footnote omitted).

Respondents meekly suggest that this rationale "appears to be *dicta*." BIO 20. That is implausible. The Eighth Circuit advanced it immediately before announcing a departure from five other circuits. To the extent it was a complementary rather than

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[5] Respondents' other merits contentions are equally incorrect. For example, Respondents are wrong that this case "did not involve proposed retail rate recovery of wholesale costs incurred by a utility pursuant to the terms of a FERC-filed rate." BIO 11. One aspect of FERC's remedy concerned costs incurred by EAL at wholesale for transmission services provided to retail customers. *See Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 548, 155 FERC ¶ 61,065, at P 151-52 ("opportunity sales made off-system are … not included in an Operating Company's Responsibility Ratio," including for purposes of "Service Schedule MSS-2"); C.A. App. 227 ("Service Schedule MSS-2[;] Transmission Equalization"); Pet. 5 n.2.

independent basis for the court's holding of no preemption, that does not render it *dicta*.[6]

That the *Cotter* petition did not discuss the Eighth Circuit's reliance on the NRC's position obviously does not prevent the *Cotter* respondent from doing so (the BIO is due on June 26, 2025), and the respondent could easily do so within the broad confines of the question presented: "Whether federal nuclear safety regulations preempt state tort standards of care in public liability actions." *Cotter* Pet. at i.

In short, the relevance of an agency's position on preemption is presented both in *Cotter* and this case, and this case should at a minimum be held for *Cotter*.

[6] Nor was the Eighth Circuit's discussion of NRC's position "cursory" (BIO 20), taking up a paragraph in the opinion's text, *Cotter* Pet. App. 9a-10a.

CONCLUSION

The petition should be granted and the Eighth Circuit's judgment summarily vacated. Alternatively, the petition should be granted and the case set for plenary briefing and oral argument. At a minimum, this Court should hold the petition for *Cotter Corp. v. Mazzocchio*, No. 24-1001 (cert. pet. filed Mar. 10, 2025).

Respectfully submitted,

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