No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, Petitioner asks the Court to resolve lower-court confusion arising from the intersection of two Court-created principles: the "substantial federal question" doctrine and the "filed rate" doctrine.

Under the substantial-federal-question doctrine, a federal court has "arising under" jurisdiction over state-law claims that necessarily depend on a substantial issue of federal law. It is an exception to the general rule that only federal claims create arising-under jurisdiction. The federal filed-rate doctrine, in turn, bars state-law claims that conflict with "tariffs" on file with a federal regulatory agency to whom Congress has given exclusive rate-making authority. It is a form of preemption, deriving its force from the Supremacy Clause.

Plaintiff, an electricity generator, filed a state-court action against Defendant, a grid operator, for breach of contract, unjust enrichment, and fraud. Defendant removed the state-court action to federal court, arguing that Plaintiff's state-law claims were inconsistent with the tariff that Defendant had filed with FERC. The question presented is:

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?

PARTIES TO THE PROCEEDINGS

Petitioner, Old Dominion Electric Cooperative ("ODEC"), was the appellant in the Court of Appeals. Respondent, PJM Interconnection, LLC ("PJM"), was the appellee.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Old Dominion Elec. Coop. v. PJM Interconnection, LLC, No. 3:19CV233, 2020 WL 1545882 (E.D. Va. Mar. 31, 2020).

United States Court of Appeals (4th Cir.):

Old Dominion Elec. Coop. v. PJM Interconnection, LLC, 24 F.4th 271 (4th Cir. 2022).

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JURISDICTION

The Fourth Circuit entered its judgment on January 19, 2022. This Court has jurisdiction under 28 U.S. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1331. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

1. In January 2014, the mid-Atlantic region experienced a cold-weather event known as a polar vortex ("Polar Vortex"). (App. 88a.) The Polar Vortex caused historically low temperatures and placed heavy demands on the area's electrical grid. (*Id.*)

2. Defendant PJM is a "regional transmission organization." (*Id.* at 86a.) As such, it has broad responsibilities concerning the purchase and sale of wholesale electrical power throughout its region, which encompasses 13 states in the mid-Atlantic area. (*Id.* at 86a-87a.) Among other things, PJM operates a transparent market for wholesale electricity and determines the mix of generators that will run at any given time. *See generally* William L. Thompson, LIVING ON THE GRID: THE FUNDAMENTALS OF THE NORTH AMERICAN ELECTRIC GRID, Ch. 4 (2016). PJM must ensure at all times that there is a sufficient supply of electricity to balance customer load. (App. 87a.) To carry out those responsibilities, PJM controls transmission facilities owned by its member utilities, including ODEC. *See* 18 C.F.R. § 35.34(j), (k).

The Federal Energy Regulatory Commission ("FERC") regulates PJM's relationship with its member utilities. The Federal Power Act mandates 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." *See* 16 U.S.C. § 824d(a). Accordingly, FERC requires regional transmission organizations like PJM to file schedules of proposed electricity transmission rates with the agency for its approval. Once authorized by FERC, rates are set forth in tariffs. Those tariffs define the "legal rate" and "[c]arry the force of federal law." *See Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922); *Bryan v. BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004).

PJM's FERC-approved tariffs include (1) its Open Access Transmission Tariff (the "PJM Tariff," or simply "the Tariff") and (2) its Amended and Restated Operating Agreement (the "Operating Agreement"). (App. 73a.) Rather than fix specific prices, the PJM Tariff prescribes detailed rules for power generators to auction off power and capacity to distributors. (*Id.* at 74a.) At the time of the Polar Vortex, one of those rules capped the price at which generators could bid into electricity auctions, limiting such bids to $1000 per megawatt-hour. (*Id.* at 7a.)

Plaintiff ODEC is a not-for-profit electric cooperative that generates wholesale electrical power. (App. 85a-86a.) At the time of the Polar Vortex, it operated three gas-powered combustion-turbine facilities within PJM's region. (*Id.*)

The Polar Vortex required PJM to undertake extraordinary measures to ensure that electrical supply would meet the heavy demands placed on the grid. (*Id.* at 88a.) Compounding PJM's difficulties, natural gas prices had spiked to levels 30 times higher than usual. (*Id.* at 92a.) This caused the marginal cost of gas-produced electricity to exceed the $1000-per-megawatt-hour maximum price at which generators could bid into the energy action. (*Id.* at 5a.) Generators who purchased gas at the then-astronomical prices were guaranteed to lose money in any such sale of electricity. This was a strong disincentive to purchase the needed gas, which would render generators unable to supply power at critical moments. The resulting imbalance between power supply and demand could have led to a grid imbalance that would necessitate rolling

blackouts or even damage the grid. As recent events in Texas illustrate, power failures during severe cold snaps can have catastrophic, even fatal, effects. *See, e.g.*, Ivan Penn, *Texas Shows How Utilities Aren't Ready for Extremes*, N.Y. Times, Feb. 19, 2021, at B1 (discussing effect of cold snaps on the grid, including the Texas event and the 2014 Polar Vortex).

3. These extreme circumstances led ODEC and PJM to enter into a side transaction that was "outside of the requirements, restrictions, and protections set forth in any tariff or other regulated PJM policy or process." (App. 88a-92a.) In particular, PJM agreed that if ODEC procured sufficient gas to enable ODEC's generators to provide the desperately needed power, then PJM would "make ODEC whole for its fuel and other costs associated with purchasing the natural gas." (*Id.* at 92a-93a.)

4. Relying on PJM's promises, ODEC incurred substantial costs in purchasing the gas and in making its combustion plants available to provide electrical power during the Polar Vortex. (*Id.* at 93a-97a.) ODEC would not have incurred those extraordinary costs but for PJM's assurances that PJM would reimburse ODEC for them. (*Id.* at 92a.)

After the Polar Vortex event, ODEC asked PJM to reimburse it in accordance with PJM's earlier promises and representations. Although PJM initially said that it would do so, it later refused

to reimburse ODEC, claiming that this would violate its Tariff on file with FERC. (*Id.* at 89a.)[1]

5. ODEC commenced the present action in the Circuit Court for the County of Henrico, Virginia. Before serving the Complaint on PJM, ODEC filed an Amended Complaint. (App. 85a-98a.) The Amended Complaint asserts four counts. (*Id.* at 94a-97a.) All four counts assert state-law causes of action. Counts I & II assert claims for breach of contract. (*Id.* at 94a-95a.) Count III asserts a claim for unjust enrichment. (*Id.* at 95a-96a.) And Count IV asserts a claim for negligent misrepresentation (i.e., constructive fraud). (*Id.* at 96a-97a.) None of the claims derives from, challenges, or seeks to alter the PJM Tariff. Instead, the claims are based on the promises and representations that PJM made to ODEC and its agents during the unique circumstances of the Polar Vortex.

6. After being served with the Amended Complaint, PJM removed the action to the Richmond Division of the Eastern District of Virginia. (App. 70a-84a.) The Notice of Removal asserts that the District Court had federal jurisdiction under 28 U.S.C. § 1331. (*Id.* at 70a.) In particular, it claims

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[1] In a separate administrative proceeding, ODEC asked FERC to amend the Tariff to permit reimbursement. In a split decision, FERC refused to do so. *See Old Dominion Elec. Coop.*, 151 FERC ¶ 61,207, 62,284 (2015), *aff'd*, *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1231 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 794 (2019).

that ODEC's state-law claims are preempted by the Federal Power Act because "Congress has assigned the wholesale energy space to the federal system" and has "foreclosed state-law claims like ODEC's in favor of exclusive federal ones." (*Id.* at 82a.) The Notice of Removal claims—despite the Amended Complaint's express statement to the contrary (*Id.* at 92a)—that ODEC's request for reimbursement is "'an action seeking to alter' or to challenge as unfair the maximum rates permitted by the Tariff." (*Id.* at 81a) (internal quotations omitted).

7. ODEC moved to remand, arguing that its state-law claims had not asserted any federal causes of action, were not completely preempted, and did not present a substantial federal question. Meanwhile, PJM had filed a motion to dismiss under Rule 12(b)(6) arguing, among other things, that ODEC's claims were barred by the "filed rate doctrine."

8. The District Court denied ODEC's motion to remand. (App. 35a-69a.) Although it did not accept PJM's argument that ODEC's state-law claims were "completely preempted," the District Court held that the Amended Complaint presented a "substantial federal question." (*Id.* at 54a-62a.) This was so, it held, because ODEC's claims "effectively challenged" PJM's FERC-filed Tariff, a tariff that had the force of a federal regulation. (*Id.* at 60a-62a) (citing *Bryan*, 377 F.3d at 430). Finding that it had subject-matter jurisdiction, the District Court then granted PJM's motion to dismiss, ruling that all of ODEC's claims were barred by the filed-rate doctrine. (App. 68a-69a.)

9. ODEC appealed the District Court's jurisdictional holding, arguing that there was no federal-question jurisdiction and so the case should have been remanded to state court. It claimed that the existence of a federal tariff provided, at most, a federal defense to ODEC's claims and that, under the well-pleaded-complaint rule, a federal defense could not create federal-question jurisdiction.

The Fourth Circuit rejected this argument. Citing its 2004 decision in *Bryan*, the Fourth Circuit held that there was federal-question jurisdiction because "the type of relief sought here is incontrovertibly barred by the governing regulatory tariff." (App. at 22a) Claiming that "no court can award the damages that Old Dominion seeks without finding some way around the terms of the PJM Tariff," it held that "'the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" (App. 23a) (quoting *Bryan*, 377 F.3d at 430) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.,* 463 U.S. 1, 28 (1983))).

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S ANALYSIS CONFLICTS WITH RULINGS IN THE SEVENTH CIRCUIT AND THE NINTH CIRCUIT.

A. With only two "extremely rare exceptions," state-law claims do not give rise to federal-question jurisdiction.

Section 1331 of Title 28 gives district courts subject-matter jurisdiction over "civil actions arising

under the Constitution, laws, or treaties of the United States." When evaluating "arising under" jurisdiction under § 1331, federal courts adhere to the "well-pleaded complaint rule." That is, they look only to the plaintiff's statement of its claims. *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) ("Under the longstanding well-pleaded complaint rule . . . a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law]'") (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (brackets in original)).

In other words, the "federal question must appear on the face of the 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) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987)). A defendant cannot divest a plaintiff of his mastery over the complaint by asserting a federal defense or a federal counterclaim; neither is sufficient for "arising under" 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).

As a general rule, a claim "arises under" federal law only where federal law creates the cause of action being asserted. *Gunn v. Minton*, 568 U.S.

251, 257 (2013) ("Most directly, a case arises under federal law when federal law creates the cause of action asserted"). This Court has carved out two "extremely rare exceptions" to that rule. *Gunn*, 568 U.S. at 257 (2013). In some areas of the law, Congress has expressed its intent that "the federal statutes at issue provide[] the exclusive cause of action for the claim asserted." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003). This is known, somewhat confusingly, as "complete preemption."[2] The other exception is where the state-law claims themselves require the court to resolve a "substantial" question of federal law. *Gunn*, 568 U.S. at 258 (citing *Grable & Sons Metal Prods., Inc. v. Darue Engineering and Mfg.*, 545 U.S. 308 (2005)). The "substantial federal question" doctrine "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law." *Grable*, 545 U.S. at 312.

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[2] Complete preemption differs fundamentally from ordinary preemption. The former is a jurisdictional doctrine, specifying the tribunal where the issue must be heard. The latter is a matter of substantive law, specifying which law—state or federal—a court should apply. Although they sound similar, they have very different functions. *Lehmann v. Brown*, 230 F.3d 916, 919 (7th Cir. 2000) (Easterbrook, J.) ("[T]he phrase 'complete preemption' has caused confusion—evident in this case—by implying that preemption sometimes permits removal. Unfortunately 'complete preemption' is a misnomer, having nothing to do with preemption and everything to do with federal occupation of a field").

B. The lower courts have split on whether the existence of a federal tariff transforms state-law claims into claims presenting a substantial federal question.

The lower courts are divided on whether—and, if so, when—a tariff filed with a federal regulatory agency confers federal-court jurisdiction over state-law claims. The issue usually comes up in the context of the "filed-rate doctrine." Under this doctrine, certain federally regulated entities are forbidden from charging a rate for their goods or services that varies from what is specified in a "tariff" required to be filed with the federal agency. *See, e.g.*, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576 (1981).

As noted above, regulations promulgated under the Federal Power Act required PJM to file a tariff specifying the terms pursuant to which wholesale power could be bought and sold in its region. *ODEC*, 892 F.3d at 1226 (citing 16 U.S.C. § 824d). That tariff has the force of a federal regulation. *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) ("A tariff filed with a federal agency is the equivalent of a federal regulation"). The federal filed-rate doctrine bars state law claims that seek to enforce "rates" that differ from those specified by a FERC-filed tariff. It operates as a form of preemption, deriving its force from the Supremacy Clause. *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003).

The issue in the present appeal is whether the presence of a federally filed tariff means that state-

law claims that potentially conflict with that tariff raise a "substantial federal question" or whether, instead, the filed-rate doctrine simply affords a substantive preemption defense to those state-law claims. The lower courts have split on this issue.

1. The Fourth Circuit and the Eleventh Circuit deem state-law claims that implicate a federal tariff to present a substantial federal question.

In both the present case and *Bryan v. BellSouth*, *supra*, the Fourth Circuit has held that the existence of a federally filed tariff means that any state-law claim that potentially conflicts with this tariff presents a substantial federal question. The Fourth Circuit bases those holdings on its view that any state-law claim that conflicts with a federally-filed tariff is a claim that "effectively challenges" the tariffed rate. Because the tariff has the effect of federal law, the Fourth Circuit deems state-law claims that "effectively challenge" a filed tariff as claims that raise a substantial federal question.

In *Bryan*, the plaintiff brought a state-law class-action suit against BellSouth, asserting that the company had injured her and others by assessing an excessive "Federal Usage Service Charge" in their monthly phone bills and by failing to disclose how the company computed that charge. 377 F.3d at 427. The plaintiff filed suit in North Carolina state court, but BellSouth removed to federal court. The plaintiff moved to remand, noting that her complaint did not assert any federal causes of action. The district court denied this motion, observing that the amount of the

Federal Usage Service Charge was dictated by a tariff filed with the FCC, which carries the force of federal law. Because the plaintiff's suit directly challenged an aspect of that tariff—i.e., the Federal Usage Service Charge—the district court concluded that the case presented a federal question sufficient for jurisdiction under § 1331.

A divided panel of the Fourth Circuit affirmed. The majority agreed with the district court that the suit was an "effective challenge" to an FCC-filed tariff, and agreed that the FCC-filed tariff had the force of federal law. Accordingly, it concluded that the case presented a federal question.

Judge Luttig dissented. He acknowledged that "the filed-rate doctrine may be raised as a ***federal defense*** to a state-law claim." *Id.* at 434 (emphasis added). But he pointed out that state courts were just as capable of adjudicating such a defense.

> [T]hat a federal court may not have jurisdiction over a claim that would be barred by the filed-rate doctrine is not problematic in the least; the filed-rate doctrine may be raised as a federal defense to a state law claim before a state court just as easily as before a federal court

Id. Judge Luttig also faulted the majority's "effective challenge" formulation as having "no basis in the Supreme Court's precedent for determining whether statutory 'arising under' jurisdiction exists," noting that "neither the plaintiff's right to relief nor the remedy that the plaintiff has requested entails resolution of any question of federal law, much less

'necessarily depend[s] on the resolution of' such a question." *Id.* at 432.

Finally, Judge Luttig pointed out that the "effective challenge" standard adopted by the majority was unworkable, observing that "a claim can easily be characterized as an effective challenge to rates set in a tariff with a federal agency, even though the adjudication of the claim itself would require the court to decide no federal issues whatsoever." *Id.* at 434. He concluded that the majority had deviated from Supreme Court precedent by "adopting a standard drawn from a possible federal defense to plaintiff's claim, rather than from whether plaintiff's right to relief, as set forth in her Complaint, 'necessarily depends on a question of federal law.'" *Id.* at 437.

The majority in *Bryan* had relied on the Eleventh Circuit's decision in *Hill v. BellSouth Telecommunications, Inc.*, 364 F.3d 1308, 1317 (11th Cir. 2004). In *Hill*, another split decision, the plaintiff likewise argued that BellSouth had overcharged its customers in the Federal Usage Service Charge line-item of its bills. She claimed that this violated Georgia's Unfair Trade Practices Act and also amounted to common-law fraud. The defendant removed to federal court, but the district court remanded these claims to state court. On appeal, the Eleventh Circuit reversed, finding that the district court should have retained jurisdiction because the claims "implicate the filed-rate doctrine" inasmuch as the plaintiff sought monetary relief. From this, and without further discussion, it concluded that "these two claims raise substantial questions of federal law." *Id.* at 1317. Chief Judge

Edmondson dissented, opining that "today's court extends the judge-made filed-rate doctrine too far." *Id.*

2. The Third and Seventh and Circuits treat the filed-rate doctrine as a substantive preemption defense that does not create federal-question jurisdiction.

In contrast with the Fourth and Eleventh Circuits, the Third and Seventh Circuits treat the filed-rate doctrine as a *substantive* preemption defense having no *jurisdictional* effect on a plaintiff's claims.

In *Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 707 F.3d 883 (7th Cir. 2013), a member of an electric cooperative brought a state-court contract action against the cooperative. The cooperative removed to federal court, claiming that the contract action related to a FERC-filed tariff. The Seventh Circuit held that there was no federal-question jurisdiction because the plaintiff did not actually base its contract claim on the FERC-filed tariff.

Relevant here, the Seventh Circuit observed that—to the extent the filed-rate doctrine applied—it did so only as an affirmative defense and so could not afford the jurisdictional basis for removal. *Id.* at 896 (holding that the filed-rate doctrine is "properly treated as a federal defense rather than an affirmative basis for jurisdiction"). It noted confusion in the cases on point—confusion that "may arise from the faulty premise that the filed-rate doctrine is a jurisdictional doctrine as opposed to a

substantive one." *Id.* It said that this confusion was understandable, because "decisions that find jurisdiction on the basis of a federal tariff that creates the liability in the suit and that also find a suit preempted by the filed-rate doctrine may be over-read to suggest that the filed-rate doctrine creates the source of jurisdiction through complete preemption." *Id.* But it held that this over-reading was faulty because subject-matter jurisdiction in those cases was "based on 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.*

In *Metro. Edison Co. v. Pennsylvania Pub. Util. Comm'n*, 767 F.3d 335, 367 (3d Cir. 2014), the Third Circuit likewise rejected the argument that the filed-rate doctrine was a jurisdictional principle, stating that "we are compelled to reject the Companies' efforts to pose their merits-based preemption arguments—the same ones that were rejected in the State Decision—as jurisdictional arguments." Quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988), it stated that "[b]inding precedent instructs that, 'when a state proceeding presents . . . a preemption issue, the proper course is to seek resolution of that issue by the state court.'" *Metro. Edison*, 767 F.3d at 364 (ellipsis added).

These circuit court opinions are echoed by the well-reasoned district court opinion in *Hendricks v. Dynegy Power Mktg., Inc.*, 160 F. Supp. 2d 1155, 1165 (S.D. Cal. 2001). The court in that case observed, correctly, that "[t]he fact that the filed rate defense may be central to this action or an absolute defense is of no moment to the removal and remand

inquiry since '[e]ven if the case turns entirely on the validity of a federal defense, federal courts may not assert jurisdiction unless a federal right or immunity is "an element, and an essential one, of the plaintiff's cause of action."'" *Id.* at 1165 (*quoting Patrickson v. Dole Food Co.*, 251 F.3d 795, 799 (9th Cir. 2001) (quoting *Franchise Tax Bd.*, 463 U.S. at 11)).

* * *

This Court should grant certiorari to resolve the lower-court disagreement and confusion about whether (1) state-law claims that allegedly conflict with federally filed tariffs present a substantial federal question; or whether (2) the filed-rate doctrine merely operates as a federal preemption defense that, under the well-pleaded-complaint rule, does not create arising-under jurisdiction.

II. THE FOURTH CIRCUIT'S ANALYSIS CONFLICTS WITH THIS COURT'S SUBSTANTIAL-FEDERAL-QUESTION TEST, AS ARTICULATED IN *GUNN* AND *GRABLE*.

The Court also should grant certiorari because the Fourth Circuit's opinion misapplies this Court's standard for determining substantial-federal-question jurisdiction. Among other things, the Fourth Circuit ignored this Court's clear standard for determining when a state-law claim "necessarily raises" a federal issue.

A claim presents a substantial federal question where the 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 (citing *Grable*, 545 U.S. at 314). Such claims represent a "special and small category" of federal-question jurisdiction.

For purposes of the substantial-federal-question analysis, "[a] federal issue is 'necessarily raised' . . . ***only if it is a 'necessary element of one of the well-pleaded state claims***.'" *Franchise Tax Bd.*, 463 U.S. at 13 (emphasis added). *Grable*, 545 U.S. at 314 (finding that federal issue was "necessarily raised" where resolving the federal issue was an "essential element of its quiet title claim"); *Gunn*, 568 U.S. at 259 (same). If a plaintiff can establish "all of the necessary elements entirely independently of federal law," then a federal question is not "necessarily raised." *Franchise Tax Bd.*, 463 U.S. at 13. When evaluating this question, courts must "look only to the necessary elements of the [plaintiff's] causes of action." *Id.* That there may be a federal defense—even an obvious and potentially dispositive one—does not mean that the claim "necessarily raises" a federal question. *Id.* at 14

In its briefing to the Fourth Circuit on the issue, ODEC pointed out that none of the elements of its state-law causes of action—common-law claims for breach of contract, unjust enrichment, and fraud—hinged on a question of federal law. [4th Cir. ECF No. 19, at 18-22; ECF No. 25, at 18-23.] In its opinion, however, the Fourth Circuit ignored these arguments. (App. 32a-33a.) Instead of examining the elements of ODEC's state-law claims, as *Franchise Tax Board*, *Gunn,* and *Grable* require, the Fourth Circuit applied its own standard, opining that a federal issue is necessarily raised where a

claim "effectively challenges" a federal law. (*Id.*) Finding that ODEC's claims "effectively challenge[]" the PJM tariff, and observing that the tariff has the effect of federal law, the Fourth Circuit concluded that the claims necessarily raised a federal issue. (*Id.*)

The Fourth Circuit's opinion violates this Court's clear precedent in *Franchise Tax Board*, *Gunn* and *Grable*. Worse, the "effectively challenges" test that the Fourth Circuit adopted in *Bryan*[3] and applied in the present case is exactly the sort of nebulous standard that had led to so much confusion before this Court's clarifying decisions in *Gunn* and *Grable*. As Judge Luttig noted in his dissent in *Bryan*: "a claim can easily be characterized as an effective challenge to rates set in a tariff with a federal agency, even though the adjudication of the claim itself would require the court to decide no federal issues whatsoever." *Bryan*, 377 F.3d at 434. Left uncorrected, the Fourth Circuit's "effectively challenges" standard will enlarge the lower courts' assertion of substantial-federal-question jurisdiction in cases involving tariffs filed with federal agencies. Such expansion conflicts with this Court's admonition that the substantial-federal-question doctrine is an "extremely rare" exception to the rule that state-law claims do not support arising-under jurisdiction.

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[3] A case that preceded *Gunn* and *Grable*.

III. THE FILED-RATE DOCTRINE IS A PREEMPTION DEFENSE THAT DOES NOT CREATE ARISING-UNDER JURISDICTION.

The Fourth Circuit's ruling also conflicts with this Court's precedents stating that: (1) the filed-rate doctrine is a federal preemption defense, and (2) federal preemption defenses do not create arising-under jurisdiction.

As noted above, the filed-rate doctrine bars state-law claims that seek to enforce rates that differ from those specified by a federally-filed tariff. As this Court has made clear, the doctrine derives its legal force from the Supremacy Clause, and operates as a species of federal preemption. *Entergy Louisiana,* 539 U.S. at 47 ("When the filed rate doctrine applies to state regulators, it does so as a matter of federal preemption through the Supremacy Clause, U.S. Const. art VI, § 2."). *See also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 953 (1986) (noting that, as applied to state law, the filed-rate doctrine is "a matter of enforcing the Supremacy Clause") (citing *Arkansas Louisiana Gas,* 453 U.S. 571).

Preemption, however, is a federal *defense*, not part of the plaintiff's claim. Accordingly, it is not a proper ground for removal:

> [I]t is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987) (citing *Franchise Tax Bd.*, 463 U.S. at 12).

The Fourth Circuit's "effectively challenges" standard incorrectly treats the filed-rate doctrine as if it were part of the plaintiff's state-law claim. It ignores the doctrine's status as a preemption defense undergirded by the Supremacy Clause. The Court should grant certiorari to correct this error and to clarify that the filed-rate doctrine is a preemption defense that cannot ground jurisdiction under § 1331.

CONCLUSION

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

Respectfully submitted,

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