No. 12-

IN THE

Supreme Court of the United States

DUKE ENERGY INTERNATIONAL, INC., *et al.*
Petitioners,

v.

ANTHONY WILLIAMS, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JAMES E. BURKE
LOUIS F. GILLIGAN
W. JEFFREY SEFTON
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400

JOSEPH R. GUERRA*
PETER D. KEISLER
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
jguerra@sidley.com

Counsel for Petitioners

* Counsel of Record

October 15, 2012

QUESTIONS PRESENTED

Under Ohio law, claims related to a public utility's rates or practices are committed to the exclusive jurisdiction of the Public Utilities Commission of Ohio (PUCO), and Ohio courts cannot entertain such claims unless and until the PUCO has found that the utility violated an applicable requirement. Similarly, this Court has long held that the filed-rate doctrine bars claims challenging a regulated utility's rates or practices as unreasonable or discriminatory, as well as claims that would effectively allow the plaintiff to pay a lower rate than the filed rate.

In this case, respondents allege state and federal claims arising from an Ohio public utility's alleged payment of discriminatory rebates off its filed rate. They seek an order requiring the utility to pay them the same rebates. The Sixth Circuit allowed these claims to proceed, holding that (1) it was not required to apply Ohio's exclusive-jurisdiction doctrine to the state claims because state law cannot limit federal jurisdiction; and (2) the filed-rate doctrine does not bar the federal claims because it applies only in challenges to the reasonableness or setting of filed rates.

The questions presented are:

1. Whether the decision below conflicts with this Court's precedents and the decisions of other circuits holding that, when state claims are barred in state court, they are barred in federal court under the *Erie* doctrine.

2. Whether the decision below conflicts with this Court's precedents and the decisions of other circuits holding that the filed-rate doctrine bars (a) claims challenging a regulated utility's rates or practices as unreasonable or discriminatory and (b) claims that

would effectively allow the plaintiff to pay a lower rate than the filed rate.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioners Duke Energy Corporation and Duke Energy International, Inc.; respondents Anthony Williams, BGR, Inc., Munafo, Inc., and Aikido of Cincinnati; and General Motors Corporation.

RULE 29.6 STATEMENT

The entity named herein as Duke Energy Corporation is now known as Duke Energy Carolinas LLC and is a wholly owned subsidiary of Duke Energy Corporation, a publicly owned Delaware corporation. The entity named herein as Duke Energy International, Inc., was dissolved in May 2005 and no longer exists; it was a subsidiary of the entity named herein as Duke Energy Corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Duke Energy Corporation and Duke Energy International, Inc., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 681 F.3d 788 and reproduced at Pet. App. 1a–30a. The Sixth Circuit's unpublished order denying rehearing and rehearing en banc is reproduced at Pet. App. 54a. The opinion of the United States District Court for the Southern District of Ohio is reported at 606 F. Supp. 2d 783 and reproduced at Pet. App. 31a–53a.

JURISDICTION

The Sixth Circuit entered its judgment on June 4, 2012, Pet. App. 1a, and denied rehearing and rehearing en banc on July 25, 2012, *id.* at 54(a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case does not require the Court to construe any statutory provisions. The regulatory regime governing Ohio public utilities, which is relevant to the background of the case, can be found in Title 49 of the Ohio Revised Code. All citations to the Ohio Revised Code are to the 2008 version in effect when this suit was filed.

INTRODUCTION

The Sixth Circuit's decision in this case is contrary to settled law. Respondents brought federal and state claims alleging that an Ohio public utility had paid

discriminatory rebates to certain customers. Respondents argued that they were not challenging the reasonableness of the utility's rates, but rather the alleged rebates themselves, and sought, *inter alia*, an order compelling the utility to pay them the same alleged rebates. The district court found that all of respondents' claims are based on allegations of unlawful rebates, Pet. App. 32a, and that the Public Utilities Commission of Ohio (PUCO) has "authority to address 'allegations of discrimination . . . and unlawful discounting of charges,'" *id.* at 46a (quoting *OCC* v. *PUCO*, 904 N.E.2d 853, 858 (Ohio 2009)). On appeal, the Sixth Circuit did not disturb this finding concerning the scope of the PUCO's authority.

Ohio has a longstanding substantive rule that bars courts from entertaining claims related to a public utility's rates or practices unless the PUCO has found the rate or practice unlawful. The Sixth Circuit nevertheless held that a federal court entertaining Ohio-law claims is not required to apply this rule, and can hear Ohio-law claims that Ohio's courts are barred from entertaining. This ruling directly conflicts with precedents of this Court and other circuits that have repeatedly held that, when state claims are barred in state court, they are likewise barred in federal court under the *Erie* doctrine.

Similarly, this Court and other circuits have long held that the filed-rate doctrine bars not only claims that challenge the reasonableness of a utility's rates, but also (1) claims challenging discriminatory rates or practices, (2) claims that would effectively allow the plaintiff to a pay a lower rate than the filed rate. In direct conflict with these precedents, the Sixth Circuit held that the filed-rate doctrine does not bar respondents' claims challenging a public utility's al-

leged payment of discriminatory rebates and seeking to compel the utility to grant them the same rebates.

The Court should grant certiorari and summarily reverse the decision below, or alternatively, grant plenary review to correct the Sixth Circuit's deviations from this Court's precedents and restore uniformity among the circuits on these important and recurring questions of federal law.

STATEMENT OF THE CASE

A. Ohio's Regulation of Public Utilities.

1. The provision of electricity in Ohio historically has been governed by a comprehensive regulatory regime administered by the PUCO. See Ohio Rev. Code Ann. tit. 49. Under this regime, which largely follows the model of the federal Interstate Commerce Act, the PUCO must approve the rates charged by public utilities. §§ 4909.17, 4909.18. The PUCO may approve a rate only if it is "just and reasonable," *id.*, and must reject any rate that is "unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law," § 4909.15(D).

A public utility, in turn, may not charge any "unjust or unreasonable" rate, § 4905.22; "make or give any undue or unreasonable preference or advantage to any person," § 4905.35(A); or subject any person "to any undue or unreasonable prejudice or disadvantage," *id.* A public utility must file with the PUCO a tariff specifying its rates, § 4905.30, and may not charge any other rate or refund or remit any portion of the filed rate to a customer, § 4905.32. Nor may a utility charge any person, by any special rate, rebate, or other device, a greater or lesser rate than it charges any other person for a like and contempora-

neous service under substantially the same circumstances and conditions. § 4905.33(A).

2. Any person claiming that a rate or practice of a public utility "is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law" may file a complaint with the PUCO. § 4905.26. Under this provision, the Ohio Supreme Court has long held that the PUCO has exclusive initial jurisdiction over claims relating to a public utility's rates or practices. *E.g., State ex rel. Duke Energy Ohio, Inc.* v. *Hamilton Cnty. Ct. Com. Pl.*, 930 N.E.2d 299, 304 (Ohio 2010) (per curiam); *State ex rel. Cleveland Elec. Illuminating Co.* v. *Cuyahoga Cnty. Ct. Com. Pl.*, 727 N.E.2d 900, 903 (Ohio 2000) (per curiam); *State ex rel. N. Ohio Tel. Co.* v. *Winter*, 260 N.E.2d 827, 829 (Ohio 1970). Appeals from PUCO orders lie only to the Ohio Supreme Court. § 4903.12. No other court has "any jurisdiction over such matters." *Cleveland Elec.*, 727 N.E.2d at 903; *accord State ex rel. Dayton Power & Light Co.* v. *Kistler*, 385 N.E.2d 1076, 1077–78 (Ohio 1979) (per curiam).

The PUCO's exclusive jurisdiction over claims relating to a public utility's rates or practices cannot be evaded by "casting the allegations in the complaint to sound in tort or contract." *Corrigan* v. *Illuminating Co.*, 910 N.E.2d 1009, 1012 (Ohio 2009) (internal quotation marks omitted). The court "must review the substance of the claims" to determine whether they involve matters within the PUCO's jurisdiction. *Id.* A court may hear "pure tort and contract claims that do not require a consideration of statutes and regulations administered and enforced by the commission." *Id.* at 1011–12. But if "the basic claim is one that the commission has exclusive jurisdiction to resolve," the claim must first be presented to the PUCO. *Id.*; *accord Allstate Ins. Co.* v. *Cleveland Elec. Illuminating*

Co., 893 N.E.2d 824, 827 (Ohio 2008); *State ex rel. Columbia Gas of Ohio, Inc.* v. *Henson*, 810 N.E.2d 953, 957 (Ohio 2004) (per curiam).

If the PUCO finds that a utility has violated an applicable requirement, any injured person may bring a civil action for treble damages. § 4905.61. But "before a Court of Common Pleas has jurisdiction to hear a complaint for treble damages under R.C. 4905.61, there first must be a determination by the commission that a violation has in fact taken place." *Milligan* v. *Ohio Bell Tel. Co.*, 383 N.E.2d 575, 577 (Ohio 1978). The court's only role in such a case is to assess "causation and damages flowing from the adjudicated violation." *Cleveland Mobile Radio Sales, Inc.* v. *Verizon Wireless*, 865 N.E.2d 1275, 1280 (Ohio 2007).

B. Competitive Retail Electric Service.

1. In 1999, the Ohio legislature enacted a law, referred to as "Senate Bill 3" or "S.B.3," restructuring the electric utility industry to enhance competition in the generation market. See *Indus. Energy Users-Ohio* v. *PUCO*, 885 N.E.2d 195, 197 (Ohio 2008). The law was designed to allow greater room for market forces to influence rates. At the same time, it retained and added provisions enabling the PUCO to ensure, *inter alia*, "*nondiscriminatory*, and reasonably priced retail electric service." § 4928.02(A) (emphasis added).

Under S.B.3, competitive retail electric service can be provided either by a utility or by an independent or affiliated competitive retail electric service (CRES) provider. The PUCO does not generally approve the rates of CRES providers, who may set rates based on market conditions. However, to ensure customers would have an alternative in the event their CRES provider failed to provide service, the legislature required electric utilities to provide a "market-based

standard service offer" to all customers "on a comparable and nondiscriminatory basis." § 4928.14(A); see *OCC* v. *PUCO*, 872 N.E.2d 269, 272 n.2 (Ohio 2007). Unlike other CRES providers' rates, a utility's market-based standard service offer must be filed with and approved by the PUCO. § 4928.14(A). As the PUCO explained, "a market-based standard service offer price is not the same as a deregulated price," and "remain[s] subject to Commission jurisdiction." Doc. 47-3, at 37.

2. Competitive retail electric service is no longer subject to "supervision and regulation" by the PUCO under certain public-utility provisions. § 4928.05. As relevant here, it is no longer subject to supervision or regulation under § 4905.32, prohibiting utilities from refunding any portion of a filed rate, or § 4905.33(A), prohibiting utilities from charging customers different rates for the same service. But, importantly, the PUCO retains jurisdiction to enforce § 4905.35, prohibiting utilities from granting "any undue or unreasonable preference or advantage." The PUCO must also enforce the statute's policy against discrimination, § 4928.06(A); must promulgate rules prohibiting "unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sale" of competitive retail electric service, § 4928.10; and may decertify a provider that "engaged in unfair, deceptive, or unconscionable acts or practices," § 4928.08(D).

In addition, when a company owns both a utility and non-utility CRES provider, the utility and its affiliate must implement and operate under a strict corporate-separation plan approved by the PUCO. § 4928.17. The PUCO may approve a corporate-separation plan only upon finding that it will "provide for ongoing compliance" with the statute's policy against discrimination. § 4928.17(C).

Any person claiming that a utility or other CRES provider has violated an applicable requirement may file a complaint with the PUCO under § 4905.26. §§ 4928.16, 4928.18. The PUCO may grant a broad range of remedies, including restitution and rescission of contracts. *Id.* If the PUCO determines that a violation occurred, any injured person may then bring a civil action for treble damages under § 4905.61. *Id.*

C. Regulatory Proceedings.

1. In January 2003, Duke Energy Ohio (DEO), an Ohio public utility, filed an application to establish its market-based standard service offer.[1] Doc. 47-3, at 4. In response, the PUCO directed DEO to submit a rate-stabilization plan for PUCO approval. *Id.* at 5. After DEO submitted its proposed plan, the Ohio Consumers Council (OCC), which represents the interests of residential consumers in Ohio, and a number of other intervenors filed objections. *Id.*

Following settlement discussions, DEO and other parties, including some that had previously objected to the plan, filed a stipulation with the PUCO that, if approved, would resolve all the issues in the case. *Id.* OCC then moved to compel discovery regarding certain "side agreements" it claimed related to the stipulation. *Id.* The PUCO denied the motion and approved the stipulated rate-stabilization plan. *Id.*

OCC appealed the PUCO's order to the Ohio Supreme Court, contending that the PUCO should have permitted discovery regarding the "side agreements." Concluding that any "side agreements" could be relevant to whether the stipulation was the product of "serious bargaining," the Ohio Supreme Court re-

---

[1] For convenience, DEO's predecessor, Cincinnati Gas & Electric, is referred to as DEO.

manded with instructions to compel disclosure of the requested information. *OCC* v. *PUCO*, 856 N.E.2d 213, 234, 236 (Ohio 2006).

2. On remand, the PUCO ordered DEO to disclose any agreements between DEO's customers and its affiliate CRES provider, Duke Energy Retail Sales (DERS) (then known as Cinergy Retail Sales). Doc. 47-3, at 6–8. OCC urged the PUCO to hold the agreements unlawful, contending that DERS was "a mere shell corporation" that DEO had used to purchase support for the stipulation, and that the agreements resulted in "discounting of standard service offer rates" for select customers in violation of Ohio antidiscrimination statutes. Doc. 103-1, at 19, 33–35. OCC specifically argued that the agreements violated § 4928.14's requirement that a utility's standard service offer be provided to all customers "on a comparable and nondiscriminatory basis," and § 4905.35's prohibition on granting "any undue or unreasonable preference or advantage." *Id.*

After reviewing the agreements, the PUCO declined to rule on the issues OCC had raised, finding them more appropriate for a separate PUCO proceeding, but concluded that the agreements raised doubts about the negotiation process related to the stipulation. Doc. 47-3, at 20–27. The PUCO then "expressly reject[ed] the stipulation" and undertook a de novo review of DEO's application. *Id.* at 27–28. The PUCO approved the proposed rate-stabilization plan with certain modifications and ordered DEO to file tariffs reflecting its terms. *Id.* at 44.

3. OCC again appealed to the Ohio Supreme Court, arguing that the PUCO had erred in declining to consider the legality of the "side agreements." Doc. 103-2, at 25–37. In its brief to the Ohio Supreme Court, the PUCO defended its decision that the agreements

were not relevant to the issue before it on remand given its rejection of the stipulation. The PUCO's brief argued that, if OCC believed the agreements were illegal, its "proper recourse" was "to file a complaint pursuant to the proper statute." Doc. 69-1, at 38. Alternatively, the PUCO stated in its brief that, to the extent the agreements were relevant, there was "no evidence that [DEO] had violated any statute or rule." *Id.* at 38 n.15. The PUCO's brief described the agreements as "competitive contracts between the affiliates and their customers" and as "a positive development in the market." *Id.*

The Ohio Supreme Court affirmed, agreeing with the PUCO that the "side agreements" were not relevant to the issue before the PUCO on remand. *OCC* v. *PUCO*, 904 N.E.2d 853, 857–58 (Ohio 2009). This did not, however, leave OCC without a remedy. Rather, the Ohio Supreme Court concluded that "OCC may still raise additional issues arising from the side agreements, including its allegations of discrimination, inadequate corporate separation, and unlawful discounting of charges" using "the complaint process set forth in R.C. 4928.16 or 4928.18." *Id.* at 858.

D. Proceedings Below.

1. Instead of filing a complaint with the PUCO, respondents brought this putative class action on behalf of residential consumers and businesses that purchased electricity from DEO under the rate-stabilization plan approved by the PUCO. They alleged that the "side agreements" between DERS and its customers were "sham transactions that had the intended effect of granting illegal, inequitable, and unfair rebates" off DEO's filed rate to select customers in violation federal and state law. Pet. App. 56a. They alleged a price-discrimination claim under the Robinson-Patman Act, *id.* at 67a–68a, and a violation

of the Racketeer Influenced and Corrupt Organizations Act (RICO), *id.* at 63a–67a. In addition, they alleged fraud, conspiracy, and corrupt-activity claims under Ohio law. *Id.* at 63a–70a. The gravamen of all their claims was that DEO, through its "sham" affiliate DERS, paid certain customers "substantial rebates without extending such rebates to all electricity customers." *Id.* at 61a. They sought declaratory and injunctive relief, damages, and an order "requiring that Duke Energy extend to the members of the Plaintiff Class rebates comparable to those" allegedly paid to other customers. *Id.* at 72a.

2. Petitioners moved to dismiss the complaint, contending that respondents' claims fell within the PUCO's exclusive jurisdiction and were barred by the filed-rate doctrine. The district court agreed. As to the state claims, the district court concluded that it was required to apply Ohio's exclusive-jurisdiction doctrine "in the same manner as if the action had been brought in state court." Pet. App. 48a. The district court found that respondents' claims were "integrally related to the rates" charged by DEO, and raised issues "virtually identical" to those raised by OCC, which the Ohio Supreme Court stated were within the PUCO's jurisdiction. *Id.* at 48a–52a. Accordingly, the district court concluded that respondents' state claims fell within the PUCO's exclusive jurisdiction. *Id.* For essentially the same reasons, the court concluded that the filed-rate doctrine barred respondents' federal claims. *Id.* at 41a–48a.

3. The Sixth Circuit reversed. Pet. App. 2a.

The court did not disturb the district court's finding that the PUCO has authority to address respondents' allegations of unlawful rebates. Instead, raising an issue that was not briefed or argued by either party, the Sixth Circuit held that a federal court is not re-

quired to apply Ohio's exclusive-jurisdiction doctrine to Ohio-law claims because "the jurisdiction of the federal courts 'cannot be limited or taken away by state statutes.'" Pet. App. 14a–15a. Because respondents alleged federal claims, the court concluded that the district court had "supplemental jurisdiction over Plaintiffs' state-law tort claims" under 28 U.S.C. § 1367. *Id.* at 15a. The court thus found it unnecessary to "reach the question of whether the district court sitting in diversity would have jurisdiction over Plaintiffs' state-law claims." *Id.* at 15a–16a.

As to respondents' federal claims, the court held that the filed-rate doctrine "applies only in challenges to the underlying reasonableness or setting of filed rates." Pet. App. 14a. The court concluded that respondents' claims did "not involve a challenge to the reasonableness of any filed rate," but rather challenged DEO's alleged payment of discriminatory rebates off its filed rate, "payments made outside of the rate scheme" pursuant to agreements that were not filed with the PUCO. *Id.* at 12a–13a. In the court's view, the "allegation that certain large customers, by receiving a rebate, effectively paid a lower rate than Plaintiffs does not transform this action into an attack on filed rates." *Id.* at 13a.[2]

REASONS FOR GRANTING THE PETITION

The decision below is clearly wrong and should be summarily reversed. Under century-old principles of both Ohio and federal law, the fundamental question in this case is whether the PUCO has jurisdiction to address respondents' allegations that an Ohio public

---

[2] The court of appeals also rejected petitioners' alternative arguments for affirmance. Pet. App. 16a–29a. Petitioners do not seek review of those rulings here.

utility paid discriminatory rebates off its filed rate. Without disturbing the district court's conclusion that the PUCO has such authority, the Sixth Circuit allowed respondents' claims to proceed, holding that (1) a federal court is not required to apply Ohio's exclusive-jurisdiction doctrine to Ohio-law claims because state law cannot limit federal jurisdiction; and (2) the filed-rate doctrine does not bar respondents' federal claims because it applies only in challenges to the reasonableness or setting of filed rates. Both holdings directly conflict with this Court's precedents and numerous decisions of other circuits.

1. The Sixth Circuit's refusal to apply Ohio's exclusive-jurisdiction doctrine to respondents' state claims plainly violates the *Erie* doctrine. Under *Erie*, this Court and other circuits have repeatedly held that federal courts hearing state claims must apply state-law bars or preconditions to suit, such that if a claim is barred in state court it is likewise barred in federal court. The Sixth Circuit's contrary decision below will produce the very evils *Erie* was designed to eliminate: It will result in disparate treatment of identical claims based solely on whether they are brought in state or federal court; it will undermine Ohio's sovereign interest in regulating its public utilities; and it will produce forum shopping as plaintiffs who seek to evade the PUCO's jurisdiction will have an incentive to sue in federal court. Regardless of whether Ohio's exclusive-jurisdiction doctrine is strictly "jurisdictional" in federal court, it supplies the governing substantive rule of decision under *Erie*, and the Sixth Circuit's refusal to apply that rule should be summarily reversed.

2. The Sixth Circuit's ruling on respondents' federal claims also conflicts with decisions of this Court and other circuits and should be summarily reversed. The

Sixth Circuit's holding that the filed-rate doctrine is restricted to challenges to the reasonableness or setting of filed rates cannot be reconciled with this Court's longstanding precedent holding that the filed-rate doctrine bars claims challenging a regulated utility's rates *or practices* as unreasonable *or discriminatory*. Indeed, this Court has held that the filed-rate doctrine barred claims that a regulated entity granted discriminatory rates and rebates to select customers pursuant to contracts that were not filed with or approved by the regulatory agency. *U.S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 479–87 (1932). Further, the decision below conflicts with this Court's precedents and decisions of other circuits—including the Eighth Circuit's decision in *Firstcom, Inc.* v. *Qwest Corp.*, 555 F.3d 669 (8th Cir. 2009), which involved materially indistinguishable facts—holding that the filed-rate doctrine bars claims that would effectively allow the plaintiffs to pay a lower rate than the filed rate. That principle plainly applies here, where respondents seek an order requiring a public utility to refund them a portion of the filed rate.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS AND DECISIONS OF OTHER CIRCUITS APPLYING THE *ERIE* DOCTRINE.

In the decision below, the Sixth Circuit did not address, much less disturb, the district court's conclusion that the PUCO has jurisdiction to address respondents' allegations of unlawful rebates. Instead, the court of appeals held that those claims could proceed because "the jurisdiction of the federal courts 'cannot be limited or taken away by state statutes.'" Pet. App. 14a–15a.

This Court has repeatedly held that *Erie* requires federal courts to apply state-law bars or preconditions

to suit, such that if a claim is barred in state court it is likewise barred in federal court. Other circuits have faithfully applied these precedents, uniformly holding that federal courts must apply state laws granting an agency exclusive jurisdiction over certain claims or imposing preconditions to suit. The decision below conflicts with these decisions, is clearly in error, and should be summarily reversed.

A. The Decision Below Conflicts With This Court's Cases Holding That, When A State Claim Is Barred In State Court, It Is Likewise Barred In Federal Court.

1. This Court's watershed decision in *Erie* established that, under the Rules of Decision Act,[3] "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938). The Court in *Erie* repudiated its prior approach, under which federal courts sought to discover and apply the "general common law," because it "had led to the undesirable results of discrimination in favor of non-citizens, prevention of uniformity in the administration of state law, and forum shopping." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 745 (1980).

In the years since, this Court has repeatedly held that the principles underlying *Erie* dictate that, when a state claim is barred in state court, it is likewise barred in federal court. In *Angel* v. *Bullington*, 330 U.S. 183 (1947), for example, this Court held that a

---

[3] "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

federal court sitting in diversity was required to apply a North Carolina statute barring North Carolina courts from entertaining suits for a deficiency judgment. *Id.* at 191–92. Rejecting as "obsolete" pre-*Erie* decisions to the contrary, the Court explained that *Erie* "drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State." *Id.* at 192. Under *Erie*, the "essence of diversity jurisdiction is that a federal court enforces State law and State policy." *Id.* at 191. Thus, the Court held, "[i]f North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment." *Id.*

Two years later in *Woods* v. *Interstate Realty Co.*, 337 U.S. 535 (1949), the Court held that a federal court sitting in diversity was required to apply a Mississippi statute barring foreign corporations that had not designated an agent for service of process in the state from maintaining any suit in a Mississippi court. *Id.* at 536–38. The *Erie* doctrine, the Court explained, is "premised on the theory" that where "one is barred from recovery in the state court, he should likewise be barred in the federal court," because "[t]he contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts." *Id.* at 538. As a result, the Court held that *Erie* "preclude[s] maintenance in the federal court in diversity cases of suits to which the State ha[s] closed its courts." *Id.* at 537.

On the same day, the Court held in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), that

a federal court sitting in diversity was required to apply a New Jersey statute barring plaintiffs from maintaining a stockholder's derivative action if they had not posted security for the defendant's legal fees. *Id.* at 555–57. A federal court's role under *Erie*, the Court held, is to "administe[r] the state system of law in all except details related to its own conduct of business." *Id.* at 555. Because the security requirement was a precondition to suit designed to effectuate the state's substantive policy regarding liability for attorney's fees, it could not "be disregarded by the federal court as a mere procedural device." *Id.* at 556.

The same principles underlie this Court's cases holding that federal courts must apply state statutes of limitations and tolling rules to state claims. *Walker*, 446 U.S. at 752–53; *Ragan* v. *Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 532–34 (1949); *Guar. Trust Co.* v. *York*, 326 U.S. 99, 107–12 (1945). These cases too rest on the fundamental principle that "the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court," and that consequently, "where one is barred from recovery in the state court, he should likewise be barred in the federal court." *Ragan*, 337 U.S. at 532. Because "a federal court adjudicating a State-created right" is "for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." *York*, 326 U.S. at 108–09.

2. The decision below is irreconcilable with these cases and the principles they enunciate. By allowing respondents' state claims to proceed without overruling the district court's conclusion that the PUCO has authority to address their allegations of illegal re-

bates, the Sixth Circuit necessarily held that those claims are not barred in federal court even if they are barred in state court. That holding squarely conflicts with this Court's cases establishing that, when "one is barred from recovery in the state court, he should likewise be barred in the federal court." *Woods*, 337 U.S. at 538.

Ohio's exclusive-jurisdiction doctrine is plainly a substantive rule of decision that a federal court must apply under *Erie*, and "not merely a regulation of procedure." *Cohen*, 337 U.S. at 555. As discussed above, *supra*, 3–5, Ohio's legislature has granted the PUCO exclusive jurisdiction over claims related to a public utility's rates or practices. As to such claims, there is no judicially cognizable cause of action under Ohio law unless the claim has been submitted to the PUCO and the PUCO has found that an applicable requirement was violated. Only then may an injured party bring a civil action for damages arising from the violation; otherwise the claim is barred. This doctrine clearly is part of Ohio's substantive law binding on a federal court under *Erie*. See, *e.g.*, *York*, 362 U.S. at 110 ("Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."); cf. *Bernhardt* v. *Polygraphic Co. of Am.,* 350 U.S. 198, 203 (1956) ("The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.").

The contrary approach taken by the Sixth Circuit will produce the very sort of "discrimination that [*Erie*] was designed to eliminate." *Woods*, 337 U.S. at 538. Under the decision below, a plaintiff who brings

rate- or service-related claims in state court will be dismissed, while a plaintiff who brings identical claims in federal court will be allowed to proceed. This violates *Erie*'s core dictate that the outcome of litigation should not turn on "the fortuity that there is diversity of citizenship between the litigants." *Walker*, 446 U.S. at 753. "The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it." *Id.*

The decision below also represents a serious affront to Ohio's sovereign interest in regulating its public utilities. Ohio's exclusive-jurisdiction doctrine is designed to effectuate the Ohio legislature's judgment that regulation of public utilities is best left to the expert administrative agency rather than the courts. Allowing plaintiffs to evade the PUCO's jurisdiction by bringing claims in federal court would undermine this vital state interest, and could result in federal courts or juries determining the propriety of practices in a highly complex industry, despite Ohio's policy that the propriety of those practices should be assessed by an expert agency intimately familiar with that industry and its complexities.

Finally, the decision below will inevitably produce forum shopping. Plaintiffs who prefer a judicial forum to the PUCO—perhaps because they believe the PUCO will reject their claims—need only sue a diverse defendant (as respondents did here by suing DEO's parent company rather than DEO) or allege parallel federal claims (as respondents also did) to evade the PUCO's jurisdiction. Such forum shopping serves no legitimate purpose and is incompatible with *Erie*.

In short, *Erie* and its progeny hold that a person's rights under state law should not "vary according to whether enforcement was sought in the state or in

the federal court." 304 U.S. at 74–75. The decision below disregards this elementary precept, directly conflicts with this Court's precedents, and should be summarily reversed. See Eugene Gressman et al., *Supreme Court Practice* 350 (9th ed. 2007) (summary reversal is appropriate when "'the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error'").

3. The court of appeals did not discuss or even cite *Erie* or this Court's cases holding that when a claim is barred in state court it is likewise barred in federal court. Instead it invoked the rule—not cited by any party—that "a state cannot defeat federal jurisdiction over a matter by limiting jurisdiction to a specialized state court." Pet. App. 15a (citing *Marshall* v. *Marshall*, 547 U.S. 293, 314 (2006)). That rule is inapposite. Unlike in *Marshall*, where Texas sought to "reserve to its probate courts the exclusive right to adjudicate a transitory tort," 547 U.S. at 313–14, Ohio has not attempted to confine adjudication of rate- and service-related claims to a specialized Ohio court, or any Ohio court for that matter. Rather, it has *closed* its courts to those claims absent a finding of a violation by the PUCO, just as North Carolina, Mississippi, and New Jersey closed their courts to certain classes of claims in *Angel*, *Woods*, and *Cohen*. Those cases, not *Marshall*, govern here.

Nor has Ohio "'create[d] a transitory cause of action and at the same time destroy[ed] the right to sue … in any court having jurisdiction.'" *Marshall*, 547 U.S. at 314. Rather, Ohio has created an *exclusive* cause of action for injuries arising from a utility's rates or practices, and conditioned that cause of action on a prior finding of a violation by the PUCO. That condition binds a federal court. See *Cohen*, 337 U.S. at 555–57 (state-law precondition to suit bound federal

court). Nothing prevents a plaintiff who has obtained such a finding from bringing a treble-damages claim under § 4905.61 in state *or* federal court. The principle that "the jurisdiction of the federal courts 'cannot be limited or taken away by state statutes,'" Pet. App. 14a–15a, is thus irrelevant. Regardless of whether Ohio's exclusive-jurisdiction doctrine is strictly "jurisdictional" in federal court, the doctrine supplies the substantive rule of decision that federal courts must apply under *Erie*. See *Angel*, 330 U.S. at 187, 191–92 (state jurisdictional rule barred state claims in federal court).[4]

Finally, the court of appeals erred in holding that Ohio's exclusive-jurisdiction doctrine does not apply because the district court has supplemental jurisdiction. Pet. App. 15a. The notion that *Erie* does not apply when a federal court has supplemental jurisdiction "simply is wrong." 19 Charles Alan Wright et al., *Federal Practice & Procedure* § 4520 (2d ed. 2012). "'[I]t is the *source* of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law.'" *Id.*; see also *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966) (federal courts with supplemental jurisdiction over state claims are "bound to apply state law to them" under *Erie*). *Erie* governs "what federal courts do when they enforce rights that have no federal origin." *York*, 326 U.S. at 112. Because Ohio law creates the rights respondents seek to enforce through their state claims, Ohio's exclusive-jurisdiction doctrine governs those claims, regardless of the basis for fed-

---

[4] Whether a district court applying the exclusive-jurisdiction doctrine should decline jurisdiction under Rule 12(b)(1) or dismiss for failure to state a claim under Rule 12(b)(6) is a procedural nicety that makes no difference in this case—either way the claims are barred and must be dismissed. *See* note 8, *infra*.

eral jurisdiction. See *Ragan*, 337 U.S. at 533 ("Since th[e] cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court.").

B. The Decision Below Conflicts With Numerous Decisions Of Other Circuits.

If the Court does not summarily reverse, it should grant plenary review to resolve the circuit conflict created by the decision below. Contrary to the Sixth Circuit's decision, other circuits have correctly held that, when state claims are barred in state court, they are likewise barred in federal court under *Erie*.

1. The decision below conflicts directly with decisions of the Third and Tenth Circuits holding that federal courts cannot adjudicate claims that lie within the exclusive jurisdiction of the state public utilities commission under state law. In *MCI Telecommunications Corp.* v. *Teleconcepts, Inc.*, 71 F.3d 1086 (3d Cir. 1995), the Third Circuit held that a federal court exercising supplemental jurisdiction could not adjudicate claims that "Pennsylvania has committed … to the exclusive jurisdiction of the Pennsylvania Public Utilities Commission," because "a contrary holding would mean that the federal courts are empowered to decide matters of state law that courts in the affected state lack authority to resolve." *Id.* at 1106; see also *id.* at 1110 (Nygaard, J., concurring in part and in the judgment) ("[T]he PUC's exclusive primary jurisdiction is part of the substantive law of Pennsylvania, law which we are bound to apply under the *Erie* doctrine."). Likewise, in *Teleco, Inc.* v. *Southwestern Bell Telephone Co.*, 511 F.2d 949 (10th Cir. 1975), the Tenth Circuit held that a federal court exercising diversity jurisdiction could not adjudicate a challenge to a public utility's tariff because "state law prec-

lude[d] state trial court jurisdiction over questions concerning the validity of regulations approved by the Commission." *Id.* at 953; see also *Coll* v. *First Am. Title Ins. Co.*, 642 F.3d 876, 886–91 (10th Cir. 2011) (holding that state-law filed-rate doctrine barred federal court from adjudicating state claims). The decision below cannot be reconciled with these cases.

2. The decision below also conflicts with numerous decisions of other circuits holding that federal courts hearing state claims must apply state laws granting exclusive jurisdiction to an administrative agency or imposing preconditions to suit. For example, the circuits have uniformly held that federal courts cannot adjudicate claims that lie within the exclusive jurisdiction of a state worker's compensation commission.[5] Similarly, the circuits have uniformly held that federal courts must apply state laws requiring plaintiffs to submit their claims to a mediation panel as a precondition to suit.[6] The Second Circuit has likewise

---

[5] *Jarrard* v. *CDI Telecomms., Inc.*, 408 F.3d 905, 916 (7th Cir. 2005); *Goetzke* v. *Ferro Corp.*, 280 F.3d 766, 779–80 (7th Cir. 2002); *Stuart* v. *Colo. Interstate Gas Co.*, 271 F.3d 1221, 1224–25 (10th Cir. 2001); *Evans* v. *B.F. Perkins Co.*, 166 F.3d 642, 647–50 (4th Cir. 1999); *Phillips* v. *Ford Motor Co.*, 83 F.3d 235, 240 (8th Cir. 1996); *Armistead* v. *C&M Transport, Inc.*, 49 F.3d 43, 47 (1st Cir. 1995); *Guess* v. *Bethlehem Steel Corp.*, 913 F.2d 463, 466 (7th Cir. 1990); *Dial* v. *Hartford Accident & Indem. Co.*, 863 F.2d 15, 16–17 (5th Cir. 1989); *Connolly* v. *Md. Cas. Co.*, 849 F.2d 525, 526–27 (11th Cir. 1988); *Beach* v. *Owens-Corning Fiberglas Corp.*, 728 F.2d 407, 409 (7th Cir. 1984); *Begay* v. *Kerr-McGee Corp.*, 682 F.2d 1311, 1317–19 (9th Cir. 1982).

[6] *Feinstein* v. *Mass. Gen. Hosp.*, 643 F.2d 880, 883–90 (1st Cir. 1981); *Hamilton* v. *Roth*, 624 F.2d 1204, 1208–12 (3d Cir. 1980); *DiAntonio* v. *Northampton-Accomack Mem'l Hosp.*, 628 F.2d 287, 290 (4th Cir. 1980); *Edelson* v. *Soricelli*, 610 F.2d 131, 133–35 (3d Cir. 1979); *Stoner* v. *Presbyterian Univ. Hosp.*, 609 F.2d 109, 110–11 (3d Cir. 1979) (per curiam); *Woods* v. *Holy Cross*

held that federal courts cannot adjudicate a state discrimination claim when a state court would lack jurisdiction to do so because the claim was first presented to an administrative agency.[7]

All of these cases recognize that "a state's rule barring an action from proceeding in its courts must be applied to bar the action from the federal court."[8] *Feinstein* v. *Mass. Gen. Hosp.*, 643 F.2d 880, 888 (1st Cir. 1981). That is so when the federal court is exercising supplemental jurisdiction as well as diversity jurisdiction. *E.g.*, *Hamilton* v. *Roth*, 624 F.2d 1204, 1208–12 (3d Cir. 1980) (rejecting "the view that a state rule deemed binding on a federal court under *Erie* in the diversity context can be ignored by a federal court exercising pendent jurisdiction"). As the Second Circuit explained, "[i]f a state would not recognize a plaintiff's right to bring a state claim in state court, a federal court exercising pendent jurisdiction, standing in the shoes of a state court, must follow the state court's jurisdictional determination and not allow that claim to be appended to a federal law claim in federal court." *Promisel* v. *First Am. Artificial Flowers, Inc.*, 943 F.2d 251, 257 (2d Cir. 1991).

Contrary to these decisions, the Sixth Circuit's decision disregards Ohio's exclusive-jurisdiction doctrine, allowing respondents' state claims to proceed in federal court even though they would be barred in

---

Hosp., 591 F.2d 1164, 1168–70 (5th Cir. 1979); *Hines* v. *Elkhart Gen. Hosp.*, 603 F.2d 646, 647–49 (7th Cir. 1979).

[7] *Moodie* v. *Fed. Reserve Bank*, 58 F.3d 879, 882–84 (2d Cir. 1995); *Promisel* v. *First Am. Artificial Flowers, Inc.*, 943 F.2d 251, 256–57 (2d Cir. 1991).

[8] Some cases treat the state-law bar as jurisdictional, while others dismiss for failure to state a claim. But all agree that the federal court must apply the state-law bar under *Erie*, and not simply disregard it as the Sixth Circuit did here.

state court. The Court should grant review to restore uniformity among the circuits on this important and recurring question of federal law.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES AND DECISIONS OF OTHER CIRCUITS APPLYING THE FILED-RATE DOCTRINE.

The Sixth Circuit's ruling on respondents' federal claims also conflicts with this Court's precedents and should be summarily reversed. The court held that the filed-rate doctrine does not bar respondents' federal claims because it applies only in challenges to the reasonableness or setting of filed rates. That holding conflicts with this Court's cases holding that the filed-rate doctrine bars (1) claims challenging a utility's rates *or practices* as unreasonable *or discriminatory*; and (2) claims that would effectively allow the plaintiff to pay a lower rate than the filed rate.

A. The Decision Below Conflicts With This Court's Filed-Rate Doctrine Cases.

1. "The filed rate doctrine has it origins in this Court's cases interpreting the Interstate Commerce Act," but "has been extended across the spectrum of regulated utilities." *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981). Under the filed-rate doctrine, this Court has long held that "[w]henever a rate, rule or practice is attacked as unreasonable or unjustly discriminatory, there must be preliminary resort to the Commission." *Great N. Ry.* v. *Merchs. Elevator Co.*, 259 U.S. 285, 291 (1922). "[B]ecause the enquiry is essentially one of fact and of discretion in technical matters," and because "acquaintance with many intricate facts of [the relevant industry] is indispensable," "uniformity can be secured only if its determination is left to the Commission." *U.S. Nav. Co.* v. *Cu-*

nard S.S. Co., 284 U.S. 474, 482 (1932). Thus, "courts may not as an original question exert authority over subjects which primarily come with the jurisdiction of the Commission." *Tex. & Pac. Ry.* v. *Am. Tie & Timber Co.*, 234 U.S. 138, 146 (1914).

In addition to this "uniformity" rationale, the filed-rate doctrine promotes equality, by barring damage awards that would effectively allow the plaintiff to pay a different rate than the filed rate. For example, the Court has held that the filed-rate doctrine bars a claim for damages based on the theory that the filed rate was the product of an antitrust conspiracy, because if a plaintiff could recover "damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." *Keogh* v. *Chi. & Nw. Ry.*, 260 U.S. 156, 163 (1922); *accord Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417–24 (1986) (reaffirming *Keogh*). Because the filed rate is the only lawful rate, which all customers must pay, "'[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.'" *AT&T* v. *Cent. Office Tel., Inc.*, 524 U.S. 214, 227 (1998) (quoting *Keogh*, 260 U.S. at 163).

2. The decision below conflicts with both principles. As to uniformity, respondents' price-discrimination and RICO claims are based on DEO's alleged payment of discriminatory rebates through its affiliate DERS. As the district court recognized, the PUCO has jurisdiction to address these allegations. And the PUCO's expertise is necessary to resolve them (for example, by deciding whether DERS's contracts were pro-competitive or should be deemed to be sham "rebates" off DEO's filed rate). See *Cunard*, 230 U.S. at 487 (while allegations that agreements were illegal

must be accepted as true on motion to dismiss, they do not foreclose a commission from making a contrary decision following a full administrative proceeding). The Sixth Circuit, however, again sidestepped the issue of the PUCO's jurisdiction by holding that the filed-rate doctrine applies only in challenges to the "reasonableness or setting of filed rates." Pet. App. 14a. That holding is demonstrably incorrect under this Court's precedents.

This Court has long held that the filed-rate doctrine bars claims of rate discrimination just as it bars claims challenging the reasonableness of rates. After holding in *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1906), that no claim based on the alleged unreasonableness of the filed rate will lie unless the Commission has first found that the rate is unreasonable, the Court applied the same rule to rate-discrimination claims: "It is true … that in [*Abilene Cotton*], the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material." *Robinson* v. *Balt. & Ohio R.R.*, 222 U.S. 506, 511 (1912). Following *Robinson*, the Court repeatedly held that rate-discrimination claims must first be presented to the regulatory agency. *E.g., Bd. of R.R. Comm'rs* v. *Great N. Ry.*, 281 U.S. 412, 420–24 (1930); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562 (1919); *Minn. Rates Cases*, 230 U.S. 352, 419–20 (1913).

Likewise, this Court's precedents make clear that the filed-rate doctrine is not limited to challenges to the "setting of filed rates." Pet. App. 14a. This Court has repeatedly held that the doctrine bars claims challenging utilities' "practices" as unreasonable or discriminatory, even when those practices do not involve the setting of filed rates. *E.g.*, *St. Louis,*

Brownsville & Mex. Ry. v. *Brownsville Nav. Dist.*, 304 U.S. 295, 299–301 (1938); *Midland Valley R.R.* v. *Barkley*, 276 U.S. 482, 484–87 (1928); *W. & Atl. R.R.* v. *Ga. Pub. Serv. Comm'n*, 267 U.S. 493, 497–98 (1925); *Morrisdale Coal Co.* v. *Pa. R.R.*, 230 U.S. 304, 312–14 (1913); *Penn. R.R.* v. *Clark Bros. Coal Mining Co.*, 238 U.S. 456, 468–69 (1915); *Balt. & Ohio R.R.* v. *U.S. ex rel. Pitcairn Coal Co.*, 215 U.S. 481, 493–500 (1910). The Sixth Circuit's treatment of the filed-rate doctrine cannot be squared with this Court's cases.

Indeed, this Court has held that the filed-rate doctrine bars antitrust claims challenging discriminatory rates and rebates granted pursuant to contracts that were not filed with or approved by the regulatory agency. *Cunard*, 284 U.S. at 479–87. Similarly, in an earlier case, the Court held that the filed-rate doctrine bars claims alleging that a payment a regulated entity made to a customer lacked economic justification and was thus in substance an unlawful rebate of the filed rate. *Mitchell Coal & Coke Co.* v. *Penn. R.R.*, 230 U.S. 247, 254–59 (1913). The decision below conflicts directly with these cases.[9]

---

[9] To be sure, the Court in *Mitchell Coal* concluded that a rebate claim was judicially cognizable if the court needed only to "pass upon the question of fact" as to whether rebates were paid, without trenching on the agency's jurisdiction. 230 U.S. at 260. But, as with the rebate claims that *Mitchell Coal* held were barred, the question whether the payments at issue here are sham "rebates" or economically legitimate is a question for the expert agency. *See id.* at 254–55. Moreover, the plaintiff in *Mitchell Coal* sued under the Interstate Commerce Act, *id.* at 250, which gave the "option of going before the Commission or the courts for damages occasioned by a violation of the statute," *id.* at 257. By contrast, here the statutory scheme, like the one involved in *Cunard*, requires *all* claims related to a utility's rates or practices to be submitted first to the PUCO.

3. The decision below also violates the equality principle. Respondents' complaint expressly requests an order "requiring that Duke Energy extend to the members of the Plaintiff Class rebates comparable to those" allegedly paid to other customers. Pet. App. 72a. But a court order requiring a utility to refund a portion of the filed rate would squarely violate the filed-rate doctrine by effectively allowing prevailing plaintiffs to pay a different rate than the filed rate. See *Keogh*, 260 U.S. at 163. The same principle also bars the nonresidential respondents' damages claims for alleged competitive injury to their businesses. See *id*. at 160 (plaintiff in *Keogh* sought both a refund of the filed rate and damages for lost profits).

Put another way, the decision below violates the principle that the "legal rights of a [customer] as against [a regulated utility] in respect to a rate are measured by the published tariff." *Id.* at 163. Respondents claim their rights with respect to the filed rates they paid have been enlarged by DEO's alleged payment of discriminatory rebates and that they therefore have a right to pay a lower effective rate than the filed rate. The Sixth Circuit's decision allowing these claims to proceed disregards this Court's repeated holdings that "'[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.'" *Cent. Office*, 524 U.S. at 227 (quoting *Keogh*, 260 U.S. at 163). For this reason as well, the decision below is clearly contrary to settled law and should be summarily reversed.

B. The Decision Below Conflicts With Decisions Of Other Circuits.

If the Court does not summarily reverse, it should grant plenary review because, in deviating from this Court's precedents, the Sixth Circuit created a square conflict with decisions of at least six other circuits as

to the scope of the filed-rate doctrine. As these decisions show, the issue is important and recurring and warrants this Court's review.

1. The decision below conflicts most starkly with the Eighth Circuit's decision in *Firstcom, Inc.* v. *Qwest Corp.*, 555 F.3d 669 (8th Cir. 2009), which addressed a virtually indistinguishable set of facts. Like respondents, Firstcom alleged that it had been injured by paying the filed rate, while its competitors paid lower rates pursuant to unapproved "'secret discounts.'" *Id.* at 679; see also *id.* at 673 n.3 (noting that the agreements providing for discounts were not filed or approved). Also like respondents, Firstcom sought "recovery for a price discount it was allegedly entitled to." *Id.* at 681. Citing the rule that rights under a filed tariff cannot be varied by contract or tort, the Eighth Circuit held that Firstcom's "claims [were] barred by the filed rate doctrine." *Id.* at 680–81.

Firstcom is on all fours with this case. Just as in this case, the plaintiff there alleged it was harmed because it paid agency-approved rates, while its competitors received secret, unapproved discounts. The Eighth Circuit held that the filed-rate doctrine barred the plaintiff who paid those agency-approved rates from suing to recover "a price discount" afforded to others. *Id.* at 681. The Sixth Circuit, by contrast, held that respondents, who paid the PUCO-approved rate, can sue to recover "rebates comparable to those" allegedly paid to other customers. Pet. App. 72a. The decision below is thus irreconcilable with the Eighth Circuit's decision in *Firstcom*.

2. Moreover, because, as just noted, the decision below permits respondents to seek damages that would effectively allow them to pay a lower rate than the filed rate, that decision conflicts with numerous deci-

sions of other circuits, which have held that the filed-rate doctrine bars claims seeking such relief:

- **Second Circuit**. The filed-rate doctrine bars claims where "[p]laintiffs who were able to prove their claims and recover damages would effectively receive a discounted rate." *Marcus* v. *AT&T Corp.*, 138 F.3d 46, 60–61 (2d Cir. 1998); *accord Wegoland Ltd.* v. *Nynex Corp.*, 27 F.3d 17, 21 (2d Cir. 1994).
- **Fourth Circuit**. The filed-rate doctrine bars claims seeking "damages that would effectively impose a rate different from that dictated by the tariff." *Bryan* v. *BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429–30 (4th Cir. 2004).
- **Seventh Circuit**. "The plaintiffs are asking us to compare the rates on [their] calls with rates on comparable calls of other persons; that is what we cannot do but the regulatory agencies can." *Arsberry* v. *Illinois*, 244 F.3d 558, 565 (7th Cir. 2001).
- **Ninth Circuit**. The filed-rate doctrine bars claims "where the measure of damages requires comparing the rates charged under the filed-rate with the rate that allegedly should have been charged." *In re NOS Commc'ns*, 495 F.3d 1052, 1060 (9th Cir. 2007).
- **Eleventh Circuit**. The filed-rate doctrine bars claims seeking damages that "would have the effect of retroactively reducing the rate" by requiring the utility "in essence . . . to refund to each of their customers the amount allegedly overcharged." *Taffet* v. *Southern Co.*, 967 F.2d 1483, 1491–92 (11th Cir. 1992) (en banc); *accord Hill* v. *BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1316–17 (11th Cir. 2004).

* * * *

In sum, the Sixth Circuit's decision conflicts with settled law governing the relationship between state and federal courts and the relationship between courts and regulatory agencies. The decision below should be reversed, and the case remanded with instructions (1) to affirm the dismissal of respondents' claims for damages under RICO and the Robinson-Patman Act as barred by the filed-rate doctrine, and (2) to decide whether the district court correctly found that the PUCO has authority to address respondents' claims of allegedly illegal rebates and, if so, to affirm the dismissal of their state-law claims and their federal claims for injunctive and declaratory relief.

CONCLUSION

The Court should grant the petition for certiorari and summarily reverse the decision below or, alternatively, accept the case for plenary review.

Respectfully submitted,

JAMES E. BURKE
LOUIS F. GILLIGAN
W. JEFFREY SEFTON
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400

JOSEPH R. GUERRA*
PETER D. KEISLER
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
jguerra@sidley.com

Counsel for Petitioners

October 15, 2012

* Counsel of Record