No. 12-477

In the Supreme Court of the United States

DUKE ENERGY INTERNATIONAL, INC., ET AL.,
Petitioners,

v.

ANTHONY WILLIAMS, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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INTRODUCTION

Duke Energy's petition mischaracterizes the Sixth Circuit panel's unanimous opinion and manufactures false conflicts between that opinion and Supreme Court and circuit decisions, all as part of the utility's continuing attempt to cloak its illegal conduct in the filed rate doctrine and the exclusive jurisdiction of the Public Utilities Commission of Ohio ("PUCO").

The Sixth Circuit followed Supreme Court decisions and its own precedents in holding that the filed rate doctrine does not apply, given that respondents' lawsuit "does not concern the particular rate set by the PUCO, but rather payments made outside the rate scheme." Pet. App. 12a. Moreover, the specific conduct at issue—*indirectly* paying kickbacks through a non-utility affiliate—violated two Ohio statutes (O.R.C. §§ 4905.33(A) and 4905.32), which prohibit *indirect* rebates and are *outside* the PUCO's jurisdiction due to deregulation more than a decade ago. The PUCO not only lacks *exclusive* authority to enforce Ohio's anti-rebate law, it actually has *no* authority to enforce that law—a fact the Sixth Circuit and the district court both recognized and Duke conceded below.[1]

The kickback agreements, which Duke's non-utility affiliate entered into with certain of Duke's largest customers, are reflected in what Duke calls "side agreements." These agreements were never filed with,

[1] Pet. App. 29a, 51a; Sixth Circuit Oral Argument Audio at 17:39-17:47 (As to O.R.C. §§ 4905.33(A) and 4905.32, Duke's counsel said: "There is no dispute that the PUCO no longer enforces those provisions as to competitive electric retail services.").

much less approved by, the PUCO. Part of the reason Duke funneled the illegal rebate payments through a third party was to avoid any risk of PUCO knowledge or oversight. Duke does not deny that, in addition to not filing these unlawful agreements with the PUCO, it fought for two years to stop the PUCO from even seeing them; it lied to the Supreme Court of Ohio about their existence;[2] and before this case was filed, Duke took the position the PUCO's "authority" was too "limited" to determine whether the side agreements were proper.[3] Grounded in a proper reading of the record and a correct interpretation of relevant state and federal statutory and case law, the Sixth Circuit opinion stands firmly in the mainstream of established law. Review by this Court is not warranted.

[2] District Court Record Entry ("R.E.") 57 at 4 (Statement by Duke's counsel at oral argument before the Supreme Court of Ohio on April 25, 2006: "[I]t is unknown whether there were any [side agreements] in this case."). That attorney's signature appears on some of the agreements.

[3] R.E. 57 at 6 (Duke's Memorandum Contra OCC's Motion to Stay in *OCC v. PUCO*, filed December 15, 2006 in PUCO Case No. 03-93-EL-ATA, p. 25). The PUCO agreed with Duke on this point. R.E. 57 at 9 n. 4 (PUCO brief before Ohio Supreme Court: "Side agreements quite simply fall outside the scope of proceedings before the Commission.").

STATEMENT OF THE CASE

A. Overview

Beginning in 2005, Duke Energy ("Duke"),[4] a public utility based in North Carolina, secretly funneled illegal rebates through non-utility affiliates to its largest electricity customers in southwestern Ohio, such as General Motors. The rest of its electricity customers, including hundreds of thousands of individuals and thousands of small businesses, received no rebates.

Indirectly paying rebates to selected customers, rather than across the board, violates Ohio's two anti-rebate statutes (O.R.C. §§ 4905.33(A) and 4905.32). Relying on these statutes,[5] respondents, a small group of customers seeking to represent themselves and all those denied rebates, filed suit in federal district court in Ohio to enjoin further selective rebates and to force Duke to pay damages under state and federal law. While respondents' motion for a preliminary injunction was pending, the district court dismissed their state and federal claims for lack of subject-matter

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[4] As used herein, "Duke" refers to Duke Energy and its predecessors, Cinergy and CG&E.

[5] Duke's petition cites a number of Ohio's general nondiscrimination statutes pertaining to utilities (Pet. at 5-6), which, in contrast to O.R.C. §§ 4905.33(A) and 4905.32, do not contain language explicitly prohibiting utilities from paying selective rebates indirectly. Because the alleged facts of this case are that Duke always paid the selective rebates through a third party, respondents have relied exclusively on O.R.C. §§ 4905.33(A) and 4905.32.

jurisdiction, citing reasons related to electricity rate regulation by the PUCO. The district court decided the state and federal damages claims were not judicially cognizable—the former due to the PUCO's "exclusive jurisdiction," the latter due to the "filed rate doctrine"—and entered judgment for Duke. The Sixth Circuit reversed on all grounds.

B. Duke's Illegal Kickback Scheme

Duke funneled rebates to its large customers through its affiliate, Duke Energy Retail Services ("DERS").[6] By running this unlawful rebate scheme through DERS, an exempt competitive retail service provider, Duke avoided the PUCO's regulatory reach. It is undisputed that Duke never filed with the PUCO—and thus the PUCO never approved—any of the secret agreements under which these rebates were paid.

Duke was so intent on keeping these agreements secret that, during questioning by the late Chief Justice Thomas Moyer of the Supreme Court of Ohio in 2006, Duke's counsel denied knowing of any such agreements—even though his own signature appears on a number of them.[7] The utility was forced to surrender the illegal agreements in 2007, as a result of a state-court whistleblower action. Based on information supplied by the whistleblower, one of

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[6] DERS is the successor in interest to Cinergy Retail Sales ("CRS"), through which Cinergy funneled the unlawful rebates before its merger with Duke. First Amended Complaint ("FAC") (R.E. 27), ¶¶ 2, 16, 18, 21.

[7] *See* footnote 2, *ante*.

Duke's non-utility affiliates, CRS (predecessor to DERS), paid approximately $15 million in rebates to the large corporate customers during 2005 alone. Also unearthed during the state-court whistleblower action was a 2006 Duke email describing the genesis of the kickbacks—that Duke's predecessor CG&E (aka Cinergy) "negotiated special conditions" with large customers who "represented a roadblock" to rapid approval of a rate increase the utility was seeking; that originally the deal called for the large customers to receive electric service from CRS "at pre-specified, contractual rates" but "Cinergy's top management" deemed that plan "too risky"; that in the end Cinergy "agreed to make monthly or quarterly payments in lieu of offering generation service from" CRS; that, as a consequence of these deals, the large customers "are actually full-requirement customers of Duke Energy Ohio, but they receive payments from the Company instead of receiving generation service from [DERS]"; that the payments consist of "refunds" of "various riders" added via the rate increase; and that DERS "does not have any retail customers, but has at least $22 million of expenses …."[8] Ohio law expressly forbids utilities from directly or, as in this instance, *indirectly* paying rebates to selected customers, rather than paying across the board. O.R.C. §§ 4905.32 and 4905.33(A). During the term of the secret rebate agreements, from January 1, 2005 through December 31, 2008, respondents did not receive any such rebates from Duke or any of its affiliates or subsidiaries.

[8] R.E. 57-4, p. 40.

C. The District Court Proceedings

In 2008, four of Duke's electricity customers (one residential and three business customers) filed a class action complaint against it and one of its largest electricity customers, General Motors, in the United States District Court for the Southern District of Ohio. The suit alleged that Duke, through one or more of its non-utility affiliates, had paid, and was continuing to pay, illegal rebates to its largest corporate customers, including General Motors. Respondents seek to represent a class consisting of all Duke ratepayers who did not receive any rebates from Duke or any of its affiliates or subsidiaries during the term of the side agreements, including a relatively small subclass of competitors of the favored ratepayers seeking damages and other relief based on competitive injury.

The operative complaint asserts state-law causes of action for civil conspiracy to violate O.R.C. §§ 4905.32 and 4905.33(A), fraud, unjust enrichment, and violation of the Ohio Pattern of Corrupt Activities Act, O.R.C. § 2923.31, and seeks compensatory and punitive damages, as well as injunctive, equitable, and declaratory relief. It also asserts federal claims under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962(c), and the Robinson-Patman Act ("RPA"), 15 U.S.C. § 13(a), and thereunder seeks treble damages as well as, again, injunctive and declaratory relief.

Although the complaint alleges that the rebate agreements coincided with the large corporate customers' withdrawal of their opposition to the utility's proposed rate increase, it further states:

> Plaintiffs do not allege – and indeed take no position on whether – the PUCO would have approved the rate increase absent the side deals that induced the large corporate customers' withdrawal of their opposition to it. *Plaintiffs do not challenge as illegal, illegitimate, unfair, or unjust the rate increase approved by the PUCO, nor any rates resulting from it.* Rather, plaintiffs simply challenge as illegal, illegitimate, unfair, and unjust the kickbacks that the conspirators paid in the form of exclusive rebates to large customers, pursuant to secret side deals.

FAC, ¶ 2 (emphasis added).

Duke moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6). On September 18, 2008, respondents filed a preliminary injunction motion, asking the district court to prevent Duke from paying, directly or through subsidiaries or affiliates, selective rather than across-the-board rebates, and from entering into any new agreements to pay such rebates.

On March 31, 2009, the district court dismissed respondents' state-law and federal claims for lack of subject-matter jurisdiction and entered judgment in Duke's favor,[9] without addressing the preliminary injunction motion.[10] In its opinion dismissing the

[9] *See* App. B to Duke's petition. The court also entered judgment for General Motors, which subsequently went through bankruptcy and did not take part in the Sixth Circuit appeal.

[10] The PUCO could not grant injunctive relief; only a court could. Under precedents of this Court and the Sixth Circuit, the district

entire case, the district court acknowledged that Ohio law expressly prohibits utilities from paying rebates such as those at issue in this case.[11] The court also acknowledged that Ohio law forbids the PUCO from enforcing the state's anti-rebate law. Pet. App. 51a ("[T]he PUCO lost jurisdiction to enforce O.R.C. § 4905.32 ...."). The district court took this to mean that no Ohio court could enforce this law either. "The fact that the PUCO lost jurisdiction to enforce O.R.C. § 4905.32," the district court reasoned, must mean that the Ohio General Assembly did not intend for state courts, let alone federal courts, to entertain suits seeking to enforce § 4905.32. *Id.* The district court separately reasoned that "a party" (presumably an allusion to respondents) could assert discriminatory pricing claims before the PUCO under "'the complaint process set forth in O.R.C. §§ 4928.16 or 4928.18,'" a process exclusively assigned to the PUCO, and that, for this additional reason, Ohio courts could not take cognizance of respondents' suit challenging the rebates. *Id.* at 52a. Thus, as a federal court "sitting in diversity," the court concluded it could no more address respondents' state-law claims than could a state court,

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court had no basis for disregarding the injunctive relief request, even if it lacked authority to entertain respondents' damages claims. Because the Sixth Circuit concluded that the district court has the authority to entertain respondents' federal and state-law claims *in toto*, the court of appeals found it unnecessary to decide whether the district court should have entertained the injunctive request. As such, no matter what happens with respect to the damages claims, the district court would have to deal with the injunctive request on remand.

[11] Pet. App. 51a (stating O.R.C. § 4905.32 "expressly prohibits rebates"). The district court failed to mention that respondents also rely on O.R.C. § 4905.33(A). FAC, ¶ 56.

so it dismissed them for lack of subject-matter jurisdiction. *Id.*

The district court dismissed respondents' federal claims based on the filed rate doctrine. As noted, Duke never filed with the PUCO—and thus the PUCO never approved—any of the secret agreements to pay rebates to certain large corporate customers. Despite this fact, and its own acknowledgement that Ohio law prohibits rebates *and* forbids the PUCO from enforcing that law, the district court held "that the filed rate doctrine precludes consideration of the Plaintiffs' federal claims." *Id.* at 48a. "Whether payments are rebates or kickbacks," the court reasoned, "depends upon an analysis of the filed rate," and "the filed rate doctrine bars essentially all claims which seek judicial relief dependent upon an attack on rates found by a regulatory agency to be fair and reasonable." *Id.* at 44a.

The district court expressed reluctance to apply the filed rate doctrine to respondents' federal claims, noting, *inter alia*,[12] that its analysis assumes "that the PUCO has the authority to determine whether the rates are discriminatory or involve unlawful discounting of charges. If the PUCO lacks jurisdiction to address this question, or if the jurisdiction of the

[12] The district court also acknowledged another reason for its reluctance: the rates, on which it deemed respondents' rebate challenge dependent, were largely "market-based electric rates" and, thus, "not established by a regulatory agency." Pet. App. 44a. The court observed: "Many, if not all, of the reasons for the filed rate doctrine are lacking in market-based, as opposed to regulated, rates." *Id.* In reversing, the Sixth Circuit did not address this observation.

PUCO does not extend to fully resolve the Plaintiffs' claims, then this Court holds that the filed rate doctrine would be inapplicable." *Id.* at 48a.[13]

Respondents filed a timely motion for reconsideration, which the district court denied without substantive comment almost a year later. Respondents then filed a timely notice of appeal.

D. The Sixth Circuit's Decision

The appeal presented the spectacle of a federal district court, clearly possessed of subject-matter jurisdiction and plainly obligated by this Court's precedents to exercise it—but unwilling to use its judicial power to remedy conduct by Duke that it recognized as legally impermissible, all in deference to a state public utilities commission, which did not approve or even know about Duke's conduct, has no power to stop it, and has no power to provide relief to injured customers. Rejecting every argument Duke raised for affirming, the Sixth Circuit reversed the

[13] In fact, the PUCO was powerless to offer respondents and the other disfavored customers any remedy whatsoever—not the return of the illegal rebates, nor any damages for the injuries suffered. Not even a simple cease-and-desist order forcing Duke's non-utility affiliate to stop paying selective rebates. Even the PUCO's statutory complaint process—under which the district court evidently assumed the PUCO could still afford respondents relief—was unavailable to them. The PUCO can never legally order a utility to refund amounts paid by customers under a rate program that has lapsed. *Lucas County Commissioners v. PUCO*, 80 Ohio St.3d 344 (Ohio 1997), syllabus. Thus, the PUCO complaint process mentioned by the district court could not possibly be what that court apparently envisioned—an avenue for the PUCO "to fully resolve the Plaintiffs' claims …." Pet. App. 48a.

district court's Rule 12(b)(1) dismissal, holding that the district court had subject-matter jurisdiction over respondents' federal and state-law claims—the former under 28 U.S.C. § 1331, the latter under 28 U.S.C. § 1367(a). The Sixth Circuit also upheld all of respondents' claims under Rule 12(b)(6).

REASONS FOR DENYING THE WRIT

I. Contrary To Duke's Characterization, The Sixth Circuit Did Not Hold That As A Federal Court It Was Free To Disregard The PUCO's Exclusive Jurisdiction Over Respondents' State-Law Claims. Ohio Law Makes Clear That The PUCO Had No Jurisdiction Over The Unlawful Activities Alleged In Respondents' State-Law Claims. The Sixth Circuit Correctly Held That The District Court Could Properly Exercise Subject-Matter Jurisdiction Over These Claims Under 28 U.S.C. § 1367(a).

Duke takes the court of appeals to task for its "refusal to apply Ohio's exclusive-jurisdiction doctrine" to respondents' state claims. Pet. at 12. It ascribes this refusal to the Sixth Circuit's misapplication of this Court's precedents since *Erie R.R. v. Tomkins*, 304 U.S. 64 (1938), including misplaced reliance on *Marshall v. Marshall*, 547 U.S. 293 (2006). *Id*. at 13-21. This supposed departure, Duke claims, warrants summary reversal of the Sixth Circuit's decision, or at the very least creates a circuit conflict that this Court must resolve.

It is unnecessary to respond to Duke's prolix disquisition on this Court's post-*Erie* precedents and on

supposedly conflicting circuit decisions. Pet. at 13-24. The Sixth Circuit's refusal to apply Ohio's exclusive-jurisdiction doctrine had nothing to do with any departure from this Court's precedents. Its refusal to apply that doctrine was correct for a reason grounded purely in state law: Ohio law does not give the PUCO exclusive—or, indeed, *any*—jurisdiction over the illegal activities alleged in respondents' state-law claims.

1. In stating its case for summary reversal, Duke extracts two quotations from *Marshall* out of a three-paragraph section of the Sixth Circuit opinion entitled "Subject-Matter Jurisdiction," where in substance the court of appeals clarified the proper basis for the district court's subject-matter jurisdiction over the state-law claims. The Sixth Circuit's jurisdictional analysis is straightforward: because the court of appeals was upholding respondents' federal claims, the district court did not have to rely on 28 U.S.C. § 1332 as an independent jurisdictional basis for entertaining their state-law claims. Pet. App. 15a. Instead, said the Sixth Circuit, "the district court's federal question subject-matter jurisdiction is sufficient to allow supplemental jurisdiction over Plaintiffs' state-law tort claims of fraud and civil conspiracy pursuant to 28 U.S.C. § 1367(a)." *Id*.

Disregarding this straightforward statement of subject-matter jurisdiction, Duke opportunistically plucks the appellate court's two passing references to *Marshall* from the previous paragraph in the subject-matter jurisdiction section and leverages them to portray the Sixth Circuit as a rogue federal tribunal refusing to apply otherwise applicable state law, contrary to *Erie* and its progeny. Quoting the opinion's

references to *Marshall*, Duke claims that "the Sixth Circuit held that a federal court is not required 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. at 10-11. Later in its petition, Duke expands this "holding": "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 rebates, the Sixth Circuit *necessarily held* that those claims are not barred in federal court even if they are barred in state court." Pet. at 16-17 (emphasis added).

This "holding" is fictitious. Duke lays the groundwork for it by repeatedly mischaracterizing the Sixth Circuit's treatment of the issue of the PUCO's jurisdiction, which Duke calls "the fundamental question in this case …." Pet. at 11. In five separate places, Duke's petition represents that the Sixth Circuit "did not disturb" the district court's conclusion that the PUCO had exclusive jurisdiction over the matters alleged in respondents' state-law claims. Pet. at 2, 10, 12, 13, and 16. Nothing could be further from the truth. In the third sentence of its opinion, the Sixth Circuit noted that the district court had concluded that the PUCO "had exclusive jurisdiction" over respondents' state-law claims, "depriving" it of subject-matter jurisdiction over those claims. Pet. App. 2a. Far from leaving that conclusion undisturbed, the court of appeals stated: "No circumstances exist here that would deprive the district court of jurisdiction over Plaintiffs' state-law claims." *Id.* at 15a. Thus, contrary to Duke's repeated characterization, the Sixth Circuit did not accept or leave intact the district court's

conclusion that Ohio's exclusive-jurisdiction doctrine deprived the lower court of subject-matter jurisdiction over the state-law claims.

2. Duke's petition contains no less than 20 references to the PUCO's supposedly exclusive jurisdiction over respondents' state-law claims. But not once does Duke mention the two-pronged test for determining whether the PUCO *actually has* exclusive jurisdiction over a particular claim, which the Supreme Court of Ohio adopted in *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St.3d 301, ¶ 12 (Ohio 2008).[14] Under *Allstate*, the PUCO has exclusive jurisdiction *only if* (1) its "'administrative expertise [is] required to resolve the issue in dispute,'" *and* (2) "'the act complained of constitute[s] a practice normally authorized by the utility.'" *Id.* Neither prong is met in this case.

As to the first *Allstate* prong, the PUCO's "administrative expertise" is not "required" to resolve whether the DERS payments constituted illegal indirect rebates.[15] In Ohio, courts resolve questions of legality, not the PUCO, which "'has no power to

[14] Duke recognized *Allstate* as the controlling test in its brief and at oral argument before the Sixth Circuit, but without explanation omitted it from the rehearing petition below and has omitted it from the instant petition. Instead, Duke relies mainly on a jumble of Ohio cases decided before *Allstate* and some decided before deregulation removed the PUCO's jurisdiction over Ohio's anti-rebate statutes. Pet. at 4-5.

[15] At oral argument before the Sixth Circuit, Duke claimed the PUCO's administrative expertise is required to determine if the side agreements provide for "an illegal rebate." Sixth Circuit Oral Argument Audio at 29:35-29:41 and 31:03-31:07.

judicially ascertain and determine legal rights and liabilities ....'" *Allstate*, at ¶ 7, quoting *New Bremen v. PUCO*, 103 Ohio St. 23, 30-31 (Ohio 1921). There is no evidence that the PUCO even possesses any administrative expertise regarding indirect rebates—or that the PUCO has ever before witnessed a utility paying rebates through a "bagman," the term that respondents' counsel, petitioners' counsel, and a member of the Sixth Circuit panel used at oral argument to describe the allegation that DERS made the rebate payments for Duke. Indeed, in an appeal to the Ohio Supreme Court regarding access to the very side agreements at issue here, the PUCO stated: "Side agreements quite simply fall outside the scope of proceedings before the Commission."[16] Most important, Duke conceded at oral argument before the Sixth Circuit that the PUCO has no legal authority to enforce Ohio's statutes prohibiting indirect rebates,[17] and the court of appeals in its opinion agreed.[18] Duke's concession, with which the opinion concurred, foreclosed any possibility that *Allstate's* first prong could be met.

As to the second *Allstate* prong, Ohio utilities are not "normally authorized" to conduct transactions such as those at issue in this case. Their normal activities are approved and supervised by the PUCO. These

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[16] R.E. 57 at 9 n. 4.

[17] Sixth Circuit Oral Argument Audio at 17:39-17:47.

[18] Pet. App. 29a (the Sixth Circuit's conclusion that competitive electric service providers such as Duke are still subject to Ohio's anti-rebate statutes even though the Ohio General Assembly "exempted" them "from the authority of the PUCO").

activities—funneling kickbacks to select customers through a third party "bagman"—were not. Indeed, Duke designed the kickbacks to avoid PUCO scrutiny. And there is no evidence these were normal transactions, whether for Duke or any other Ohio utility. In fact, Duke purposely structured them so that a non-utility (DERS) carried out the transactions.

So Duke got no traction by relying on *Allstate* below,[19] and indeed the test for answering what Duke calls "the fundamental question in this case" (Pet. at 11) is found in an Ohio Supreme Court decision interpreting only state law. Thus, it's no mystery why Duke's petition does not mention the utility's inability to satisfy the *Allstate* test for exclusive PUCO jurisdiction and why it instead ascribes the Sixth Circuit's refusal to apply Ohio's exclusive-jurisdiction doctrine to something more nefarious and attention-grabbing—the fictitious "holding" that "a federal court is not required 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. at 10-11.

3. In Duke's depiction, the court of appeals, relying on *Marshall* and ignoring *Erie* and its progeny, blithely shrugged off the Ohio statutes that circumscribe the PUCO's jurisdiction and validated respondents' state-law claims even while recognizing that an Ohio court would dismiss them outright. This depiction cannot be reconciled with the opinion's careful, detailed analysis

[19] For 12 pages in its brief below, Duke expounded on the reasons why it believed the PUCO had "exclusive jurisdiction" over the DERS-paid kickbacks under Ohio law.

of those very statutes, respondents' civil conspiracy claim, and the impact of deregulation in 1999 on the PUCO's jurisdiction over the conduct alleged in this state-law claim. *See* Pet. App. 27a-29a.

Citing Ohio's anti-rebate statutes, O.R.C. §§ 4905.32 and 4905.33(A), the opinion notes, "The selective payment of rebates constitutes a felony under Ohio law." *Id*. at 26a. In line with Duke's concession at oral argument before the Sixth Circuit that the PUCO no longer has the authority to enforce these statutes, the court of appeals opinion quotes from the 1999 deregulation law, O.R.C. § 4928.05, by which the Ohio General Assembly removed these statutes from the PUCO's enforcement authority. *See id*. at 28a, incl. n.11. Without in any way distinguishing itself from an Ohio court, the Sixth Circuit concludes that the General Assembly's withdrawal of the PUCO's authority to enforce the statutes specified in § 4928.05 *does not* bar a private right of action based on conduct prohibited by them, such as respondents' civil conspiracy claim. *Id.* at 27a-29a.

This conclusion directly contradicts the district court's thinking on the very same state-law issue. *Id*. at 51a. To the district court, the fact that the Ohio General Assembly stripped the PUCO of enforcement authority over the anti-rebate law also meant that there could be no "private cause of action in state or federal court." *Id.* at 51a-52a. The court of appeals reached the opposite conclusion, it said, simply by reading "the plain language" of O.R.C. § 4928.05. *Id.* at 29a. The court of appeals further noted an anomaly in Duke's (and what turned out to be the district court's) view of the impact of deregulation: the notion that the

PUCO retains the authority to remedy the wrongs alleged in respondents' state-law claims "is at odds with" the PUCO's inability to enforce Ohio's anti-rebate statutes. *Id*. at 28a n.11.

It should be noted that this crucial disagreement between the Sixth Circuit and the district court, which caused the latter to conclude it lacked jurisdiction to entertain respondents' state-law claims, was nothing more than a disagreement over how to interpret Ohio law. This belies Duke's thesis that the Sixth Circuit ignored Ohio law in concluding that the district court could entertain respondents' state-law claims.[20]

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[20] Duke also implies the Sixth Circuit overlooked Ohio case law that previously held the PUCO must find a violation before a court may impose liability and award treble damages under O.R.C. § 4905.61. That case law does not apply in this case, now that the legislature has stripped the PUCO of its power to enforce O.R.C. §§ 4905.32 and 4905.33(A). In *State ex rel. Dayton Power & Light Co. v. Kistler*, 57 Ohio St.2d 21 (Ohio 1979), a case decided before the General Assembly stripped the PUCO of its power to enforce § 4905.33(A) against certain utilities, the Ohio Supreme Court held that electricity customers could not seek § 4905.61 treble damages against a utility for discriminatory pricing under § 4905.33 until the PUCO found that statute had been violated because at that time, in the Supreme Court's words, "alleged violations of R.C. Chapter 4905, such as R.C. 4905.33 in the present controversy, are the concern of the Public Utilities Commission in the first instance …." *Kistler*, 57 Ohio St.2d at 23. After *Kistler*, the General Assembly, through S.B. 3 in 1999, stripped the PUCO of its power to enforce §§ 4905.32 and 4905.33(A) under circumstances found in this case. Thus, the court-made rule requiring a prior PUCO finding of a violation no longer would apply to claims such as those brought in this case, which, after the passage of S.B. 3, "do not require a consideration of statutes and regulations administered and enforced by the [PUCO]." *State ex rel. The Illuminating Co. v. Cuyahoga County*, 97 Ohio St.3d 69, ¶ 21 (Ohio 2002).

4. In sum, Duke's *Erie*-based argument is predicated on a fiction—that because of the Sixth Circuit's passing reference to the truism that state law cannot impair federal jurisdiction, the court of appeals "necessarily held" it was free to ignore state law giving the PUCO exclusive jurisdiction over the matters alleged in respondents' state-law claims, even though a state court would dismiss the same claims on that basis. In fact, what Duke calls the "fundamental question in this case"—whether the PUCO has exclusive jurisdiction to address Duke's allegedly illegal activities—is easily resolved by applying a simple two-pronged test found in an Ohio Supreme Court decision. Instead of owning up to its inability to show exclusive PUCO jurisdiction under this state-law test, Duke has invented a federal issue—the Sixth Circuit's supposed departure from *Erie*—in hopes of grabbing this Court's attention. Whether the Sixth Circuit has correctly appraised the PUCO's jurisdiction, however, hinges strictly on state law and is, therefore, an issue with which this Court need not concern itself.

II. The Sixth Circuit Properly Held That The Filed Rate Doctrine Has No Application To These Facts, And Its Reasoning Is Consistent With That Found In The Filed Rate Decisions Of This Court, Other Circuits, And District Courts.

In holding that the filed rate doctrine does not apply to the facts of this case, the Sixth Circuit opinion points out that respondents are not disputing any filed rates, challenging their reasonableness, or trying to change

them in any way.[21] This reasoning is hardly novel or unprecedented. It finds support in many circuit and district court decisions, including two that Duke claims are in conflict with the Sixth Circuit opinion.[22] In analogous situations, other courts have found the filed rate doctrine inapplicable.[23] None of the other circuit

[21] The complaint could not have spelled this out more clearly: "Plaintiffs do not challenge as illegal, illegitimate, unfair, or unjust the rate increase approved by the PUCO, nor any rates resulting from it." R.E. 27 at ¶ 2. "Rather," as the complaint goes on to say, "plaintiffs simply challenge as illegal, illegitimate, unfair, and unjust the kickbacks that the conspirators paid in the form of exclusive rebates to large customers, pursuant to secret side deals" arranged through DERS. *Id.*

[22] *See In re NOS Commc'ns*, 495 F.3d 1052, 1060 (9th Cir. 2007) (state law claims not barred by the filed rate doctrine where there is no challenge to validity or reasonableness of filed rates); *Arsberry v. Illinois*, 244 F.3d 558, 562-63 (7th Cir. 2001) (claims not barred by the filed rate doctrine where objection is to continuation of deals under which correctional authorities granted exclusive rights to telephone companies in return for kickbacks). Duke cites both cases at page 30 of its petition.

[23] *See, e.g., Alston v. Countrywide Fin. Corp.,* 585 F.3d 753, 763-65 (3d Cir. 2009) ("It is absolutely clear that the filed rate doctrine simply does not apply" to RESPA suits because they "challenge [the defendant's] allegedly wrongful conduct" in paying or receiving kickbacks, "not the reasonableness or propriety of the rate."); *Kunzelmann v. Wells Fargo Bank, N.A.*, Case No. 9-11-cv-81373, 2012 WL 2003337, *3 (S.D. Fla. June 4 2012) ("Plaintiff challenges ... the impermissible kickbacks that were included in the premiums.... Accordingly, Plaintiff's claims are not barred by the filed rate doctrine."); *TON Servs. v. Qwest Corp.*, 493 F.3d 1225, 1237 (10th Cir. 2007) (citing the fact that the plaintiff TON's complaint did not raise any "challenge to the reasonableness of Qwest's rates" as a reason why "the filed rate doctrine cannot categorically preclude TON's claims"); *Brown v. MCI Worldcom Network Servs., Inc.*, 277 F.3d 1166, 1171-72 (9th Cir. 2001) (where

decisions cited by Duke contradicts this sound reasoning.

1. First and foremost, the Sixth Circuit opinion is consistent with the two core principles that this Court and others have used to define the contours of the filed rate doctrine: (1) *nondiscrimination*—that legislative bodies design agencies for the specific purpose of setting uniform rates; and (2) *non-justiciability*—that courts are not institutionally well suited to engage in retroactive rate-setting.[24] *Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (emphasizing nondiscrimination); *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986) (emphasizing non-justiciability); *see also Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18-19 (2d Cir. 1994) (discussing both core principles). Applying the filed rate doctrine to this case would be contrary to both of the core principles set out in these precedents. First, the doctrine prevents utilities from discriminating among ratepayers, but

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the plaintiff did not challenge the validity of the tariff or the reasonableness of the fee it established, the court held his claim was "not precluded by the filed rate doctrine"); *Premiere Network Servs., Inc. v. SBC Commc'ns, Inc.*, 440 F.3d 683, 692 n.11 (5th Cir. 2006) ("because Premiere's claims under the Settlement Agreement apparently do not challenge SBC's tariff, the filed-rate doctrine likely does not apply to completely preempt such claims").

[24] In its discussion of the nondiscrimination and non-justiciability strands of the filed rate doctrine, the Sixth Circuit properly relied on its own prior decision in *MCI Telecomms. Corp. v. Ohio Bell Tel. Co.,* 376 F.3d 539 (6th Cir. 2004), which the court of appeals discussed in detail as an example of a case where the plaintiff's challenge did not affect the setting or reasonableness of any rate and therefore was not encompassed by the filed rate doctrine. Pet. App. 10a-14a.

Duke invokes it to preserve its ability to pay kickbacks through a third party to only certain ratepayers. Second, the doctrine protects the rate-setting agency's regulatory jurisdiction, but Duke seeks to apply it to indirect rebates, over which the agency (the PUCO) lost its regulatory jurisdiction more than a decade ago. In contrast, allowing respondents to challenge in court selective kickbacks that were never filed with or approved by the PUCO, and to challenge them under statutes that the PUCO is not even permitted to enforce, would further the nondiscrimination principle at the core of the filed rate doctrine while doing nothing to undermine the doctrine's non-justiciability principle.

2. Duke also contends that the Sixth Circuit's refusal to apply the filed rate doctrine cannot be squared with this Court's decisions in *United States Navig. Co., Inc. v. Cunard S.S. Co., Ltd.*, 284 U.S. 474 (1932), *Mitchell Coal & Coke Co. v. Penn. R.R.*, 230 U.S. 247 (1913), and other Supreme Court decisions cited at page 27 of Duke's petition. To the contrary, *Cunard* is inapposite, and *Mitchell Coal* actually supports the Sixth Circuit's reasoning and distinguishes the line of cases cited by Duke.

That the contracts at issue in *Cunard* had not been filed with the Shipping Board was not a significant factor in the Court's application of the filed rate doctrine to the facts of that case. Rather, application of the doctrine turned on the fact that the Shipping Act conferred on that board plenary power over such contracts, including the authority to enforce statutory provisions prohibiting them. *Cunard*, 284 U.S. 483-484. As noted above, the PUCO has no authority to enforce Ohio's anti-rebate statutes, and, by the PUCO's

own admission, "Side agreements quite simply fall outside the scope of proceedings before the Commission."[25]

It is significant for present purposes that the Court in *Cunard* took note of what was even then established Supreme Court jurisprudence permitting injured parties to file suit "without preliminary resort" to the rate-setting agency, on the ground that "no question of administrative discretion" was involved. *Id.* at 481-482. Though not explicitly mentioned in *Cunard* in this context, *Mitchell Coal* is a useful example because it discussed such prior Supreme Court jurisprudence and, in so doing, distinguished other Supreme Court cases, some of which Duke cites at page 27 of its petition.

For example, the Court in *Mitchell Coal* discussed *Wight v. United States*, 167 U.S. 512 (1897), a case involving allegedly unlawful rebates paid by an entity regulated by the Interstate Commerce Commission. The Court noted that in *Wight* it held it was "not necessary to have a preliminary ruling by the Commission because the statute itself prohibited the payment of rebates, and the courts could apply the law accordingly." *Mitchell Coal*, 230 U.S. at 261. The Court in *Mitchell Coal* also relied heavily on its then-recent decision in *Pennsylvania R.R. Co. v. Int'l Coal Mining Co.*, 230 U.S. 184 (1913). In *Pennsylvania R.R.*, the "published tariffs" approved by the Interstate Commerce Commission "named but one rate for all alike," and by statute "it was unlawful" for the railroad "to pay a part back" to any shipper. The Court held

[25] R.E. 57 at 9 n. 4.

that "there was no call for the exercise of the rate-regulating discretion of the administrative body" because

> the refund of any part of the tariff rate collected was unlawful.... The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class.

Id. at 197. Relying on the decision "just rendered in" *Pennsylvania R.R.*, the Court in *Mitchell Coal* deemed a similar "allowance" to be

> a mere gift,—a rebate, absolutely forbidden by the statute and *ipso facto* illegal. Being an act prohibited by law, it was not necessary to have any preliminary decision to that effect by the Commission, but the courts could, as in any other case, apply the law to the facts proven and award damages to the person injured.

Mitchell Coal, 230 U.S. at 266. Based on these holdings, there is no call for the PUCO to weigh in as a predicate to court action. Rather, it is simply a matter of a court applying the fixed law (*e.g.*, Ohio's anti-rebate statutes, which the PUCO cannot enforce in any event) to what Duke did (as stated in the 2006 Duke email, certain "full-requirement customers" of Duke received "refunds" of "various riders" in the form of "monthly or quarterly payments" from Duke's

affiliate, which did not provide them any electric service) and awarding damages to those injured.

The Court's decisions in *Mitchell Coal* and *Pennsylvania R.R.* demonstrate that for at least the past century courts have been allowed to take cognizance of damages claims such as those asserted in this case, alleging secret payments of illegal rebates by a regulated entity, without awaiting any preliminary determination by the regulating agency. Indeed, in *Union Pac. Ry. Co. v. Goodridge*, 149 U.S. 680 (1893), issued twenty years before *Mitchell Coal* and *Pennsylvania R.R.*, the Court upheld a coal company's damages claim against a railroad for having secretly paid rebates to the coal company's competitor in violation of Colorado's anti-rebate law. Duke offers no compelling rationale for the Court to revisit the past 120 years of consistent jurisprudence permitting courts to entertain such claims for damages, notwithstanding the filed rate doctrine.

3. Duke further argues that the Sixth Circuit opinion is alone among circuit decisions in that it "permits respondents to seek damages that would effectively allow them to pay a lower rate than the filed rate …." Pet. at 29-30.

The applicability of the filed rate doctrine does not turn on whether the plaintiff is claiming damages that "would effectively allow them to pay a lower rate than the filed rate," as Duke puts it. True, the filed rate doctrine has been applied in cases where "the measure of damages requires comparing the rates charged under the filed-rate with the rate that allegedly should have been charged." *NOS Commc'ns*, 495 F.3d at 1060.

But this is *not* such a case. Nowhere does the complaint mention any different rate "that allegedly should have been charged," nor seek damages based on such a hypothetical alternative rate. *Id.* Respondents' claims are directed against the kickback payments they did not receive, not the filed rates they paid. A secret payment from DERS to large companies is a "kickback" or "rebate" regardless whether the filed rate determined by the PUCO and paid by all ratepayers was "x," "2x," or "10x." It is sophistry for Duke to suggest that respondents cannot challenge the kickback payments that others received but they did not without simultaneously attacking the filed rates that respondents paid. There is a clear difference between a party's attack on payments it did not receive and an attack on payments it made. As the Sixth Circuit opinion aptly observes, "The allegation that certain large consumers, by receiving a rebate, effectively paid a lower rate than Plaintiffs does not transform this action into an attack on filed rates." Pet. App. 13a.

Moreover, prevailing on their claims does not depend on respondents' ability to show that the filed rates were insufficient or unreasonable, or should have been different. No analysis of filed rates is necessary for respondents to prove that the payments constituted kickbacks and violated the law, causing them harm. The Sixth Circuit opinion's reference to the alleged harm suffered by competitors of the favored companies[26] (members of the proposed subclass) is the clearest possible illustration that measuring damages

[26] *See* Pet. App. 20a-21a (discussion of the harm required for an RPA claim).

for purposes of the federal claims in this case does not require comparing the filed rate with any other "reasonable" rate. And nowhere in the complaint do respondents ask the district court to determine a different, more "reasonable" rate and then award them the difference between that and the rate respondents actually paid.[27]

4. Duke relies extensively on *Firstcom, Inc. v. Qwest Corp.,* 555 F.3d 669 (8th Cir. 2009), a case that applied the filed rate doctrine to what Duke claims are "a virtually indistinguishable set of facts." Pet. at 29. The facts of *Firstcom* are readily distinguishable, and the application of the filed rate doctrine in that case, unlike this one, was perfectly consistent with the nondiscrimination and non-justiciability principles at the core of the filed rate doctrine. The plaintiff in *Firstcom* was the successor to a competitive local exchange carrier ("CLEC"), complaining of Qwest's failure to provide terms that it gave to competitor CLECs in unfiled interconnection agreements. Unlike the side agreements by Duke's affiliate in this case, which were *not* required to be filed with the PUCO, there was no question in *Firstcom* that the unfiled interconnection agreements entered into directly with Qwest were required to be filed with the Minnesota Public Utilities Commission ("MPUC"). *Id.* at 673 n. 3, 677. And unlike the side agreements in this case, which were structured to provide *indirect* rebates in violation of statutes *outside* the PUCO's jurisdiction,

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[27] *Contrast Bryan v. BellSouth Commc'ns, Inc.,* 377 F.3d 424, 430 (4th Cir. 2004) ("And because Count A would require the court to determine a reasonable rate for the FUSC, that claim must be dismissed pursuant to the filed-rate doctrine.").

the failure to file the interconnection agreements in *Firstcom* was specifically within the jurisdiction of the regulator. *Id.* In fact, years before the plaintiffs' suit in *Firstcom*, the Minnesota Department of Commerce filed an action against Qwest before the MPUC for Qwest's failure to file the interconnection agreements, obtaining a $6.5 million fine and an agreement by Qwest to make compensatory payments to any CLEC "who was purchasing wholesale services from Qwest while the unfiled agreements were in effect" to "be based on the most favorable discount terms found in the unfiled agreements …." *Id.* Thus, *Firstcom*, unlike this case, involved a direct and appropriate application of the nondiscrimination and non-justiciability principles at the core of the filed rate doctrine.

5. Duke offers a radical version of the filed rate doctrine that no circuit, much less this Court, has ever embraced. Duke suggests its ratepayers have no "'legal rights'" against it other than what is spelled out in "'the published tariff'" and that *no* tortious conduct by Duke could vary or enlarge those legal rights. Pet. at 28. By Duke's logic, if its PUCO-approved tariff did not mention that Duke would selectively bomb a ratepayer's business or home, the filed rate doctrine would bar wrongful death suits as improper attempts to vary or enlarge the ratepayers' rights vis-à-vis Duke under "'the published tariff,'" and any damages against Duke presumably would be prohibited as varying the rates paid. The filed rate doctrine is, fortunately, not so broad.

There is no cause for the Court to review or reverse the Sixth Circuit's refusal to apply the filed rate doctrine to the facts of this case.

CONCLUSION

For the foregoing reasons, respondents respectfully request that Duke's petition be denied.

Respectfully submitted,

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