No. 13-271

In the Supreme Court of the United States

ONEOK, INC., ET AL., PETITIONERS

v.

LEARJET, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Natural Gas Act, 15 U.S.C. 717 *et seq.*, preempts respondents' state-law antitrust claims targeting manipulation of privately published natural-gas price indices, when the manipulation directly affected wholesale rates for natural-gas sales, which the Federal Energy Regulatory Commission (FERC) has exclusive authority to regulate, 15 U.S.C. 717(b), 717d(a), but when respondents' purchases of natural gas from petitioners were not subject to FERC's jurisdiction under 15 U.S.C. 717(b).

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INTEREST OF THE UNITED STATES

This case concerns whether the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, preempts state-law antitrust claims based on misconduct that directly affects the price of wholesale sales of natural gas, where the entities engaging in such misconduct and the affected wholesale rates fall within the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission or FERC). Because this case directly implicates FERC's regulatory responsibilities, the United States has a substantial interest in the Court's resolution of the preemption issue. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

STATEMENT

1. a. The NGA grants FERC authority to regulate defined segments of the natural-gas market. Section 1(b) of that Act (15 U.S.C. 717(b)) provides FERC with jurisdiction over (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale" (*i.e.*, wholesale sales), and (3) "natural-gas companies engaged in such transportation or sale." *Ibid.* The transportation, sales, and companies subject to such jurisdiction are referred to as FERC-"jurisdictional" transportation, sales, and entities (transporters and sellers). Cf. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626 n.1 (1972). Section 1(b) also specifies that the NGA does not apply to "any other transportation or sale of natural gas," "the local distribution of natural gas," "the facilities used for such distribution," or "the production or gathering of natural gas." 15 U.S.C. 717(b). Those areas are generally left open to state regulation. See *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510 (1989).

FERC's jurisdiction over wholesale natural-gas sales includes authority to regulate the rates charged by natural-gas companies in such sales. See 15 U.S.C. 717c, 717d(a). In 1978 and 1989, Congress "substantially narrowed" that jurisdiction by removing "first sales" of natural gas from FERC's rate-setting authority. See *Amendments to Blanket Sales Certificates*, 68 Fed. Reg. 66,323, 66,325 (Nov. 17, 2003) (citing Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, and Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157). "[F]irst sales" are "sales of natural gas that are not preceded by a sale to an interstate pipeline, intrastate pipeline, local distri-

bution company, or retail customer." *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027, 1037 (9th Cir. 2007) (*Gallo*); see 15 U.S.C. 3301(21) (defining first sale). Accordingly, "sales by pipelines, local distribution companies, and their affiliates [are not] first sales unless these entities are selling gas of their own production." *Gallo*, 503 F.3d at 1037.

FERC's rate-setting jurisdiction thus now "includes all sales for resale by interstate and intrastate pipelines and [local distribution companies] and their affiliates, other than their sales of their own production." *National Ass'n of Gas Consumers* v. *All Sellers of Natural Gas*, 106 F.E.R.C. ¶ 61,072, at 61,247, 61,248 (2004). This Court has held that, by removing first sales from FERC's jurisdiction, Congress intended to leave that field free from price regulation by both FERC and the States. See *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422-423 (1986).

In exercising its authority concerning rates under the NGA, FERC acts under Sections 4 and 5(a) of that Act (15 U.S.C. 717c, 717d(a)) to ensure that "any rate * * * charged[] or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission," is just, reasonable, and not unduly discriminatory or preferential. 15 U.S.C. 717d(a); see 15 U.S.C. 717c(a) and (b). FERC has the same Section 5(a) authority with respect to "any rule, regulation, practice, or contract affecting such rate." 15 U.S.C. 717d(a). In addition, Section 7 (15 U.S.C. 717f) requires all jurisdictional sellers to obtain a FERC-issued certificate before engaging in a jurisdictional sale, 15 U.S.C. 717f(c), and authorizes FERC to im-

pose in the certificate "reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. 717f(e).

This case concerns the scope of FERC's jurisdiction over such jurisdictional sellers and over "any * * * practice * * * affecting" "any rate" charged or collected by a jurisdictional seller in connection with "any * * * sale of natural gas, subject to the jurisdiction of the Commission," 15 U.S.C. 717d(a).

b. Since 1992, FERC has issued blanket marketing certificates that authorize natural-gas companies to make wholesale sales at market-based rates, rather than at rates pre-filed with FERC, upon a finding that the company lacks market power. See 57 Fed. Reg. 57,952, 57,957-57,958 (Dec. 8, 1992); 57 Fed. Reg. 13,267, 13,270 (Apr. 16, 1992). During the time period at issue here (2000-2002), FERC's oversight of the market primarily consisted of that before-the-fact examination of market power, and the availability of a complaint process under 15 U.S.C. 717d(a).

Private entities publish indices of natural-gas prices that are intended to represent average natural-gas prices at different times and places. J.A. 124-125. Buyers and sellers in the natural-gas markets then use those indices as reference points to set prices for wholesale transactions within FERC's jurisdiction, and non-jurisdictional transactions (*i.e.*, retail sales and first sales). See Pet. App. 14a, 110a-112a & n.19; see *id.* at 106a (explaining that natural-gas sales contracts often use the indices "as a price term") (citation omitted).

This case arises from index-focused misconduct in the natural-gas market during the Western energy

crisis of 2000-2002—specifically, false price reporting to the entities that publish natural-gas price indices and "wash trades," *i.e.*, prearranged offsetting sales of the same product between two parties used to create a false price for use in the indices. Pet. App. 13a-14a; see 68 Fed. Reg. at 66,328-66,330 (describing wash trades). In 2003, FERC completed an investigation of manipulation in the natural-gas and electric markets during that 2000-2002 time period. See *Final Report on Price Manipulation in Western Markets*, Docket No. PA02-2-000 (F.E.R.C. Mar. 2003), http://www.ferc.gov/industries/electric/indus-act/wec.asp (*Final Report*) (partially reproduced at J.A. 84-239). The staff report identified five major traders, each a petitioner here, as having "admitted that their employees falsified information provided to" the index publishers. J.A. 88. The report determined that, as a result of those and other practices, "[s]pot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market." J.A. 85-86. The report explained that "the Commission has jurisdiction over most of the transactions that form the basis for the indices and many Commission-jurisdictional transactions (both gas and electric) are based on the indices." J.A. 150. The report recommended various reforms to FERC rules to "[en]sure that the published indices are accurate, not subject to manipulation, and not serving as a means for price manipulation." *Ibid.*; see J.A. 207-209 (recommendations).

FERC subsequently amended all blanket marketing certificates explicitly to prohibit jurisdictional sellers (*i.e.,* companies engaged in the sale of natural gas in interstate commerce for resale) from engaging in

"actions or transactions without a legitimate business purpose" to "manipulate market prices," including "wash trades" and "[c]ollusion." 68 Fed. Reg. at 66,323, 66,337 (18 C.F.R. 284.403(a) (2004)). Those amendments, referred to as the 2003 Code of Conduct, also require that jurisdictional sellers that report their natural-gas sales to publishers of price indices must "provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher." *Id.* at 66,337 (18 C.F.R. 284.403(b) (2004)); see also 18 C.F.R. 284.288(a) and (b) (code of conduct for unbundled gas sales service). FERC contemporaneously issued a policy statement setting forth standards intended to ensure a robust and accurate voluntary price-reporting regime. See *Policy Statement on Natural Gas and Electric Price Indices*, 104 F.E.R.C. ¶ 61,121, at 61,403 (2003), clarified, 112 F.E.R.C. ¶ 61,040, at 61,294 (2005); see *id.* at 61,404 (discussing wide use of price indices in natural-gas markets).

FERC explained that the original blanket certificates "implicitly prohibited acts which would manipulate the competitive market for natural gas," but that the Western energy crisis had made clear the need "to explicitly prohibit acts intended to manipulate the natural gas market." *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. ¶ 61,174, at 61,688, 61,690 (2004) (denying rehearing of the 2003 Code of Conduct). FERC further explained that it based the 2003 Code of Conduct on its finding that "the [Code's] prohibited practices are unjust and unreasonable" and that it therefore prohibited them expressly in blanket marketing certificates pursuant to its authority under "Sections 5, 7, and 16 of the NGA" (15 U.S.C. 717d,

717f, 717*o*). 107 F.E.R.C. at 61,690. Those provisions authorize FERC to regulate "any * * * practice * * * affecting" "any rate" charged or collected by a jurisdictional seller in connection with "any * * * sale of natural gas, subject to the jurisdiction of the Commission," 15 U.S.C. 717d(a); require jurisdictional sellers to obtain a FERC-issued certificate before engaging in jurisdictional sales, 15 U.S.C. 717f(c); and authorize FERC to issue orders, rules, and regulations to carry out its duties under the NGA, 15 U.S.C. 717*o*.

c. Congress subsequently passed the Energy Policy Act of 2005 (EPAct), Pub. L. No. 109-58, 119 Stat. 594, which, *inter alia*, amended the NGA to expressly prohibit market manipulation. See 15 U.S.C. 717c-1. That Act expanded FERC's enforcement authority to reach not only FERC-jurisdictional sellers, but "any entity" that, "directly or indirectly, * * * use[s] or employ[s], in connection with the purchase or sale of natural gas * * * subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance * * * in contravention of such rules and regulations as the Commission may prescribe." *Ibid.*; see 18 C.F.R. 1c.1 (implementing regulations for natural-gas market).

In promulgating its regulations implementing EPAct, FERC explained that although the new provisions did not expand "the types of transactions subject to the Commission's jurisdiction" under the NGA, they did expand the types of entities subject to FERC authority. *Prohibition of Energy Market Manipulation*, 71 Fed. Reg. 4244, 4247-4248 (Jan. 26, 2006). Under EPAct, FERC stated, "[i]f any entity engages in manipulation and the conduct is found to be 'in

connection with' a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority." *Ibid.* "[T]he 'in connection with' element," FERC explained, "encompass[es] situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction," such that an "entity engaging in a non-jurisdictional transaction" will "engag[e] in fraudulent conduct in connection with a jurisdictional transaction" if it acts intentionally or recklessly to affect the price of "jurisdictional transactions." *Id.* at 4249.[1]

2. Petitioners are natural-gas traders that engage in both FERC-jurisdictional wholesale sales (making them FERC-jurisdictional sellers) and non-jurisdictional retail and first sales of natural gas. Pet. App. 12a, 81a-102a. Respondents are industrial and commercial consumers of natural gas. *Id.* at 12a. As relevant here, respondents assert state antitrust claims seeking to recover damages arising from petitioners' alleged manipulation of the natural-gas market between 2000 and 2002. *Id.* at 12a-14a, 19a-21a, 67a-68a. Respondents contend that petitioners conspired to give false price information to the indices and engaged in wash trades, which artificially increased the price of natural gas in petitioners' non-jurisdictional retail and first sales to respondents. *Id.* at 12a-13a, 55a; J.A. 47.

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[1] FERC rescinded portions of its 2003 Code of Conduct that became "unnecessary" in light of EPAct and its regulations, *Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, 71 Fed. Reg. 9709 (Feb. 16, 2006), but kept in place regulations prohibiting false reporting to indices and requiring that price records be retained for five years. 18 C.F.R. 284.403.

a. In 2007, petitioners moved for summary judgment on the ground that the NGA preempts respondents' state-law antitrust claims. Pet. App. 22a. The district court initially denied petitioners' motions. J.A. 37-62. The court explained that, under Section 1(b), Congress granted FERC jurisdiction over "matters relating to the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and the natural gas companies engaged in such transportation or sales." J.A. 44. The court concluded, however, that FERC's jurisdiction over *entities* engaged in jurisdictional sales "does not mean FERC has exclusive jurisdiction over those companies' conduct in non-jurisdictional transactions." J.A. 58-59. Thus, the court reasoned, to the extent respondents could show both that petitioners "engaged in misconduct in non-jurisdictional transactions" and that respondents were "harmed by purchasing natural gas in non-jurisdictional sales" involving natural-gas rates affected by that misconduct, respondents' state-law claims would not be preempted because FERC would "lack[] jurisdiction" over either the "manipulative conduct" or the "injury-causing sale." J.A. 55.

The district court subsequently granted reconsideration to address petitioners' argument that FERC's exclusive jurisdiction over their alleged misconduct rests not only on their status as jurisdictional sellers but also on FERC's authority under NGA Section 5(a) "to regulate any practice by a jurisdictional seller that affects a jurisdictional rate," Pet. App. 132a. See *id.* at 124a-136a. The court concluded that, under Section 5(a), FERC's exclusive authority extends to "any practice by a jurisdictional seller affecting a rate

charged or collected by a jurisdictional seller in connection with the transportation or sale of natural gas within FERC's jurisdiction," *id.* at 133a, if the practice "directly affect[s]" jurisdictional rates, *id.* at 134a-135a (citation omitted). The court thus held that respondents' claims would be preempted "if [petitioners] were jurisdictional sellers and their alleged practices of false price reporting and wash trades were practices which directly affected a jurisdictional rate," because such "practices fall within FERC's exclusive jurisdiction." *Id.* at 135a.

After further submissions, the district court granted petitioners partial summary judgment. Pet. App. 64a-123a. The court concluded that the undisputed evidence showed that petitioners were jurisdictional sellers, *id.* at 77a, 81a-102a, and that their alleged false price reporting and wash trades "directly affect[ed]" FERC-jurisdictional rates because FERC-regulated wholesale rates were "set by reference to the indices" that petitioners allegedly manipulated. *Id.* at 110a-112a; see *id.* at 106a-107a. The court accordingly held respondents' state-law antitrust claims preempted, *id.* at 115a, and entered final judgment on those claims under Fed. R. Civ. P. 54(b), see Pet. App. 13a n.2, 123a; J.A. 36.

b. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-63a. As relevant here, the court held that respondents' state antitrust claims are not preempted. *Id.* at 23a-39a.

i. The court of appeals did not disagree with the district court's evaluation of the summary judgment evidence. The court instead concluded that although Section 5(a) provides FERC with jurisdiction over practices "affecting" wholesale rates, that grant of

jurisdiction does not preempt state antitrust claims that "aris[e] out of price manipulation associated with transactions falling outside of FERC's jurisdiction." Pet. App. 24a. The court reasoned that preemption of respondents' claims would "conflict[] with Congress's express intent [in Section 1(b)] to delineate carefully the scope of federal jurisdiction" and to preserve state authority. *Ibid.*; *id.* at 32a-34a. The court concluded that Section 5(a) should be "narrowly" construed "to define the scope of FERC's jurisdiction within the limitations imposed by Section 1(b)." *Id.* at 29a.

ii. The court of appeals found support for its holding in its previous decision in *Gallo*. Pet. App. 25a-28a. In *Gallo*, the plaintiff brought federal and state antitrust claims against a natural-gas supplier, alleging that it had paid inflated prices due to the supplier's manipulative price reporting and wash trades that affected the price of natural gas reflected in the indices. 503 F.3d at 1030-1032. The defendant sought summary judgment on the ground that those claims were barred by the filed-rate doctrine (which precludes claims for damages that effectively alter a rate set or authorized by FERC, see *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 579-581 (1981)), and preempted. 503 F.3d at 1030.

The court of appeals in *Gallo* concluded that, under the filed-rate doctrine, "the market-based rate[s] for natural gas transactions under FERC's jurisdiction are FERC-authorized rates, and cannot be the basis of a federal antitrust or state damage action." 503 F.3d at 1043. The court further concluded, however, that the indices did not merely reflect FERC-authorized rates because they were partially composed of (1) fictitious and misreported rates and

(2) rates from non-jurisdictional sales. *Id.* at 1045. Thus, *Gallo* held that "to the extent the indices are comprised of rates that are not FERC-authorized rates" for either of those reasons, the filed-rate doctrine "does not bar [the] claim that such rates are unfair and led to unfair retail rates." *Id.* at 1048. The *Gallo* court also held that a plaintiff may "bas[e] damage claims" on manipulative reporting of first-sale transactions because, in its view, such antitrust claims "complement" Congress's goal of deregulating first sales. *Id.* at 1046.

The court of appeals here concluded that *Gallo*'s reasoning "applies with equal force to the question presented in this case." Pet. App. 28a. The court therefore concluded that "federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction." *Ibid.*

iii. The court of appeals rejected petitioners' argument that FERC's promulgation of the 2003 Code of Conduct confirmed that FERC had jurisdiction over the price manipulation at issue here. Pet. App. 36a-39a. The court noted that Congress's 2005 enactment of EPAct prohibits market manipulation and authorizes FERC to promulgate regulations to protect natural gas purchasers. *Id.* at 37a. The court believed that EPAct's market-manipulation provisions would have been unnecessary if FERC already had regulatory authority over such manipulative conduct. *Id.* at 37a-38a. The court also noted that FERC limited the application of the 2003 Code of Conduct to sales within its jurisdiction, which in the court's view showed that FERC did not have jurisdiction over manipulative behavior related to non-jurisdictional sales. *Id.* at 38a.

SUMMARY OF ARGUMENT

The Natural Gas Act vests FERC with exclusive jurisdiction over, and "occupied the field of matters relating to[,] wholesale sales" of natural gas. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 305 (1988). That authority includes the power to regulate "practice[s]" by jurisdictional sellers directly "affecting" the rates of FERC-jurisdictional wholesale sales, 15 U.S.C. 717d(a), and to impose upon jurisdictional sellers "reasonable terms and conditions as the public convenience and necessity may require," 15 U.S.C. 717f(e). As a result, FERC's "exclusive * * * jurisdiction" under Section 1(b) of the Act "extend[s] to" ensuring that "rates, and practices * * * affecting rates, are just and reasonable," *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 506 (1989), even if the rate-affecting practices are not themselves manifested during FERC-jurisdictional sales. Petitioners' state-law antitrust claims challenge practices—false reporting of natural-gas-sales rates to index publishers and wash trades—by jurisdictional sellers that directly affect FERC-jurisdictional rates. They therefore fall squarely within FERC's exclusive regulatory authority and are preempted.

The Ninth Circuit concluded that FERC's authority should be narrowly construed in light of Section 1(b)'s preservation of state authority over natural-gas sales other than wholesale sales. But first sales do not implicate any relevant state regulatory authority, and respondents' claims do not implicate Section 1(b)'s preservation of state rate-setting authority over retail sales. False reporting necessarily occurs after natural-gas sales, and wash sales constitute a practice that falls within FERC's, not the States', authority

over wholesale sales. But even if respondents' claims implicated some state authority, the claims would not be saved from preemption. Where, as here, practices by jurisdictional sellers *directly* affect jurisdictional rates, those practices fall within FERC's exclusive and comprehensive jurisdiction to regulate matters relating to wholesale natural-gas sales.

Even if the NGA were ambiguous on this point, FERC's pre-2005 conclusion that it possessed authority to regulate the conduct at issue here is reasonable and entitled to deference. The Ninth Circuit's contrary conclusion is based on a misunderstanding of FERC's 2003 Code of Conduct and on the mistaken view that EPAct's market-manipulation provisions would have been superfluous if FERC had possessed authority over the manipulative practices of jurisdictional sellers that respondents challenge.

ARGUMENT

THE NATURAL GAS ACT PREEMPTS RESPONDENTS' STATE ANTITRUST CLAIMS CHALLENGING MANIPULATIVE PRACTICES BY JURISDICTIONAL SELLERS THAT DIRECTLY AFFECTED NATURAL-GAS SALES WITHIN FERC'S EXCLUSIVE JURISDICTION

This case concerns the scope of FERC's pre-2005 authority under the NGA to regulate manipulative practices by jurisdictional sellers that directly affected the price of wholesale sales of natural gas within FERC's exclusive jurisdiction. In light of the nature of the Nation's "integrated gas supply system" and Congress's decision in the NGA to "divide[] regulatory authority between the States and the Federal Government," it is "inevitable that 'jurisdictional tensions will arise as a result of the fact that state and federally regulated elements coexist within a single integrat-

ed system.'" *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 515 (1989) (citation and brackets omitted). In this case, the asserted tension arises because of an unusual feature of the natural-gas markets in this case: The rates for natural gas in wholesale (jurisdictional) sales and other (non-jurisdictional) sales were often based on the *same* published price indices, which were themselves based on the sale prices that wholesale and other natural-gas market participants reported to the publishers.

Respondents' state-law antitrust claims are preempted because they seek to regulate the conduct of FERC-jurisdictional sellers that directly affected FERC-regulated wholesale natural-gas rates. When Congress passed the NGA, "Congress occupied the field of matters *relating to* wholesale sales * * * of natural gas in interstate commerce." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 305 (1988) (emphasis added). The NGA's grant of authority to FERC thus not only encompasses authority to regulate "any rate" charged or collected in a FERC-jurisdictional sale of natural gas, it also grants FERC authority to regulate "any * * * practice * * * affecting such rate." 15 U.S.C. 717d(a). Where, as here, alleged manipulative practices by jurisdictional sellers *directly affect* the rate charged in jurisdictional sales, FERC jurisdiction over those practices is exclusive, even if the practices do not themselves all arise from jurisdictional sales. The integrity of the Nation's natural-gas wholesale market depends on the reliability of natural-gas price indices and the prices reported thereto by market participants. The NGA grants FERC comprehensive authority to regulate manipula-

tive practices by jurisdictional sellers directly affecting that market. State laws that would also regulate the same wholesale-market-affecting practices of FERC-jurisdictional sellers would threaten the "[u]niformity of regulation" that Congress intended by enacting the NGA's "comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'" *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 419 (1986) (*Transco II*) (citations omitted). The state-law antitrust claims in this case would constitute such regulation and are therefore preempted.

A. FERC's Authority Under The Natural Gas Act Preempts Respondents' State-Law Antitrust Claims

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Where, as here, Congress has not expressly preempted state law, preemption will nevertheless occur if state law conflicts with federal law or "the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively." *Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1265-1266 (2012) (brackets in original; citation omitted). Whether Congress intended field preemption turns on an interpretation of "the proper scope of the federal power" that Congress delegated to FERC in the NGA. See *New York* v. *FERC*, 535 U.S. 1, 18 (2002).[2]

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[2] Because the field-preemption claim in this case requires the Court to "interpret the [governing federal] statute to determine whether Congress has given FERC the power to act" and the "proper scope" of that federal power, this case turns on a normal

The broad text of the NGA, as interpreted by this Court, vests FERC with authority to regulate any manipulative "practice" by jurisdictional sellers directly "affecting" the rates charged in wholesale sales of natural gas, and preempts respondents' state-law claims.

a. Section 1(b) of the NGA grants FERC jurisdiction over "the sale in interstate commerce of natural gas for resale." 15 U.S.C. 717(b). That grant of authority "long has been recognized" by this Court as providing "a 'comprehensive scheme of federal regulation of "all wholesales of natural gas in interstate commerce"'" that "confers upon FERC exclusive jurisdiction over" those sales. *Schneidewind*, 485 U.S. at 300-301 (quoting *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 91 (1963)); see *Transco II*, 474 U.S. at 419. It thus is "well settled" that "Congress occupied the field of matters relating to wholesale sales * * * of natural gas." *Schneidewind*, 485 U.S. at 305.

FERC "exercises [its] authority" granted by Section 1(b) of the NGA "through a variety of powers," including those specified in Section 5 and Section 7. *Schneidewind*, 485 U.S. at 301; see *id.* at 302, 304. Section 5(a), as relevant here, authorizes FERC to regulate "*any* rule, regulation, practice, or contract affecting" "*any* rate * * * charged[] or collected by *any* natural-gas company in connection with *any* * * * sale of natural gas, subject to the jurisdiction of the Commission." 15 U.S.C. 717d(a) (emphases added). That broad statutory authorization grants

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exercise of statutory interpretation without a "presumption against pre-emption." *New York*, 535 U.S. at 17-18 (distinguishing such cases from conflict-preemption cases).

FERC regulatory power over the practices of jurisdictional sellers affecting wholesale rates "without qualification or exception." *Permian Basin Area Rate Cases*, 390 U.S. 747, 783-784 (1968); cf. *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach."). This Court has accordingly held that "[t]he rules, practices, or contracts 'affecting' the jurisdictional rate are not themselves limited to the jurisdictional context," at least when the entity involved is a FERC-jurisdictional entity. See *FPC* v. *Conway Corp.*, 426 U.S. 271, 281 (1976) (Federal Power Act decision following this Court's interpretation of NGA § 5(a) in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 646 (1945));[3] cf. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 23-27 (1961) (*Transco I*) (holding that, notwithstanding "the bar in § 1(b)" prohibiting federal regulation of direct sales, the Commission may take action that adversely affects future "direct sales" based on its determination that "the effect [of] the inflated sales price charged in [such a non-jurisdictional direct] sale" would adversely affect the "future field prices" for both "direct sales and [jurisdictional] sales for resale").

Moreover, the breadth of FERC's jurisdictional authority under the NGA rests not only on Section 1(b)'s broad grant of federal authority over wholesale

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[3] Because the relevant provisions of the NGA and Federal Power Act "are in all material respects substantially identical," this Court follows the "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n. 7 (1981) (citation omitted).

(jurisdictional) sales, but also on that provision's "independent grant of jurisdiction" over the natural-gas companies that make such sales. See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972). By separately and independently granting FERC authority over "natural-gas companies engaged in [FERC-jurisdictional] transportation or sale[s]," 15 U.S.C. 717(b), Congress established that FERC's authority over jurisdictional sellers is not rigidly confined to the FERC-jurisdictional transactions in which they engage. Among other things, Section 7 of the Act requires that a jurisdictional seller obtain a certificate from FERC before engaging in any jurisdictional sale, see 15 U.S.C. 717f(c), and thereby vests FERC with a "certification power," *Schneidewind*, 485 U.S. at 302-303, that includes authority to impose on jurisdictional sellers "such reasonable terms and conditions as the public convenience and necessity may require," 15 U.S.C. 717f(e). Section 7 thereby grants the agency "a wide range of discretionary authority" over jurisdictional sellers to address "all factors bearing on the public interest," including factors that affect "both * * * direct sales and sales for resale." *Transco I*, 365 U.S. at 7-8, 23 (citations and emphasis omitted).

FERC's "exclusive * * * jurisdiction" under Section 1(b) accordingly can "extend to * * * ensuring that rates, and practices * * * affecting rates, are just and reasonable," *Northwest Central*, 489 U.S. at 506 (citing 15 U.S.C. 717c, 717d), even if the rate-affecting practices are not themselves manifested during FERC-"jurisdictional" sales, see *Conway Corp.*, 426 U.S. at 281. Indeed, a "fundamental principle[] concerning the pre-emptive impact of federal jurisdiction over wholesale rates on state regula-

tion" is that "FERC's exclusive jurisdiction applies not only to rates but also to [factors] that affect wholesale rates." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988). That authority ensures that FERC possesses the jurisdiction commensurate with Congress's decision to grant it comprehensive regulatory authority over the Nation's natural-gas wholesale market and to prohibit unjust and unreasonable practices that directly affect wholesale rates.

Because petitioners' alleged manipulation of price indices directly affected the wholesale price of natural gas, the state-law claims in this case challenge "practice[s] * * * affecting" the rates charged by natural-gas companies in jurisdictional sales within the meaning of 15 U.S.C. 717d(a). Those practices by jurisdictional sellers thus were subject to FERC's exclusive authority to determine whether their practices affecting jurisdictional rates were just and reasonable, even if respondents contend that the practices also involved false reporting about non-jurisdictional trades and collusive wash trades.[4]

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[4] The district court concluded at summary judgment that petitioners' alleged false price reporting and wash trades "directly affect[ed]" FERC-jurisdictional rates because FERC-regulated wholesale rates are "set by reference to the indices" that petitioners allegedly manipulated, Pet. App. 110a-112a; the court of appeals did not disagree; and this Court granted certiorari to decide whether the NGA preempts state-law antitrust claims challenging practices that "directly affect the wholesale natural gas market," Pet. i. To the extent respondents contend that the summary-judgment evidence reflects a genuine issue of material fact about whether petitioners' alleged practices "directly affect[ed]" wholesale rates, that fact-bound contention should be resolved by the

b. That understanding of FERC's authority is consistent with this Court's decisions governing the preemptive effect of the NGA. In conducting preemption analysis, this Court has looked to the effect of a state law, not its nominal subject, to determine whether the NGA preempts state law, and it has set aside state regulations that intrude on FERC's exclusive authority to regulate wholesale natural-gas sales by regulating practices directly affecting those rates.

In *Schneidewind*, for example, Michigan sought to regulate long-term securities issued by natural-gas companies transporting gas into the State. 485 U.S. at 296-297. The Court concluded that, although the NGA does not "expressly authorize[] [FERC] to regulate the issuance of securities by natural gas companies," the State was prohibited from doing so. *Id.* at 304. The Court explained that when FERC determines a reasonable rate of return on invested capital for a natural-gas company, FERC may calculate the company's rates based on an imputed capital structure, rather than its actual capital structure, if the company's equity ratio moves beyond certain limits, in order "to limit the burden on ratepayers of abnormally high equity ratios." *Id.* at 302. Because Michigan's law would have permitted the State to prevent a natural-gas company from raising its equity levels above a certain point, thus "ensur[ing] that the company w[ould] charge only what Michigan consider[ed] to be a 'reasonable rate,'" the Court concluded that the state law was preempted. *Id.* at 308.

As relevant here, *Schneidewind* explained that FERC's Section 5(a) "authority to regulate and fix

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court of appeals on remand, which can consider in the first instance whether respondents have preserved that contention.

practices affecting rates allows the agency to address directly any unduly leveraged, unduly risky, or unduly capitalized investments" because of the effect that such investments have on jurisdictional rates. 485 U.S. at 309; see *id.* at 304. *Schneidewind* further explained that FERC's Section 7 "certification power" over jurisdictional sellers enabled it to address the securities-related concerns addressed by the state law in question. *Id.* at 302-303, 309. And because FERC possessed such authority under those provisions to control a company's capital structure in connection with its determination of a reasonable natural-gas wholesale rate, the Court held the state law preempted because it "[wa]s directed at * * * precisely the things over which FERC has comprehensive authority." *Id.* at 308.

Similarly, in *Northern Natural Gas*, the Court held that the NGA preempted state measures designed to preserve the State's natural-gas resources, which ostensibly relied on the State's authority to regulate the natural-gas "production and gathering" activities that Section 1(b) preserves. 372 U.S. at 89, 93-94. Kansas had required that pipelines desiring to purchase gas from a particular gas field must purchase that gas ratably from all connected wells in the field. *Id.* at 85-86. Although the Court recognized the State's authority to adopt measures to preserve its natural resources (for which ratable extractions were important), the Court explained that the "particular means chosen by [the State] to exercise the conceded power" was problematic, because the State had imposed requirements "aimed directly at interstate purchasers and wholesales for resale," *id.* at 93-94, and thus "deal[t] with matters which *directly affect*

the ability of [FERC's predecessor] to regulate comprehensively" and "achieve the uniformity of regulation" intended by Congress, *id.* at 91-92 (emphasis added). "The federal regulatory scheme," the Court concluded, "leaves no room * * * for state regulations which would indirectly achieve the same result" as FERC's regulation of wholesale sales. See *id.* at 91 (citation omitted).[5]

"Of course, every state statute that has some indirect effect on rates and facilities of natural gas companies is not pre-empted." *Schneidewind*, 485 U.S. at 308. Such a result would stretch the NGA's grant of authority to FERC beyond any logical mooring. But if state statutory or other regulatory provisions "deal with matters which directly affect the ability of [FERC] to regulate comprehensively and effectively the * * * sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act," they "invalidly invade the federal agency's exclusive domain" under that Act. *Northern Natural Gas*, 372 U.S. at 91-92. In other words, a state provision that would "regulate[] in [the] field the NGA has occupied to the exclusion of state law * * * is pre-empted." *Schneidewind*, 485 U.S. at 300. Respondents' state-law antitrust claims are directed at false price reporting and wash trades by

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[5] The Court has followed a similar course in Federal Power Act cases. In *Mississippi Power & Light Co.*, for instance, the Court held that, even where the States legitimately act within the scope of their authority to set retail rates and conduct prudence reviews, "FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates." 487 U.S. at 371 (applying *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986)).

jurisdictional sellers, practices that directly affect wholesale rates within FERC's exclusive jurisdiction. Those claims are thus preempted.

FERC's jurisdiction over petitioners' manipulation of gas price indices to the exclusion of the States does not mean that federal antitrust laws would be displaced to the extent they otherwise would apply. See, *e.g.*, *Connell Constr. Co.* v. *Plumbers Local Union No. 100*, 421 U.S. 616, 635-637 (1975). Regulation under the NGA does not insulate companies from federal antitrust laws. See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374 (1973) (stating that "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws" by enacting the NGA). Rather, this Court has held that in the relationship between the NGA and federal antitrust laws, "the rule is to give effect to both if possible." *California* v. *FPC*, 369 U.S. 482, 485 (1962) (citation omitted).

This Court has not determined whether a federal antitrust action in a context such as this would be barred by the filed-rate doctrine. The filed-rate doctrine prevents federal and state courts from intruding upon FERC's authority to determine the reasonableness of a rate. See *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 962-964 (1986). Since 1992, FERC's blanket marketing certificates have "authoriz[ed] sales for resale at rates negotiated in a competitive market environment," *i.e.*, "a truly competitive market" in which "market forces * * * balance the supply and demand for natural gas at [just and] reasonable prices." 57 Fed. Reg. 57,952, 57,953, 57,958 (Dec. 8, 1992). Thus, when jurisdictional sellers engage in market manipulation directly affecting juris-

dictional rates, they act beyond the scope of their FERC-issued certificate authorizing their sale of natural gas. See *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. ¶ 61,174, at 61,690 (2004) (certificates "implicitly prohibited acts which would manipulate the competitive market for natural gas"); cf. *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 554 (2008) ("[U]nlawful market activity that directly affects contract negotiations eliminates the premise" that the FERC-authorized contract rates were "the product of fair, arms-length negotiations.").

This Court has also not decided whether the filed-rate doctrine would preclude a state-law breach-of-contract claim arising from a contracting party's market-manipulating misconduct. Cf. *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 579-580, 583-584 (1981) (barring contract claim challenging negotiated natural-gas rates but reserving question whether "affirmative misconduct" by a contracting party would warrant a different result). As this case comes to the Court, however, it does not involve the filed-rate doctrine or that doctrine's relationship to a federal antitrust or a state-law breach-of-contract action.

B. Section 1(b)'s Proviso Does Not Save Respondents' Claims From Preemption

The Ninth Circuit concluded that FERC's authority under Section 5(a) should be construed "narrowly" in light of "limitations imposed by Section 1(b)." Pet. App. 29a. Section 1(b) of the NGA grants FERC exclusive jurisdiction over "the field of matters relating to wholesale sales," *Schneidewind*, 485 U.S. at 305, while also containing a proviso that "expressly carves out a regulatory role for the States" in other

portions of the natural-gas industry. *Northwest Central*, 489 U.S. at 507. That proviso preserves a State's authority over direct (retail) "sale[s]" to end-users by specifying that the NGA "shall not apply to any other * * * sale of natural gas" beyond wholesale sales. 15 U.S.C. 717(b). This Court has accordingly concluded that the NGA's field-preemptive force should be interpreted in light of that proviso to avoid "nullify[ing]" its reservation of state authority. *Northwest Central*, 489 U.S. at 512, 514. But in this case, field preemption is consistent with the Congress's preservation of state authority over retail sales.

1. The court of appeals concluded that recognizing FERC authority over the "practices" directly affecting wholesale rates here would be inconsistent with the proviso because it would prohibit state laws from applying to "first sales and retail sales." Pet. App. 28a. That is incorrect.

a. As an initial matter, first sales do not implicate any additional state regulatory authority. When Congress removed first sales from FERC's jurisdiction over wholesale sales, it left that field free from price regulation by the States as well as by FERC. See *Transco II*, 474 U.S. at 422-423.

b. States do have authority to regulate actual retail sales of natural gas. But "the proviso of § 1(b) withh[o]ld[s] from [FERC] only *rate-setting* authority with respect to direct sales." *Louisiana Power & Light Co.*, 406 U.S. at 638. Here, however, respondents' claims are based on allegations that petitioners manipulated price indices by "reporting false information" to index publishers and "engaging in wash sales" that are reported to index publishers. Pet. App. 9a-10a.

With respect to false reports, the court of appeals observed that "some index pricing inputs [have been] misreported or [were] wholly fictitious." Pet. App. 27a (citation omitted). But a seller's misreporting of a sale price is a *post*-sale action that does not affect the actual rate for (or any other aspect of) the reported sale itself. A wholly fictitious price report is even further removed. Not only does such manipulative action purport to be a post-sale report, it does not even report the price of an actual sale.

With respect to wash sales, the Ninth Circuit indicated that "at least some of the transactions included in the indices" are retail sales over which FERC lacks rate-setting authority, Pet. App. 27a (citation omitted), apparently suggesting that such "wash sales" must be subject to state authority over retail sales. But a "wash sale" is not so much a sale as a *practice* in which parties collude to make offsetting trades. And in any event, a wash-sale transaction inherently rests on a *wholesale* sale of natural gas—*i.e.*, a "sale * * * for resale," 15 U.S.C. 717(b)—because the seller effectively sells natural gas for its immediate *resale* back to it. Such a sale for resale forming the core of a wash-sale transaction falls squarely within FERC's exclusive jurisdiction over wholesale sales.

As a result, respondents' state-law antitrust claims based on petitioners' reporting to price indices are not based on authority that Section 1(b) by its terms has reserved to the States over retail sales themselves. To be sure, false index reporting and wash sales that manipulate price indices can affect the price for *subsequent* retail sales, just as they directly affect wholesale sales that lie within FERC's exclusive jurisdiction. But Congress has made clear that its grant of

jurisdiction to FERC includes authority over practices directly "affecting" wholesale rates, 15 U.S.C. 717d(a), and the NGA contains no similar express reservation for the States. Thus, because FERC-regulated wholesale and state-regulated retail markets are affected by the *same* price indices, FERC's jurisdiction under the NGA, which occupies "the field of matters relating to wholesale sales," *Schneidewind*, 485 U.S. at 305, preempts state regulation of petitioners' manipulative practices alleged by respondents.[6]

2. For the foregoing reasons, the Ninth Circuit erred in concluding that FERC lacks authority to regulate the practices of FERC-jurisdictional sellers that directly affect FERC-jurisdictional rates simply because those practices also have some relation to retail sales. The court of appeals concluded that this

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[6] The NGA would not preempt a State's authority to regulate retail gas sales that the State decouples from the wholesale price indices at issue here. A State could, for instance, directly regulate the actual rates for such sales. FERC "lacks authority to fix rates for [such] direct * * * sales," *Conway Corp.*, 426 U.S. at 281 (quoting *Panhandle E. Pipe Line Co.*, 324 U.S. at 646), even if they affect FERC-regulated wholesale prices, because such state price regulation of retail sales falls squarely within Section 1(b)'s proviso. Likewise, a State might require that if a retail transaction employs a price index, the transaction must use an index based exclusively on retail sales (and not FERC-regulated wholesales) subject to the State's regulatory purview. A State could thereby separate retail from wholesale prices in a manner that would protect its authority from field preemption. But where a State allows retail sellers to set rates based on an index that includes FERC-regulated wholesale rates and is used to determine the price for FERC-regulated transactions, the State cannot trespass upon FERC's exclusive regulation of manipulative practices by jurisdictional sellers that directly affects FERC-jurisdictional sales.

Court's decision in *Northwest Central* supported its narrow interpretation of FERC's authority and that, unless that authority were read narrowly, "no 'conceptual core'" would provide a limitation preventing FERC's authority from swallowing state authority reserved by Section 1(b). Pet. App. 29a-30a, 32a. Both conclusions are incorrect.

In *Northwest Central*, this Court considered a state regulatory order that governed the timing and production of natural gas from the Kansas-Hugoton field by directing that a producer's right to pump its assigned gas-production quota would be cancelled if production was delayed too long. 489 U.S. at 497, 499, 503. Several interstate pipelines held long-term contracts with Hugoton producers entitling them to much of the field's potential production, but the pipelines had reduced their Hugoton purchases (effectively storing their gas in the field) because they had entered into other contracts that required that they take production from other locations (or pay for it). *Id.* at 501-505. The plaintiff pipeline argued that the NGA preempted the State's order because it exerted coercive pressure on pipelines to increase their purchases from that field, but the Court rejected that claim. *Id.* at 496-497.

The Court noted that Section 1(b) of the NGA explicitly states that the Act does not apply to the "production or gathering of natural gas," 15 U.S.C. 717(b), and it concluded that the State's order fell within that category as a regulation of the timing of production of natural gas within the State. *Northwest Central*, 489 U.S. at 511-512. The Court acknowledged that the state law "may result in pipelines making purchasing decisions that have an effect on their cost structures

and hence on interstate rates," but it concluded that the possibility that enforcement of the state law "*might* have *some* effect on interstate rates" was insufficient to warrant field preemption. *Id.* at 512-513 (emphases added). The Court thus distinguished the field-preemption holdings in *Northern Natural Gas* and *Transco II*, because *Northern Natural Gas* involved a state provision "directed at [pipeline] purchasers" and *Transco II* likewise involved "state ratable-take orders directed to pipelines" that "forc[ed] upon them certain purchasing patterns." *Id.* at 513-514 (citations and emphasis omitted).

Unlike *Northwest Central*, petitioners' state-law claims are based on practices of FERC-jurisdictional sellers that *directly affected* the price of wholesale gas within FERC's exclusive jurisdiction. The false price reports to and the manipulation of the indices alleged here are "not insignificant or tangential to jurisdictional rates." Pet. App. 111a. The indices both "embody jurisdictional rates" and were "*the* method by which jurisdictional rates are set." *Id.* at 111a-112a (emphasis added); see p. 4, *supra*. That close connection between petitioners' challenged practices and the rates for FERC-jurisdictional sales brings this case within the heartland of FERC's authority to regulate "practice[s] * * * affecting" such rates, 15 U.S.C. 717d(a).

The court of appeals was also incorrect in believing that recognizing FERC's authority in this case would swallow state rate-setting authority over retail gas sales. This case concerns only the practices of FERC-jurisdictional sellers that *directly* affect FERC-jurisdictional rates. Although FERC's jurisdiction extends to (a) false reporting to price-index publishers

by jurisdictional sellers about non-jurisdictional as well as jurisdictional trades and (b) wash-trading practices by jurisdictional sellers even if the offsetting trades purport to reflect separate retail trades, the existence of FERC jurisdiction reflects the unusual circumstance at the center of this suit: Both wholesale and retail natural-gas prices were based on the *same* price indices that were themselves based on reported wholesale and retail prices. The index-based wholesale and retail natural-gas markets have in that sense and to that extent partially merged. States may exercise their authority to separate their local markets from the wholesale market, see p. 28 n.6, *supra*, but if States permit retail natural-gas prices to be based on the same indices as wholesale sales, FERC's exclusive jurisdiction to regulate wholesale rates necessarily extends to the index-focused practices of jurisdictional sellers that directly affect those rates.

If FERC had lacked jurisdiction to regulate the sort of manipulative practices in this case before 2005, a significant portion of the practices by FERC-jurisdictional sellers that directly affected wholesale rates would have been left to a patchwork of state authority. Such state-by-state regulation would undermine FERC's ability "to regulate comprehensively and effectively the * * * [wholesale] sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act." *Northern Natural Gas*, 372 U.S. at 91-92; see *Louisiana Power & Light Co.*, 406 U.S. at 631 (In drawing the line between FERC and state authority in an area of potential overlap, "'we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide

that federal authority governs.'") (quoting *Transco I*, 365 U.S. at 19-20); see also *Schneidewind*, 485 U.S. at 310.[7]

C. FERC's Interpretation Of Its Statutory Authority Underlying Its 2003 Code Of Conduct Is Entitled To Deference

Even if the NGA were ambiguous about the scope of FERC's authority, this Court should defer to FERC's reasonable conclusion that it possesses that authority under the NGA. If a "'statute is silent or ambiguous'" regarding the proper scope of authority that Congress conferred on an agency, the agency's "reasonable interpretation" of "the scope of [its] statutory authority (that is, its jurisdiction)" is entitled to *Chevron* deference. *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868, 1874-1875 (2013) (citation omitted); see *Mississippi Power & Light Co.*, 487 U.S. at 380-381 (Scalia, J., concurring in the judgment) (FERC's construction of Federal Power Act, including provisions "designed to confine its authority," is entitled to *Chevron* deference.).

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[7] FERC did not exercise regulatory authority over non-jurisdictional sellers' index-related practices associated with non-jurisdictional sales before Congress's 2005 enactment of EPAct. In EPAct, Congress directed FERC to regulate the manipulative practices of "any entity" employed in connection with jurisdictional sales. 15 U.S.C. 717c-1. Under FERC's construction of that provision, Congress granted FERC authority to regulate *non*-jurisdictional entities' manipulative reporting about, and wash-trade practices purporting to involve, non-jurisdictional sales when they are used to manipulate wholesale gas rates, pp. 7-8, *supra*, thereby providing a single federal standard for such practices for all natural-gas sellers. This case, however, does not call for the Court to interpret the scope of FERC's authority under EPAct.

a. FERC has reasonably concluded that it possessed statutory authority before 2005 to regulate the type of manipulative conduct of jurisdictional sellers at issue in this case. In 2003, FERC amended its blanket gas-marketing certificates to impose a Code of Conduct on jurisdictional sellers. See pp. 5-7, *supra*. That Code expressly prohibited jurisdictional sellers from engaging in actions without a legitimate business purpose to manipulate market prices, including wash trades, and from making false price reports to index publishers. *Amendments to Blanket Sales Certificates*, 68 Fed. Reg. 66,323, 66,337 (Nov. 17, 2003) (promulgating 18 C.F.R. 284.403 (2004)). FERC specifically invoked "Sections 5, 7, and 16 of the NGA" as statutory authority to adopt that Code. *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. at 61,690.

As discussed above, Section 5(a) of the NGA authorized FERC to regulate "any * * * practice * * * affecting" rates subject to its jurisdiction and to prohibit such practices that are "unjust" or "unreasonable." 15 U.S.C. 717d(a). Section 7 further authorized FERC to attach to certificates for jurisdictional sellers "reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. 717f(e). And Section 16 authorized FERC to make orders, rules, and regulations and to take actions "as it may find necessary and appropriate to carry out [the NGA]." 15 U.S.C. 717*o*; see *Louisiana Power & Light Co.*, 406 U.S. at 642 (Section 16 "assures the [Commission] the necessary degree of flexibility" to carry out its "'broad responsibilities'" and "'therefore demand[s] a generous construction'") (citation omitted). FERC invoked those provisions in promulgating its 2003 Code of Conduct based on its findings that the

Code's "prohibited practices are unjust and unreasonable"; that "explicit" anti-manipulation prohibitions were "necessary to ensure that market-based sales of gas * * * will be just and reasonable"; and that "the public convenience and necessity" further warranted adopting the Code "to ensure a competitive and transparent market." *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. at 61,690. Although FERC did not analyze its authority further, its conclusion that the NGA conferred authority to address the prohibited practices is reasonable, see pp. 17-32, *supra*, and entitled to deference. See *City of Arlington*, 133 S. Ct. at 1868, 1874-1875.

b. The Ninth Circuit concluded that FERC's 2003 Code of Conduct did not suggest that "FERC had jurisdiction over the market manipulation at issue" here. Pet. App. 36a-37a. The court's reasons for its conclusion do not withstand scrutiny.

First, the Ninth Circuit concluded that the Code of Conduct applied only to practices arising from "sales within [FERC's] jurisdiction" because FERC noted that it "'does not regulate the entire natural gas market'" and applied the Code to "'that portion of the gas market which is within its jurisdiction.'" Pet. App. 38a (quoting 68 Fed. Reg. at 66,326). But FERC's rationale was that it could not regulate "all *sellers* of natural gas," 68 Fed. Reg. at 66,326 (emphasis added), not that it lacked authority to prohibit *jurisdictional* sellers from engaging in the type of conduct alleged here. The terms of the 2003 Code of Conduct thus broadly prohibited jurisdictional sellers from taking actions to manipulate "market prices" (including wash trades) and from providing false information to index publishers, without limiting those prohibitions

to contexts involving jurisdictional sales. 18 C.F.R. 284.403(a) and (b) (2004).

Second, the Ninth Circuit concluded that Congress's 2005 passage of EPAct's market-manipulation provision (15 U.S.C. 717c-1) would be "superfluous" if FERC had preexisting authority to regulate the conduct here. Pet. App. 37a-38a. That is incorrect. Section 717c-1 *expanded* the prohibitions in FERC's 2003 Code of Conduct by making it unlawful for "any entity"—not just jurisdictional entities—directly or indirectly to use a manipulative or deceptive device (as those terms are used in Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b)) in connection with a jurisdictional sale in violation of FERC's implementing regulations. See 15 U.S.C. 717c-1; pp. 7-8, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2014

APPENDIX

1. Section 1 of the Natural Gas Act, 15 U.S.C. 717, provides in pertinent part:

Regulation of natural gas companies

* * * * *

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * *

2. Section 2 of the Natural Gas Act, 15 U.S.C. 717a, provides in pertinent part:

Definitions

When used in this chapter, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

* * * * *

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

* * * * *

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

* * * * *

3. Section 4 of the Natural Gas Act, 15 U.S.C. 717c, provides in pertinent part:

Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

* * * * *

4. Section 4A of the Natural Gas Act, 15 U.S.C. 717c-1 (added 2005), provides:

Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

5. Section 5 of the Natural Gas Act, 15 U.S.C. 717d, provides:

Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do

so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

6. Section 7 of the Natural Gas Act, 15 U.S.C. 717f, provides in pertinent part:

Construction, extension, or abandonment of facilities

* * * * *

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be

served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

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(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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7. Section 16 of the Natural Gas Act, 15 U.S.C. 717*o*, provides:

Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.