No. 13-271

In the Supreme Court of the United States

ONEOK, INC. ET AL., PETITIONERS

v.

LEARJET, INC., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

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

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Natural Gas Act (NGA), 15 U.S.C. 717-717w, grants the Federal Energy Regulatory Commission (Commission or FERC) authority to regulate defined segments of the natural gas market. Section 717(b) provides FERC with jurisdiction over "the transportation of natural gas in interstate commerce," "the sale in interstate commerce of natural gas for resale," and "natural-gas companies engaged in such transportation or sale." The NGA does not apply "to any other transportation or sale of natural gas," "to the local distribution of natural gas," "to the facilities

used for such distribution[,] or to the production or gathering of natural gas." 15 U.S.C. 717(b). Those areas are generally left open to state regulation. See *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510 (1989).

In exercising its authority under the NGA, FERC acts 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), 717c. FERC has the same authority with respect to "any rule, regulation, practice, or contract affecting such rate." 15 U.S.C. 717d(a).

In 1978 and 1989, Congress "substantially narrowed" FERC's jurisdiction by removing "first sales" of natural gas from FERC's rate-setting jurisdiction. See 68 Fed. Reg. 66,323, 66,325 (Nov. 26, 2003) (citing Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432, and Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157). "First sales" are "sales of natural gas that are not preceded by a sale to an interstate pipeline, intrastate pipeline, local distribution 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 sales). 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 "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 the field unregulated by both FERC and the States. See *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422-423 (1986).

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. 13,267, 13,270 (Apr. 16, 1992); *id.* at 57,952, 57,957-57,958 (Dec. 8, 1992). During the time period at issue here (2000-2002), FERC's oversight of the market primarily consisted of this before-the-fact examination of market power, and the availability of a complaint process under 15 U.S.C. 717d(a).

b. This case concerns well-documented misconduct in the natural gas market, involving false price reporting to privately published 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) in the years 2000 and 2001, a period corresponding to the Western energy crisis of 2000-2002. Pet. App. 13a-14a; see 68 Fed. Reg. at 66,328, 66,329 (describing wash trades). Buyers and sellers in the natural gas markets use those price indices, which are intended to represent average natural gas prices at different times and places, as reference points for pricing all types of natural gas transactions, including wholesale transactions within FERC's jurisdiction, and non-jurisdictional transac-

tions (*i.e.*, retail sales and first sales). See Pet. App. 14a, 110a-112a.

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*). The report identified five major traders, each a petitioner here, as having "admitted that their employees falsified information provided to" the index publishers. *Id.* at ES-6. FERC 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." *Id.* at ES-1. 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." *Id.* at III-17. 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 *id.* at III-51 (recommendations).

After issuing the report, FERC amended all blanket marketing certificates explicitly to prohibit "engaging in actions without a legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion." 68 Fed. Reg. at 66,324. Those amendments, referred to as the 2003 Code of Conduct, also require that jurisdictional sellers (*i.e.,* natural gas companies engaged in the sale of natural gas in interstate commerce for

resale, 15 U.S.C. 717(b)) that choose to report to price indices must "provide accurate and factual information[,] and not knowingly submit false or misleading information or omit material information to any such publisher." 68 Fed. Reg. at 66,331; see 18 C.F.R. 284.288(a). 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 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 (May 19, 2004) (denying rehearing of the 2003 Code of Conduct). FERC also 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 generally wide use of price indices in natural gas and electric markets).

c. In the Energy Policy Act of 2005 (EPAct), Pub. L. No. 109-58, 119 Stat. 594, Congress expressly prohibited market manipulation and reporting of false price information. The EPAct also expanded FERC's enforcement authority to reach not only 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." 15 U.S.C. 717c-1.

In regulations implementing the EPAct, FERC explained that it was not expanding "the types of transactions subject to the Commission's jurisdiction" under the NGA. 71 Fed. Reg. 4244, 4247 (Jan. 26, 2006). FERC explained, however, that under the EPAct, "[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." *Id.* at 4247-4248. FERC stated that it "views the 'in connection with' element in the energy context as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction." *Id.* at 4249.

2. Petitioners are natural gas traders that engage in FERC-jurisdictional wholesale sales, as well as non-jurisdictional retail and first sales of natural gas. Pet. App. 12a, 81a-102a. Respondents are industrial and commercial natural gas users. *Id.* at 12a. Beginning in 2005, respondents brought state antitrust claims in state and federal court 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. The cases were consolidated in a multidistrict litigation proceeding. *Id.* at 12a. 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 their non-jurisdictional transactions with petitioners, *i.e.*, retail sales and first sales. *Id.* at 12a-13a. In 2007, petitioners moved for summary judgment on the ground that respondents' state-law antitrust claims were preempted by the NGA. *Id.* at 22a.

3. a. The district court initially denied petitioners' motion for summary judgment. 2:03-cv-01431 Docket entry No. 1025 (May 14, 2008). The court explained that, under Section 717(b), Congress gave 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." *Id.* at 6. 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," *i.e.*, petitioners' alleged manipulation of the natural gas market to increase the price of natural gas at retail or first sale, which "falls outside FERC's exclusive jurisdiction." *Id.* at 8, 16-17.

b. The district court later granted petitioners' motion for reconsideration. Pet. App. 124a-136a. Petitioners argued that it is not only their status as jurisdictional sellers that gives FERC exclusive jurisdiction over their alleged conduct, but FERC's authority under Section 717d(a) "to regulate any practice by a jurisdictional seller that affects a jurisdictional rate." *Id.* at 132a.

The district court recognized that FERC has jurisdiction under Section 717d(a) "to regulate any practice by a jurisdictional seller affecting a rate charged or collected * * * in connection with the transportation or sale of natural gas within FERC's jurisdiction." Pet. App. 133a. The court therefore ruled that "if [petitioners] were jurisdictional sellers and their alleged practices of false price reporting and wash trades were practices which directly affected a juris-

dictional rate, the practices fell within FERC's exclusive jurisdiction," and respondents claims would be preempted. *Id.* at 135a.

c. After further submissions, the district court granted petitioners' motion for summary judgment. Pet. App. 64a-123a. The court concluded that petitioners are jurisdictional sellers, *id.* at 77a; *id.* at 81a-102a, and that their alleged false price reporting and wash trades by petitioners directly affected jurisdictional rates because wholesale rates are also set by reference to the indices that petitioners had manipulated. *Id.* at 72a, 110a-112a.

4. a. The court of appeals reversed in relevant part. Pet. App. 1a-63a. The court concluded that Section 717d(a), although it provides FERC with jurisdiction over practices affecting wholesale rates, does not preempt state antitrust claims that "aris[e] out of price manipulation associated with transactions falling outside of FERC's jurisdiction." *Id.* at 24a. The court reasoned that preemption of respondents' state antitrust claims would "conflict[] with Congress's express intent to delineate carefully the scope of federal jurisdiction" set forth in Section 717(b). *Ibid.*; *id.* at 32a-33a. The court concluded that FERC's authority under Section 717d(a) should be read narrowly "to define the scope of FERC's jurisdiction within the limitations imposed by Section [717(b)]." *Id.* at 29a.

b. 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 in retail purchases 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 moved for summary judgment on the ground that the filed-rate doctrine and federal preemption barred the claims. *Id.* at 1030. Under the filed-rate doctrine, state and federal antitrust laws may not be used to invalidate a rate that is set or authorized by FERC. *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981).

The court of appeals concluded in *Gallo* that, under the filed-rate doctrine, "the market-based rate 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 were not equivalent to FERC-authorized rates because they were composed, in part, of fictitious rates and rates from non-jurisdictional sales. *Id.* at 1045. The court held that, "to the extent the indices are comprised of rates that are not FERC-authorized rates, the [filed-rate doctrine] does not bar [plaintiff's] claim that such rates are unfair and led to unfair retail rates," but that plaintiff "cannot challenge FERC-authorized rates that are incorporated in the indices." *Id.* at 1048. The court also held in *Gallo* that Congress's decision to remove first sales from FERC's jurisdiction meant that a plaintiff may "base[] damage claims" on manipulative reporting of first-sale transactions because, in its view, antitrust law "complement[s]" Congress's goal of deregulating first sales. *Id.* at 1046.

The court of appeals concluded in the decision below that the reasoning of *Gallo* "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.*

c. 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 in 2005, Congress enacted the EPAct, which prohibits market manipulation and authorizes FERC to promulgate regulations to protect natural gas purchasers. *Id.* at 37a. The court believed that the EPAct 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.

DISCUSSION

Under 15 U.S.C. 717d(a), FERC has exclusive authority over practices affecting rates charged by natural gas companies in connection with the interstate sale of natural gas for resale. Because the manipulation of price indices that are used to establish rates in both jurisdictional and non-jurisdictional natural gas transactions is a practice that directly affects jurisdictional rates, the court of appeals erred in concluding that FERC did not have exclusive authority in 2000 and 2001 to regulate petitioners' manipulation of the indices.

Although the court of appeals reached an incorrect conclusion about the scope of FERC's authority under

Section 717d(a), this Court's review is not warranted. Contrary to petitioners' contention, the court of appeals' decision does not conflict with any state supreme court decision. Furthermore, significant changes to the regulatory environment make it highly unlikely that the factual scenario giving rise to respondents' claims will recur, and FERC's expanded authority under the EPAct would presumably alter the preemption analysis going forward, making any decision by this Court on the scope of FERC's authority to regulate manipulation of the indices under Section 717d(a) of limited prospective significance.

A. FERC Had Exclusive Jurisdiction Over Petitioners' Manipulation Of The Privately Published Price Indices In 2000 And 2001

1. a. 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). By enacting 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).

As the court of appeals explained (Pet. App. 24-25), 15 U.S.C. 717(b) provides that the NGA applies to the sale of natural gas in interstate commerce for resale and to companies engaged in such sale, but the Act does not apply to "any other * * * sale of natural gas." *Ibid.* Although FERC thus does not have jurisdiction to regulate "the entire natural gas field," Congress "contemplated the exercise of federal power as

specified in the Act," *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510 (1989), and the Act provides FERC with authority to ensure that any "rule, regulation, practice, or contract affecting" rates charged by natural gas companies in connection with jurisdictional transactions is just, reasonable, and not unduly discriminatory, 15 U.S.C. 717d(a), 717c. As a result, the NGA "leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 91 (1963) (citation omitted).[1]

b. This case presents a unique scenario: in the natural gas market, both wholesale and retail natural gas rates were set with reference to the same privately published price indices. Pet. App. 110a-112a. Petitioners provided evidence that jurisdictional contracts included price terms set at index, *id.* at 111a n.19, and FERC's final report on the Western energy crisis concluded that "the Commission has jurisdiction over most of the transactions that form the basis for the indices and many Commission-jurisdictional transactions * * * are based on the indices." *Final Report* III-17.

Because manipulation of the indices thus directly affected the wholesale price of natural gas, the conduct that respondents challenge was a "practice * * * affecting" the rates charged by natural gas

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[1] This Court has observed with respect to a parallel provision of the Federal Power Act, 16 U.S.C. 791a *et seq.*, that "[t]he rules, practices, or contracts 'affecting' the jurisdictional rate are not themselves limited to the jurisdictional context." *FPC* v. *Conway Corp.*, 426 U.S. 271, 281 (1976).

companies in jurisdictional sales within the meaning of 15 U.S.C. 717d(a). The practice therefore was subject to FERC's exclusive authority under Section 717d(a) to determine whether practices affecting jurisdictional rates are just, reasonable, and not unduly discriminatory.

In conducting preemption analysis under Section 717d(a), this Court has looked to the effect of a state law, not its nominal subject, to determine whether the NGA has preemptive force. In *Schneidewind*, for example, Michigan sought to regulate the issuance of long-term securities 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, if the company's equity ratio moves beyond generally accepted limits, FERC may calculate a company's rates based on an imputed capital structure, rather than its actual capital structure, "to limit the burden on ratepayers of abnormally high equity ratios." *Schneidewind*, 485 U.S. at 302. Because the state law would permit the State to keep 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. Relying in part on FERC's authority under Section 717d(a) to regulate practices affecting wholesale rates, *id.* at 309, the Court explained that FERC essentially reviewed a

company's capital structure when determining a reasonable rate for the company, and the state law "[wa]s directed at * * * precisely the things over which FERC has comprehensive authority." *Id.* at 308.

Moreover, in the parallel context of the regulation of wholesale electric power under the Federal Power Act, the D.C. Circuit has held that FERC has authority to review rules related to power capacity pursuant to its authority under 16 U.S.C. 824e(a) to ensure that "practices * * * affecting" rates subject to FERC's jurisdiction are just and reasonable, even though the rules affected state decisions about generation facilities, which FERC cannot directly regulate by virtue of 16 U.S.C. 824(b)(1). See *Connecticut Dep't of Pub. Util. Control* v. *FERC*, 569 F.3d 477, 479 (2009), cert. denied, 558 U.S. 1110 (2010). Capacity-related requirements are far more removed from jurisdictional rates than the indices at issue here, which are expressly referenced in jurisdictional transactions.

2. a. The court of appeals concluded (Pet. App. 28a-36a) that FERC's authority under Section 717d(a) must be read narrowly because Section 717(b) excludes retail sales of natural gas from FERC's regulatory authority. The cases cited by the court of appeals, however, establish only that the practice regulated by FERC under Section 717d(a) must have a direct effect, not an incidental effect, on jurisdictional gas rates.

In *Northwest Central Pipeline Corp.*, the Court considered a state law that governed the timing and production of natural gas from the Kansas-Hugoton field, which the plaintiffs contended was preempted by the NGA because it would exert pressure on pipelines to increase purchases from Hugoton producers and

thereby "affect[] their purchase mixes and cost structures." 489 U.S. at 497. The Court noted that Section 717(b) explicitly states that the NGA does not apply to the "production or gathering of natural gas," and it concluded that the state law fell within that category as a regulation of the timing of production of natural gas within the State. *Id.* 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 "might have some effect on interstate rates" did not support a finding of preemption. *Id.* at 512-513.

In *American Gas Ass'n* v. *FERC*, 912 F.2d 1496 (1990), cert. denied, 498 U.S. 1084 (1991), the D.C. Circuit considered whether FERC had jurisdiction to review the justness and reasonableness of contracts governing non-jurisdictional sales on the ground that those contracts might affect jurisdictional rates. *Id.* at 1504. FERC had asserted in that case that its Section 717d(a) authority with respect to contracts affecting jurisdictional rates did not extend to non-jurisdictional contracts, but more importantly, the non-jurisdictional contracts that FERC had declined to review "'affect[ed]' [jurisdictional] rate[s] indirectly, merely by affecting the costs that determine what pipeline sales rates are * * * 'just and reasonable.'" *Id.* at 1506. The court concluded that contracts affecting the wholesale rate in such an indirect way "are beyond [Section 717d]'s reach." *Ibid.*

Unlike the practices at issue in the above cases, the manipulation of the indices here was "not insignificant or tangential to jurisdictional rates." Pet. App. 111a; see Learjet Br. in Opp. 8-9 (contending that manipula-

tion of the indices had only an "attenuated" effect on wholesale rates). As the district court explained, the indices were "the method by which jurisdictional rates are set and embody jurisdictional rates." Pet. App. 111a-112a; *Final Report* III-17. This case thus presents a unique situation in which privately published indices were used by the natural gas industry to set prices in both jurisdictional and non-jurisdictional sales of natural gas. In those circumstances, FERC's authority under Section 717d(a) to ensure that practices affecting jurisdictional rates are just, reasonable, and not unduly discriminatory granted FERC exclusive jurisdiction to regulate the manipulation of the indices.[2]

b. The court of appeals erred in relying on its decision in *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007), to hold that the NGA does not preempt "state law claims arising out of transactions outside of FERC's jurisdiction." Pet. App. 28a. Even assuming *arguendo* that *Gallo* was correctly decided, it did not control this case. The court in *Gallo* was primarily considering whether antitrust claims were precluded based on the filed-rate doctrine, which is why the court was concerned with whether the prices reported to the indices were from

[2] The court of appeals erred to the extent it suggested that the manipulative behavior at issue here is not a "practice" affecting wholesale rates. See Pet. App. 32a-34a (citing *California Indep. Sys. Operator Corp.* v. *FERC*, 372 F.3d 395 (D.C. Cir. 2004)). There is no question that FERC has had authority since 2005 to regulate market manipulation pursuant to the EPAct. See 15 U.S.C. 717c-1. But even before 2005, FERC was of the view that market manipulation was a "practice[]" that is unjust and unreasonable. *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. ¶ 61,174, at 61,690.

FERC-jurisdictional transactions, or were instead fictitious prices or prices reported for non-jurisdictional sales. 503 F.3d at 1045-1048. In this case, the question is whether manipulation of the indices during the relevant period was a practice affecting wholesale rates. Because the wholesale price of natural gas was pegged to the indices, Pet. App. 110a-112a, manipulation of the indices necessarily affected jurisdictional rates regardless of the underlying nature of the transactions included therein. Respondents' argument that their state-law claims are not preempted is based on the non-jurisdictional nature of their *transactions* with petitioners, not the manipulation of non-jurisdictional sales information reported to the indices. Learjet Br. in Opp. 4, 6; Wisc. Br. in Opp. 7-8, 19 n.20.

c. FERC's jurisdiction over the manipulation of the indices to the exclusion of the States does not mean that federal antitrust laws would be displaced to the extent they 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). 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). Unlike federal antitrust laws, application of state antitrust laws would "impos[e] on interstate natural gas wholesalers 50 different sets of state rules

concerning anticompetitive behavior." *State* v. *Reliant Energy, Inc.*, 289 P.3d 1186, 1193 (Nev. 2012), cert. denied, 133 S. Ct. 2853 (2013) (*Reliant*); see *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843, 869 (Tenn. 2010).[3]

B. The Court Of Appeals' Decision Does Not Conflict With Any State Supreme Court Decision

Petitioners contend (Pet. 12-16) that the court of appeals' decision conflicts with the Supreme Court of Tennessee's decision in *Leggett*, *supra*, and the Supreme Court of Nevada's decision in *Reliant*, *supra*. Petitioners' contention rests on a misunderstanding of those decisions, and there is no conflict that would warrant this Court's resolution.

1. In *Leggett*, the plaintiffs were commercial and residential consumers that had purchased natural gas from utilities at retail. 308 S.W.3d at 847. The utilities had previously "acquired the product wholesale from the defendants." *Id.* at 847-848. The plaintiffs alleged that the wholesalers had made false statements about natural gas transactions and engaged in wash trades as part of a scheme "to inflate the price of wholesale natural gas," and the utilities that pur-

[3] The Seventh Circuit held in *Illinois* v. *Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), cert. denied, 502 U.S. 1094 (1992), that application of a state antitrust law to pipeline transportation was not preempted by the NGA. Noting that the pipeline's arguments would apply equally to federal antitrust laws, and that the federal laws were not displaced, the court saw no reason to preempt a state law that "only mirrors" the federal laws. *Id.* at 1479. There is no indication that the pipeline raised a field preemption argument, which would have required distinguishing between the standards for preemption of a state law and implied repeal of another federal law.

chased gas at wholesale from the defendants then passed the inflated costs along to their retail customers. *Id.* at 848-849. The plaintiffs argued that their state-law antitrust claims were not preempted by the NGA because preemption applies only to wholesale transactions, whereas the plaintiffs "were retail-level customers." *Id.* at 850; *id.* at 865 (plaintiffs contended that "their claims are not pre-empted because they arise, at least in part, out of transactions that are not within FERC jurisdiction").

The Supreme Court of Tennessee stated that it "simply disagreed" with the plaintiffs' contention that their status as retail customers meant that their state antitrust claims were not preempted. *Leggett*, 308 S.W.3d at 872. The court explained that plaintiffs' claims were brought pursuant to the "indirect purchaser" doctrine recognized under Tennessee law. *Id.* at 852. Under that doctrine, "when a wholesaler violates [state antitrust law] and the cost of that violation is passed through a retailer to a customer, th[e] customer can seek to recover from the wholesaler, despite the fact that the two parties never directly conducted business with each other." *Ibid.* The court concluded that "[a]s indirect purchasers, [plaintiffs] are ultimately challenging wholesale prices," and their claims therefore "necessarily intrude upon the federal domain." *Id.* at 872.

2. In *Reliant*, the State of Nevada sued a natural gas wholesaler, alleging that the wholesaler (Reliant) had "conspired with the now-defunct Enron Corporation to drive up the price of natural gas." 289 P.3d at 1187. The State sued in its proprietary capacity "as a direct or indirect purchaser of natural gas * * * and also in its capacity as parens patriae on behalf of the

residents of the [relevant] areas * * * who are direct or indirect purchasers of delivered natural gas." *Id.* at 1188 n.2. The court described the case as one, like *Leggett*, see *id.* at 1192, involving "interstate natural gas wholesalers," *id.* at 1193, noting that FERC had concluded in its 2003 Final Report that "Reliant's sales were subject to its jurisdiction," *id.* at 1188. The court therefore concluded that the State's antitrust claim "improperly encroache[d] upon the [federal regulatory] field." *Id.* at 1193.

Reliant (a petitioner here) confirmed in its brief in opposition to the State's petition for a writ of certiorari in *Reliant* that the State was challenging manipulative conduct only with respect to wholesale transactions. Reliant stated that "[a]ll of the alleged misconduct occurred in FERC-jurisdictional sales between Reliant and Enron for later resale," and "[n]one of the allegedly unlawful practices occurred in the course of 'first sales' or any other sales outside of FERC's jurisdiction." Br. in Opp. at 5, *Nevada* v. *Reliant Energy, Inc.*, 133 S. Ct. 2853 (2013). Reliant, moreover, specifically stated that it would have likewise prevailed in that case under the Ninth Circuit's approach "because [the State] allege[d] state-law antitrust violations solely with respect to wholesale transactions over which FERC has exclusive jurisdiction." *Id.* at 14.

3. Because the Tennessee and Nevada courts analyzed state-law challenges to manipulation of the natural gas market by jurisdictional sellers to increase the wholesale price of natural gas in transactions that fall squarely within FERC's jurisdiction under Section 717(b), those courts had no occasion to address the specific question presented in this case—the scope of

FERC's jurisdiction to regulate practices *affecting* wholesale rates under Section 717d(a).

C. The Question Presented Lacks Prospective Importance Because The Regulatory Environment Has Changed

Further review in this case is also unwarranted because the question presented is of limited prospective importance due to significant changes in the regulatory environment in the wake of the Western energy crisis.

1. This case arose from highly unusual factual circumstances that existed in 2000 and 2001. The Western energy crisis was "an unprecedented situation in which numerous adverse events occurred simultaneously to place California and the entire West in an electricity crisis that had never before been experienced." *CAlifornians for Renewable Energy* v. *California Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058, at 61,243, 61,247 (2007). In addition to flawed market rules and market manipulation, there was "inadequate addition of generating facilities in the preceding years; a drop in available hydropower due to drought conditions; a rupture of a major pipeline supplying natural gas into California; strong growth in the economy and in electricity demand; unusually high temperatures; [and] an increase in unplanned outages of extremely old generating facilities." *Ibid.*; see *Morgan Stanley Capital Gr. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 539-541 (2008) (describing the Western energy crisis and, in part, FERC's response).

In the aftermath of widespread manipulation of the market by petitioners and others during that time period, the market is far more heavily regulated. The blanket marketing certificates issued by FERC ex-

plicitly prohibit "engaging in actions without a legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion." See 68 Fed. Reg. at 66,324. The certificates also require jurisdictional sellers that voluntarily report to price indices to "provide accurate and factual information[,] and not knowingly submit false or misleading information or omit material information to any such publisher." *Id.* at 66,331; see 18 C.F.R. 284.288(a).

Furthermore, in 2005, Congress enacted the EPAct, which expressly prohibits the type of manipulation that occurred in 2000 and 2001. Section 717c-1 provides that it is "unlawful for any entity, directly or indirectly, to use or employ, 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." See pp. 23-24, *infra*. And Congress drastically increased the available penalties for companies that engage in manipulative conduct. Section 717t-1 authorizes a civil penalty of $1 million per day for any violation of the NGA or any FERC rule.

In light of this altered statutory and regulatory framework, FERC continues to encourage, with significant success, the negotiated resolution of outstanding energy crisis claims before the Commission and the courts. See *Final Report* III-2; FERC, *The Commission's Response to the California Electricity Crisis and Timeline for Distribution of Refunds* 3 (Dec. 27, 2005) (noting FERC staff had, at the time of the report, secured settlements totaling over $6.3 billion), http://ferc.gov/legal/staff-reports/comm-

response.pdf. Settlement efforts continue today, more than a decade after the energy crisis ended. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 145 F.E.R.C. ¶ 61,015, at 61,058 (2013) (approving $750 million settlement between Powerex and California parties). Because of these significant changes to the regulatory environment since 2002, the circumstances giving rise to respondents' state-law antitrust claims are unlikely to recur.

2. Furthermore, in light of the enactment of the EPAct, it may be unnecessary in future cases to evaluate whether manipulation of price indices that are used to set rates in both jurisdictional and non-jurisdictional transactions is a practice affecting wholesale rates under Section 717d(a). Section 717c-1 explicitly gives FERC authority to regulate that practice and expands the authority to "any entity" that, "directly or indirectly," uses a manipulative device in violation of FERC rules "in connection with the purchase or sale of natural gas * * * subject to the jurisdiction of the Commission." That new authority, and FERC's interpretation of its new authority to "encompass[] situations in which there is a nexus between the fraudulent conduct of an[y] entity and a jurisdictional transaction," 71 Fed. Reg. at 4247, 4249; see p. 6, *supra*, has not yet been considered by the lower courts. Preemption analysis of state-law antitrust claims related to market manipulation in future cases would presumably begin with FERC's explicit authority to regulate that practice under Section 717c-1, thus rendering any decision of this Court concerning the scope of FERC's authority to regulate the practice under Section 717d(a) of limited prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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