
IN THE
Supreme Court of the United States

THE STATE OF NEVADA, IN ITS PROPRIETARY
CAPACITY AND AS PARENS PATRIAE;
PEGGY MAZE JOHNSON AND LAUNA
WILSON, INDIVIDUALLY AND AS CLASS
REPRESENTATIVES FOR ALL OTHERS
SIMILARLY SITUATED; AND LARRY LANCTO,
INDIVIDUALLY AND AS CLASS REPRESENTATIVE
FOR ALL OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

RELIANT ENERGY, INC.; RELIANT RESOURCES,
INC.; CENTERPOINT ENERGY, INC.; AND
KATHLEEN M. ZANABONI, AN INDIVIDUAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

CATHERINE CORTEZ MASTO
ATTORNEY GENERAL, STATE OF NEVADA
*WAYNE HOWLE
SOLICITOR GENERAL, STATE OF NEVADA
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1227
WHowle@ag.nv.gov

**Counsel of Record*

Attorneys for Petitioners

(Additional counsel listed on inside cover)

ERIC WITKOSKI
CHIEF DEPUTY ATTORNEY GENERAL,
STATE OF NEVADA
Consumer Advocate,
Bureau of Consumer Protection
10791 West Twain Ave.,
Suite 100
Las Vegas, NV 89135
(702) 486-3129 Direct
ewitkoski@ag.nv.gov

DOUGLASS A. MITCHELL
BOIES, SHILLER & FLEXNER
300 South Fourth Street,
Suite 800
Las Vegas, NV 89101
(702) 382-7300
dmitchell@bsflp.com

JAMES TYNAN KELLY
JAMES TYNAN KELLY PC
3000 Wesleyan St., Suite 350
Houston, TX 77027
(713) 888-1809

BRAD N. BAKER
BAKER, BURTON & LUNDY PC
515 Pier Avenue
Hermosa Beach, CA 90254
(310) 376-9893
Brad@bakerburtonlundy.com

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether the decision of the Supreme Court of Nevada holding that the Nevada Attorney General's action for damages under the Nevada state antitrust law is preempted as a matter of law by federal regulation of natural gas markets is in conflict with decisions of the Seventh and Ninth Circuits in *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) and *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007).
2. Whether it was error for the Nevada Supreme Court to base its "field preemption" conclusion on this Court's decision in *Transcontinental Pipe Line Co. v. State Oil & Gas Bd. of Mississippi*, 474 U.S. 409 (1986) without regard to subsequent limitations of that decision in *Puerto Rico Department of Consumers Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) and subsequent changes in the relevant statutory and regulatory framework enacted by Congress and the Federal Energy Regulatory Commission.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI.....	1
DECISION BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
A. FACTS	2
B. LEGAL AND REGULATORY FRAMEWORK.....	5
1. Statutory and Regulatory Framework	6
2. FERC Policies Deregulating Wholesale Markets	11
C. State Court Proceedings in the Nevada AG Suit	14

Table of Contents

	<i>Page</i>
REASONS FOR GRANTING THE PETITION.....	17
I. THE NEVADA SUPREME COURT DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE FEDERAL COURTS OF APPEAL BECAUSE IT IGNORED THE LIMITS OF THE FERC'S STATUTORY AUTHORITY.....	19
II. THE NEVADA SUPREME COURT'S FIELD PREEMPTION CONCLUSION IS UNSUPPORTED BY AN EXPRESSION OF CONGRESSIONAL INTENT IN THE RELEVANT STATUTORY SCHEME AND IMPROPERLY REVERSES THE PRESUMPTION AGAINST PREEMPTION APPLICABLE TO ENFORCEMENT ACTIONS UNDER NEVADA ANTITRUST LAW.	28
CONCLUSION	39

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE SUPREME COURT OF NEVADA, FILED SEPTEMBER 27, 2012	1a
APPENDIX B — ORDER OF THE DISTRICT COURT CLARK COUNTY, NEVADA FILED SEPTEMBER 27, 2007	21a
APPENDIX C — DISTRICT CASE INQUIRY—MINUTES, ENTERED ON APRIL 4, 2007	25a
APPENDIX D — STATUTORY PROVISIONS . . .	26a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Arkansas Elec. Coop. v. Ark. Public Serv. Comm'n</i> , 461 U.S. 375 (1983)	29, 34
<i>Bonito Boats, Inc. v. Thunder Craft Boats, Inc.</i> , 489 U.S. 141 (1989)	25
<i>Californians for Renewable Energy, Inc. v. Sellers of Energy and Ancillary Services</i> , 119 F.E.R.C. (CCH ¶ 61,058 (2007))	3
<i>California v. ARC America Corp.</i> , 490 U.S. 93 (1989)	29
<i>California v. Federal Power Commission</i> , 369 U.S. 482 (1962)	passim
<i>Credit Suisse Securities (USA) LLC v. Billing</i> , 551 U.S. 264 (2009)	21, 23
<i>Cuomo v. Clearing House Ass'n, L.L.C.</i> , 129 S. Ct. 2710, 174 L. Ed. 2d 464 (2009)	33, 34
<i>E. & J. Gallo Winery v. EnCana Corp.</i> , 503 F.3d 1027 (9th Cir. 2007)	passim
<i>English v. General Elec. Co.</i> , 496 U.S. 72 (1990)	19, 30

Cited Authorities

	<i>Page</i>
<i>Fed. Power Comm'n v. Hope Natural Gas Co.</i> , 320 U.S. 591 (1944)	9
<i>Federal Power Comm. v. Sierra Pacific Power Co.</i> , 350 U.S. 348 (1956)	22
<i>FPC v. Panhandle Eastern Pipe Line Co.</i> , 337 U.S. 498 (1949)	32
<i>Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.</i> , 935 F.2d 1469 (7th Cir. 1991), <i>cert. denied</i> , 502 U.S. 1094 (1992)	<i>passim</i>
<i>Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.</i> , 730 F. Supp. 826 (C.D. Ill. 1990), <i>aff'd sub nom Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.</i> , 935 F.2d 1469 (7th Cir. 1991), <i>cert. denied</i> , 502 U.S. 1094 (1992)	24
<i>In re Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968)	9
<i>Leggett v. Duke Energy Corp.</i> , 308 S.W.3d 843 (Tenn. 2010)	<i>passim</i>
<i>Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington</i> , 554 U.S. 527 (2008).....	2, 3, 8

Cited Authorities

	<i>Page</i>
<i>Nanopierce Techs. v. Depository Trust,</i> 123 Nev. 362, 168 P.3d 73 (2007)	6, 19
<i>National Ass'n of Gas Consumers v.</i> <i>All Sellers of Natural Gas in the United States</i> <i>of American in Interstate Commerce,</i> 106 F.E.R.C. (CCH 61,072 (2004))	13
<i>Northern Natural Gas Co. v.</i> <i>State Corporation Comm'n of Kansas,</i> 372 U.S. 84 (1963)	31, 32, 22
<i>Northwest Central Pipeline Corp. v.</i> <i>State Corp. Comm'n of Kansas,</i> 489 U.S. 493 (1989)	7, 9, 32, 33
<i>Otter Tail Power Co. v. United States,</i> 410 U.S. 366 (1973)	passim
<i>Phillips Petroleum Co. v. Wisconsin,</i> 347 U.S. 672 (1954)	9, 16
<i>Puerto Rico Department of Consumers Affairs</i> <i>v. Isla Petroleum Corp.,</i> 485 U.S. 495 (1988)	passim
<i>Rice v. Santa Fe Elevator Corp.,</i> 33 U.S. 218 (1947)	29
<i>Silkwood v. Kerr-McGee Corporation,</i> 464 U.S. 238 (1984)	38

Cited Authorities

	<i>Page</i>
<i>Transcontinental Gas Pipe Line Corp. v.</i> <i>State Oil and Gas Bd. of Miss.,</i> 474 U.S. 409 (1986)	<i>passim</i>
<i>United Distribution Cos. v. FERC,</i> 88 F.3d 1105 (D.C. Cir. 1996), <i>aff'd sub nom</i> <i>Associated Gas Distributors v. FERC,</i> 520 U.S. 1224 (1997)	7, 9, 10, 11
<i>United Gas Pipe Line Co. v.</i> <i>Mobile Gas Service Corp.,</i> 330 U.S. 332 (1956)	8, 22, 37
<i>United States v. Philadelphia Nat'l Bank,</i> 314 U.S. 321 (1963)	37
<i>Watters v. Wachovia Bank, N.A.,</i> 550 U.S. 1 (2007)	33
<i>Wyeth v. Levine,</i> 129 S. Ct. 1187 (2009)	38
 Statutes and Other Authorities	
Natural Gas Act, 15 U.S.C. §§ 717, <i>et seq.</i>	<i>passim</i>
15 U.S.C. § 717b	7
15 U.S.C. § 717c	8
15 U.S.C. § 717d	8
15 U.S.C. § 717f	7-8

Cited Authorities

	<i>Page</i>
15 U.S.C. § 717s(a)	<i>passim</i>
28 U.S.C. § 1257(a)	1
15 U.S.C. § 3301(21)	9, 10
Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301, <i>et seq.</i>	<i>passim</i>
15 U.S.C. § 3431	10
15 U.S.C. § 3431(a)	10
15 U.S.C. § 3364(e)	10, 20, 21, 24
15 U.S.C. § 3364(e)(1)	21
FERC Order 547, Regulations Governing Blanket Marketer Sales Certificates, 57 Fed. Reg. 57952 (November 30, 1992), <i>reh'g denied</i> , 62 FERC P 61,239 (1992)	12, 13, 27
FERC Order 636, 57 Fed. Reg. 13262 (April 16, 1992)	10, 11
Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157.	<i>passim</i>
Energy Policy Act of 2005, Pub. L. No. 109-58	13
<i>Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, "Final Report on Price Manipulation in Western Markets," FERC Docket No. PA02-2-000 (March 2003)</i>	<i>3</i>

Cited Authorities

	<i>Page</i>
<i>Amendments to Blanket Sales Certificates,</i> Order No. 644, 105 F.E.R.C. (CCH) ¶ 61,217 (2003), <i>reh'g denied</i> , 107 F.E.R.C. ¶ 61,174 (2003), <i>appeal docketed</i> , No. 04-1168 (D.C. Cir. May 28, 2004), <i>appeal voluntarily dismissed</i>	13
<i>Revisions to Record Retention Requirements</i> <i>for Unbundled Sales Service, Persons</i> <i>Holding Blanket Marketing Certificates,</i> <i>and Public Utility Market-Based Rate</i> <i>Authorization Holders, Order No. 677,</i> 115 F.E.R.C. (CCH) ¶ 61,212 (2006)	13
<i>Policy Statement on Natural Gas and Electric</i> <i>Price Indices, 104 F.E.R.C. (CCH) ¶ 61,121</i> (2003); <i>order on clarification, 105 F.E.R.C.</i> (CCH) ¶ 61,282 (2003); <i>order regarding future</i> <i>monitoring, 109 F.E.R.C. (CCH) ¶ 61,184 (2004);</i> <i>order on clarification, 112 F.E.R.C. (CCH)</i> 61,040 (2005)	13
<i>Amendments to Codes of Conduct for</i> <i>Unbundled Sales Service and for Persons</i> <i>Holding Blanket Marketing Certificates,</i> Order No. 673, 114 F.E.R.C. (CCH ¶ 61,166 (2006))	14
<i>Regulations Governing Blanket Marketer</i> <i>Sales Certificates, 57 Fed. Reg. 57952</i> (November 30, 1992), <i>reh'g denied, 62 FERC</i> ¶ 61,239 (1992)	12

PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of *certiorari* to review the judgment of the Supreme Court of Nevada.

DECISION BELOW

The opinion of the Supreme Court of Nevada is reported at 128 Nev. Adv. Rep. 46; 2012 Nev. LEXIS 89 (September 27, 2012). The Order of the District Court Clark County, Nevada filed September 27, 2007 (App. B). Minutes of District Court entered on March 4, 2007 (App. C).

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on September 27, 2012. No petitions for reconsideration or rehearing were filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). As described more fully in the Statement of the Case below, the question presented by Petitioner was properly presented to the Supreme Court of Nevada.

STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix to the Petition at App. D.

STATEMENT OF THE CASE

This case is an action by the Nevada Attorney General (Nevada AG) proceeding in *parens patriae* for enforcement of Nevada's antitrust laws against persons

who, the Nevada AG alleges, engaged in illegal price-fixing activity that contributed to significant increases in the price of natural gas for Nevada consumers in 2000 and 2001. The principal allegation is that the defendants and bankrupt co-conspirator Enron engaged in deceptive and manipulative natural gas trading activity on the “Enron Online” natural gas trading platform and caused substantial overcharges in retail natural gas and electricity prices paid by consumers in Southern Nevada. The district court dismissed the case on the pleadings on the ground that the “complaint centers on misconduct in the wholesale gas market which is within FERC’s exclusive jurisdiction.” App. 23a, 25a. The Supreme Court of Nevada, without addressing relevant language of the federal energy regulatory statutes or reconciling its analysis with this Court’s precedents concerning the relationships of federal regulatory statutes as applied to federal and state antitrust claims, affirmed the lower court’s preemption decision.

A. Facts

In 2000-2001, the western United States experienced a severe and prolonged energy crisis.¹ During this period, the wholesale price of electricity in Nevada, California and other western states frequently skyrocketed to unprecedented levels. App. 2a; *see also Morgan Stanley Capital Group, Inc.*, 554 U.S. at 539-541. Accompanying these electricity price spikes – and contributing to them – was a significant increase in the wholesale price of natural

1. The crisis was the backdrop for this Court’s decision in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 554 U.S. 527 (2008).

gas. App. 2a. After the crisis subsided, investigations by regulators and others concluded that market manipulation by electricity and natural gas commodity traders had been one of the causes of the elevated natural gas and electricity prices. See, e.g., *Morgan Stanley Capital Group*, 554 U.S. at 540 (citing *Californians for Renewable Energy, Inc. v. Sellers of Energy and Ancillary Services*, 119 F.E.R.C. (CCH) ¶ 61,058, pp. 61,243, 61,247 (2007)).

One investigation of natural gas markets in the Southwest by the Staff of the Federal Energy Regulatory Commission² identified certain egregious and manipulative trading practices by respondent Reliant Resources, Inc. and its chief western trader, Mary Kathleen Zanaboni. The Staff concluded that Reliant's trading tactics substantially elevated natural gas prices in the Southwest. *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, "Final Report on Price Manipulation in Western Markets," FERC Docket No. PA02-2-000 (March 2003) (FERC Staff Report). Based on the facts identified in the FERC Staff Report, in December, 2004, the State of Nevada in its proprietary capacity as a natural gas consumer and as *parens patriae* on behalf of natural gas consumers in the State filed suit in Nevada state district court against Reliant Energy, Inc., Reliant Resources, Inc., Centerpoint Energy, Inc. and Kathleen M. Zanaboni (collectively, "Reliant") alleging violations of Nevada's Unfair Trade Practices Act, N.R.S.

2. This agency is referred to as the "FERC" or the "Commission." References to the Commission cover either or both of the FERC and its predecessor agency, the Federal Power Commission.

Chapter 598A.³ The State alleged that Reliant, along with non-party co-conspirator Enron Corporation (Enron), had participated in a conspiracy to manipulate the natural gas “spot” markets in the western United States during the November 2000 through May 2001 time period.

The price fixing conspiracy alleged by the Nevada AG involved “churning” trades initiated by Reliant on the Enron Online electronic trading platform and a secret “netting” agreement between Reliant and Enron. “Churning” was the rapid-fire buying and selling of natural gas volumes in a market tied to delivered gas supplies at a pipeline junction at Topock, Arizona, near the Arizona borders with California and Nevada. Under the gas pricing practices then prevalent in the natural gas market, natural gas costs for end consumers in Southern Nevada and California were tied to “index” prices at the Topock location. Reliant, which was at the relevant time a major generator of electricity in the Southwest, was motivated to engage in the churning in order to obtain natural gas prices that were relatively lower than its competitor generators of electricity, but was indifferent to absolute price levels because the cost was always recovered through its electricity sales.

The Nevada AG’s complaint also asserted that Reliant’s ability to trade profitably by churning was facilitated by a secret verbal “netting” agreement between Reliant and Enron. The netting agreement allowed Reliant to trade nominally volumes of natural gas greatly in excess

3. The State of Nevada was joined by three class representative plaintiffs. After the filing of the case, Reliant has gone through a series of mergers and now operates as GenOn Energy.

of its actual requirements but to settle each day's trades with Enron on a net basis. On at least one trading day Reliant traded as much as 60% of the Topock locations deliverable capacity. As noted above, this provided Reliant with significant economic and operational benefits by keeping its fuel costs lower than competitors and giving it greater access to constrained pipeline capacity. *See* App. 4a. However, because the Enron Online platform was a "one-to-many" electronic trading platform in which Enron was the counter-party to all transactions, the spurious churning trades and prices were visible to the market, but the spurious character was not. What was visible was a false and artificial appearance of scarcity and volatility that produced extreme spikes in spot natural gas prices. These Topock prices then flowed through to end consumers of natural gas and electricity through the index pricing mechanism.

B. Legal and Regulatory Framework

At both the trial court and appellate levels of the Nevada courts, Petitioner has consistently contended that the Topock market was wholly unsupervised by the FERC and not subject to any form of rate regulation. These allegations are not easily squared with the idea that the FERC, a non-regulating regulator, nonetheless has a preemptive "exclusive jurisdiction" over the relevant transactions. Nonetheless, the Nevada Supreme Court, accepted the preemption analysis of the Tennessee Supreme Court in *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010) and rejected that of *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007), and concluded that the "field preemption" plank of this Court's implied preemption doctrines required dismissal

of the case even though there was no actual regulation of the relevant transactions and market. App. 4a, 19a.

The Nevada Supreme Court noted that under its own precedent, a claim of field preemption requires the court to conduct a searching examination of the whole regulatory scheme that is claimed to be preemptive. *Nanopierce Techs. v. Depository Trust*, 123 Nev. 362, 371, 168 P.3d 73, 79-80 (2007). The court did not, however, engage in any detailed, direct review of the federal scheme applicable to the natural gas industry, but relied primarily on the historical review by the Tennessee Supreme Court in the *Leggett* case.

1. Statutory and Regulatory Framework

Federal regulation of the natural gas industry may be summarized as a period of increasing regulation from passage in 1938 of the Natural Gas Act (NGA), (15 U.S.C. §§ 717, *et seq.*) and a trend of deregulation from 1978 through the 2000-2001 period relevant to the present case. Congress initiated the deregulatory trend with the Natural Gas Policy Act of 1978 (NGPA), (15 U.S.C. §§ 3301, *et seq.*), and completed it with the Wellhead Decontrol Act of 1989 (Decontrol Act) Pub. L. No. 101-60, 103 Stat. 157.

FERC policy in the 1980s and 1990s advanced this deregulatory trend. The key events in this process were the transformation of interstate pipeline companies from proprietary resellers of natural gas to “open access” transporters of gas for third parties, and the promotion of a free natural gas commodity market. Limitation of interstate pipelines to transportation functions was accomplished through regulations issued under

regulations issued under the auspices of FERC Orders 436 in 1985 and Order 636 in 1992. Additionally, FERC's Order 547 in 1992 established an unregulated natural gas commodity market for merchant energy companies that were not pipelines, and the commodity transactions involving such unregulated market participants were not subject to rate regulation or filing requirements. *See* pp. 23-25, *infra*.

The structure of the natural gas industry for regulatory purposes has three phases: production, transportation, and distribution. *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1122 (D.C. Cir. 1996), *cert. denied sub. nom. Associated Gas Distributors v. FERC*, 520 U.S. 1224 (1997) (“*United Distribution Cos.*”). Federal regulation of the natural gas industry is focused on its interstate components. The NGA grants three bases of jurisdiction to the Commission, all related to interstate commerce: jurisdiction over (i) “the transportation of natural gas in interstate commerce, . . . (ii) the sale in interstate commerce of natural gas for resale . . . and (iii) natural-gas companies engaged in such transportation or sale.” 15 U.S.C. § 717b (numerical indices added). Matters related to intrastate transportation, local distribution, and distribution facilities, “the production or gathering of natural gas” are areas of state authority exempt from federal authority under the NGA. *Id.*; *see also Northwest Central Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 506-507 (1989).

Under the original regulatory scheme of the NGA, natural gas companies conducted all sale or transport operations under “certificates of public convenience and necessity” issued under section 7 of the NGA. 15 U.S.C.

§ 717f. NGA sections 4 and 5 require all rates for sale or transportation to be “just and reasonable.” 15 U.S.C. §§ 717c and 717d. The NGA also includes a specific provision limiting the power of the Commission with respect to the antitrust laws. *See* NGA § 20(a)(15 U.S.C. § 717s(a)).

The power and mechanisms of the Commission under the NGA to supervise rates is different from the uniform pricing model associated with the former Interstate Commerce Commission (ICC). Under the NGA system, rates and terms of service were set initially by the pipeline through privately-negotiated gas sales or transportation contracts. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 330 U.S. 332, 341 (1956); *see also Morgan Stanley Capital Group*, 554 U.S. at 531-535 (discussing equivalent provisions of the Federal Power Act). *Mobile*, 330 U.S. at 341. The contracts were filed with, and reviewed by, the Commission on a contract by contract basis, and were not subject to any uniformity requirement. *Mobile*, 330 U.S. at 341. The Commission had authority to approve or disapprove the agreement under the just and reasonable standard, but only limited direct authority to modify contractual terms. *Mobile*, 330 U.S. at 341; *Morgan Stanley*, 554 U.S. at 531-535. This Court has declined to characterize the Commission’s supervisory authority as a “rate-making [or] rate-changing procedure.” *Mobile*, 330 U.S. at 341. The Commission’s power “is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. *Id.* Because rates were set initially on a contract by contract basis, and the contracts were not subject to a uniformity requirement, natural gas companies were not allowed to change rates through unilateral tariff filings as was commonly done in the ICC context.

From the passage of the NGA in 1938 to 1954, the Commission refrained from regulating wellhead sale contracts to pipelines because it considered such transactions exempt from NGA regulation. *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 612-13, 614 (1944). In 1954, this Court overruled *Hope* and held producers making sales to pipelines were "natural gas companies" under the Act, and their wellhead sales to pipelines subject to Commission jurisdiction. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 677 (1954). Over time, the *Phillips* mandate for regulation of producer prices came to be seen as a failure. *United Distribution Cos.*, *supra*, 88 F.3d at 1123.⁴ This led Congress in 1978 to pass the NGPA. 15 U.S.C. §§ 3301, *et seq.* The NGPA did not amend the NGA's jurisdictional provisions, but instead introduced the concept of "first sales" (15 U.S.C. § 3301(21)) and took such first sales "outside the coverage of the NGA." *Northwest Central Pipeline Corp.*, 489 U.S. at 502; *see also Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Miss.*, 474 U.S. 409 (1986); *United Distribution Cos.*, 88 F.3d at 1123. According to the FERC,

The NGPA created new statutory rates for the wholesale gas market, for so-called "first sales" of natural gas, *in lieu of rates established by the Commission*. As part of the new rate structure, the NGPA also started the process of decontrolling wellhead prices of natural gas.

4. Justice Harlan noted that after *Phillips*, "the Commission's regulation of producers' sales became increasingly laborious, until, in 1960, it was described as the outstanding example in the federal government of the breakdown of the administrative process." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 758 (1968).

Upon decontrol, NGPA Section 601 *removed much of the pricing of the nation's natural gas supplies from the Commission's regulatory jurisdiction.*

FERC Order 636, 57 Fed. Reg. 13262, 13270-71 (April 16, 1992). Like the NGA, the NGPA includes a provision referencing the antitrust laws. Entitled "Antitrust Protections," NGPA section 304(e)(15 U.S.C. § 3364(e) sets up a limited defense to antitrust liability, stating, in part: "There shall be available as a defense for any person to civil or criminal action brought for violation of the Federal antitrust laws (or any similar law of any State). . . ." *Id.* (e)(1).

In 1989, Congress passed the Wellhead Decontrol Act (Decontrol Act). Pub. L. No. 101-60, 103 Stat. 157. By this Act, "Congress completed the process of deregulating the producer sales market." *United Distribution Cos.*, 88 F.3d at 1125. The Act completely removed FERC's jurisdiction over all "first sales" of natural gas as defined in 15 U.S.C. § 3301(21). It amended the NGPA section 601(a)(1)(A)(15 U.S.C. § 3431(a)) to read: "For purposes of section 1(b) of the Natural Gas Act, *the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply* to any natural gas solely by reason of any first sale of such natural gas." (emphasis added). Moreover, it eliminated the FERC's rate supervisory power conclusively by establishing that "for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable." Pub. L. No. 101-60, § 3(b)(7)(*amending* NGPA § 601(15 USC § 3431). Because the NGA is the sole basis for FERC jurisdiction over natural gas sale transactions,

this provision eliminated all FERC regulatory power left first sale prices unregulated by the FERC. *Gallo, supra*, 503 F.3d at 1046.

2. FERC Policies Deregulating Wholesale Markets.

In the 1980s, prior to the Decontrol Act, the FERC changed its regulatory policies in order to foster a competitive natural gas commodity. *United Distribution Cos.*, 88 F.3d at 1122-1127. The policy focus was to induce pipelines to withdraw from their traditional “merchant” business of buying and reselling gas and to become, instead, “open access” pipelines engaged solely in transportation services. These policies were voluntary under FERC Order 436 but became mandatory under FERC’s Order 636, *supra*. Thereafter, “pipeline sales”,⁵ the sole segment of the commodity market that remained subject to the FERC’s traditional NGA jurisdiction, became a vanishingly small segment of the market.⁶

5. The FERC under Order 636 instituted “blanket certificates accompanied by “light handed regulation” for gas sales by pipelines. *United Distribution Cos.*, 88 F.3d at 1126. The voluntary program under Order 436 reduced pipeline sales to end user markets from 90% of sales to 21%. *Id.* at 1125. Order 636 eliminated the bundling of sales and transportation that created advantages for such firm sales and was intended to reduce this percentage further. *Id.* at 1126.

6. This case was dismissed at the pleading stage and no discovery occurred. Petitioner cannot definitively assert that none of the sales in the Topock market were pipeline sales. However, pipelines are obligated to report such sales quarterly. Petitioner submitted a declaration to the district court establishing that two of the three long distance pipelines serving the Southern

With pipelines transformed from proprietary gas resellers to open access transporters, the natural gas commodity market became populated by various merchant energy companies who were shippers on the pipelines. FERC policy promoted a completely free market with respect to these participants in the commodity markets. The key initiative was the FERC's "blanket certificate program" issued under FERC's Order 547.⁷ The order,

Nevada market, El Paso Natural Gas Co. and Kern River Transmission, made no pipeline sales. The sales reported by the third, Transwestern, constituted a very small percentage of the pipeline's capacity.

7. The order and regulations are very terse, and bear extensive quotation:

The Federal Energy Regulatory Commission (Commission) is issuing a final rule governing jurisdictional sales for resale of natural gas by all persons who are not interstate pipelines. The final rule issues blanket certificates of public convenience and necessity authorizing certificate holders to make jurisdictional gas sales for resale at negotiated rates, with pregranted abandonment. The blanket sales certificates (marketing certificates) are issued by operation of the rule itself--there is no need or requirement for persons to file applications seeking such authorization. The final rule provides authorization that is equivalent to that of, or more expansive than, our prior individual marketing authorizations. ... Further, the marketing certificates issued by the final rule are of limited jurisdiction. As such, the holders of marketing certificates are not subject to any other regulation under the Natural Gas Act jurisdiction of the Commission by virtue of transactions under the certificates.

Regulations Governing Blanket Marketer Sales Certificates, 57 Fed. Reg. 57952 (November 30, 1992), *reh'g denied*, 62 FERC ¶ 61,239 (1992).

covering every market participant that is not an interstate pipeline, may fairly be characterized as defining a wholly free market using the language of regulation. “Certificates” to allow market participation were issued “by operation of the rule” without necessity of application to the FERC, and provided for “pre-granted abandonment”, i.e., the right to exit the market without necessity of FERC permission. Moreover, the certificates were of “limited jurisdiction,” meaning the holders “are not subject to *any other regulation* under the Natural Gas Act jurisdiction of the Commission by virtue of transactions under the certificates.” Order 547 (emphasis added). This automatic “blanket” certificate program allowed non-pipeline sellers remaining within FERC’s wholesale jurisdiction to make natural gas sales at prices free of regulatory obligation or supervision. *See e.g., National Ass’n of Gas Consumers v. All Sellers of Natural Gas in the United States of American in Interstate Commerce*, 106 F.E.R.C. (CCH) 61,072 at PP 6-8 (2004).⁸

8. Following the energy crisis of 2000-2001, FERC imposed certain anti-market manipulation and record retention conditions on blanket certificates. *See Amendments to Blanket Sales Certificates*, Order No. 644, 105 F.E.R.C. (CCH) ¶ 61,217 (2003), *reh’g denied*, 107 F.E.R.C. ¶ 61,174 (2003), *appeal docketed*, No. 04-1168 (D.C. Cir. May 28, 2004), *appeal voluntarily dismissed*; *Revisions to Record Retention Requirements for Unbundled Sales Service, Persons Holding Blanket Marketing Certificates, and Public Utility Market-Based Rate Authorization Holders*, Order No. 677, 115 F.E.R.C. (CCH) ¶ 61,212 (2006). As well, FERC also adopted policies aimed at preventing false market price reporting – one of the factors contributing to the energy crisis. *Policy Statement on Natural Gas and Electric Price Indices*, 104 F.E.R.C. (CCH) ¶ 61,121 (2003); *order on clarification*, 105 F.E.R.C. (CCH) ¶ 61,282 (2003); *order regarding future monitoring*, 109 F.E.R.C. (CCH) ¶ 61,184 (2004); *order on clarification*, 112 F.E.R.C. (CCH) ¶ 61,040 (2005). Following the enactment of the Energy Policy Act of 2005, Pub. L. No. 109-58, FERC adopted

C. STATE COURT PROCEEDINGS IN THE NEVADA AG SUIT

The Nevada AG's state court complaint against Reliant alleged a single violation of Nevada's Unfair Trade Practices Act, N.R.S. Chapter 598A.

After removal of the Nevada AG's suit to federal court and a remand back to state trial court, Reliant moved to dismiss, arguing that federal regulation of natural gas wholesales preempted Nevada's antitrust law and that Nevada courts lacked personal jurisdiction over them.⁹

more generalized anti-market manipulation requirements. *See generally Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, Order No. 673, 114 F.E.R.C. (CCH) ¶ 61,166 (2006).

9. Reliant also maintained that FERC had examined its manipulative conduct in the Topock market and exonerated Reliant. Reliant based this contention FERC's approval of Reliant's settlement agreement with the FERC Staff. *See Reliant Energy Services, Inc.*, 105 F.E.R.C. (CCH) ¶ 61,008 (2003). The Supreme Court of Nevada did not mention or rely on the settlement order in making its preemption ruling, but its factual recitation seems to suggest a view that the staff investigation and settlement as an official determination by FERC that it had jurisdiction over Reliant's conduct. It is not. As the Nevada AG pointed out below, neither the State of Nevada nor its consumers were parties to this settlement; the agreement is not between the FERC and Reliant, but is rather between Reliant and the FERC's Office of Market Oversight and Investigations ("OMOI"); the settlement agreement obligated Reliant to pay multimillion dollar penalties for misconduct in electric markets, but zero dollars for gas market manipulation; that the settlement agreement with the OMOI specified, word for word, the language concerning natural gas issues to be included in the FERC's order approving the settlement, and that non-inclusion of that language would void the settlement; and that the FERC declared its order approving the settlement does not constitute precedent for any purpose.

The Nevada AG opposed the motions to dismiss, arguing that the federal energy regulatory scheme over natural gas did not provide antitrust immunity, citing, among other authorities, *California v. Federal Power Commission*, 369 U.S. 482 (1962); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). The Nevada AG also disputed Reliant's contention that state antitrust claims were preempted by FERC's authority under the NGA, particularly in light of the effective deregulation of the wholesale market. *Id.* at 9-17.

The state trial court issued a minute order on April 3, 2007 dismissing all defendants on federal preemption grounds, and additionally holding that Nevada lacked personal jurisdiction over Ms. Zanaboni. App. 5a. The trial court entered its judgment on September 27, 2007 in a three-page order. App. 22a-24a. A motion to alter or amend the state trial court judgment citing the Ninth Circuit's decision in *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007) was denied.

The Nevada AG filed a timely notice of appeal to the Supreme Court of Nevada. Once again, the Nevada AG's lead argument on appeal was that Nevada state antitrust laws are not preempted by federal energy regulatory statutes under well-established precedents of this Court, including *California v. Federal Power Commission*, 369 U.S. 482, *Otter Tail Power Co. v. United States*, 410 U.S. 366 and of the Seventh Circuit in *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992). Petitioner also objected to the field preemption rationale of the Tennessee Supreme Court in *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010), and renewed the non-preemption

argument based on *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007). The objections pointed out that *Leggett* conducted no analysis of the relationship of antitrust law and the federal regulatory scheme. Moreover, Petitioner argued that *Leggett*'s reliance on this Court's *Transcontinental* case is inapposite because the underlying disputes involved purely regulatory conflicts between the FERC and state regulators that are remote from general law enforcement cases under antitrust laws of general application. Despite the broad language in the *Transcontinental* line of cases emanating from this Court's 1954 *Phillips* decision, these cases boil down to the modest principle that state regulatory attempts to regulate the interstate operations of natural gas pipelines are preempted. The Nevada AG's effort to enforce the Nevada antitrust law against non-pipeline participants in the deregulated natural gas commodity markets cannot be characterized as "regulation" under *Transcontinental* and similar cases.

The Supreme Court of Nevada issued its opinion on September 27, 2012 affirming the trial court's dismissal of the Nevada AG's complaint. App. 2a-3a. The court did not directly address the Nevada AG's contention that the NGA does not insulate natural gas traders from state or federal antitrust liability under this Court's precedents. Instead, the Nevada Supreme Court analyzed the case as presenting purely an issue of federal preemption, concluding that the Nevada AG's claims were barred under field preemption principles. App. 7a-14a.

The Nevada Supreme Court explicitly recognized the inconsistency between the *Leggett* and *Gallo* cases and followed *Leggett*. App. 14a. The opinion justified rejection

of *Gallo's* non-preemption conclusion on the policy ground that allowing state antitrust enforcement suits "would devastate two of the additional purposes of the federal statutory scheme: national uniformity and freedom from burdensome government intervention." App. 18a (*quoting Leggett*, 308 S.W. 3d at 868-69). Such enforcement of state laws, the court concluded, would result in "a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market," *id.* at 19a, a result the court found inconsistent with what it perceived to have been Congress' "purposeful deregulation" of natural gas commodity markets. *Id.* The Supreme Court of Nevada concluded that "[s]tate antitrust law cannot coexist peacefully with the natural gas federal regulations." *Id.* Acknowledging that its ruling would leave the citizens of Nevada without redress, the court asserted that "the long and entangled history of natural gas regulation in this country requires this result," concluding that "[b]ecause Congress has afforded no room for imposition of state-law requirements, federal preemption bars this action." App. 19a.

REASONS FOR GRANTING THE PETITION

The decision of the Nevada Supreme Court is in conflict with two decisions of United States Courts of Appeal holding that federal natural gas legislation and regulation is not preemptive of state antitrust law. The Nevada Supreme Court recognized that its decision and that of the Tennessee Supreme Court in *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010) conflicts with the holding of *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007). App. 14a. This is a particularly clear conflict because this action by the Nevada AG,

Leggett and *Gallo* arise out of the same general set of events associated with the energy crisis in the Southwest, though this case is more narrowly focused.

The case below is also in conflict with the decision of the Seventh Circuit in *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) in which held that a FERC regulated interstate pipeline had no preemption defense to a cause of action under Illinois state antitrust law. Petitioner presented *Illinois* to the Nevada court, and the court's failure to address the decision is puzzling. It is a *parens patriae* action for enforcement of state antitrust law like this one, and is on all fours with this case with respect to the preemption issue. There is a clear conflict between *Illinois* and this case that requires resolution by this Court.

Apart from these conflicts, the reasoning of the Nevada Supreme Court and the *Leggett* case represents an unwarranted application of the reasoning of this Court in *Transcontinental Pipe Line Co. v. State Oil & Gas Bd. of Mississippi*, 474 U.S. 409 (1986). The case is inapposite for a number of reasons, but the key error is the Nevada court's application of a burden shifting rule in implied preemption cases that this Court criticized and refused to apply in *Puerto Rico Department of Consumers Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988). Essentially, *Isla* reaffirmed the general preemption canons requiring that implied preemption be based on positive expressions of Congressional intent within a legislative scheme, and the presumption *against* preemption of the exercise of state laws within the traditional police powers of the States. The Nevada opinion does not identify a true conflict

between state and federal law so the decision represents a singularly striking judicial overstretch. It is improper to elevate judge-made implied preemption categories over traditionally restrictive preemption rules grounded in recognition of the general equality of sovereignty of the States and the federal government within the federal system.

I. THE NEVADA SUPREME COURT DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE FEDERAL COURTS OF APPEAL BECAUSE IT IGNORED THE LIMITS OF THE FERC'S STATUTORY AUTHORITY

The issue below concerned whether petitioners' claim that defendants' "alleged price-fixing activities [related to natural gas sales] violated" Nevada unfair trade practices law could be heard by the courts or "is preempted by federal law." App. 2a-3a. Here the Nevada Supreme Court concluded that "field preemption" of federal natural gas regulatory statutes precluded, as a matter of law, maintenance of suit for overcharges under Nevada's antitrust law. App. 19a.

In general, "preemption is a question of congressional intent." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). The Nevada Supreme Court examined the federal preemption under the standards that it outlined in *Nanopierce Techs. v. Depository Trust*, 123 Nev. 362, 371, 168 P.3d 73, 79-80 (2007). The court recognized that the "field preemption" doctrine requires analysis of the "entire regulatory scheme . . . to determine whether, based on its level of comprehensiveness or the nature of the field regulated, Congress intended to preclude states from

also imposing requirements on that field,” (App. 7a), but the Court did not directly analyze the scope of the three pertinent statutes governing federal regulation of natural gas matters: the NGA, the NGPA,¹⁰ and the Decontrol Act. Had the court examined these statutes and settled precedent based on such statutes, it would have recognized that antitrust matters are outside the scope of federal natural gas legislation and regulation and such legislation is neither preemptive nor preclusive of the application of state or federal antitrust law to matters within the actual or potential regulatory coverage of the FERC.

1. The Nevada Court began its preemption analysis with a discussion of the history of federal regulation under the NGA. App. 8a-14a. Importantly, the Court omitted any examination of how NGA regulation or subsequent legislation intersects with antitrust law. Both Section 20(a) of the NGA (15 U.S.C. § 717s(a)) and NGPA § 304(e) (15 U.S.C. § 3364(e)) specifically reference the antitrust laws.¹¹ Section 20(a) authorizes the Commission to proceed directly in the federal courts to enjoin “acts or practices which constitute or will constitute a violation” of the provisions of the NGA, but requires the Commission to refer antitrust violations to the Attorney General for

10. The Court does quote without comment the NGPA’s definition of “first sale” and does not analyze the concept. App. 10a n. 5.

11. NGA § 20(a) states in pertinent part: “The Commission may transmit such evidence as may be available concerning such acts or practices *or concerning apparent violations of the Federal antitrust laws* to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.” 15 U.S.C. § 717s(a) (emphasis added).

prosecution. Similarly, section 304(e) of the NGPA (15 U.S.C. § 3364(e)) sets up a limited defense to state or federal antitrust cases, stating, in part: “There shall be available as a defense for any person to civil or criminal action brought for violation of the Federal antitrust laws (or any similar law of any State). . . .” *Id.* (e)(1). This evidences the express recognition by Congress that federal and state antitrust actions in the courts are generally outside the scope of the federal natural gas regulation.

This is not a case where the relevant regulatory scheme is silent as to antitrust issues. *Cf. Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 270-71 (2009). This Court has interpreted NGA section 20(a) as reflective of congressional intention to exclude antitrust matters from FERC’s regulatory purview and to leave antitrust enforcement to the courts. *California v. Federal Power Comm.*, 369 U.S. 482, 485 (1962). Per *California*, “there is no ‘pervasive regulatory scheme’ *including the antitrust law* that has been entrusted to the Commission.” *Id.*, 369 U.S. at 485 (emphasis added). The applicable rule dealing with the overlap of the antitrust laws and the NGA was rather that “when there are two acts upon the same subject, the rule is to give effect to both if possible.” *Id.*; see also *Credit Suisse*, *supra*, 551 U.S. at 271 (“courts should reconcil[e] the operation of . . . statutory schemes . . . rather than holding one completely ousted.”

In support of the decision, the *California* specifically contrasted the power to decide antitrust issues granted to the ICC and other federal agencies with the Commission’s lack of similar power. 369 U.S. at 486. Subsequently this Court extended *California* under the closely related

Federal Power Act¹² to reject an electric utility's claim that its status as a regulated utility precluded antitrust liability, observing that "[a]ctivities which come under the jurisdiction of a regulatory agency may nevertheless be subject to scrutiny under the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

The specific rule that emerged from the *California/Otter Tail* cases is that antitrust liability may attach to "voluntary commercial relationships" of regulated companies that are initiated on the basis of the "business judgment" of such companies. *Otter Tail*, 410 U.S. at 374. The scope of such business judgment was very wide under the regulatory model of the NGA because the regulated companies negotiated rates and terms of service in the first instance and submitted completed contracts to the Commission for review. *Mobile, supra*, 350 U.S. at 338, 341 (*see discussion, supra*, pp 17-19) The Commission did not have a "rate-making [or] rate-changing procedure" like that of the former Interstate Commerce Commission, because the individual contracts were not subject to a uniformity requirement as with shipper contracts subject to ICC regulation. Thus the *Otter Tail* Court concluded:

Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business

12. *See Federal Power Comm. v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956) (certain Federal Power Act provisions "are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act").

judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.

Otter Tail, 410 U.S. at 374. As with *Credit Suisse*, *supra*, any defense to antitrust liability required a finding of “clear repugnancy” between the antitrust laws and the regulatory scheme.

The rule of *California* and *Otter Tail* is well settled and has not been overruled or limited by this Court. *See Credit Suisse*, *supra*, 551 U.S. at 271 (identifying the regulatory scheme of *Otter Tail* as one that does not provide implied immunity from antitrust liability.) The fact that *California* and *Otter Tail* concerned the relationship of federal antitrust law and federal regulatory statutes and not state antitrust law is immaterial. In *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) the Illinois attorney general brought a *parens patriae* action, like this one, against the Panhandle Eastern pipeline company for monopolization of the natural gas supply to central Illinois. 935 F.2d at 1476. As in this case, the defendant in *Illinois* pleaded preemption of the Illinois state antitrust law because of “extensive federal regulation of the natural gas industry.” 935 F. 2d at 1479. The court, however, rejected this claim because the preemption argument “would apply with equal force to federal antitrust law, but federal gas regulation does not immunize natural gas companies from application of the federal antitrust laws.” 935 F. 2d at 1479 (*citing California*,

supra).¹³ Finally, the preemption issue was not a side issue in Illinois, but was essential to the judgment of the Seventh Circuit because the Attorney General's claim under federal law had been dismissed, leaving the state antitrust case as the only cause of action under review. 935 F.2d at 1479.

2. The same failure of the Nevada Supreme Court to examine properly the relationship of the antitrust laws and the NGA vitiates the Nevada Supreme Court's view of the NPGA and the Decontrol Act.¹⁴ As discussed above, section 304(e) of the NGPA (15 U.S.C. § 3364(e)) sets up

13. The Seventh Circuit did not address the *Otter Tail* "voluntary conduct" liability rule in connection with preemption, but it affirmed the district court judgment in all respects. The district court assessed the issue of regulatory preclusion under the *Otter Tail* plain repugnancy standard, and noted that "the mere pervasiveness of a regulatory scheme" does not immunize conduct from antitrust challenge where the conduct is "voluntarily initiated." *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.* 730 F.Supp. 826, 934 (C.D. Ill. 1990), *aff'd sub nom Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992).

14. The Nevada Supreme Court briefly addressed the Decontrol Act in connection with its preemption analysis, App. 10a-11a, but again failed to examine the statute. The Act is a narrow statute, rewriting only NGPA § 121 in its entirety and making several technical and conforming amendments to various NGPA sections. *See* 103 Stat. 157-59 (setting out Decontrol Act changes to NGPA). Important for the current matter, and overlooked by the decision below, the Decontrol Act made no changes to NGPA § 304(e) or NGA § 20(a) nor added any language to overturn or to modify this Court's interpretation that the latter provision does not delegate to FERC authority to address antitrust claims involving natural gas sales and transportation.

a limited defense to state or federal antitrust liability, which makes no sense of Congress intended to preempt such liability as a general matter. Additionally, it is also noteworthy that Congress when enacting the NGPA did not remove NGA § 20(a) or otherwise revise the NGA to overturn or to modify this Court's interpretations that apparent antitrust violations related to natural gas sale or transportation are properly brought to courts, not to FERC. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) ("The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tensions there [is] between them.'") (citation omitted).

Although the Nevada Court recognized that the NGPA deprived the FERC of its former rate supervisory authority, it found that "the NGPA did not signal a retreat from comprehensive federal gas policy." App. 15a-16a. Relying on *Transcontinental*, *supra*, and *Leggett*, the Nevada Court ruled that the NGPA's "mere changes in approach did not contract the scope of preemption."

As discussed below, the Nevada Supreme Court's application of *Transcontinental*'s purported burden shifting rule to require congressional evidence to *contract* preemption is erroneous on its merits, but it is well to note that both *Transcontinental* and *Gallo*, *supra*, recognized that the NGPA was a statute that reduced the scope of the FERC's authority to regulate natural gas commodity prices. If the burden shifting rule *does not* apply, there can be no question that both cases support the proposition that Congressional action since 1978 reduces the potential for

conflict or “repugnancy” between antitrust liability and the authority of the Commission, further restricting any basis in the language of federal statutes to support the inference of preemption. According to *Transcontinental*, “Congress clearly intended [the NGPA] to eliminate the distortive effects that NGA price controls had had on supply and demand.” 474 U.S. at 424 n. 6. *Gallo*’s statutory analysis focused on the NGPA’s removal of “first sales” from the FERC’s NGA rate supervisory jurisdiction under the and the absence of preemptive language in the NGPA and Decontrol Act. *Gallo* concluded that “the withdrawal of the FERC’s authority to determine ... rates gives rise to the ... inference that normal market forces, including the tug and pull of private lawsuits, will hold sway. App. 17a-18a (*citing Gallo*, 503 F. d at 1046). Given the absence of any broad rule preclusion or preemption based on the Commission’s NGA jurisdiction prior to passage of the NGPA and Decontrol Act, this legislation to contract the Commission’s authority over natural gas commodity rates cannot be viewed as reaching the potential price fixing liability in this case.

4. The *Illinois* case addressed events of the 1980s in the early stages of post-NGPA deregulation. The trend of congressional and FERC policy from this period up to the time of the energy crisis in the Western States was to release the natural gas commodity business from regulation and allow market forces to govern natural gas pricing. See *discussion of Regulatory Framework* 11-13, *supra*. The NGPA had removed a large category of natural gas purchase and sale transactions from the Commission’s rate supervision, and the statutory price ceilings that replaced the former NGA rate controls were repealed by the Decontrol Act in 1989. *Id.* FERC policy had induced interstate pipeline companies to exit the commodity

business and confine their operations to transportation. *See, supra*, 27-29. Order 547 granted everyone in the world that was not a pipeline or local distribution company freedom to buy and sell natural gas without any licensing, filing or regulatory supervision. *Id.* This condition of deregulation and promotion of market forces represents a maximum of "voluntary" or "discretionary" business conduct that, under settled doctrine, is subject to the antitrust laws, so under the logic of the *California/Otter Tail* line of cases, antitrust liability would be the primary, if not only, check on price fixing in the relevant market.

In sum, the Nevada Supreme Court erred in its failure to conduct a proper statutory analysis of the relationship of the antitrust laws and federal regulatory statutes covering the natural gas industry. The Nevada Supreme Court's failure to recognize the limitations of the scope of the federal regulatory scheme relative to the antitrust laws is reversible error that justifies granting this petition for writ of certiorari and, ultimately, reversing the decision of the Nevada Supreme Court.

II. THE NEVADA SUPREME COURT'S FIELD PREEMPTION CONCLUSION IS UNSUPPORTED BY AN EXPRESSION OF CONGRESSIONAL INTENT IN THE RELEVANT STATUTORY SCHEME AND IMPROPERLY REVERSES THE PRESUMPTION AGAINST PREEMPTION APPLICABLE TO ENFORCEMENT ACTIONS UNDER NEVADA ANTITRUST LAW.

The foregoing review of the cases culminating in the *Illinois* decision is sufficient to show the deficiencies of the Nevada Supreme Court's analysis of the federal statutory

scheme. However, the “field preemption” rationale of the Nevada Supreme Court and the Tennessee Supreme Court in *Leggett* does not hold up under the settled canons applicable to preemption issues generally. In contrast, the preemption method employed by the Ninth Circuit in *Gallo* is in accordance with this Court’s preemption authorities, and *Gallo* reached the correct result in holding that a state antitrust case complaining of conduct in the deregulated natural gas commodity market is not preempted and may proceed. The Nevada Supreme Court decision is in conflict with the correct result in *Gallo*, and must be reversed.

1. The Nevada Supreme Court’s preemption analysis is in error in several ways. First, the Nevada Court accepted the premise supporting the rationale of the Tennessee Supreme Court in *Leggett*, that Congress had enacted “broad field preemption” under the NGA that was undisturbed by the NGPA. App. 15a (*citing Leggett*, 308 SW 3d at 866). Based on this premise of “broad field preemption”, the *Leggett* court identified the dispositive issue as “whether Congress [by the Decontrol Act] repealed or reduced the scope of the preemptive regime.” *Id.* (*quoting Leggett*, 308 SW 3d at 866). Petitioner’s argument above establishes that the “broad field preemption” of the NGA does not and has never created any form of general immunity or broad preemption of the application of the antitrust laws to participants or transactions in FERC regulated markets. The holding of *Illinois*, *supra*, that federal natural gas regulation is not generally preemptive of state antitrust law is correct, and requires reversal of the Nevada Supreme Court decision.

Second, the Nevada Supreme Court applied the wrong preemption standard to the extent it extends the

rule of cases such as *Transcontinental* dealing with the allocation of powers between state and federal regulatory commissions to this antitrust case for the protection of Nevada consumers. Antitrust law is “an area traditionally regulated by the States.” *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). In such cases, the court analyzes claims federal preemption of state laws under “the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 33 U.S. 218, 230 (1947).

Third, the Nevada Supreme Court did not merely fail to apply the presumption against preemption, it applied a “burden shifting” rule derived from *Transcontinental*, *supra*, and *Arkansas Elec. Coop. v. Ark. Public Serv. Comm’n*, 461 U.S. 375, 384 (1983). The endorsement of the Nevada and *Leggett* courts of the *Transcontinental* burden shifting rule is misguided because this Court criticized and declined to apply the rule just two years after *Transcontinental* was decided. See *Puerto Rico Department of Consumers Affairs v. Isla Petroleum Corp.* 485 U.S. 495 (1988). *Isla*, a unanimous decision wholly undercuts the reasoning of *Transcontinental* and with it the reasoning of the Nevada and Tennessee Supreme Courts, and requires reversal of the decision below.

Finally, the court’s application of a “field preemption” category without analysis of the existence of any actual conflict between the Nevada antitrust law runs afoul of a key prudential rule applicable in implied preemption cases. This Court has cautioned against excessively rigid adherence to these categories in implied preemption cases.

By referring to [these] categories, we should not be taken to mean that they are rigidly distinct. Indeed, field preemption may be understood as a species of conflict preemption: a state law that falls within preempted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.

English, supra, 496 U.S. at 79 n. 5. With these standards in mind, there can be no question but that the Nevada Supreme Court's "field preemption" analysis and conclusion is in error.

2. The source and scope of the "broad field preemption" that is the predicate for the Nevada decision is obscure and it is, in fact, a phantom. The Nevada Supreme Court cites *Leggett* for the proposition, that "it was well-established that Congress had enacted broad field pre-emption prior to the [Decontrol Act]." *Leggett*, however, states only that "Plaintiff does not contest that broad field pre-emption has been a cardinal feature of natural gas regulation for much of the previous century." 308 S.W. 3d at 864. It is certainly not correct that the Nevada AG has left the issue of "broad field preemption" uncontested. In the courts below, Petitioner argued the *Illinois* case and the *California/Otter Tail* line of cases restricting antitrust preemption.

The only apparent source for the preexisting "broad preemption" in *Leggett* is *Transcontinental* and the *Northern Natural* case that *Transcontinental* reaffirmed. *Transcontinental* was a case in which the Mississippi Oil & Gas Board ordered a FERC regulated pipeline to purchase gas from all producers in a common pool in a

producing field even though the pipeline had contracts with some but not all of the producers. 485 U.S. at 411. Such “ratable take” orders to the pipelines had been held to be preempted by this Court in *Northern Natural Gas Co. v. State Corporation Comm’n of Kansas*, 372 U.S. 84 (1963). The Mississippi Supreme Court ruled that the NGPA undermined the *Northern Natural* rule by depriving the FERC its supervisory jurisdiction over wellhead prices. 485 U.S. at 415 This Court reversed and held the Mississippi order preempted because the order would tend to raise the pipeline’s purchase costs and frustrate the federal goal of a less regulated market and ensuring low prices for consumers. 485 U.S. at 422-24. Additionally the Court objected that “Mississippi cannot be permitted to foreclose ... federal oversight of purchasing practices. “485 U.S. at 423 n 5.

Although *Transcontinental* certainly preempted a regulatory directive by a state regulatory body to a federally regulated interstate pipeline, the case is legally and factually remote from this antitrust case. *Leggett* discerned in *Northern Natural*’s language reference to a “comprehensive scheme” of federal regulation, which it called a classic “field preemption” rationale. However, *Northern Natural* like *Transcontinental* merely invalidates a state regulatory order and nowhere defines the scope of the “comprehensive scheme” of federal regulation. However, as seen above, in 1962 just a year before the 1963 *Northern Natural* case, this Court stated that “there is no ‘pervasive regulatory scheme’ including the antitrust law that has been entrusted to the Commission.” *California*, *supra*, 369 U.S. at 485.

Even without reference to the inconsistency between *Northern Natural* and *California, Transcontinental* cannot bear the weight placed on it by the Nevada Supreme Court and *Leggett*. Quite simply Natural Gas Act has not been construed to have the broad “field preemption” characteristics suggested by the Nevada Supreme Court. See generally, *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989). The *NW Central* case, unlike *Northern Natural* or *Transcontinental*, explicitly examines the Natural Gas Act in terms of “field preemption.” The major holding of the case is that the NGA *did not envisage federal regulation of the entire natural gas field to the limit of constitutional power*. 489 U.S. at 510 (citing *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503 (1949))(emphasis added). The Court emphasized too that the NGA jurisdictional language limited the reach of FERC’s jurisdiction “in language certainly as sweeping as the wording of the provision declaring . . . [FERC’s] role.” 489 U.S. at 512.

The *NW Central* court also pared down substantially the “comprehensive scheme” rationale by essentially vacating in practical effect the limitation on the power of state regulators applied in *Northern Natural* and *Transcontinental*. *NW Central* approved a Kansas pro-rationing rule that accomplished functionally a similar result as the prohibited ratable take rule in *Transcontinental* because the order was directed to producers, not interstate pipelines. *NW Central* explained that the error of the state regulators in *Northern Natural* and *Transcontinental* was in directing their orders to purchasers, which were in each case interstate pipeline

companies. 489 U.S. at 513. The net effect of *NW Central* in relation to *Transcontinental* is to show that the “comprehensive scheme” articulated in *Transcontinental* and *Northern Natural* is primarily a rationale to protect federal jurisdiction over interstate pipelines, and is not and cannot be construed as unbounded restraint on the power of States to protect consumers in their states by redressing natural gas price fixing in natural gas commodity markets.

The Nevada Supreme Court opinion does not explain how a preemption case derived from purely regulatory conflicts like *Transcontinental* should be extended to general law enforcement actions by an attorney general. In this regard Petitioner pointed out below that this Court has made just such a distinction in recent years in cases involving national banks. Compare *Cuomo v. Clearing House Ass’n, L.L.C.*, 129 S. Ct. 2710, 174 L. Ed. 2d 464 (2009) and *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007). *Watters* preempted direct state regulation of affiliates of national banks, but two years later the Court upheld the power of the New York attorney general to conduct a broad investigation of the banks under state fair lending laws. The *Cuomo* opinion held that general law enforcement by the attorney general raised none of the concerns associated with conflicting regulatory supervision by state and federal regulators. *Id.* at 2718. *Gallo* recognized in a similar vein that laws of general applicability such as the antitrust laws are not ordinarily preempted. 503 F.3d at 1046.

3. According to the Nevada Supreme Court, *Transcontinental* and *Arkansas Electric* cases stand for the proposition that “the act of deregulation has the

same preemptive force as regulation,”¹⁵ App. 16a-17a. Based on this putative prudential rule the Nevada Supreme Court and the *Leggett* case held that the putative “field preemption” that *Leggett* purported to find in *Transcontinental* and related cases would continue despite deregulatory statutes such as the NGPA and Decontrol Act. Applying this retransfer test, the Court concluded, “We cannot conclude that this [intervention of state law] is what Congress intended through the use of purposeful deregulation.” App. 19a.

This reversal of the ordinary presumption against preemption is of questionable vitality in view of this Court’s criticism of the putative retransfer rule just two years after *Transcontinental* was decided. See *Puerto Rico Department of Consumers Affairs v. Isla Petroleum Corp.* 485 U.S. 495 (1988). In *Isla*, this Court reversed a lower court decision based on the *Transcontinental* holding that that deregulation of federal gasoline price controls at the federal level constituted a decision in favor of the free market sufficient to preempt subsequent price controls imposed by Puerto Rico. In the opinion, Justice Scalia for a unanimous court rejected the lower court’s view that *Transcontinental*,

announc[ed] a new rule of burden shifting
whenever the federal government terminates

15. This formulation paraphrases this purported rule in a manner less nuanced than the original which states: “[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much preemptive force as a decision *to regulate*” (emphasis in original). *Transcontinental*, 465 U.S. at 422 (quoting *Arkansas Electric*, 461 U.S. at 384.)

or reduces its regulation of a field of commerce, replacing the normal need for finding a federal intent to preempt with the need to find a federal intent to retransfer authority to the States. To the contrary, a clear and manifest purpose of pre-emption is always required.

485 U.S. at 503 (citations and internal quotations omitted). *Isla* thus refused to apply the retransfer rule and further reaffirmed the general rule that “preemption analysis requires ascertaining congressional intent... [and is] never meant ... to signify congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text.” 485 U.S. at 501. Although *Isla* did not overrule *Transcontinental*, this pointed criticism and refusal to follow the rule renders validity of the “retransfer” reasoning of the *Transcontinental* decision highly suspect and calls for a decision of this court deciding the issue.

Ultimately, *Isla* reaffirmed the presumption against preemption and required a “clear and manifest” statutory basis for any implied preemption decision. The reasoning of the court below based on *Transcontinental* does not meet the test. No interstate pipeline is a party to the case or any relevant transaction. The parties to the conspiracy alleged were an electrical generation company purchasing fuel for its plants, and an energy trading company operating an internet based trading platform. *See* pp. 9-12, *supra*. This price fixing case involves the type of “voluntary conduct” that has always been subject to antitrust liability, and there is no basis for a preemption decision.

4. The opinion of the Nevada Supreme Court clearly recognized that the *Leggett* preemption analysis depended

on the *Transcontinental* retransfer standard, but that *Gallo* analyzed the issue through direct examination of the language of the NGPA and Decontrol Act directly positive evidence of congressional intent to preempt the antitrust case under consideration. App. 14a, 17a-18a. By following the proper method of preemption analysis, *Gallo* focused on the removal of “first sales” from the FERC’s jurisdiction under the NGA and the absence of preemptive language in the NGPA and Decontrol Act. Thus, *Gallo* concluded that “the withdrawal of the FERC’s authority to determine ... rates gives rise to the ... inference that normal market forces, including the tug and pull of private lawsuits, will hold sway. App. 18a (*citing Gallo*, 503 F. 3d at 1046).

The Nevada court acknowledged that the *Gallo* analysis drew support from the presumption that laws of general applicability such as the antitrust laws are not ordinarily preempted, and that the antitrust laws are complementary of the goals of the federal regulatory statutes. App. 18a-19a. Indeed, The Nevada court did not challenge any of these aspects of *Gallo*’s reasoning but only rejected it based its interpretation of congressional intent under the highly questionable *Transcontinental* standard. However, if the criticism of the *Transcontinental* retransfer rule in *Isla* is applied, *Gallo*’s recognition of the complete deregulation of the portion of the natural gas market consisting of “first sales” requires rejection of the preemption theory because there can be no preemptive “field” where the FERC has no regulatory jurisdiction. The Nevada Supreme Court made the wrong choice in selecting *Leggett*’s preemption standard and reasoning over that of *Gallo*.

4. The Nevada Supreme Court ruled that “[s]tate antitrust law cannot coexist peacefully with the natural gas federal regulations” because of two purposes of the federal scheme under the NGPA and Decontrol Act: “national uniformity and freedom from burdensome government regulation.” App. 18a. This policy argument misses the mark. First, as shown above, the regulatory scheme of the NGA has never been based on uniformity. *See Mobile, supra* (discussion at pp. 17-19, *supra*). Second, this is a price fixing case. The Nevada Supreme Court does not and cannot identify any true non-uniformity of state or federal law with regard to price fixing. Petitioner is confident that price fixing is unlawful in every state in the union, and is certainly unlawful under the Sherman Act. The Nevada Supreme Court’s ruling overlooks this Court’s admonition that “courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.” *Otter Tail, supra*, 410 U.S. at 374. The decision of the Nevada Supreme Court imposes a non-uniformity in the national marketplace by granting to participants in the natural gas markets a privilege to engage in price fixing that participants other markets do not enjoy.

Similarly the policy argument that antitrust liability for price fixing is a form of “regulation” is also misguided. In ordinary private damage actions, the Supreme Court has been hesitant to treat claims for damages as “regulation” at all. *See generally, Wyeth v. Levine*, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009) (state tort damages due to inadequate labeling not preempted by authority of Food and Drug Administration); *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 (1984) (despite pervasive safety regulation by Nuclear

Regulatory Commission, punitive damages under state tort law not preempted). Damage actions to protect consumers are simply different in character and purpose from administrative oversight of industry under regulatory statutes.

CONCLUSION

For the reasons stated herein, the petition should be granted.

Respectfully submitted,

CATHERINE CORTEZ MASTO
ATTORNEY GENERAL, STATE OF
NEVADA

*WAYNE HOWLE
SOLICITOR GENERAL, STATE OF
NEVADA

100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1227
WHowle@ag.nv.gov

**Counsel of Record*

ERIC WITKOSKI
CHIEF DEPUTY ATTORNEY GENERAL,
STATE OF NEVADA
Consumer Advocate,
Bureau of Consumer Protection
10791 West Twain Ave.,
Suite 100
Las Vegas, NV 89135
(702) 486-3129 Direct
ewitkoski@ag.nv.gov

DOUGLASS A. MITCHELL
BOIES, SHILLER & FLEXNER
300 South Fourth Street,
Suite 800
Las Vegas, NV 89101
(702) 382-7300
dmitchell@bsflp.com

JAMES TYNAN KELLY
JAMES TYNAN KELLY PC
3000 Wesleyan St., Suite 350
Houston, TX 77027
(713) 888-1809

BRAD N. BAKER
BAKER, BURTON & LUNDY PC
515 Pier Avenue
Hermosa Beach, California 90254
(310) 376-9893
Brad@bakerburtonlundy.com

Attorneys for Petitioners