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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Natural Gas Act occupies the field as to matters within its scope, preempting state regulation directed at practices that affect the wholesale natural gas market. Respondents brought state-law claims against natural gas companies, seeking to regulate industry practices that Respondents concede affected prices in the wholesale market. And yet the Ninth Circuit held—in direct conflict with two state courts of last resort—that Respondents' claims were not preempted because Respondents allegedly were damaged when they bought natural gas in *retail* sales, which fall outside federal jurisdiction.

The question presented is: Does the Natural Gas Act preempt state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by litigants who purchased gas in retail transactions?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit:

1. AEP Energy Services; American Electric Power Company, Inc.; CMS Field Services; CMS Marketing Services & Trading Company; Coral Energy Resources, L.P.; Duke Energy Trading and Marketing, LLC; Dynegy Marketing and Trade; DMT G.P. LLC; Dynegy Illinois, Inc.; Dynegy GP, Inc.; El Paso Merchant Energy, L.P.; El Paso Corporation; ONEOK Energy Marketing & Trading Co., L.P.; ONEOK, Inc.; Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Energy Marketing & Trading Company; Williams Merchant Services Company, Inc.; Williams Power Company, Inc.; Xcel Energy, Inc.; Northern States Power Company; and e prime, Inc., Petitioners on review, were defendants-appellees below.[1]

2. Learjet, Inc.; Topeka Unified School District 501; Breckenridge Brewery of Colorado, LLC; BBD Acquisition Co.; Merricks, Inc.; Sargento Foods, Inc.; Ladish Co., Inc.; Carthage College; Briggs & Stratton Corporation; Arandell Corporation; Newpage Wisconsin System, Inc.; Reorganized FLI, Inc.; Sinclair Oil Corporation; Heartland Regional Medical Center; Prime Tanning Corp.; Northwest Missouri State

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[1] The Petitioners' corporate names are reproduced as they were typically listed in the docket below. Some Petitioners have undergone corporate reorganizations (and in some instances were sued under their names as reorganized). For purposes of recusal and completeness, updated corporate information is provided in the corporate disclosure statement at pp. iv-vii, *infra*.

University; and Muliut Corporation, Respondents on review, were plaintiffs-appellants below.

3. Duke Energy Corporation; CMS Energy Corporation; and Reliant Energy, Inc., Respondents on review, were defendants-appellees below.

RULE 29.6 DISCLOSURE STATEMENT

AEP Energy Services, Inc. is an indirect, wholly owned subsidiary of American Electric Power Company, Inc., which is a publicly owned corporation.

American Electric Power Company, Inc. is a publicly owned corporation. American Electric Power Company, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of American Electric Power Company, Inc.'s stock.

CMS Marketing Services and Trading Company is now known as CMS Energy Resources Management Co. It is a wholly owned indirect subsidiary of CMS Energy Corp., a publicly traded company.

CMS Field Services Inc. was a former wholly-owned indirect subsidiary of CMS Energy Corp. CMS Field Services Inc. later changed its name to Cantera Gas Company and eventually was acquired by Copano Energy, L.L.C. Copano Energy, L.L.C. was acquired by Kinder Morgan Energy Partners LP, which is publicly traded. No other public company holds more than 10% of Kinder Morgan Energy Partners LP's stock.

Shell Energy North America (U.S.), L.P., is the successor in interest to Coral Energy Resources, L.P. Shell Energy North America is not itself a corporation, and has no direct publicly-owned parent corporation, but is indirectly wholly-owned by Royal Dutch Shell plc. Royal Dutch Shell plc is registered as a public company, but no publicly held corporation owns more than 10% of its stock.

Duke Energy Trading and Marketing, L.L.C. has as its parent companies DETMI Management, Inc. (60% owner) and Mobil Natural Gas, Inc. (40% owner).

Neither DETMI Management, Inc. nor Mobil Natural Gas, Inc. is a publicly held corporation. However, DETMI Management, Inc. and Mobil Natural Gas, Inc. are indirectly, wholly owned by Duke Energy Corporation and ExxonMobil Corporation, respectively, both publicly held corporations.

Dynegy Marketing and Trade is now Dynegy Marketing and Trade, LLC and is an indirect subsidiary of Dynegy Inc. DMT G.P. L.L.C. was previously merged into another entity that is now Dynegy Power Marketing, LLC, and is an indirect subsidiary of Dynegy Inc. Dynegy GP Inc. was previously merged into another entity that was Dynegy Holdings LLC, which was subsequently merged into Dynegy Inc. as a result of Dynegy Holdings LLC's and Dynegy Inc.'s bankruptcy proceedings. Dynegy Illinois Inc. was dissolved in June 2009. Prior to its dissolution, Dynegy Illinois Inc. was a wholly owned subsidiary of Dynegy Inc. Franklin Advisers, Inc., which is a subsidiary of Franklin Resources Inc., a publicly traded company, owns more than 10% of Dynegy Inc.'s common stock.

El Paso Corporation has changed its name to El Paso LLC. El Paso LLC and El Paso Merchant Energy L.P. are indirect subsidiaries of Kinder Morgan, Inc., a publicly held corporation.

ONEOK, Inc. is a publicly held corporation. No parent entity or other publicly held corporation owns 10% or more of its outstanding stock.

ONEOK Energy Services Company, L.P., formerly known as ONEOK Energy Marketing & Trading Company, L.P., is an indirectly wholly owned subsidiary of ONEOK, Inc.

After the underlying lawsuits were filed, Reliant Energy, Inc. and Reliant Energy Services, Inc. underwent a series of name changes and corporate transactions. Reliant Energy, Inc. changed its name to RRI Energy, Inc. and subsequently merged with Mirant Corp. to become GenOn Energy, Inc.; 100% of its stock is now owned by NRG Energy, Inc. (NYSE:NRG). Reliant Energy Services, Inc. changed its name to RRI Energy Services, Inc. and subsequently changed its form from a corporation to a limited liability company, which is now known as RRI Energy Services, LLC. GenOn Energy, Inc. indirectly owns 100% of the stock of RRI Energy Services, Inc., which is now known as RRI Energy Services, LLC. Only T. Rowe Price owns more than 10% of the shares of NRG Energy, Inc.

The Williams Companies, Inc. is a publicly held Delaware corporation. No publicly held corporation owns more than 10% of its stock.

Williams Merchant Services Company, Inc., now known as Williams Merchant Services Company LLC, is a wholly owned subsidiary of The Williams Companies, Inc., a publicly held Delaware corporation.

Williams Energy Marketing & Trading Company, formerly Williams Gas Marketing, Inc. and now known as WPX Energy Marketing, LLC, is a wholly-owned subsidiary of WPX Energy, Inc.

Williams Power Company, Inc., formerly Williams Gas Marketing, Inc. and now known as WPX Energy Marketing, LLC, is a wholly-owned subsidiary of WPX Energy, Inc. As of December 31, 2011, WPX Energy, Inc. is no longer an affiliate of The Williams Companies, Inc.

e prime, Inc. is an indirect wholly owned subsidiary of Xcel Energy Inc., a publicly held corporation.

Northern States Power Company is a wholly owned subsidiary of Xcel Energy Inc., a publicly held corporation.

Xcel Energy Inc. is a publicly held corporation with no parent or corporate owner.

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IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 715 F.3d 716. Pet. App. 1a. The District Court's July 18, 2011 opinion granting Petitioners summary judgment is unreported but available at 2011 WL 2912910. *Id.* at 64a. Its November 2, 2009 opinion regarding preemption is unreported. *Id.* at 124a.

JURISDICTION

The Ninth Circuit entered judgment on April 10, 2013. On June 20, 2013, Justice Kennedy extended the time to petition for certiorari to and including

Saturday, August 24, 2013, making the petition due on Monday, August 26, 2013 under Rule 30.1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides in relevant part:

> [T]his chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption * * * , and to natural-gas companies engaged in such transportation or sale * * * , but shall not apply to any other transportation or sale of natural gas[.]

Section 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a), provides in relevant part:

> Whenever the Commission * * * shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order[.]

INTRODUCTION

This case presents a question of exceptional importance on which the Ninth Circuit and two state supreme courts are squarely in conflict: Under what circumstances does the Natural Gas Act ("NGA")

preempt lawsuits aimed at regulating the practices of natural gas companies?

The NGA, 15 U.S.C. § 717 *et seq.*, gives the federal government exclusive power to regulate the wholesale natural gas market and the practices of natural gas companies affecting wholesale gas rates. Recognizing the NGA's broad field-preemptive scope, this Court has held time and again that states cannot regulate the wholesale gas market through the back door: No matter the putative subject of a state regulation, it is preempted if its effects are "directed at * * * things over which [the NGA] has comprehensive authority." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 308 (1988). Thus, for example, although states generally have the power to regulate the issuance of gas companies' securities, the NGA preempts such regulations where they would directly affect wholesale gas rates. *Id.* at 307-09. The Court has strictly policed state regulations like these to ensure that states do not destroy "the uniformity of regulation which was an objective of the Natural Gas Act." *Id.* at 310.

The Ninth Circuit in the decision below broke with this Court's teachings—and created a recipe for regulatory chaos—by authorizing every state to impose its own unique regulatory regime on the wholesale gas market.

Respondents are commercial and industrial end users of natural gas. They sued Petitioners, who are natural gas companies subject to federal regulation, on state-law antitrust theories. Respondents alleged that Petitioners had engaged in practices that inflated so-called "index" rates for natural gas—that is, published rate compilations, reported by several industry publications, that natural gas buyers and

sellers often use to set the price term for natural gas contracts in both the wholesale and retail gas markets. Respondents alleged that Petitioners' index-rate manipulation drove up prices in the wholesale and retail gas markets and that Respondents paid higher retail prices as a result.

Petitioners argued, and the District Court held, that those state-law antitrust claims were preempted because, by Respondents' own admission, the claims were "directed at" practices that affected wholesale gas prices—an area the NGA's plain text commits to federal control. *Schneidewind*, 485 U.S. at 308; 15 U.S.C. § 717d(a). The Ninth Circuit rejected the District Court's approach. It held that what matters for preemption purposes is not whether the lawsuit would have the effect of regulating in the federal field, but instead the type of *transaction* in which the plaintiff allegedly sustained injury. The Ninth Circuit held that because Respondents suffered harm in retail transactions, and the NGA does not regulate retail sales, there could be no preemption. That was so even though Respondents' lawsuits would regulate a subject matter—practices affecting the wholesale market—that is within the federal field.

That holding is irreconcilable with *Schneidewind* and this Court's other NGA preemption decisions. It creates a split of authority with the Supreme Courts of Tennessee and Nevada, which have rejected the Ninth Circuit's analysis and held that state-law antitrust suits arising out of the same conduct are preempted. And it is worthy of review because it threatens to wreak havoc on the Federal Energy Regulatory Commission's oversight of the nation's energy market. Under the Ninth Circuit's approach, if a natural gas wholesaler engages in a practice that

happens to affect both wholesale and retail rates, that practice is subject to regulation by lawsuits in every state. Natural gas companies will have to try to conform their conduct to 50 different sets of state laws. Worse, companies—and FERC itself—will not know whether some or all states will end up competing with FERC to regulate a given practice, because they will have no way to predict whether, or where, that practice might end up affecting retail rates.

That is untenable. As the Tennessee Supreme Court wrote in rejecting the Ninth Circuit's approach, "[t]he application of * * * state[ ] antitrust law to the circumstances here would undermine two essential purposes of the federal legislation: uniformity and freedom from government interference." *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843, 871 (Tenn. 2010). This Court should grant the petition for certiorari and reverse.

STATEMENT

A. Statutory and Regulatory Background

1. 2013 marks the 75th anniversary of federal regulation of the interstate natural gas market. Before that time, this Court held that each state's authority over natural gas transactions ended at the state line. *See, e.g., Pub. Util. Comm'n of R.I.* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89-90 (1927). Seeking to fill the regulatory gap created by those decisions, Congress enacted the NGA in 1938. *See Fed. Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 609-610 (1944).

Section 1(b) of the NGA established federal control over "the transportation of natural gas in interstate commerce," "the sale in interstate commerce of natural gas for resale for ultimate public consump-

tion for * * * any * * * use," and "natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b). In other words, it established federal control over a class of natural gas *sales*—wholesale transactions—and a class of natural gas *companies*—those engaged in such sales and in interstate gas transport. *Id.* In industry parlance, such sales are called "jurisdictional sales" and such companies are called "jurisdictional sellers." Pet. App. 16a, 22a. At the same time, Section 1(b) preserved the states' role in regulating local activities by providing that the NGA "shall not apply to any other transportation or sale of natural gas * * * or to the production or gathering of natural gas." *Id.* Sales not subject to federal control—including retail sales—are known as "non-jurisdictional sales."

The NGA empowers FERC to ensure that rates for jurisdictional sales are "just and reasonable." 15 U.S.C. § 717c. To carry out that mandate, NGA Section 5 empowers FERC to regulate jurisdictional sellers with respect to "any rule, regulation, practice, or contract * * * affecting" a "rate * * * subject to the jurisdiction of the Commission." *Id.* § 717d(a).

This Court has long held that the NGA occupies the field as to matters within its scope. *Hope*, 320 U.S. at 609-610. The statute "leaves no room either for direct state regulation" in the field "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). Thus—as discussed further *infra* at 17-21—this Court has held that even state regulations nominally involving some topic outside the NGA's affirmative reach are preempted by the NGA if their regulatory effects are "aimed directly at" jurisdictional sellers, *Transcontinental*

Pipe Line Corp. v. *State Oil & Gas Bd.*, 474 U.S. 409, 419 (1986) ("*Transcon*") (citation omitted), or "directed at * * * things over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308.

2. Starting in the 1970s, Congress deregulated parts of the industry through the Natural Gas Policy Act, Pub. L. No. 96-621, 92 Stat. 3350 (1978), Wellhead Decontrol Act, Pub. L. No. 101-60, 103 Stat. 157 (1989), and other statutes. These statutes removed from FERC's jurisdiction certain portions of the market, including "first sales," which are "sales of natural gas that are not preceded by a sale to a * * * pipeline, local distribution company, or retail customer." *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027, 1037 (9th Cir. 2007). Consistent with Congress's increasingly market-based approach, FERC in 1992 began issuing "blanket certificates" to interstate pipelines and marketers to sell wholesale natural gas at market rates. *See* 57 Fed. Reg. 57,952 (Dec. 8, 1992). FERC emphasized, however, that it would continue to "monitor the operation of the market through the complaint process" and take steps to combat market abuses. *Id.* at 59,958.

This Court has confirmed that these deregulatory efforts did not diminish the NGA's field-preemptive scope. In *Transcon*, the Court rejected a state's argument that the state had jurisdiction to regulate first sales. The Court explained that Congress's "decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations." 474 U.S. at 423.

B. The Decisions Below.

1. This case stems from events between 2000 and 2002. At that time, two trade publications, *Gas Daily* and *Inside FERC*, collected information on the

prices at which market participants were buying and selling gas. Pet. App. 14a. The publications compiled these price reports into indices. Many natural gas contracts, in turn, incorporated the "index" prices as the contractual pricing term. *Id.*

Respondents' lawsuits alleged that Petitioners engaged in practices that inflated these "index" prices. Specifically, Respondents alleged that Petitioners reported fictional trades and engaged in "wash sales"[2] that created the impression of heightened demand for gas and improperly raised the index prices reported by *Gas Daily* and *Inside FERC*. Pet. App. 15a. As a result, Respondents allegedly paid higher prices because they bought gas in retail transactions with price terms pegged to the index. *Id.* at 14a-15a. They filed suit in various states on state-law antitrust theories. The Panel on Multidistrict Litigation consolidated the suits in the District of Nevada. *Id.* at 12a. Other suits challenging the same conduct were not amenable to federal jurisdiction and continued on parallel tracks in state court. *See, e.g., Leggett*, 308 S.W.3d 849.

2. Petitioners moved for summary judgment in the multidistrict litigation, arguing that Respondents' state-law claims were barred by NGA field preemption. The argument was based on an undisputed fact: Although Petitioners' alleged practices supposedly increased the price Respondents paid for natural gas at retail, Respondents conceded that the same alleged practices also necessarily increased the

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[2] A "wash sale" is a "prearranged sale[ ] in which traders agree[ ] to execute a buy or sell * * * and then immediately reverse or offset the first trade by bilaterally executing * * * an equal or opposite buy or sell." Pet. App. 15a (citation omitted).

price for *wholesale* gas subject to FERC's jurisdiction. Pet. App. 110a-111a; Resp. CA9 Opening Br. 11-12. That was so because wholesale transactions, like retail transactions, routinely used published index prices as their contractual price term. Pet. App. 111a; ER1341-43, 1367-70. To the extent alleged false reports or wash sales drove up a published index price, those practices would have affected both wholesale and retail transactions priced with reference to that index in exactly the same way. Pet. App. 111a. Respondents' attempt to impose state-law regulation through lawsuits thus was directed at a subject matter the NGA's plain text places within the federal field—namely, "practice[s] * * * affecting" wholesale gas rates. 15 U.S.C. § 717d(a).

And it was clear that FERC had authority over the practices at issue. In 2003, pursuant to its pre-existing authority under the NGA, FERC amended its blanket certificates to promulgate a "Code of Conduct" for jurisdictional sellers, forbidding them from engaging in the precise practices Respondents challenge in these state-law antitrust cases. 68 Fed. Reg. 66,323, ¶¶ 5, 21-22, 53, 65, 70, 84 (Nov. 26, 2003). FERC explained that it was using its authority over jurisdictional sellers like Petitioners to forbid false reports and wash sales and "maintain and protect the competitive marketplace" for the "sales over which it [has] jurisdiction." *Id.* at ¶ 23.

The District Court agreed with Petitioners' contentions and granted them summary judgment. Pet. App. 64a. The court found that Petitioners' alleged index-manipulation practices would have directly affected jurisdictional rates. *Id.* at 110a-111a. It accordingly concluded that those practices were subject to FERC's jurisdiction and that Respondents'

antitrust claims—which attempted to regulate the same practices through state law—were preempted. *Id.* at 75a. The District Court explained: "Although FERC had no jurisdiction over [Respondents'] non-jurisdictional transactions," the agency "does have exclusive jurisdiction over any practice by a jurisdictional seller that directly affects a jurisdictional rate." *Id.* And "[b]ecause FERC's jurisdiction is exclusive where it exists, any state law claims based on any such practices are preempted." *Id.*

3. Respondents appealed to the Ninth Circuit. They relied heavily on that court's opinion in *Gallo*, *supra*, which also involved allegations that a jurisdictional seller drove up index prices through false reports and wash sales. Respondents asserted that *Gallo* established a "transaction-based approach to the preemption analysis." Resp. CA9 Opening Br. 43. Under *Gallo*, they argued, the fact that the *transactions* in which they bought gas were non-jurisdictional meant the NGA did not preempt their claims. *Id.* at 46.

The Ninth Circuit agreed. Although the *Gallo* decision principally addressed the filed-rate doctrine, *see* 503 F.3d at 1039-46, the panel in this case held that *Gallo*'s brief discussion of field preemption was controlling. It explained that "[t]he claims in *Gallo* were essentially the same as [Respondents'] claims." Pet. App. 25a. In *Gallo*, as here, the plaintiff's claims included state-law antitrust causes of action. *Id.* at 26a. And in *Gallo*, as here, the jurisdictional seller argued that field preemption barred those claims. *Id.* *Gallo* had rejected that argument, the Ninth Circuit explained, because the indices on which the plaintiffs based their claims included some reports of non-jurisdictional first sales. *Id.* The panel conclud-

ed that the "reasoning in *Gallo* applies with equal force to the question presented by this case." *Id.* at 28a. It held that because Respondents bought their natural gas in non-jurisdictional retail sales, their claims were not preempted. *Id.*

The Ninth Circuit rejected the District Court's holding that FERC had exclusive jurisdiction because the alleged index-manipulation practices affected jurisdictional rates. Pet. App. 28a. As the panel saw things, Section 5 of the NGA, which gives FERC jurisdiction over practices affecting jurisdictional rates, had to be "read * * * narrowly" to preserve states' authority over non-jurisdictional sales. *Id.* at 29a. In other words, although the panel acknowledged that FERC has plenary authority over jurisdictional sellers' practices affecting jurisdictional rates, the court concluded that that plenary authority evaporates if the practices happen to also affect non-jurisdictional rates. *Id.*

This petition followed.

REASONS FOR GRANTING THE PETITION

Recognizing the "importance of the * * * functioning of the interstate market in natural gas," this Court frequently has granted certiorari to review state regulation that threatens to interfere with that market. *E.g.*, *Transcon*, 474 U.S. at 411; *Schneidewind*, 485 U.S. at 408; *Northern Natural*, 372 U.S. at 91. The Court should do so again here. The Ninth Circuit's decision meets every criterion for review. It "conflicts with a decision by a state court of last resort"—indeed, two state courts of last resort—on "an important federal question." S. Ct. R. 10(a). It is irreconcilable with this Court's decisions. And the subject matter is of considerable importance: The Ninth Circuit's ruling "disturbs the uniformity of the

federal scheme," and could "seriously impair [FERC's] authority to regulate" jurisdictional sellers, because those sellers "will be forced to comply with varied state regulations of their * * * practices." *Transcon*, 474 U.S. at 420, 423 (citation omitted). That is the very danger the NGA was designed to prevent. The writ should be granted.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE TENNESSEE AND NEVADA SUPREME COURTS.

The decision below splits with decisions of the Tennessee and Nevada Supreme Courts arising out of the very same underlying facts. The Ninth Circuit held that the NGA does not preempt a state-law claim that regulates the wholesale market if the plaintiff's particular gas purchase happened to be at retail. The Tennessee and Nevada courts, by contrast, hold that the NGA *does* preempt a state-law claim that regulates the wholesale market regardless of whether the plaintiff purchased at retail. That is a fundamental disagreement about how preemption works. This Court should resolve it.

1. In *Leggett*, the Tennessee Supreme Court faced a case materially identical to this one—indeed, *Leggett* was actually part of this multidistrict litigation before it was remanded to state court for failure to satisfy the amount-in-controversy requirement, and the defendants in *Leggett* are also Petitioners here. *See Leggett*, 308 S.W.3d at 848-49; Dist. Ct. Dkt. No. 338 (May 2, 2006). Just as here, the plaintiffs in *Leggett* were retail purchasers who sued the defendants under state antitrust theories for allegedly manipulating published index prices through wash trades and false price reports. *Id.* at 848, 850. Just as here, the defendants in *Leggett* argued that

plaintiffs' claims were field-preempted because "the conduct at issue occurred in the wholesale market." *Id.* at 850. And the plaintiffs in *Leggett* responded by advancing the same arguments the Ninth Circuit adopted in *Gallo* and this case—that the claims were not preempted because the index contained a mix of jurisdictional and non-jurisdictional transactions, and because plaintiffs bought gas in retail transactions. *Id.* at 865, 872.

The Tennessee Supreme Court squarely rejected plaintiffs' arguments. First, as for *Gallo*: The court conceded that plaintiffs would prevail "[i]f [it] were bound to follow" *Gallo*, but it "decline[d] to adopt the rationale of the Ninth Circuit * * * as to [its] determination that field pre-emption did not preclude a state action." *Id.* at 871-872. Instead, the Tennessee court focused on the impact of state antitrust lawsuits on the federal regulatory scheme for interstate natural gas, *id.*, and concluded that "[t]he application of our state's antitrust law to the circumstances here would undermine two essential purposes of the federal legislation: uniformity and freedom from government interference." *Id.*

The Tennessee Supreme Court then rejected the argument the Ninth Circuit accepted in this case: that the plaintiffs' "claims are not pre-empted because they are based on consumer transactions, rather than" on jurisdictional sales. *Compare id.* at 872, *with* Pet. App. 24a. The *Leggett* court "simply disagree[d]" that it mattered for purposes of field preemption that plaintiffs' alleged damages resulted from retail purchases. 308 S.W.3d at 872. It explained that though plaintiffs were retail purchasers, they were "ultimately challenging wholesale prices," and "[t]heir claims, therefore, necessarily intrude

upon the federal domain, even if the transactions to which they were direct parties fell outside the scope of the NGA. Such claims are preempted." *Id.*

The decisions of the Tennessee Supreme Court and the Ninth Circuit cannot be reconciled. In one court, a lawsuit based on a retail transaction that has the effect of regulating in the federal field is preempted by the NGA; in the other, it is not. And that split is outcome-determinative. In the Tennessee Supreme Court, the plaintiffs' lawsuits have been dismissed, and in the Ninth Circuit they have not. That is "a real or 'intolerable' conflict on the same matter of law or fact" of the sort this Court regularly grants certiorari to resolve. E. Gressman *et al.*, *Supreme Court Practice* 241 (9th ed. 2007).

2. The problem is even worse in Nevada, where the Ninth Circuit's opinion conflicts with the Nevada Supreme Court's decision in *Nevada ex rel. Johnson* v. *Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012), *cert. denied*, 133 S. Ct. 2853 (2013). Because Nevada sits within the Ninth Circuit, lawsuits like those at issue here will be preempted if they are filed and remain in Nevada state court, but will be allowed to proceed if they are adjudicated in Nevada federal court. That absurdity should not be allowed to stand.

In *Johnson*, like in this case and *Leggett*, the plaintiff purchasers of natural gas alleged that a jurisdictional seller had inflated index prices through anticompetitive trading practices. *Id.* at 1188. The defendants, one of whom is a Petitioner here, argued that plaintiffs' claims were preempted by the NGA. *Id.* And the Nevada Supreme Court agreed: It reviewed *Gallo* and *Leggett*, observed that the Ninth Circuit and the Tennessee high court had reached

"vastly different results" on the same facts, and then cast its lot with the Tennessee court. *Id.* at 1192. The *Johnson* court explained that it "c[ould not] agree" with the Ninth Circuit's foundational premise that state antitrust law can "coexist peacefully with natural gas federal regulations" regarding the same misconduct. *Id.* at 1193. On the contrary, it agreed with *Leggett*'s conclusion that the absence of preemption would lead to "the imposition on interstate natural gas wholesalers [of] 50 different sets of state rules concerning anticompetitive behavior." Such rules, in turn, would result in "a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market." *Id.* *Johnson* thus concluded that Nevada's antitrust statute "improperly encroache[d] on the field" and was preempted. *Id.*

The different outcomes in *Leggett* and *Johnson* on the one hand, and the decision below on the other, create a clear and acknowledged split. Under the decision below, whether a claim is preempted turns on whether the plaintiff's injury occurred in a jurisdictional transaction. But under *Leggett* and *Johnson*, whether the injury occurred in a jurisdictional transaction is irrelevant. Instead, those courts ask the far more sensible question: Would the state lawsuits regulate activity within the wholesale market? *Leggett*, 308 S.W.3d at 868-872; *Johnson*, 289 P.3d at 1192-93. That is the analysis commanded by this Court's precedent, as we discuss below. This Court should accept review and conclusively resolve whether state antitrust claims aimed at practices within the federal field are preempted.

3. Finally, the deep disagreement among these courts also extends to the foundational question

whether a presumption against preemption applies. The Ninth Circuit applied the presumption and characterized it as carrying "particular force in light of Congress's deliberate efforts to preserve traditional areas of state regulation" of natural gas. Pet. App. 24a-25a (citing *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009)). The Tennessee court, in contrast, observed that the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence,'" as there has been with respect to natural gas. *Leggett*, 308 S.W.3d at 866 (quoting *United States* v. *Locke*, 529 U.S. 89, 108, 120 (2000)). More generally, the circuits have adopted inconsistent approaches to the presumption when a state law implicates both an exercise of state police powers and a history of federal involvement. *Compare Pacific Merch. Shipping Ass'n* v. *Goldstene*, 639 F.3d 1154, 1166-67 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012) (applying presumption in this context), *and Farina* v. *Nokia Inc.*, 625 F.3d 97, 116 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 365 (2011) (same), *with Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (declining to apply presumption to a "dual * * * system" of federal and state regulation), *and Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598, 608 (5th Cir. 2000) (declining to apply presumption because a state law aimed at health and safety "implicate[d] federal concerns at least as much as state concerns"), *rev'd on other grounds by*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002). This recurring conflict merits this Court's review and provides an additional reason to grant the petition.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

This case separately warrants review because it involves an "important federal question," and the Ninth Circuit's resolution of that question "conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

1. It is black-letter law that through the NGA "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind*, 485 U.S. at 305. The NGA thus forbids both "direct state regulation" of jurisdictional sales and "state regulations which would indirectly achieve the same result." *Northern Natural*, 372 U.S. at 91. Applying that standard, this Court repeatedly has held that state regulation is preempted, regardless of its nominal subject area, if it is "directed at * * * things over which [the NGA] has comprehensive authority." *Schneidewind*, 485 U.S. at 308; *accord, e.g.*, *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 372 (1988);[3] *Transcon*, 474 U.S. at 419; *Northern Natural*, 372 U.S. at 90.

a. In *Schneidewind*, for example, the Court held that the NGA preempted a Michigan statute requiring companies that transported natural gas in-state to obtain state approval before issuing securities. 485 U.S. at 298. The Court acknowledged that the NGA did not expressly authorize FERC to regulate

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[3] *Mississippi Power* was a Federal Power Act ("FPA") preemption case. "[T]he relevant provisions of [the FPA and the NGA] are in all material respects substantially identical," and this Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (quotation marks & citation omitted).

the issuance of securities. *Id.* But that was not the end of the preemption analysis. Instead, the Court held that the Michigan law was preempted because it "amount[ed] to regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." *Id.* at 304. "By keeping a natural gas company from raising its equity levels above a certain point," the Court reasoned, "Michigan s[ought] to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.' That is regulation of rates." *Id.* at 308. Moreover, to the extent the Michigan law was aimed at natural-gas companies "that threaten the continued supply of gas by seeking to finance their operations through excessive debt," that too intruded on FERC's domain because FERC has the "authority to regulate and fix practices affecting rates," and that authority "allows the agency to address directly any unduly leveraged, unduly risky, or unduly capitalized investments." *Id.* at 309; *see also id.* at 304 ("FERC has the authority to examine and to change 'any rule, regulation, practice, or contract affecting [rates that] is unjust, unreasonable, unduly discriminatory, or preferential.' ") (quoting 15 U.S.C. § 717d(a)). That the Michigan law nominally regulated a company's capital structure was irrelevant. *Id.* at 309.

Schneidewind construed the same statutory provision, 15 U.S.C. § 717d, at issue in this case. And its key point applies squarely here: The nominal subject of a state regulation is irrelevant; instead, a regulation is preempted when its effects are "directed at" areas "over which FERC has comprehensive authority." *Id.* at 308.

The Ninth Circuit's holding flies in the face of that simple teaching. The panel believed that Respond-

ents' state-law claims nominally relate to a subject matter—retail transactions—over which the NGA exercises no authority. Pet. App. 24a. But like in *Schneidewind*, that is neither here nor there; the relevant consideration is that Respondents' attempted regulation-by-lawsuit is "directed at" an area "over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308.[4] Indeed, the entire point of Respondents' claims is to regulate alleged practices that Respondents admit would affect jurisdictional rates. *See* Resp. CA9 Opening Br. 11-12. And the NGA by its terms has given authority over such "practice[s] * * * affecting" jurisdictional rates exclusively to FERC. 15 U.S.C. § 717d(a); *see Mississippi Power*, 487 U.S. at 371, 374 (FERC has exclusive authority not just over wholesale rates, but over agreements and other matters "that affect wholesale rates").

FERC clearly understands that it has that authority: The agency exercised it in 2003, outlawing the very transaction-reporting and wash-trading practices that form the basis of Respondents' suits. *See supra* at 9. And the District Court did not hesitate to conclude that FERC had the power to do so. It observed that FERC's authority "is demonstrated not only by FERC's actual exercise thereof in relation to these practices, but by the fact that the Court would have little trouble rejecting a challenge to FERC's

[4] It is no answer to say Respondents' claims are not regulation imposed by state legislative enactment. Respondents' antitrust claims aim to impose legal liability on Petitioners for their activities. They thus constitute state regulation, subject to preemption analysis like any other state regulatory action. *See, e.g., Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 325 (2008); *Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1265 (2012).

jurisdiction to prohibit jurisdictional sellers from engaging in false price reporting [and] wash trades * * * that affected the price mechanism by which jurisdictional rates are set." Pet. App. 111a. Yet the Ninth Circuit now lets states regulate the same practices. That approach stands this Court's preemption jurisprudence on its head. As Justice Scalia has observed, "it is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Mississippi Power*, 487 U.S. at 377 (Scalia, J., concurring in the judgment).

b. This Court's decision in *Mississippi Power* likewise demonstrates that the Ninth Circuit erred. *Mississippi Power* held that an agreement between four power companies allocating power from a nuclear plant was a "contract affecting the wholesale rates of those * * * companies." 487 U.S. at 360 n.6. It therefore held that Mississippi could not regulate that contract through its power to set retail rates. *Id.* at 374. The reason was straightforward: "Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to * * * insure that agreements affecting wholesale rates are reasonable." *Id.* And that was true even though Mississippi was purporting to exercise its regulatory authority over the *retail* market. *Id.*

Mississippi Power's preemption analysis applies with the same force in this case. Just as FERC had exclusive jurisdiction over contracts affecting wholesale rates in *Mississippi Power*, so too does it have exclusive jurisdiction over practices affecting whole-

sale rates here—both subjects are assigned to FERC by the same NGA provision, 15 U.S.C. § 717d(a). As a consequence, "[s]tates may not regulate in [the] area[]" even if they do it through their authority over the retail market. *Mississippi Power*, 487 U.S. at 374. But that is precisely what Respondents' state-law antitrust suits would do here.

The Ninth Circuit panel in this case rejected Petitioners' reliance on *Mississippi Power*, but its reasoning only underscores the degree to which it went astray. It wrote that Petitioners' analogy to *Mississippi Power* "cannot be squared with the *Gallo* court's holding that the NGA does not preempt state antitrust challenges to rates and practices associated with * * * nonjurisdictional sales." Pet. App. 36a. The panel asserted, in effect, that a *Ninth Circuit decision* somehow trumps a decision of *this Court*. That reasoning gets vertical *stare decisis* backwards. *Mississippi Power* compels rejection of the Ninth Circuit's holding, and nothing in the annals of Ninth Circuit case law can change that fact.

2. This Court's recent decision in *Kurns* v. *Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), further illuminates the Ninth Circuit' error. In *Kurns*, plaintiffs brought common-law defective-design and duty-to-warn claims against railroad product manufacturers, alleging that the products caused them physical injury. *Id.* at 1265-66. The manufacturers argued that those claims were preempted by the Locomotive Inspection Act ("LIA"), which provides that rail carriers may use cars on their railroad lines only when all of the cars' parts "are in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. § 20701. The plaintiffs responded by advancing an

argument akin to the one the Ninth Circuit adopted here: They argued that the LIA did not preempt their claims "because the claims arise out of the repair and maintenance of locomotives," and federal regulatory authority under the LIA did not extend to the regulation of hazards arising from repair or maintenance; instead, it covered only "use of locomotives on a railroad line." 132 S. Ct. at 1267.

The Court rejected that argument in short order. It explained that Congress manifested an intent in the LIA to " 'occupy the entire field of regulating locomotive equipment' and * * * did not distinguish between hazards arising from repair and maintenance as opposed to those arising from use on the line." *Id.* at 1267-68 (citation omitted). Because the plaintiffs' suit was "*aimed at the equipment of locomotives*"—the " 'same subject as' " the Act—the fact that the plaintiff's injuries arose from the allegedly improper maintenance and repair of the locomotive rather than its use on the line was irrelevant. *Id.* at 1268 (citation omitted; emphasis added).

The argument this Court rejected in *Kurns* is indistinguishable from the one the Ninth Circuit has now embraced. Although the Ninth Circuit believed Respondents' suits "aris[e] out of" Respondents' retail transactions, Pet. App. 28a, that is irrelevant. Rather, the question under *Kurns* is whether Respondents' claims are "aimed at" regulating something that a federal statute commits to exclusive federal jurisdiction. 132 S. Ct. at 1268; *see also Medco Energi U.S., LLC* v. *Sea Robin Pipeline Co.*, 895 F. Supp. 2d 794, 806-811 (W.D. La. 2012) (applying *Kurns* to analyze field preemption under the NGA), *aff'd*, ___ F. App'x ___, 2013 WL 3316635 (5th Cir. July 2, 2013). In this case, Respondents' claims

are aimed at practices affecting jurisdictional rates, and Section 5 of the NGA places practices affecting jurisdictional rates within exclusive federal control. That is the end of the matter; the context in which the suits "arose" is of no moment.

In short, the application of state antitrust law to Petitioners' purported practices "amounts to regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." *Schneidewind*, 485 U.S. at 304. The Ninth Circuit accordingly should have held that Respondents' suits are preempted. Because Petitioners' alleged index manipulation practices are subject to FERC's control, the states cannot regulate them.

3. The Ninth Circuit's contrary conclusion relied on the following syllogism: Respondents suffered their alleged injuries in retail gas transactions; states have authority to regulate retail gas transactions; therefore, Respondents can use state law to sue for relief. Pet. App. 24a, 28a. But that thinking misses the point of this Court's precedents: It is the *effect* of a state regulation, not the context from which it sprang, that determines preemption.

In several NGA (and FPA) preemption cases, states have made the very same argument the Ninth Circuit accepted here, asserting that they were nominally regulating something within state authority. In *Mississippi Power*, much like here, that "something" was the prudence of "an increase in [the power company's] retail rates." 487 U.S. at 356. In *Northern Natural*, it was the "production and gathering" of natural gas. 372 U.S. at 90. In *Schneidewind*, it was the issuance of securities. 485 U.S. at 298. And yet in each case, this Court concluded that the state regulation was preempted because its effects were

"directed at * * * things over which [the NGA] has comprehensive authority." *Id.* at 308; *accord Northern Natural*, 372 U.S. at 94 (state regulation preempted because it was "aimed directly at interstate purchasers and wholesales for resale"); *Mississippi Power*, 487 U.S. at 374 (state regulation preempted because it was directed at "agreements that affect wholesale rates"). So too here. The Ninth Circuit's logic does not take this case outside the scope of *Schneidewind* and its predecessors. Its decision is contrary to this Court's precedent.

III. THE NINTH CIRCUIT'S DECISION WOULD FRAGMENT REGULATION OF THE INTERSTATE NATURAL GAS MARKET.

Finally, the question presented is tremendously important to the natural gas industry (and the electric power industry, whose governing statute is identical, *see supra* at 17 n.3). Many billions of dollars are allegedly at stake in this litigation. *See, e.g.*, Dist. Ct. Dkt. No. 1846 at 3, 58-59 (Nov. 3, 2009) (alleging $1.75 to $3.5 billion in damages in one state in a single year). But the significance of the Ninth Circuit's aberrant legal rule goes much farther than this case. The panel's notion of shared jurisdiction over contracts or practices that have the same effect on wholesale and retail markets would severely undercut the "uniformity of the federal scheme" that this Court has identified as a prime objective of the Natural Gas Act. *Transcon*, 474 U.S. at 423. Under the Ninth Circuit's rule, jurisdictional sellers will have to monitor the antitrust laws (and other consumer protection laws) of 50 states, and conform their practices affecting jurisdictional rates to the rules imposed by the most restrictive states, or risk exposure to massive damages. Moreover, no one—

not industry actors nor even FERC itself—will know until long after the fact what jurisdictions might regulate a particular practice. That is intolerable. This Court should grant review to restore the uniformity of regulation contemplated by the NGA.

1. Under the Ninth Circuit's test, jurisdictional sellers will be unable to determine *a priori* who will regulate any particular practice in the wholesale market. If, by happenstance, a practice affects only customers who buy natural gas in jurisdictional sales, then presumably FERC will be the lone regulator. However, if retail buyers (or the plaintiffs' bar on their behalf) can make a case that the practice affects them, too, then FERC's exclusive control is out the window. Suddenly, every state in which such a retail buyer resides can throw its hat into the regulatory ring. Gas companies thus would be exposed to massive liability for practices that are uniform nationwide, and that may well meet the approval of FERC and many states, but that do not pass muster under the idiosyncratic antitrust laws applied in a few state courts.

The whole point of the NGA is to guard against this fragmentation of natural-gas regulation. Congress charged FERC "to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act." *Northern Natural*, 372 U.S. at 91-92. State regulation thus "runs afoul" of the NGA when it "disturbs the uniformity of the federal scheme" and forces jurisdictional actors "*to comply with varied state regulations of their * * * practices.*" *Transcon*, 474 U.S. at 423 (emphasis added). That is just what would happen under the Ninth Circuit's rule. Indeed, it could well

happen in this very case: If the Ninth Circuit's judgment stands, the cases will be remanded for trial in various district courts under divergent rules of state law. *See Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (MDL courts must send cases back to transferor courts for trial). Respondents' claims seeking to regulate Petitioners' practices could end up succeeding under some state's antitrust laws and not others. The result would be a jumble of inconsistent rulings on whether a particular practice is proper.

The Ninth Circuit's rule, in short, forces jurisdictional sellers to obey state law first and FERC second, and creates the real threat of conflicting regulation. Those results fly in the face of the NGA's design. We can put it no better than the Nevada high court did:

> [T]he conclusion that there is no preemption leads to the imposition on interstate natural gas wholesalers [of] 50 different sets of state rules concerning anticompetitive behavior. [That] * * * would devastate two of the * * * purposes of the federal statutory scheme: national uniformity and freedom from burdensome government intervention. From a practical standpoint, if each state intervened in this field with different regulations, the result would be a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market. [*Johnson*, 289 P.3d at 1193 (quotation marks & citation omitted)].

2. The Ninth Circuit downplayed these concerns, asserting that "[s]tate and federal antitrust laws complement" the NGA "because such laws support fair competition." Pet. App. 27a. That is the wrong analysis as a matter of law; "[w]here Congress occu-

pies an entire field * * * even complementary state regulation is impermissible." *Arizona* v. *United States*, 132 S. Ct. 2492, 2502 (2012). But the Ninth Circuit's assertion also ignores the way state regulations operate in practice. States inevitably will disagree about what practices are "anticompetitive." As the Tennessee Supreme Court explained, there is no Platonic ideal of a competitive market that all antitrust laws strive to protect; on the contrary, "there is much disagreement as to the meaning of a 'competitive' market, and, therefore, when antitrust law should intervene." *Leggett*, 308 S.W.3d at 869. What one state might deem a legitimate business transaction, another might deem a manipulative wash sale. What one state might deem a legitimate way of reporting transactions to the trade press, another might view as deceptive. *See id.* To say state antitrust regimes would "complement" the uniform federal scheme is to ignore the differences from one state to the next.

Moreover, different state laws also punish purportedly anticompetitive conduct in markedly different ways—different both from each other and from federal law. For instance, Kansas, Wisconsin, and Colorado allow antitrust plaintiffs in certain circumstances to collect the *full* price they paid for a good as damages, not just treble the amount the defendant supposedly overcharged for the product. *See* Kan. Stat. Ann. § 50-115 (2011); Wis. Stat. Ann. § 133.14; Colo. Rev. Stat. § 6-4-121. That is a far greater measure of damages than a plaintiff can obtain under federal law. *See Kansas* v. *UtiliCorp United, Inc.*, 497 U.S. 199, 206 (1990) (Clayton Act damages limited to treble amount direct purchaser was overcharged plus costs and attorney fees). Other states

have still different rules. *See, e.g.*, Minn. Stat. § 325D.57 (limiting damages to treble amount of overcharge plus costs and attorney fees, but allowing indirect purchasers to collect damages). This is just one example of the larger point: Respondents' state-law suits pose a grave risk of inconsistent regulation of the natural gas market.

In short, even if all state antitrust laws shared the same objectives as their federal counterparts, "[p]ermitting the [s]tate[s] to impose [their] own penalties * * * would conflict with the careful framework Congress adopted." *Arizona*, 132 S. Ct. at 2502. And it would create the potential for significant new, and conflicting, regulation of jurisdictional sellers that would warp the market.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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