No. 13-271

In The
Supreme Court of the United States

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1]

The AAI submits this brief in support of affirming the decision of the Ninth Circuit holding that respondents' state antitrust claims are not preempted by the Natural Gas Act (NGA). The question raised in this case is important to AAI's mission because state antitrust law is a critical component of the U.S. antitrust regime, which complements sectoral regulation by the Federal Energy Regulatory Commission

[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae has made a monetary contribution to its preparation or submission. The AAI's Board of Directors alone has approved of this filing for the AAI. Individual views of board members or members of the Advisory Board may differ from the AAI's positions. Prof. Peter Carstensen, a senior fellow and member of the Advisory Board, served as an expert for certain Wisconsin respondents. He played no role in the preparation of this brief.

(FERC). "Since the 19th Century, the United States has relied on a combination of federal, state, and private enforcers to combat anticompetitive conduct." Bill Baer, Ass't Atty. General, Antitrust Division, U.S. Dep't of Justice, Public and Private Antitrust Enforcement in the United States, Remarks as Prepared for Delivery to European Competition Forum 2014 at 1 (Feb. 11, 2014). Indeed, state antitrust law predates the Sherman Act, which was intended "to supplement, not displace, state antitrust remedies." *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989).

"Given the long history of state common-law and statutory remedies against monopolies and unfair business practices," this Court has held that state antitrust laws are entitled to "the presumption against finding pre-emption." *Id.* at 101. This presumption is all the more important in regulated industries in the modern era because, as those industries are deregulated, "the natural result . . . is an increased role for the antitrust laws." Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335, 341. Preempting state antitrust law in these circumstances, therefore, would deprive natural gas and electricity markets of a necessary and valuable tool to deter and remedy anticompetitive conduct, and invite similarly misguided efforts to preempt state antitrust law in other markets with sector-specific regulatory schemes.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' preemption theory is far-reaching: applying state antitrust laws to price fixing and other hard-core antitrust violations in deregulated natural gas markets would be preempted as long as FERC *could* address aspects of the conduct that form the basis of the antitrust claims. Petitioners would oust state antitrust law regardless of whether it conflicts with FERC regulation or whether FERC was or could be "an effective steward of the antitrust function." *Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 413 (2004).

Petitioners' theory does not depend on whether there is any potential that FERC would endorse cartel conduct that the antitrust laws forbid – there is none. Neither does it depend on whether FERC's power to address the index-reporting conduct at issue involves the application of antitrust standards – it does not. Petitioner's theory also does not rest on whether FERC could penalize the conduct retrospectively – it could not. Finally, petitioners' theory does not turn on whether FERC could provide any compensation to purchasers of natural gas victimized by petitioners' conduct, let alone direct retail customers like the respondents here whose purchases were not subject to FERC jurisdiction – it could not.

Petitioners' preemption theory would bar not only private state antitrust suits in natural gas markets, but enforcement by state attorneys general. And it

would apply not only to natural gas markets, but also to deregulated electricity markets subject to FERC's jurisdiction. Beyond antitrust law, petitioners' theory would suggest that other generally applicable state laws – including criminal or tort prohibitions on fraud, extortion, and theft – would also be preempted when applied to conduct that FERC *could* address.

Implied preemption under the Natural Gas Act does not sweep so far. Only an interpretation of FERC's "exclusive jurisdiction" unhinged from any context or congressional purpose could produce the extreme result advocated by petitioners. Even assuming that FERC had jurisdiction to address the index manipulation at issue in this case, and apart from the NGA's express reservation of authority to the States under § 1(b) of the Act to regulate retail transactions, petitioners' expansive preemption theory should be rejected for several reasons.

First, petitioners treat this case as if it involves a conflict between federal and state utility regulation. It does not. The antitrust laws do not constitute regulation directed at the natural gas market. The antitrust laws are laws of general applicability that ordinarily apply to all economic actors. They define the rules of the free-market economy, as an alternative to traditional sector-specific regulation. Under this Court's preemption jurisprudence, state laws of general applicability usually are not preempted. The Court recognized this principle in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988). Petitioners' "leading case" made it clear that, unlike a state

securities law directed at natural gas companies and intended to regulate rates within FERC's control, a generally applicable blue sky law would not be preempted when it is applied to natural gas companies.

All of petitioners' other cases involve preemption of state utility regulations, not laws of general applicability. A state law of general applicability does not become a law "directed at" a field over which FERC has jurisdiction whenever it is applied to conduct in the field. Such a reading would imply the preemption of not only state blue sky laws but also any contract or tort claim in FERC regulated markets. Moreover, whether the index-reporting practices at issue may "directly affect" wholesale rates says nothing about whether a state law that affects reporting practices is "directed at" either such practices or wholesale rates. Petitioners' preemption theory leads to the anomalous result that if they raised index prices by blackmailing or bribing index publishers or by stealing and hacking their software, state criminal or civil claims for fraud, extortion, or theft would be preempted.

Second, there is no risk of an imminent collision between FERC regulation and state antitrust enforcement. The "regulatory chaos" predicted by petitioners ignores that state antitrust laws generally follow federal antitrust law on substantive issues, and there is no divergence as to hard-core antitrust offenses like the price fixing alleged here. The fact that some state antitrust laws provide remedies that

are not available under federal antitrust law creates no conflict with the objectives of the NGA.

Petitioners and the Solicitor General concede that respondents' antitrust claims would not be barred had respondents brought their claims under federal antitrust law. The only appellate court to address the issue has held that when state antitrust law mirrors federal antitrust law, it is not preempted by the NGA. *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991). This makes perfect sense. The fact that federal antitrust law is not precluded by the NGA militates against preemption because there is no basis to believe that when it enacted the National Gas Act in 1938, Congress intended to allow the continued application of federal antitrust law but not analogous state antitrust law. Also, the presumption against finding preemption of state antitrust laws is similar to the rule of construction that implied immunity from federal antitrust law is disfavored. The presumption against preemption of antitrust laws does not disappear merely because petitioners assert a field-preemption theory or because this Court has determined that under the NGA field preemption applies to some state utility laws. The question to which the presumption applies is whether state antitrust laws in general, or respondents' price-fixing claims in particular, are within the field Congress intended to preempt.

State and federal antitrust enforcement complements FERC oversight, and plays an increasingly

important role as Congress and FERC have deregulated natural gas markets. In contrast to the previous price-regulated environment, natural gas companies now have wide discretion over pricing and other contractual terms. FERC oversight helps promote competitive natural gas markets, but it has important limitations. For example, its ability to police collusion through its market manipulation authority is limited to conduct that involves fraud and deceit. Antitrust is concerned with collusion itself. When FERC brings an enforcement action, it can only award restitution, not damages, and only to wholesale customers to remedy a violation of a specific rule or tariff. Thus, respondents could not have obtained relief from FERC.

In sum, antitrust enforcement complements FERC's supervision of natural gas markets by addressing anticompetitive harm that FERC does not, and by providing remedies to victims that FERC cannot. Federal and state antitrust enforcement are both important. The Justice Department and the States bring cases in markets regulated by FERC. And private enforcement is an essential element of both the Sherman Act and state antitrust law.

ARGUMENT

I. STATE ANTITRUST LAWS, AS LAWS OF GENERAL APPLICABILITY, ARE NOT WITHIN THE FIELD PREEMPTED BY THE NATURAL GAS ACT

Even if FERC had the authority to regulate the challenged misconduct here as a "practice . . . affecting [wholesale] rate[s]," 15 U.S.C. § 717d(a), respondents' state antitrust claims are not preempted because the state antitrust laws do not "attempt to regulate matters within FERC's exclusive jurisdiction." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988). Rather, state antitrust laws are laws of general applicability governing the "free market," which are not "directed at[ ] the control of rates and facilities of natural gas companies." *Id.*

A. The Antitrust Laws Are Rules of the Free Market, Not Regulation Directed at the Natural Gas Market

Petitioners' arguments in favor of implied field preemption rest on the assumption that antitrust laws constitute regulation directed at the natural gas market. *See* Pet. Br. 12, 16, 26. However, the antitrust laws are laws of general applicability that ordinarily apply to all economic actors. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). Like contract and property law, the antitrust laws "define the rules of the free market economy." *Paper Systems Inc. v. Mitsubishi Corp.*, 967 F. Supp. 364, 368 (E.D.

Wis. 1997). They "are the Magna Carta of free enterprise." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *accord Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004); *see also Community Communs. Co. v. City of Boulder*, 455 U.S. 40, 56 (1982) (antitrust laws embody our "commitment to the policy of free markets and open competition"). And the First Commandment of the antitrust laws, "Thou shalt not conspire to fix prices," – which is at issue in this case – is as fundamental as the laws against theft. *See Trinko*, 540 U.S. at 408 ("the supreme evil of antitrust [is] collusion"); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 Fordham L. Rev. 2349, 2355 (2013) ("[T]he overriding goal of the antitrust statutes was to protect consumers from theft.").

State antitrust law, which is often enshrined in state constitutions, is also a linchpin of the free market. *See, e.g., Am. Med. Transp. of Wisconsin, Inc. v. Curtis-Universal, Inc.*, 452 N.W.2d 575, 582 (Wis. 1990) (adopting *Topco*'s Magna Carta characterization and noting that Wisconsin antitrust statute is intended "'to make competition the fundamental economic policy of this state'" (quoting Wis. Stat. § 133.01)).

Accordingly, antitrust laws provide a fundamentally different method for policing markets than state or federal laws regulating the natural gas industry. *See Blue Cross & Blue Shield United of Wisconsin v.*

Marshfield Clinic, 65 F.3d 1406, 1413 (7th Cir. 1995) (Posner, C.J.) ("the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute"). As then-Judge Breyer explained, "antitrust is more accurately contrasted with, rather than viewed as another form of, government regulation." Stephen Breyer, *Regulation and its Reform* 157 (1982).

> The antitrust laws seek to create or maintain the *conditions* of a competitive marketplace rather than replicate the *results* of competition or correct for the defects of competitive markets. In doing so, they act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not order firms to behave in specified ways; for the most part, they tell private firms what not to do.

Id. at 156-57; *see Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.) (regulation and antitrust "seek to achieve [similar] goals in very different ways"); *Trinko,* 540 U.S. at 408 (antitrust courts are "ill suited" "to act as central planners, identifying the proper price, quantity, and other terms of dealing"). In its preemption jurisprudence, this Court has recognized the "well established distinction between [regulatory] supervision and law enforcement." *Cuomo v. The Clearing House Ass'n,* 557 U.S. 519, 528 (2009). Antitrust is a matter of law enforcement.

B. State Laws of General Applicability Ordinarily Are Not Preempted

Courts "ordinarily do not deem Congress to preempt laws of general applicability." *E&J Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1046 (9th Cir. 2007). For example, notwithstanding the "expansive sweep" of the preemption clause of the Employee Retirement Income Security Act of 1974, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987), this Court has held that ERISA does not preempt "myriad state laws of general applicability that impose some burdens on the administration of ERISA plans." *De Buono v. NYSA-ILA Med. and Clinical Services Fund*, 520 U.S. 806, 815 (1997) (internal quotation marks omitted); *see also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) (general health care regulation not preempted by ERISA). And although the National Bank Act "shields national banking from unduly burdensome and duplicative state regulation, . . . [f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007).

Likewise, this Court has held that the Occupational Safety and Health Act does not generally preempt "state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike." *Gade v.*

Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 107 (1992); *see also Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970, 974-75 n.10 (2012) (while preemption clause of Federal Meat Inspection Act "sweeps widely" as to slaughterhouse requirements, "state laws of general application (workplace safety regulations, building codes, etc.) will usually apply to slaughterhouses").

This Court applied the same principles in analyzing preemption under the National Labor Relations Act. The Court held that a state unemployment compensation law allowing strikers to receive benefits was not preempted by the NLRA where the plurality characterized the state statute as one of general applicability and noted that "our cases have consistently recognized that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws directed specifically at concerted [labor] activity." *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 533 (1979) (plurality opinion). *Metropolitan Life Insurance Co. v. Massachusetts* held that minimum labor standards affecting union and nonunion employees equally – which were "state laws of general application affecting terms of collective-bargaining agreements subject to mandatory bargaining" – were not pre-empted by the NLRA. 471 U.S. 724, 753-56 (1985).[2]

[2] Even cases involving the very broad *express* preemption provisions of the airline and motor carrier deregulation laws,

(Continued on following page)

In *Schneidewind*, this Court recognized that state laws of general applicability ordinarily are not preempted by the Natural Gas Act. The Court held that the NGA preempted a Michigan law that specifically regulated the issuance of securities by natural gas companies because the state law was "directed at[ ] the control of rates and facilities of natural gas companies." 485 U.S. at 308. However, the Court made clear that preemption would not extend to state "blue sky" laws, which *generally* govern the "registration and sale of securities sold within the State." *Id.* at 308 n.11.[3] Citing *Metropolitan Life*'s discussion of

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cited by petitioners (Br. 37 n.6), recognize that generally applicable state laws often are not preempted when applied to the otherwise preempted federal field. Thus, in *Rowe v. New Hampshire Motor Transport Ass'n*, this Court held that Maine laws governing the delivery and transportation of tobacco that "aim directly at the carriage of goods" were preempted by federal trucking law, but that "state regulation that broadly prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public" would not be preempted. 552 U.S. 364, 375-76 (2008); *see id.* at 375-77 ("public health regulation" not generally preempted; state could address tobacco health issues by passing "other laws of general (non-carrier-specific) applicability").

[3] The Court noted that state blue sky laws governed "'securities regulation' in the traditional sense of the term," which is "one area FERC does not exclusively control." *Schneidewind*, 485 U.S. at 308 n.11. Fraud in issuing securities to finance a natural gas project could be the basis for FERC denying a certificate of convenience for the facility, *see id.* at 302, as well as for liability under the Michigan blue sky law. Antitrust enforcement is another area that FERC does not exclusively control.

state laws of general application, the Court indicated that the preempted Michigan statute was not such a generally applicable state law with only "'indirect'" effects, because the "*central purpose* [of the statute] is to regulate matters that Congress intended FERC to regulate." *Id.* at 308-09 (emphasis added); *see also Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 516 (1989) (citing *Schneidewind* for the proposition that a state regulation may be preempted if its "impact on matters within federal control is not an incident of efforts to achieve a proper state purpose").[4]

C. Petitioners Rely on Cases That Involve State Regulations Directed at Natural Gas or Electricity Markets, Not State Laws of General Applicability

To support their preemption claim, petitioners cite four cases that involved state utility regulation *directed at* natural gas or electricity markets, rather than state laws of general applicability. Petitioners'

[4] Petitioners read *Schneidwind*'s reference to statutes with only "indirect effects" as supporting their contention that conduct that directly affects wholesale rates cannot be subject to state law. Pet. Br. 35. But the distinction the Court drew was not whether the conduct at issue (issuing securities) had a direct or indirect effect on rates or facilities, but whether the *statute* at issue was "directed at[ ] the control of rates and facilities of natural gas companies" because of its specificity and purpose. The effect of a state law not so directed was deemed "'indirect.'" *Schneidewind*, 485 U.S. at 308.

"leading case is *Schneidewind*," Pet. Br. 23, which, as explained above, involved a utility-specific securities law whose purpose was "to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.'" *Id.* at 24 (quoting *Schneidewind*, 485 U.S. at 308) (quotation marks omitted); *see also Nw. Cent. Pipeline*, 489 U.S. at 513 n.10 ("[N]ot only was the regulation at issue in [*Schneidewind*] directed to interstate gas companies, but it also had as its central purposes the maintenance of their rates at what the State considered a reasonable level, and their provision of reliable service.").

Petitioners also rely on *Northern Natural Gas Co. v. State Corp. Commission,* 372 U.S. 84 (1963), in which this Court held that a "ratable take" order of the Kansas utility commission was preempted. The Court distinguished "between conservation measures aimed directly at interstate purchasers and wholesales for resale," such as the order at issue, which are preempted "when they threaten . . . the achievement of the comprehensive scheme of federal regulation," and conservation measures "aimed at producers and production," which are not. *Id.* at 94; *see also Transcon. Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474 U.S. 409 (1986) (same).

And petitioners rely on *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), which held that the Federal Power Act required the Mississippi Public Service Commission to allow a utility "to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined

wholesale rate for a FERC-mandated allocation of power." *Id.* at 373. The Court applied the principle that, "'[o]nce FERC sets . . . a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable.'" *Id.* (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986)). And petitioners rely on *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), which was not a preemption case, as such. Rather, it held that the Federal Power Commission had authority to issue curtailment orders that include non-jurisdictional direct sales, under its authority to regulate the interstate transportation of natural gas.

These cases, in which this Court has found state utility regulation to be preempted by federal law, all have involved just that, state *utility* regulation, which, petitioners recognize, was "'directed at . . . things over which FERC has comprehensive authority.'" Pet. Br. 3 (quoting *Schneidewind*, 485 U.S. at 308) (ellipsis in original). Obviously, state antitrust laws, as laws of general application, are *not* "directed at" the natural gas market, utilities, or index reporting practices. Rather, as explained above, they enforce well-established norms of conduct for *all* firms, including the prohibition of price fixing by competitors. *See also infra* II.A.

Yet petitioners insist that preemption here follows from these cases because petitioners' *claims or lawsuits* "target," or are directed at, index manipulation by wholesale sellers within FERC's jurisdiction. Pet.

Br. 3, 12; *see also* U.S. Br. 23. But accepting this argument would eviscerate *Schneidewind*'s distinction between "a state law whose central purpose is to regulate matters that Congress intended FERC to regulate," and laws of general application like state blue sky laws. *Schneidewind*, 485 U.S. at 308-09; *cf. Pilot Life*, 481 U.S. at 50 ("[I]n order to *regulate* [an industry], a law must not just have an impact on the . . . industry, but must be specifically directed toward that industry.") (emphasis added). If preemption analysis turned on whether a *particular* claim or lawsuit was directed at a field over which FERC has jurisdiction, then state blue sky laws as applied to natural gas companies would be preempted, as would any contract or tort claim in FERC-regulated markets, which is obviously not the case. *See Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 582 n.12 (1981) (state law contract claims consistent with federal tariff are actionable); *Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883, 896 (7th Cir. 2013) (same).[5]

To be sure, state common law duties have occasionally been preempted under some statutes, as

[5] Petitioners' theory would suggest that if a natural gas company breached its contract to supply gas to wholesale purchasers, the purchasers' suit to recover damages would amount to impermissible "regulation" of the wholesale market because the "'obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" Pet. Br. 26-27 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

petitioners point out. Pet. Br. 27. Typically, however, *general* common law or statutory duties are not preempted. *See, e.g., Altria Group, Inc. v. Good*, 555 U.S. 70, 84 (2008) (general duty not to deceive in state unfair practice statute, like common law duty not to make fraudulent statements, is not preempted by Federal Cigarette Labeling and Advertising Act; finding "no support for an argument that a general prohibition of deceptive practices is 'based on' the harm caused by the specific kind of deception to which the prohibition is applied in a given case"); *Sprietsma v. Mercury Marine,* 537 U.S. 51, 69-70 (2002) (Federal Boat Safety Act of 1971 "might be interpreted as expressly occupying the field with respect to state positive laws and regulations," but the "occupied 'field' [does not] include judge-made common law"); *English v. General Elec. Co.*, 496 U.S. 72 (1990) (common law claim for intentional infliction of emotional distress based on retaliation against employee's nuclear-safety complaints not within the preempted field of nuclear safety).

Petitioners' assumption that the index reporting practices at issue "directly affect" wholesale rates does not bolster their position. Pet. Br. 40-43. The question is whether state antitrust law as applied to reporting practices is "directed at" the preempted field. Indeed, petitioners' preemption theory leads to the anomalous result that if they raised index prices by blackmailing or bribing the index publishers, or by stealing and hacking the publications' software, state law criminal or tort claims for fraud, extortion, or

theft would be preempted because the prohibited conduct likewise would "directly affect" wholesale rates.

Petitioners' attempt to portray this case as involving a conflict between federal and state utility regulation cannot be sustained. Regardless of FERC's authority, petitioners' implied field preemption theory must be rejected because applying state antitrust laws to petitioners' conduct does not "intrude[ ] on a field of regulation that federal legislation has occupied," *Schneidewind*, 485 U.S. at 309 n.12.

II. THERE IS NO IMMINENT POSSIBILITY OF COLLISION BETWEEN STATE ANTITRUST ENFORCEMENT AND FEDERAL ENERGY REGULATION

Petitioners' claim of an imminent collision between state antitrust enforcement and federal regulation of the natural gas market ignores that, in general, state antitrust laws are in substantive harmony with federal antitrust law. And in particular, all would condemn the price fixing among competitors alleged here. And the fact that federal antitrust claims are not precluded militates against preemption of analogous state antitrust law. Both federal and state antitrust enforcement complement FERC oversight of natural gas markets, particularly under

deregulation, and especially when it concerns such unambiguously anticompetitive conduct.[6]

A. State Antitrust Laws Are in Harmony and Consistent with Federal Law on Substantive Standards, Particularly as to Price Fixing

Petitioners contend that the enforcement of state antitrust law would result in "regulatory chaos" and a "morass under which individual states can impose their own conflicting standards." Pet. Br. 16, 17, 33. According to petitioners, "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.'" *Id.* at 31 (quoting *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 869 (Tenn. 2010)). In fact, however, state antitrust laws generally follow federal antitrust law on substantive issues. *See generally* ABA Section of Antitrust Law, *State Antitrust Enforcement Handbook* 22-23 (2d ed. 2008). As Professors Areeda and Hovenkamp explain,

> The antitrust laws of many states follow a common pattern of construction. First, they

[6] Petitioners do not argue here, and did not argue below, that there is an *actual* conflict between state antitrust enforcement and federal regulation; they simply contend that there is a *potential* conflict which supports their field-preemption argument.

> use statutory language that tracks the federal statutes closely. Then by either statute or state supreme court declaration, they hold that on substantive issues federal case law should be regarded as precedential.
>
> . . .
>
> [E]ven in those states whose statutes or general case law permit deviation, variance from federal law in substantive doctrine is quite exceptional.

14 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2410, at 350-51, 355 (3d ed. 2012).

For example, on questions of substantive law, the state antitrust laws of Colorado, Kansas, Missouri, Oklahoma, Wisconsin, and Wyoming – under which respondents have brought their claims – are all applied in a manner consistent with federal antitrust precedent. Colorado law provides that "in construing [state antitrust laws], the courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws." Colo. Rev. Stat. § 6-4-119. Although the Kansas courts historically treated federal antitrust law as only persuasive authority, state statute now requires the courts to generally follow federal precedent. Kan. Stat. Ann. § 50-163(b). Similarly, Missouri law requires that the state's antitrust laws "be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." Mo. Rev. Stat. § 416.141. Oklahoma law also requires that the state antitrust law "be interpreted in a manner consistent with Federal

Antitrust Law." Okla. Stat., tit. 79, § 212. In Wisconsin, state courts "have [long] followed federal court interpretations of Sections 1 and 2 of the Sherman Act and have construed Wisconsin antitrust statutes in conformity with these federal court interpretations." *Meyers v. Bayer AG, Bayer Corp.*, 735 N.W.2d 448, 465 (Wis. 2007) (alteration in original). Wyoming antitrust case law is sparse and does not address the role of federal precedent but Wyoming law is analogous to the Sherman Act. *See* Wyo. Const., art. 10, § 8 (banning trusts); Wyo. Stat. § 40-4-101 (parties are prohibited from entering into agreements to "prevent competition or to control or influence production or prices").

Particularly as to price fixing, there is no divergence among the States. Under the Sherman Act, the conspiracy to inflate retail prices alleged here is per se illegal. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*.").[7] States would likewise condemn the price fixing conspiracy as per se

[7] The allegations here bear a resemblance to the facts of *Socony-Vacuum*. That case involved a conspiracy by major oil companies to raise the price of their gasoline sales to jobbers (and ultimately consumers), which were pegged by contract to spot market prices published in market journals. The major oil companies sought to raise or maintain the published spot market prices by purchasing distress gasoline from independent refiners at artificially inflated prices.

illegal, either because they follow the Sherman Act or expressly codify the per se rule against price fixing. *See generally* Michael A. Lindsay, *Overview of State RPM*, The Antitrust Source (Oct. 2014) http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_lindsay_chart.authcheckdam.pdf (survey of state antitrust laws); *see also* 14 Areeda & Hovenkamp, ¶ 2418, at 392 ("state law of cartels . . . very largely tracks federal law on the same subject").

Petitioners' argument (Pet. Br. 31) that there is a potential conflict because a state court jury might find a manipulative wash sale or a deceptive practice where FERC might consider the conduct to be a legitimate business transaction is beside the point. There is no risk that FERC would consider a *price fixing conspiracy* to be a legitimate business transaction.

Petitioners also argue that state remedies that are available under some state antitrust laws but not federal antitrust law create a potential conflict with the NGA. In particular, they point to the laws of three states at issue in this case which allow (or did allow) victims of pricing fixing to recover the full amount of the purchase price, regardless of the size of the overcharge.[8] Pet. Br. 32. However, there is no general

[8] Full-consideration damages have a venerable antitrust pedigree. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 Fordham L. Rev. 2279, 2341-42 (2013) (noting that full-consideration remedies were in the earliest state antitrust laws, predating the Sherman Act). Full

(Continued on following page)

principle that state remedies broader than those available under federal law conflict with careful federal frameworks.

On the contrary, "[o]rdinarily, the mere existence of a federal regulatory or enforcement scheme, even one as detailed as [the whistleblower protections of the Atomic Energy Act], does not by itself imply pre-emption of state remedies." *English*, 496 U.S. at 87; *see also Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011) (state law providing for revocation of license to do business for employing unauthorized aliens did not interfere with federal regulation of immigration). Indeed, in the antitrust field, this Court has explicitly held that states may impose "liability in addition to that imposed by federal law" without conflicting with federal antitrust law. *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989) (noting that "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law").

And if Sherman Act treble damages and criminal sanctions for price fixing do not conflict with the

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consideration damages may or may not exceed the treble damages available under federal antitrust law. Full consideration will be less than treble damages when the cartel overcharge is more than one-third, which is often the case. *See generally* John M. Connor, *Cartel Overcharges*, *in* 26 Res. in Law & Econ. 249 (2014) (meta-survey of cartel studies and other data finds median overcharge of 23% and mean overcharge of at least 49%).

objectives of the NGA in general, or FERC regulation of index reporting practices in particular, then it is difficult to understand how full-consideration remedies would somehow conflict.

B. The Fact That FERC's "Exclusive Jurisdiction" Does Not Preclude Federal Antitrust Claims Militates Against Preemption of Analogous State Antitrust Law

This Court has held that the Natural Gas Act does *not* displace federal antitrust law. *California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962) ("[T]here is no 'pervasive regulatory scheme' including the antitrust laws that has been entrusted to the Commission."); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973) ("There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws."). Thus, had respondents brought their claims under the Sherman Act, they would not have been precluded, as the lower courts so held. *See* Pet. App. 42a. Petitioners and the Solicitor General recognize that federal antitrust laws would apply. Pet. Br. 32; U.S. Br. 24-25 ("NGA does not insulate companies from federal antitrust laws;" premise of filed-rate doctrine inapplicable when sellers "act beyond the scope of their FERC-issued certificate").

The fact that federal antitrust law is not precluded by the NGA strongly militates against preemption of analogous state antitrust claims, for two reasons. First, both preclusion and preemption are at bottom based on the intent of Congress. *See English*, 496 U.S. at 78-79 ("Pre-emption fundamentally is a question of congressional intent" (citing *Schneidewind*, 485 U.S. at 299)); *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014) (whether one federal statute precludes another is a question of statutory interpretation). There is no basis to believe that when it enacted the Natural Gas Act in 1938, Congress intended to allow the continued application of federal antitrust laws, but not analogous state antitrust laws.

Second, the canons of statutory construction as to preclusion of federal antitrust claims and preemption of state antitrust claims are similar. Just as the doctrine of implied immunity raises a high bar for precluding federal antitrust claims, so too is there a strong presumption against the preemption of state antitrust laws. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws . . . repeals by implication" are "disfavored." *Fed. Trade Comm'n v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1010 (2013). Similarly, state antitrust laws are entitled to the presumption 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.'" *ARC America*,

490 U.S. at 101 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).[9]

Accordingly, the Seventh Circuit has held that the Natural Gas Act does not preempt state antitrust claims "[w]hen state antitrust law only mirrors federal antitrust law." *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1479 (7th Cir. 1991). *Burris* is consistent with this Court's cases that treat similar state and federal laws similarly for preemption and preclusion purposes. *See, e.g., Metropolitan Life*, 471 U.S. at 755 ("We see no reason to believe that . . . Congress intended state minimum labor standards to be treated differently from minimum federal standards."); *Cuomo*, 557 U.S. at 528 (fact that Comptroller's "exclusive exercise" of visitorial powers did not preclude law enforcement by federal agencies supported conclusion that state law enforcement was not preempted). Indeed, just last term, this Court held that principles of preemption precedent were "instructive" for analyzing preclusion of federal claims "insofar as they are designed to

[9] "Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States." *ARC America*, 490 U.S. at 101. The Court noted: "At the time of the enactment of the Sherman Act, 21 States had already adopted their own antitrust laws. Moreover, the Sherman Act itself, in the words of Senator Sherman, 'does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.'" *Id.* at 101 n.4 (citations omitted).

assess the interaction of laws that bear on the same subject." *Pom Wonderful*, 134 S. Ct. at 2236.

The Solicitor General cites *Connell Construction Co. v. Plumbers Local Union No. 100*, 421 U.S. 616, 635-37 (1975), for the proposition that federal regulation (there, the NLRA) can preempt state antitrust laws without precluding federal antitrust law. U.S. Br. 24. In *Connell*, however, there was a difference between state and federal antitrust law, which is how the Seventh Circuit in *Burris* distinguished the case. Whereas federal antitrust law had been "carefully tailored" to avoid conflict with federal labor policy, state antitrust laws, "[i]f they take account of labor goals at all, . . . may represent a totally different balance between labor and antitrust policies." *Connell*, 421 U.S. at 636.[10] Thus, unlike federal antitrust law, state antitrust law "create[d] a substantial risk of conflict with policies central to federal labor law." *Id.* In contrast, here federal and state antitrust laws are in harmony and both complement federal natural gas regulation, so there is no threat of conflict.

The Solicitor General also incorrectly asserts that the presumption against preemption does not apply here because the only question is the "proper scope" of FERC's authority. U.S. Br. 16 n.2 (citing *New York v. FERC*, 535 U.S. 1, 17-18 (2002)). However, this case

[10] The Court pointed out that union activity under Texas labor law was not exempt from the Texas antitrust statute at issue. *Connell*, 421 U.S. at 636 n.18.

not only turns on the scope of FERC's authority to regulate, but whether state antitrust law "intrudes" on that authority. *Schneidewind*, 485 U.S. at 309 n.12; *id*. at 305 ("question remains . . . whether [a]ct . . . regulates *within* [the] exclusively federal domain").[11]

Moreover, as the cases cited by *New York v. FERC* demonstrate, the presumption against preemption of the historic powers of the States applies to conflict *or* field preemption. *See Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985) ("Appellee must thus present a showing of implicit preemption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation."); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *see also Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). Indeed, *Schneidewind* itself relied on the fact that the Michigan "regulation of natural gas company securities issuances" was not "a field of regulation that . . . 'the States had traditionally

[11] Likewise, petitioners' argument that the presumption "has long been overcome" because the Court has determined that 'Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce,'" (Pet. Br. 44, quoting *Schneidewind*, 485 U.S. at 305), ignores that the very question presented is whether the preempted field includes antitrust conspiracy claims based on harm in retail markets.

occupied.'" *Schneidewind*, 485 U.S. at 310 n.13 (quoting *Rice*, 331 U.S. at 230) (brackets omitted).

Petitioners note that "it is unclear whether the presumption should apply . . . 'where there has been a history of significant federal presence.'" Pet. Br. 43 (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)). However, it *is* clear that state antitrust law long predates federal regulation of natural gas markets. And this Court held subsequent to *Locke* that the presumption against preemption "accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009).

C. Antitrust Enforcement Complements Federal Regulation, Especially in Deregulated Markets

Given that antitrust is an *alternative* to traditional regulation, *see supra* I.A., "[a]s deregulation turns more decision making back to the regulated firms, antitrust takes a more important role." Herbert Hovenkamp, *The Antitrust Enterprise* 230 (2005); *see* Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 Mich. L. Rev. 683, 728 (2011) ("[T]he availability of antitrust enforcement allows regulation to diminish without leaving a gap in oversight of competitive conduct in the relevant markets."); *see also* Alfred E. Kahn, *I Would Do It Again*, Regulation, Feb. 1988, No. 2, at 22, 28

(arguing that failure to enforce antitrust laws in deregulated industries would discredit deregulation).

This Court has recognized the importance of applying "fundamental national polices embodied in the antitrust laws" to markets regulated by FERC when "voluntary commercial relationships . . . are governed in the first instance by business judgment and not regulatory coercion." *Otter Tail*, 410 U.S. at 374. And, as the Ninth Circuit recognized here, "State and federal antitrust laws complement Congress's intent to move to a less regulated [natural gas] market, because such laws support fair competition." Pet. App. 27a; *see also Gallo*, 503 F.3d at 1046 ("[T]he withdrawal of FERC's authority to determine [first sale] rates gives rise to the . . . inference[ ] that normal market forces, including the tug and pull of private lawsuits, will hold sway.").

Congress has deregulated the natural gas market since the late 1970s, eliminating price caps and narrowing FERC's active jurisdiction. *See* Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.*; Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157. Market forces are now the predominant price-setting mechanism in the natural gas industry. Rather than directly set rates as it once did, FERC issues blanket certificates to market participants giving them the right to sell gas at whatever price the market will bear. *See Regulations Governing Blanket Marketer Sales Certificates*, 57 Fed. Reg. 57,952, 57,957-58 (Dec. 8, 1992). FERC oversees the market through a complaint process

under 15 U.S.C. 717d(a).[12] In contrast to the previous price-regulated environment, "firms have a great deal of business discretion even in the areas that are under the agency's formal jurisdiction." 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law,* ¶243g1, at 387 (4th ed. 2013).

FERC oversight helps promote competitive natural gas markets, but it has important limitations. FERC regulation may take competition issues into account. *See, e.g.*, *Gulf States Utilities Co. v. Fed. Power Comm'n*, 411 U.S. 747, 760 (1973) ("Consideration of antitrust and anticompetitive issues by the Commission . . . serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings."). But it does not always do so. *See Otter Tail*, 410 U.S. at 373 ("Although antitrust considerations may be relevant, they are not determinative.").

Indeed the Code of Conduct adopted by FERC partly in response to the market manipulation at issue in this case was not focused on antitrust concerns.

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[12] FERC can withdraw blanket marketing authority if it finds that it no longer leads to rates that are just and reasonable, but its ex post review of rates determined under blanket marketing certificates is sharply restricted under the *Mobile-Sierra* doctrine. *See Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008); *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010).

See Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323, 66,330 (Nov. 26, 2003) (Order 644) ("Although our regulatory approach includes elements of anti-trust law, it is not limited to the structure of those laws."). FERC's ability to police collusion under the Code of Conduct and its current market manipulation rules is limited to conduct that involves fraud and deceit.[13] In contrast, "[i]t is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which [the antitrust law] strikes down." *Socony-Vacuum*, 310 U.S. at 224 n.59 (ellipsis in original); *see* William H. Stallings, *Colloquium on Antitrust and Regulation: The Continuing Role For Antitrust Enforcement in the Electricity Sector*, 9 Competition Pol'y Int'l 12, 17-21 (2013) (discussing recent antitrust cases brought by the Justice Department in electricity markets where FERC found no violation of its market manipulation rules).

When FERC does bring an enforcement action, it can only award restitution, not damages,[14] and then only to wholesale customers to remedy violations of a

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[13] *See Prohibition of Energy Market Manipulation*, 71 Fed. Reg. 4244, 4252-54 (Jan. 26, 2006) (Order 670) (adopting rule under Energy Policy Act of 2005 modeled on SEC Rule 10b5); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, at ¶ 22 (Feb. 16, 2006) (discussing pre-EPAct, cognate anti-manipulation rule for electric utilities).

[14] *See* Order 644, 68 Fed. Reg. at 66,334 (¶95). The Commission was given authority to impose civil penalties for violations of its natural gas rules under the EPAct of 2005. 15 U.S.C. § 717t-1.

specific rule or tariff.[15] Thus, respondents could not have obtained relief from FERC. Moreover, while FERC ordered certain prospective relief with regard to petitioners' index-reporting practices, it apparently obtained no monetary relief for the manipulation.[16] Accordingly, it can hardly be said that "the NGA has equipped FERC adequately to address the precise concerns [antitrust law] purports to manage." *Schneidewind*, 485 U.S. at 309.

Antitrust enforcement, in short, complements FERC's supervision of the natural gas markets by addressing anticompetitive harm that FERC does not, and by providing remedies to victims that FERC cannot. As in other markets, "[s]tate and federal [antitrust] enforcement can be strong complements in achieving optimal enforcement." Antitrust Modernization Comm'n, *Report & Recommendations* at v (2007). The Justice Department has brought important antitrust cases in markets regulated by FERC. *See, e.g., United States v. KeySpan Corp.*, 763 F. Supp. 2d

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[15] *See* Order 644, 68 Fed. Reg. at 66,334 (¶94). Refunds and reparations are not permitted merely because rates or practices are determined to be unreasonable under sections 4 and 5 of the NGA. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).

[16] *See* Pet. App. 107a-109a (reciting settlements with some of the petitioners); *Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, 114 FERC ¶ 61,166, at ¶ 38 (Feb. 16, 2006) (noting that "there were not clear rules to deal with abusive market conduct" prior to Code of Conduct).

633 (S.D.N.Y. 2011); Stallings, *supra*. States have also long brought antitrust cases in gas and electric markets, as the States' amicus brief points out.

Not only does state antitrust enforcement put another cop on the beat, but state law often gives state attorneys general certain options that are unavailable when they enforce federal antitrust law, including seeking relief on behalf of businesses, as well as individuals, *compare*, *e.g.*, Kan. Stat. Ann. § 50-103(a)(8) *with* 15 U.S.C. § 15c(a)(1), obtaining civil and criminal penalties, *see, e.g.,* Colo. Rev. Stat. § 6-4-112, -117, securing compensation for direct and indirect purchasers, *see, e.g., Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), and suing in state court as permitted by the Class Action Fairness Act, *id.*

Private enforcement of the antitrust laws is a key component of both the Sherman Act and state antitrust laws, and is particularly important in FERC regulated markets given FERC's limited ability to deter and compensate victims of anticompetitive harm. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, *Inc.*, 473 U.S. 614, 635 (1985) ("the private cause of action plays a central role in enforcing this regime"). As this Court recently recognized with regard to private actions under the Lanham Act, private plaintiffs' "awareness of unfair competition practices may be far more immediate and accurate than that of agency rulemakers and regulators," private actions "provide incentives for manufacturers to behave well," and allowing private suits "takes

advantage of synergies among multiple methods of regulation." *POM Wonderful*, 134 S. Ct. at 2238-39 (internal quotation marks omitted).

In sum, petitioners have failed to show any possibility of collision between state antitrust enforcement against the "supreme evil of antitrust" and FERC regulation of natural gas markets. On the contrary, enforcement of state antitrust laws, like the Sherman Act, broadly complements FERC regulation.

CONCLUSION

For the foregoing reasons, and those stated in repondents' briefs, this Court should reject petitioners' field-preemption argument and affirm the decision of the Ninth Circuit.

Respectfully submitted,

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