No. 13-271

IN THE

Supreme Court of the United States

ONEOK, INC., *et al.*,
Petitioners,
v.
LEARJET, INC., *et al.*,
Respondents.

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

AMICUS CURIAE BRIEF OF AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

The American Gas Association ("AGA") is the national trade association representing energy members that deliver natural gas. The AGA represents over 200 distribution companies, located in all 50 states that deliver natural gas to 64 million customers throughout the United States; sixty-four million customer homes and businesses in need of stable, efficient and reliable markets.

AGA members include: (1) publicly traded energy utilities, municipally owned energy utilities, and privately held utility companies and (2) natural gas distributors, pipelines, marketers and storage facilities. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for members including the filing of *amici* briefs commenting on issues that could affect its members and/or their customers.

The AGA represents businesses and other entities that participate in the intrastate and national interstate natural gas markets. For this reason, *amicus* has a substantial interest in ensuring that there is clarity and a bright line between the intra and interstate regulation of natural gas sales. As explained below, we believe these principles were violated in the subject cases.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its non-party members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

As discussed below, the rule adopted by the Ninth Circuit exposes natural gas companies to inconsistent state regulation, and uncertainty as to which state laws and jurisdictions they must comply with, for engaging in practices that for the past half-century have been subject to consistent, uniform national policy and regulation. Currently natural gas companies look to one entity—the Federal Energy Regulatory Commission ("FERC")—for certainty in these areas.

Natural gas companies participating in the complex interstate marketplace cannot implement nationwide practices with uncertainty as to the laws with which they must comply or the jurisdictions to which they may be subject. That is a recipe for confusion and will only serve as a drag on the interstate market for natural gas which will, in turn, harm consumers and the national economy.

ARGUMENT

I. HISTORY AND IMPORTANCE OF THE NATURAL GAS FEDERAL REGUATORY SCHEME

A. The Federal Government Comprehensively Regulates The Interstate Natural Gas Market To Ensure Efficiency And Uniformity.

Over the last century, the natural gas industry has progressed from local markets lightly regulated at the state level, to a national market closely controlled by the federal government, and, ultimately, to our present system which incorporates competitive market principles into a well-established and uniform

regulatory scheme addressing natural gas in interstate commerce.

During the 1800's, natural gas was used mainly to power street and housing lights in the United States. Today, almost 200 years later, natural gas is one of the principal energy sources in the United States, integral to the needs of individual consumers, business and industry, local and state governments, and the federal government.

Today, the Energy Information Administration, US Department of Energy, reports that U.S. natural gas reserves are at record levels (over 330 tcf at year-end 2011) and have grown with the continued development of shale gas during the past seven years.[2, 3] In 1990, that inventory represented about 9 years of domestic dry gas production. Today, the 334 tcf of proven dry gas reserves represents nearly 14 years of an on-the-shelf inventory supported by over 100 years of resources and reserves combined—assuming continued U.S. natural gas production of levels.

The abundance of natural gas means that it will play an ever increasing role in meeting the constantly expanding energy needs of the United States. It is hard to understate the importance of natural gas to the future of the United States. Thus, ensuring reliable and consistent laws, regulation and policy is

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[2] Energy Informational Administration, Natural Gas Reserves Summary as of December 31, 2011. http://www.eia.gov/dnav/ng/ng_enr_sum_a_EPG0_R11_BCF_a.htm. Source: Form EIA-23, "Annual Survey of Domestic Oil and Gas Re-serves."

[3] Natural gas *reserves* are the on-the-shelf inventory associated with drilled wells and thus most immediately available for production.

vital to both the public and private interests of the United States and its citizens.

Initially, the distribution of natural gas was regulated by local municipalities. By the early 1900's, the first intrastate pipelines were developed and transportation of natural gas between municipalities began to occur. In 1907, New York and Wisconsin were the first states to form public utility and service commissions to oversee the regulation of natural gas distribution. Over the ensuing years, other states followed suit. Soon enough, however, technological advances permitted interstate pipelines to be developed, and the interstate distribution of natural gas began. As with their predecessors, the local municipalities, state governments could only regulate the distribution of pipelines within their individual jurisdictions; they could not regulate the new interstate pipelines.

In 1938, Congress passed the Natural Gas Act ("NGA") and charged the federal government with regulating the prices charged by the companies that owned and operated the interstate natural gas pipelines. The NGA gave the Federal Power Commission jurisdiction over regulation of interstate natural gas sales.

However, natural gas producers were not regulated under the Natural Gas Act. In 1954, however, the Supreme Court held that natural gas producers that sold gas into interstate pipelines fell under the classification of "natural gas companies" under the Natural Gas Act and were subject to federal regulation. *See Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). From 1954 through the early 1970's, the federal government utilized different schemes to regulate the price of natural gas. But,

these regulatory attempts backfired since they blunted incentives to produce natural gas. In fact, during 1976 and 1977, severe natural gas shortages led to closures of industries and schools in the Midwest while states in the southern producing regions of the country experienced no shortages.

To remedy the strains created by the shortages, Congress enacted new legislation, the Natural Gas Policy Act of 1978, 15 U.S.C. 717 et. seq. ("NGPA"). Congress had three main goals in implementing the Natural Gas Policy Act of 1978, specifically (1) creating a single, national natural gas market; (2) equalizing supply with demand; and (3) allowing market forces to establish the wellhead price of natural gas. To meet these goals, Congress created the FERC. Under the NGPA, the FERC was authorized to approve the transportation of natural gas by an interstate pipeline on behalf of intrastate pipelines and local distribution companies—avoiding some of the regulatory hurdles that had created such a schism between interstate and intrastate markets, which was one of the primary reasons for the severe gas shortages.

Using its authority under the NGPA, the FERC began the process of introducing competition to the natural gas market. Historically, pipeline operators purchased natural gas from producers, transported it to their customers (mostly local distribution companies or "LDCs")[4], and sold the bundled product of gas and the transportation service for a single, regulated price. This meant that a pipeline customer

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[4] An LDC, or local distribution company, is the entity that provides natural gas to end users, such as consumers, business, industry, and government.

could not purchase natural gas from a producer as one product and transportation service as a separate service from a pipeline company. This limitation impeded Congress' goal of creating a single, national, natural gas market.

In 1985, the FERC issued Order No. 436, which permitted pipelines to offer transportation service as a separate service.[5] Essentially, with Order No. 436, the FERC allowed pipelines, on a voluntary basis, to offer transportation services to customers who requested them on a first come, first served basis. At the same time, the FERC barred interstate pipelines from discriminating against such customer transportation requests in favor of protecting their own merchant services (i.e. the bundled product of gas and transportation service). One of the long term effects of Order No. 436 was that the transportation function became the primary function of the interstate pipelines and the practice of bundled gas and transportation services declined.

In furtherance of this regulatory scheme based on competitive market principles, Congress passed the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157, deregulating 'first sales' and

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[5] *Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regs. Preambles ¶ 30,665 (1985), *vacated and remanded*, *Associated Gas Distrib. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), *readopted*, Order No. 500, FERC Stats. & Regs., Regs. Preambles ¶ 30,761 (1987), *remanded*, *American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, FERC Stats. & Regs., Regs. Preambles ¶ 30,867 (1989), *order on reh'g*, Order No. 500-I, FERC Stats. & Regs., Regs. Preambles ¶ 30,880 (1990), *aff'd in relevant part*, *American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 957 (1991).

removing them from FERC's rate setting jurisdiction. By this Act, Congress did not relinquish its regulatory authority but continued its policy of replacing direct regulation with a reliance on competitive market forces.

The Congressional and FERC efforts were successful and a single, national, natural gas market emerged, shortages disappeared, and market forces determined the price of natural gas. In 1992, the FERC issued Order No. 636, which completed the final steps toward the permanent unbundling of pipeline services.[6] (Order No. 636 is sometimes called the "Final Restructuring Rule"). Essentially, Order No. 636 requires that pipelines separate their transportation and sales services so that all pipeline customers may purchase gas from any producer and may purchase transportation services from any pipeline according to rates filed with the FERC in the form of a tariff. Order No. 636 also required that pipelines restructure their gas production and marketing arms as arms-length affiliates and provided that the new affiliates could have no advantage over other pipeline customers. The main purpose of Order No. 636 is to give both natural gas producers and purchasers an even playing field on which to sell, purchase, and transport natural gas.

To protect the efficient and reliable national natural gas market that we enjoy today, both the courts and

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[6] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs., Regs. Preambles ¶ 30,939, order on reh'g, Order No. 636-A, FERC Stats. & Regs., Regs. Preambles ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *aff'd in relevant part*, *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir.), *cert. denied*, 520 U.S. 1224 (1997).

the FERC have recognized that natural gas in an interstate pipeline is in interstate commerce and should be free from regulation by individual states. *See Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).

B. This Court Has Long Safeguarded The Federal Government's Regulatory Control Over The Interstate Market.

Driven by Congressional policy and FERC regulations, the Supreme Court has long held that the NGA was designed to unify regulation of the wholesale market and to place authority over that market in FERC. The Court has repeatedly taken a dim view of approaches that allow states to "disturb[] the uniformity of the federal scheme," explaining that such state regulation 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." *Transcontinental Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 420, 423 (1986).

The development of the natural gas industry has been of critical importance to the development of the United States. Given the abundance of natural gas and the efficient and reliable single, national market regulated by the FERC that allows producers and purchasers to choose the most efficient means of obtaining and transporting gas, the natural gas industry remains vitally important to the national interests of the United States and all of its citizens. On behalf of its members, the AGA suggests that the Court should grant certiorari in this case and hold that the Ninth Circuit's pre-emption analysis is at odds with both the letter and spirit of the federal government's regulatory scheme and in conflict with

the national interest in having a single, efficient, and re-liable market for natural gas.

This case gives the Court the opportunity to re-affirm that the wholesale market—including practices, such as price reporting, that affect the wholesale market—is an area preempted from the states' jurisdiction.

II. THIS COURT SHOULD GRANT CERTIORARI TO GIVE ADDITIONAL GUIDANCE ON THE STATES' ROLE IN REGULATING INTERSTATE NATURAL GAS MARKETS

This Court has continuously clarified the extent of the federal government's regulation of the interstate natural gas market. See, e.g., *Natural Gas Pipeline Co. of Am. v. Panoma Corp*., 349 U.S. 44, 75, S.Ct. 576, 99 L.Ed. 866 (1955) (holding that Oklahoma law was preempted); *Phillips*, 347 U.S. U.S. 672 , 98 L. Ed. 1035, 74 S. Ct. 794 (1954) (independent natural gas producers selling gas to interstate pipeline companies are subject to Federal Power Commission regulation); *Ill. Natural Gas Co. v. Central Ill. Public Service Co*., 314 U.S. 498 (1941) (holding that Illinois law was preempted); *Northern Natural Gas Co.. v. State Corporation Commission*, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963) (state law which required that an interstate pipeline company purchase gas ratably from all wells connected to its pipeline system in each gas field within the State unduly interfered with the exclusive federal authority to regulate inter-state sales under the NGA); and *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed. 2d 316 (1988) (state statute requiring natural gas companies to obtain approval from a state public service commission before issuing long-term securities

was preempted by the NGA). The present case presents the Court with another opportunity to guide states and market participants to understand the extent of federal preemption in this area and the breadth of the NGA.

"The NGA long has been recognized as a 'comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce'" *Schneidewind*, citing *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. 84, 91 (1963), quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954). Further, it is well settled that " . . . Congress occupied the field of matters relating to whole-sale sales and transportation of natural gas in interstate commerce." *Schneidewind* at 305. This exercise of its authority was " . . . to achieve the uniformity of regulation [over sales and transportation] which was an objective of the Natural Gas Act . . ." *Schneidewind* at 331-332 quoting *Northern Natural Gas Co*., 372 U.S. at 91-92.

This "federal regulatory scheme leaves no room either for direct state regulation of prices or interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." *Northern Natural*, 372 U.S. at 91 (citations and footnotes omitted).

The plaintiff-respondents are industrial or commercial users of natural gas that chose to negotiate their own natural gas purchases. Their case is premised on an alleged conspiracy by defendant-petitioners to inflate published index prices that were used to set natural gas prices in wholesale transactions and in the kinds of retail purchases negotiated by plaintiff-respondents.

Price index reporting is an essential element of a well-functioning competitive market for natural gas. In a competitive market, price index reporting not only serves to set the price of natural gas sales, for those transactions tied to the index, it also enables FERC to monitor the market to ensure that prices remain just and reasonable pursuant to its statutory mandate under the Natural Gas Act. In furtherance of that goal, FERC required natural gas sellers subject to its jurisdiction to abide by a Code of Conduct regarding the price index reporting. *See* Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323 (Nov. 26, 2003).

Pursuant to the Natural Gas Act, FERC has jurisdiction to regulate any practice that directly affects rates subject to its jurisdiction. 15 U.S.C. 717d. Price index reporting is just such a practice. The fact that the plaintiff-respondents were retail purchasers in the state-regulated retail market is irrelevant. Their state law claims are preempted because the alleged price index manipulation would have directly affected wholesale rates subject to FERC's jurisdiction. Moreover, the fact that FERC no longer exercises rate regulation over a portion of the wholesale natural gas market is also irrelevant. Price index reporting directly affects wholesale rates in a competitive market, and is an essential element of FERC's enforcement effort to ensure the competitive market functions efficiently to produce just and reasonable rates. The plaintiff-respondents' causes of action seek redress for the very conduct which the federal government has undertaken to regulate.

The scheme of federal regulation is so pervasive and deliberate as to make reasonable the inference that Congress left no room to the States to supplement it.

Permitting the causes of action to go forward will thwart the two primary elements of the federal statutory scheme: national uniformity and freedom from burdensome government intervention.

The Court is right to guard against state fragmentation of natural gas regulation. One cornerstone underlining the development of a robust natural gas industry has been that a single regulator, expert in how it works, oversees the operation. The NGA enables FERC to issue clear rules identifying what is, and what is not, proper conduct. That has enabled natural gas companies to conform their conduct to a definitive set of regulations, and to seek FERC guidance whenever the guidelines are uncertain. Moreover, Congress gave FERC a balanced set of enforcement tools for it to apply even-handedly through the interstate markets.

A contrary approach, splitting authority over wholesale-market practices between the federal government and the states, would be unworkable. "[T]he conclusion that there is no preemption leads to the imposition on interstate natural gas wholesalers 50 different sets of state rules concerning anti-comptitive behavior. . . . the result would be a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market." *Nevada ex rel. Johnson v. Reliant Energy, Inc*., 289 P.3d 1186, 1193 (Nev. 2012), *cert. denied*, 133 S.Ct. 2853 (2013) (citing *Leggett v. Duke Energy Corp*., 308 S.W.3d 843 (Tenn. 2010)).

CONCLUSION

For the foregoing reasons, amicus urges this Court to grant the subject Petition for Writ of Certiorari.

Respectfully submitted,

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