No. 13-271

IN THE
Supreme Court of the United States

ONEOK, INC., ET AL., PETITIONERS,

v.

LEARJET, INC., ET AL., RESPONDENTS

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

BRIEF FOR THE WISCONSIN RESPONDENTS

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QUESTION PRESENTED

Whether the Natural Gas Act, as it existed during the relevant time period, before the Act was materially amended in 2005, preempts state antitrust claims based on a conspiracy to inflate prices in retail natural gas sales transactions explicitly reserved to state regulation by the Act.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Wisconsin Respondents disclose their corporate affiliations as follows:

Arandell Corporation has no parent and no publicly-held corporation owns 10% or more of its stock.

ATI Ladish LLC, f/k/a Ladish Company, Inc., is a wholly-owned subsidiary of Allegheny Technologies Incorporated. No publicly-held corporation owns 10% or more of the stock of Allegheny Technologies Incorporated, which is publicly traded on the New York Stock Exchange.

Briggs & Stratton Corporation has no parent and is publicly traded on the New York Stock Exchange. No other publicly-held corporation owns 10% or more of its stock.

Carthage College has no parent and no publicly-held corporation owns 10% or more of its stock.

Merrick's, Inc., is a wholly-owned subsidiary of Merrick Animal Nutrition, Inc. No publicly-held corporation owns 10% or more of the stock of Merrick's, Inc., or Merrick Animal Nutrition, Inc.

NewPage Wisconsin System Inc., is a wholly-owned subsidiary of NewPage Consolidated Papers Inc. No publicly-held corporation owns 10% or more of the stock of NewPage Wisconsin System Inc., or NewPage Consolidated Papers Inc.

Sargento Foods Inc. has no parent and no publicly-held corporation owns 10% or more of its stock.

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BRIEF FOR THE WISCONSIN RESPONDENTS

The Wisconsin Respondents[1] respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

STATUTES INVOLVED

Wisconsin Statutes Section 133.01 provides:

> The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

[1] "Wisconsin Respondents" refers to the plaintiffs in the Wisconsin actions, as described below.

Wisconsin Statues Section 133.03 provides, in relevant part:

> (1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal….

Wisconsin Statutes Section 133.14 provides:

> All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by s. 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. Any payment made upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered from any person who received or benefited from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party.

Wisconsin Statutes Section 133.18 provides, in relevant part:

> (1)(a) Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including

> reasonable attorney fees. Any recovery of treble damages shall, after trebling, be reduced by any payments actually recovered under s. 133.14 for the same injury.
>
> …

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

> (b) Transactions to which provisions of chapter applicable
>
> The provisions of this 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 for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

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

> (a) Decreases in rates
> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company,

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: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

INTRODUCTION

The matter before this Court involves Wisconsin businesses who were victims of petitioners' conspiracy that successfully inflated the retail price of natural gas in Wisconsin.

Petitioners, searching for any means of avoiding liability for their wrongdoing, ask the Court to adopt a preemption test that would not only immunize them from liability, but would also fundamentally contort bedrock principles of federalism, as well as the dual-regulatory system of the Natural Gas Act ("NGA").

The issue before this Court is whether known market manipulators should be able to avoid antitrust liability for voluntary, collusive activities that successfully caused rampant inflation of retail natural gas prices in Wisconsin. The ignoble means by which petitioners would achieve this end would overturn express Congressional restrictions on the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), an agency that lacked the purpose and ability to police and redress such behavior.

Petitioners' theory casts aside a century of public policy and practice, explicit and codified Congressional intent, the principles of statutory interpretation and federalism, the rights of the State of Wisconsin to enjoy a free and uncorrupted economy and the victims: Wisconsin businesses at whose expense the Petitioners lined their pockets.

STATEMENT OF THE CASE

A. Factual Background.

Each year, Wisconsin businesses and residents consume up to $3.5 billion worth of natural gas, amounting to almost two percent of the state's gross domestic product. J.A. 517. Natural gas is the primary energy source for many industries and businesses in Wisconsin, including metal working, food processing, brewing and dairy processing. J.A. 243. It is used heavily as heating fuel, and generates a substantial percentage of the electricity consumed in the state. J.A. 242-243. Wisconsin is entirely dependent on producers in other states to provide the needed gas. J.A. 243. Wisconsin was one of the pioneers of natural gas regulation and has regulated sales of natural gas for more than 100 years. Muchow, D. & W. Mogel, eds., Energy Law and Transactions § 50.76[a] (New York: Matthew Bender, 2014) ("*Energy Law & Transactions*") ("Wisconsin and New York ushered in the modern era [of state utility regulation] in 1907 with comprehensive enabling statutes").

Between 2000 and 2002, the retail price of natural gas in Wisconsin rose dramatically. J.A. 312. For instance, the city-gate price for natural gas in Wisconsin increased from $2.94 per thousand cubic feet in January 2000, to a price of $9.92 per thousand cubic feet in January 2001. J.A. 243. On average, prices during this period more than doubled. J.A. 312. That dramatic spike was the result of a conspiracy among petitioners. Pet. App. 12a-15a. The victims of the conspiracy include industrial and commercial users of natural gas who consumed it. Pet. App. 19a-23a. These Wisconsin businesses were

injured by the exorbitantly high prices paid for natural gas as a result of petitioners' wrongful acts. *Id.* State of Wisconsin Amicus Curiae Brief in Support of Plaintiff-Appellants, Dkt No. 26-1, at 3 (Dec. 7, 2011) ("*Wis. Amicus*") ("The financial impact of the alleged price manipulation on Wisconsin natural gas purchases is large. The Energy Information Agency estimates that during the relevant time period, Wisconsin industrial and commercial users of natural gas spent $3.7 billion, including approximately $1.9 billion for natural gas at unregulated rates").

To achieve such a substantial artificial increase in natural gas prices, it was necessary for petitioners to act in concert, as, individually, they lacked market power. *See Regulations Governing Blanket Marketer Sales Certificates*, 57 Fed. Reg. 57,952-01, 57,957-58 (1992) (explaining that no single company had market power, a prerequisite condition for FERC's issuance of blanket certificates). Thus, petitioners "made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas." J.A. 253.

The mechanisms by which this conspiracy was carried out are the subject of ongoing discovery, but the Wisconsin Respondents have alleged a host of activities in which petitioners engaged to achieve their conspiratorial aim of inflating retail prices, including:

- directly coming to pricing agreements (*See, e.g.*, *Arandell-Wisconsin* Complaint, J.A. 299);
- sharing pricing information (J.A. 299);
- engaging in strategic marketing policies and strategies designed to inflate prices (J.A. 251);
- engaging in continuous communications regarding spot prices of natural gas and natural gas futures prices to give the conspirators privileged access to market information (J.A. 300);
- planning and executing schemes to increase volatility in spot prices (J.A. 300);
- agreeing to coordinate the withholding of information from the market (J.A. 278);
- voluntarily submitting false or misleading price and volume information to private indices and other sources of market information (J.A. 284);
- coordinating their voluntary disclosure of fabricated trades to private publishers of price indices (J.A. 255);
- engaging in sham transactions involving simultaneous, offsetting purchases and sales of natural gas at the same volume and price, with no contemplation of product or money changing hands (sometimes known as "wash trades") (J.A. 268); and
- agreeing to pretend that the false market perceptions they created were real in interactions with non-conspirators (J.A. 302).

Petitioners have denied engaging in these activities, so the methods by which petitioners achieved their conspiratorial objective will ultimately be determined at trial.

The cumulative effects of petitioners' misconduct triggered a historic crisis in the energy markets. *See*, *e.g.*, 151 Cong. Rec. S. 9344 (July 29, 2005) (containing the comments of Senator Cantwell, describing the unethical manipulation of the natural gas market between 2000-2002 as "disastrous"). Public outcry led to an investigation by FERC. Subsequent investigations by the United States Commodity Futures Trading Commission and the Department of Justice led to multi-million dollar fines for the petitioner entities and related companies, as well as guilty pleas, fines and jail time for a number of individual traders who participated in the conspiracy. *See, e.g.*, J.A. 289, 298. However, fourteen years later, the Wisconsin businesses who paid exorbitant prices for natural gas to operate their businesses have received no compensation for their injuries.

B. Procedural History.

The Wisconsin Respondents brought three putative class actions between 2006 and 2009 pursuant to Wisconsin antitrust laws: *Arandell-Wisconsin*,[2] *NewPage*[3] and *Arandell-Michigan.*[4] These actions seek recovery for:

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[2] Ninth Circuit Appeal No: 11-16869; Dist. Ct. Case No.: CV-S-07-1019-PMP (PAL) (D. Nev.).

[3] Ninth Circuit Appeal No: 11-16876; Dist. Ct. Case No.: CV-S-09-915-PMP (PAL) (D. Nev.).

> Industrial and commercial purchasers of natural gas for their own use or consumption between January 1, 2000 and October 31, 2002 (the "Relevant Time Period"), and which gas was used or consumed by them in Wisconsin.

See, e.g., J.A. 242. In addition to limiting their claims to purchases of natural gas for consumption, plaintiffs have alleged that they "do *not* seek to recover damages for any sales the price of which is set via a regulatory procedure by [FERC]." J.A. 246 (emphasis added). Because the initial actions were filed in state court, raising state antitrust claims, and because federal and state antitrust laws are coterminous and complementary, it was unnecessary to bring an action in federal court pleading both state and federal antitrust claims.

Petitioners removed all three actions under 28 U.S.C. § 1453, and the actions were consolidated for pretrial purposes with other cases in MDL-1566, *In re Western States Wholesale Natural Gas Antitrust Litigation*.

Among many other procedural motions, petitioners moved, in other cases in the MDL, but not in any of the Wisconsin Respondents' actions, for summary judgment on the basis of preemption under the NGA, 15 U.S.C. § 717, *et seq.* The district court denied these motions in the other consolidated actions on May 14, 2008. J.A. 61-62. At that time, the statute of limitations for the Wisconsin Respondents' claims had not yet run, and, given the district court's conclusion that similar state antitrust claims were

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[4] Ninth Circuit Appeal No: 11-16880; Dist. Ct. Case No.: 2:09-CV-1103-PMP (PAL) (D. Nev.).

not preempted by the NGA, the Wisconsin Respondents did not seek to amend their complaints to add federal claims.

After one and a half years of substantial litigation on the merits, on November 2, 2009, the district court granted petitioners' motion for reconsideration of its May 18, 2008, Order denying summary judgment on preemption grounds. Pet. App. 40a, 136a. Because no such motion had been brought in any of the Wisconsin Respondents' actions, the Wisconsin Respondents had no opportunity to participate in this decision or appeal its holding. *See id.* Despite this, petitioners used the district court's reconsideration of its earlier decision in the other actions to file new preemption motions against the Wisconsin Respondents on December 16, 2009.

On December 15, 2009, as a result of the district court's severely delayed reversal of its earlier holding, the Wisconsin Respondents filed a motion for leave to file an amended complaint, adding federal claims. On October 29, 2010, the district court denied the Wisconsin Respondents' motion. Pet. App. 39a. On July 18, 2011, the district court granted summary judgment to petitioners on preemption grounds in all pending cases in the MDL. Although the district court had concluded that Section 1(b) of the NGA denied FERC jurisdiction over the retail sales in question here, the district court concluded that FERC had such jurisdiction on the basis of its authority to regulate practices in Section 5(a). Pet. App. 114a. The district court entered an amended final judgment on August 18, 2011. Pet. App. 119a-121a.

Respondents appealed, and the United States Court of Appeals for the Ninth Circuit reversed the

district court's judgment with respect to preemption on April 10, 2013. Pet. App. at 63a. The Ninth Circuit offered a careful and comprehensive analysis of why FERC's jurisdiction over the practices of natural gas companies under Section 5(a) of the NGA does not bar state antitrust claims challenging retail prices. Pet. App. 23a-39a. The court of appeals did not address the unfair prejudice to the Wisconsin Respondents resulting from the district court's delayed reversal of its holding in the other consolidated cases.

On August 26, 2013, petitioners brought before this Court a petition for writ of *certiorari*. On July 1, 2014, the Court granted *certiorari* review. On September 25, 2014, *amicus* briefs in support of the petition were filed by the Independent Petroleum Association of America (IPAA),[5] Interstate Natural Gas Association of America (INGAA),[6] and Natural Gas Supply Association (NGSA)[7] (combined brief

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[5] The IPAA's membership list is not publicly available; however, its website allows corporate members to post available jobs, and lists jobs posted by the parent of the CMS and El Paso defendant groups.

[6] INGAA's foundation members include the parent of the CMS and El Paso defendant groups and Williams Gas Pipeline (affiliate of petitioner The Williams Companies, Inc.); its members include petitioner ONEOK, Inc.; and Sempra US Gas & Power (n/k/a Noble Americas Gas & Power; *see* n.10, *infra*). *See* INGAA Foundation Members and Members, *available at*: http://www.ingaa.org/common/default.aspx?id=32 (listing the foundation members) and http://www.ingaa.org/Members/963.aspx (listing members) (last visited Nov. 19, 2014).

[7] The NGSA's membership list is not publicly available, but Frans Everts, President of Shell Energy North America (U.S.), L.P., successor to petitioner Coral Energy, is the organization's Secretary-Treasurer. *See* Natural Gas Supply Association

filed), Noble Americas Energy Solutions, Noble Americas Corporation, and Noble Americas Gas & Power[8] (combined brief filed), and the Washington Legal Foundation.[9] The fellow-traveler *amici* set forth exactly the arguments one would expect them to make, parroting petitioners' arguments.

Secretary-Treasurer, *available at:* http://www.ngsa.org/about-ngsa/secretary-treasurer/ (last visited Nov. 19, 2014).

[8] According to its own "Linked-In" webpage, Noble Americas Energy Solutions LLC is the successor-in-interest to Sempra Energy Solutions. *See:* http://www.linkedin.com/company/noble-americas-energy-solutions-lc?trk=top_nav_home (last visited Nov. 19, 2014)). Although not a named defendant here, *Sempra Energy is listed in the Wisconsin Respondents' Complaints as a co-conspirator. See, e.g.* J.A. 488. According to documents that Sempra itself filed with the SEC on May 2, 2008, on January 4, 2008, Sempra settled thirteen antitrust actions that had been coordinated against it in San Diego Superior Court, related to Sempra's unlawful manipulation. *See:* http://www.wikinvest.com/stock/SEMPRA_ENERGY_(SRE)/Filing/10-Q/2008/10-Q/D766874 (last visited Nov. 19, 2014).

[9] The Members of the Washington Legal Foundation's Legal Policy Advisory Board include Coleen Klasmeier of Sidley Austin LLP, whose firm serves as counsel for the CMS petitioners, and Rob McKenna of Orrick, Herrington & Sutcliffe LLP, whose firm serves as counsel for the AEP petitioners. *See* Washington Legal Foundation, Legal Policy Advisory Board, *available at*: http://www.wlf.org/org/legalpolicy.asp (last visited Nov. 19, 2014). The Washington Legal Foundation's "Speakers List" (found in its annual report on its website) include Thomas C. Goldstein, counsel for INGA, IPAA, and NGSA; Neal Katyal, petitioners' counsel of record, as well as Janet L. McDavid, also of Hogan Lovells LLP, and several additional attorneys from the Sidley Austin firm (representing CMS). *See id.*

SUMMARY OF THE ARGUMENT

I. The NGA does not preempt the Wisconsin Respondents' state antitrust claims. Federal and state antitrust claims have served in concert with the NGA since its inception. No court has held that FERC requires implicit preemption of antitrust claims to accomplish its core regulatory goals. In fact, antitrust regulation has become more vital to the deregulated natural gas markets envisioned by Congress.

Petitioners mischaracterize the Wisconsin Respondents' claims as targeting the individual practices of natural gas companies in voluntarily submitting false sales statistics to private indices of market information. That is manifestly incorrect. The Wisconsin Respondents' antitrust lawsuits challenge petitioners' conspiracy in restraint of trade, which succeeded in exorbitantly increasing prices the Wisconsin Respondents paid for gas they consumed in the course of their business operations. Such claims present no impermissible overlap with any FERC authority.

II. The NGA does not preempt the Wisconsin Respondents' challenges to the retail prices of natural gas. In enacting the NGA, Congress deliberately set out a dual-regulatory system of federal and state authority that explicitly preserved the powers of the states present at the time of enactment. Congress has never wavered from this regulatory scheme, and the Court has carefully protected it in an unbroken stream of cases spanning more than seven decades.

Congress' dual-regulatory system reserved to the states the plenary authority they had applied effectively to regulate retail sales since natural gas became a viable commercial commodity, more than forty years before the NGA. Not only, therefore, do the Wisconsin Respondents' actions not threaten FERC's authority, they reside in an area in which FERC may not regulate, pursuant to the deliberate intent of Congress. To dismantle the dual-regulatory system embodied in the NGA in the name of granting individual immunity to a group of admitted wrongdoers would be perverse.

III. *Chevron* deference is inapplicable as asserted here. Despite the arguments of the Solicitor General, FERC's recently revised interpretation of its authority under the NGA, as it existed prior to the Energy Policy Act of 2005 ("EPAct"), is entitled to no deference or consideration in this Court's preemption analysis. Since passage of the EPAct, FERC has become embroiled in multiple lawsuits testing the reach of its new authority. FERC's enlarged authority post-EPAct, however, is not implicated by the matter before this Court.

IV. A heavy presumption against preemption should be applied to petitioners' novel theory. To protect the rights of the states to police matters within their own borders, this Court has consistently applied presumptions that Congress does not intend to intrude upon historic state authority absent explicit evidence to the contrary. There is no such evidence here, and petitioners' arguments should be viewed with heightened scrutiny and significant skepticism.

V. Finally, the novel test petitioners urge this Court to adopt would be unworkable and disastrous. Petitioners' "direct effects" test is unprecedented. No such radical and all-consuming usurpation of state authority or disregard of Congressional language has ever been recognized by this Court. To the contrary, this Frankenstein's monster is stitched together from a carefully selected handful of this Court's opinions that are premised on very different fact patterns.

Petitioners' test, if adopted, would eviscerate state regulation and fundamentally alter the balance between federal and state authority. It would allow known wrongdoers like petitioners to game agency regulatory authority in order to achieve immunity from state laws. Such a result has no basis in law, precedent or policy, and must not succeed.

ARGUMENT

I. THE NGA DOES NOT PREEMPT THE WISCONSIN RESPONDENTS' ANTITRUST CLAIMS.

A. Antitrust Laws Predate the Natural Gas Act, Existing Comfortably Alongside the NGA Since its Inception.

The Sherman Antitrust Act, 15 U.S.C. §§ 1, *et seq.,* was passed in 1890. 26 Stat. 209. At that time, 21 states had enacted their own antitrust laws.[10] In 1893, Wisconsin passed a nearly identical law. 1893 Wis. Act 219; Stats. 1898 § 1747e; *see also Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 150 (Wis. 2005) (explaining that the similarities between the

[10] *California v. ARC America Corp.*, 490 U.S. 93, 101 n.4 (1989).

Sherman Act and Wisconsin's antitrust laws have led courts and commentators to refer to Wisconsin's antitrust laws as the "Little Sherman Act").

Congress intended the Sherman Act to apply only to interstate antitrust violations, while the state antitrust acts would govern intrastate cases. *See* 21 Cong. Rec. S. 2456 (Mar. 21, 1890) (containing the remarks of the Sherman Act's sponsor, Senator John Sherman of Ohio, that "Each state can and does prevent and control combinations within the limit of the state. This we do not propose to interfere with"). The Sherman Act has never been interpreted as displacing state antitrust laws. *See, e.g.*, *ARC America Corp.*, 490 U.S. at 102.

For more than 120 years, Wisconsin's Little Sherman Act has existed comfortably alongside federal antitrust law. Moreover, Wisconsin, like many other states, follows federal court interpretations of the Sherman Act in construing the Little Sherman Act.[11]

Congress was aware of such antitrust laws when it passed the NGA in 1938, and intended no disturbance of their reach. This Court has respected Congress' intent by holding that in interpreting the relationship between the federal antitrust laws and the NGA, "the rule is to give effect to both if possible." *California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962); *Otter Tail Power Co. v. United*

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[11] *See, e.g., Prentice v. Title Ins. Co. of Minn.,* 176 Wis. 2d 714, 724, 500 N.W.2d 658 (1993) (collecting cases). Federal courts have also interpreted the Little Sherman Act in accordance with federal precedent. *See, e.g., Westowne Shoes, Inc. v. Brown Group, Inc.,* 104 F.3d 994, 998 (7th Cir. 1997).

States, 410 U.S. 366, 374 (1973) (explaining that regulation under the NGA does not insulate companies from federal antitrust laws, and stressing that "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws"); *see also City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389, 398-99 (1978) (explaining that antitrust laws will not be displaced by a regulatory regime unless the antitrust and regulatory provisions are "plainly repugnant").

Accordingly, no court has held that the NGA preempts the Sherman Act or the companion state antitrust acts. To the contrary, this Court has held that FERC must defer to the decisions of courts on antitrust issues delegated to the courts by Congress in the federal antitrust laws. *City of Lafayette*, 435 U.S. at 485, 490 ("there is no 'pervasive regulatory scheme' including the antitrust laws that has been entrusted to [FERC]…. Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency… lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the [FERC]"); *see also* Pet. Br. p. 32 (conceding that identical Sherman Act claims would not be preempted).

The courts of appeal have applied the same reasoning with respect to state antitrust laws. In *State of Ill., ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1479-80 (7th Cir. 1991), the court rejected a pipeline's claim that Illinois antitrust actions were preempted by federal regulation of the natural gas industry. Citing *California v. Federal Power Commission*, the court reasoned:

> [F]ederal gas regulation does not immunize natural gas companies from application of the federal antitrust laws. When state antitrust law only mirrors federal antitrust law, there is no reason to conclude that Congress intended to preempt the state law.... the Illinois Antitrust Act…[was] modeled [on] the Sherman Act… and Illinois law provides that its courts should use the construction of federal antitrust law by federal courts to guide their construction of those state antitrust laws....[12]

The reasoning of the court of appeals is soundly rooted in the fundamental economic policies underpinning antitrust actions and the fact that state antitrust actions have long been understood to be part of the states' historic regulation. *ARC America Corp.*, 490 U.S. at 101 ("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" (internal footnote omitted)); *Wis. Amicus*, p. 6 (explaining that Wisconsin's historical police power includes antitrust enforcement).

The Solicitor General conceded at the *certiorari* stage, as the petitioners did in the lower courts and in their brief before this Court, that "FERC's

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[12] Petitioners argue that Wisconsin's full consideration statute would impose additional burdens on natural gas companies beyond their Sherman Act liability. However, there is no basis to conclude that a full consideration recovery would be more onerous than treble damages. With a doubling of natural gas prices during the relevant time period, it is quite possible that full consideration might be the lesser recovery. *See, e.g.*, J.A. 312.

jurisdiction over the manipulation of the indices to the exclusion of the States does not mean that federal antitrust laws would be displaced to the extent they apply." U.S. Cert. Br. p. 17; Pet. Br. p. 32. In its *amicus* brief, the Solicitor General points out that the Court has not opined on whether the filed-rate doctrine preempts federal antitrust or state breach of contract actions. U.S. Br. pp. 24-25. However, the filed-rate doctrine is not implicated here, as FERC has already concluded that the petitioners' manipulations violated their blanket certificates, and thus petitioners' sales under these certificates were not FERC-approved market rates. Petitioners have accordingly raised no filed-rate defense.

There is no basis in history or precedent for the premise that Wisconsin's antitrust law poses any danger to FERC. Antitrust actions, be they federal or state, target anticompetitive collusion, which is neither within FERC's purview nor a threat to its regulatory purpose. In fact, general antitrust laws are the cornerstone to establishing a fair market in which prices are set by competitive forces. *City of Lafayette*, 435 U.S. at 398; *Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 529 N.W.2d 905, 909 (Wis. 1995) ("The importance of the antitrust laws in preventing monopolies and encouraging competition, the fundamental economic policy of this state, is directly reflected in the statement of legislative intent in [the Wisconsin Statutes and] case law" (internal quotation omitted).[13]

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[13] *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as

Indeed, antitrust laws protect the free markets on which FERC's recent deregulation polices are based. *See Simon v. KeySpan Corp.*, 694 F.3d 196, 206 (2d Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S.Ct. 1998 (2013) ("antitrust remedies become more necessary as markets become increasingly deregulated"); *see also Energy Law & Transactions*, § 101 ("Economic regulation of the energy industries derives from two basic sources: first, direct regulation through administrative agencies; second, indirect regulation under the antitrust laws. These two forms of regulation have a common objective—to protect the public interest by achieving the most efficient allocation of resources possible, and should be assumed not to conflict" (internal quotation omitted)).

B. The Wisconsin Respondents' Antitrust Claims Do Not Require a Finding As to Reporting Practices to Prevail.

The Wisconsin Respondents allege violations of Wisconsin's antitrust laws. Wis. Stat. §§ 133.14 and 133.18. The required elements of these claims mirror Section 1 of the Sherman Act, namely:

(1) Defendants entered into a conspiracy or collusive agreement;
(2) In restraint of trade;
(3) Causing injury to the plaintiffs.

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important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster").

Murray v. McGarigle, 34 N.W. 522, 529 (Wis. 1887); *Meyers v. Bayer AG,* 735 N.W.2d 448, 454 (Wis. 2007). The purposes of these generally applicable prohibitions have been laid out expressly by the Wisconsin legislature, which took the unusual act of making this intent part of Wisconsin's statutory law. Wis. Stat. § 133.01 provides:

> The intent of this chapter is to safeguard the public [against monopolies and] encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition… to make competition the fundamental economic policy of this state….

There can be no doubt that Wisconsin's antitrust laws target anticompetitive behavior for the purpose of promoting competition. Such laws of general applicability are not targeted at any specific industry, but rather at anticompetitive collusion generally.

The Wisconsin Respondents are industrial and commercial purchasers of natural gas, who purchased such gas for consumption (*i.e.,* at retail) in the course of their business operations. J.A. 242; J.A. 427-428; J.A. 512-513. The Wisconsin Respondents allege that the petitioners "conspired to restrain trade or commerce relating to natural gas, and they received or benefitted from the payments made by the plaintiffs pursuant to the plaintiffs' natural gas purchase agreements…. result[ing] in the plaintiffs paying inflated prices for natural gas…. higher prices for natural gas than [plaintiffs] would have paid if the defendants' conspiracy had not existed." *See, e.g.*, J.A. 311-312.

The obvious purpose of these claims is to redress injury to purchasers who overpaid for natural gas due to the petitioners' collusive agreement in restraint of trade. This is a classic antitrust case of the kind that has coexisted with the NGA since its inception.

Ignoring this, petitioners seek to recast the Wisconsin Respondents' antitrust claims as centering on individual reporting practices of natural gas companies. This mischaracterization is demonstrably incorrect, as individual companies' voluntary submission of false sales information to private indices is neither an element of, nor a necessary or sufficient factual predicate to establish, the Wisconsin Respondents' claims. For instance, a jury could find in the Wisconsin Respondents' favor even if it found that there was no false reporting, but that petitioners' conspiracy manifested in a backroom agreement to fix prices. *See* J.A. 299 (alleging such agreements). Conversely, a jury could find that petitioners individually engaged in false reporting, but still find in petitioners' favor, if the jury believed that the petitioners acted unilaterally or without the requisite collusive intent, that any agreements reached were not anticompetitive or that they did not damage the Wisconsin Respondents.

It is simply false to argue that the Wisconsin Respondents' claims merely concern individual natural gas companies' reporting practices.[14] Any

[14] The district court erroneously believed that false reporting practices were a necessary aspect of the Wisconsin Respondent's legal claims. Pet. App. 115a. This demonstrably incorrect conclusion of law naturally influenced its holding. To be clear, the Wisconsin Respondents believe that false reporting is a notable—but not the sole—mechanism by which petitioners

assertion that the Wisconsin Respondents' claims, or the statutes upon which they arise, are not centered on collusion to raise retail prices, is inaccurate.

C. The NGA Does Not Implicitly Preempt Antitrust Laws.

Despite petitioners' assertion to the contrary (Pet. Br. p. 32), petitioners' logic would suggest that the general antitrust laws must be displaced by FERC's specific regulatory authority. Under extreme circumstances, an agency's regulatory authority may implicitly preempt antitrust laws. *See, e.g.*, *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597 (1976) (explaining that implied preemption of the antitrust laws will be found only when "the relevant aspect of the agency's jurisdiction must be sufficiently central to the purposes of the enabling statute so that implied repeal of the antitrust laws is necessary to make the (regulatory scheme) work" (internal quotation omitted)); *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162 (1922).

A conclusion of implied preemption must be based on a clear act of Congress, and exemptions against antitrust liability are strictly construed. *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. Nat'l Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719-20 (1975) ("Repeal by implication will be invoked only where there is a 'plain repugnancy' between the antitrust and regulatory provisions"); *Silver v. N.Y. Stock Exch.,* 373 U.S. 341, 351 (1963). These extreme

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accomplished their conspiratorial aim, but no fact has been found as to that issue, nor is such a finding necessary for the Wisconsin Respondents to recover.

circumstances are not present here. *Cf. Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 275-76 (2007) (finding antitrust preemption due to the "SEC's comprehensive authority to regulate IPO underwriting syndicates, its active and ongoing exercise of that authority, and the undisputed need for joint IPO underwriter activity").

FERC had no power to prosecute natural gas companies in group settings during the relevant time period. *California Indep. Sys. Operator Corp. v. F.E.R.C.*, 372 F.3d 395, 400 (D.C. Cir. 2004) (Before the EPAct, FERC could only apply its Section 5(a) authority over practices of individual natural gas companies after it held a hearing and determined that a rate was "unjust, unreasonable, unduly discriminatory or preferential"). Even post-EPAct, FERC lacks punitive measures geared towards conspiratorial behavior.[15] *See* Testimony of Norman C. Bay, Director, Office of Enforcement, FERC, Before the Committee on Banking Financial Institutions and Consumer Protection Subcommittee, United States Senate, January 15, 2014 (summarizing FERC's enforcement powers post-EPAct) ("Bay Test.").[16]

Moreover, FERC's ability to police market manipulation, even post-EPAct, is limited by the authority of other regulators. *Hunter v. F.E.R.C.*, 711 F.3d 155, 160 (D.C. Cir. 2013) (holding that FERC lacks jurisdiction to charge market manipulators of

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[15] If only a single entity had voluntarily submitted false sales information to a private index, no antitrust action would arise. Without market power, market manipulation inherently required multiple participants.

[16] *Available at:* http://www.ferc.gov/CalendarFiles/20140115143216-Bay-testimony-01-15-2014.pdf (last visited Nov. 19, 2014).

natural gas futures contracts, and that the CFTC has exclusive jurisdiction);[17] *Energy Law & Transactions,* § 50.04[2][f] (describing *Hunter* as the "first fully-litigated proceeding involving the Commission's newly enhanced [post-EPAct] enforcement authority" and noting that "the precise scope of [FERC's] enforcement authority is still evolving").

In addition, FERC has no authority (pre- or post-EPAct) to provide relief to the victims of antitrust conspiracies. Indeed, FERC has openly admitted that it is not an enforcer of the Sherman Act. *Cities of Anaheim, Riverside, Banning Colton & Azusa, Ca. v. S. California Edison Co.,* No. CV 78-810 MRP, 1990 WL 209261, at *12 (C.D. Cal. Oct. 22, 1990), *aff'd sub nom.*, *City of Anaheim v. S. California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992) ("FERC itself stated, it does not engage in comprehensive antitrust proceedings" (internal quotation omitted)).

Courts have repeatedly held that FERC is neither tasked with nor competent to enforce the antitrust laws. *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) ("Enforcing the antitrust laws is not the

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[17] Indeed, post-EPAct, the Department of Justice has successfully pursued wholesale sellers for violation of the Sherman Act even in cases where FERC has determined no market manipulation has occurred. FERC Enforcement Staff Report, Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New York City Capacity Market, pp. 17, 22 (Feb. 28, 2008) (concluding that an electricity wholesaler did not engage in market manipulation); *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 635-638, 643 (S.D.N.Y. 2011) (approving a DOJ settlement with the electricity wholesaler requiring disgorgement of $12 million for violation of the antitrust laws, founded on the same behavior FERC determined did not constitute market manipulation).

FERC's paramount objective, and the only remedy the FERC can grant is to reduce the wholesale price to the lower end of the zone of reasonableness" (internal quotation marks omitted)); *see also id.* (determining that antitrust laws complement and do not interfere with either FERC or state utility regulation, and explaining "neither the FERC nor the [the state utility regulator] has plenary authority over the interaction of wholesale and retail rates, because each commission can affect only one category of those rates. Thus, neither an award of antitrust damages nor the granting of properly conditioned injunctive relief for the price squeeze would interfere with either commission's regulatory authority").

There is no ground for arguing that FERC has regulatory authority "to supervise [antitrust violations]" or "evidence that [FERC] exercises that authority," much less support for any argument that FERC's authority displaces antitrust law. *Credit Suisse*, 551 U.S. at 275-76.

II. THE NGA DOES NOT PREEMPT THE WISCONSIN RESPONDENTS' CHALLENGES TO RETAIL PRICES OF NATURAL GAS.

It is enough that the court of appeals should be affirmed on the basis that the Wisconsin Respondents' state antitrust claims are not preempted by the NGA. Additionally, the decision below should be affirmed on the independent ground that, to the extent the claims at issue constitute natural gas regulation, the Wisconsin Respondents' challenges to the retail sales at issue are firmly on the side of state regulation beyond FERC's reach. They are therefore not preempted by federal law under any circumstance.

A. The NGA Originated in the Historical Backdrop of a Strict Interstate/Intrastate Division Established in the *Attleboro* Line of Cases.

Natural gas became a fuel with broad application in 1855 with the invention of the atmospheric burner by Robert Wilhelm von Bunsen. *Energy Law & Transactions*, § 50.02[1][a]. At that time, natural gas was predominantly manufactured from coal and delivered locally within the same municipality in which it was produced.[18] Local governments regulated the rates charged by passing laws preventing abuse of market power by producers of natural gas.[19] *See also Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States").

The advent of interstate pipeline technologies changed the nature of the industry and the manner of its regulation. Schwartz, *supra* n.19, at 558. Between 1911 and 1928, several states attempted to regulate interstate natural gas pipelines, which at the time were unregulated by the federal government. *History of Regulation, supra* n.18. The federal and state governments operated in separate, mutually exclusive spheres of influence. Not surprisingly, the states' attempt to regulate

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[18] Natural Gas Supply Ass'n, *Natural Gas Regulations: History of Regulation*, *available at*: http://www.naturalgas.org/regulation/history.asp (an *amicus* here) (last visited Nov. 19, 2014).

[19] *Id.*; *see also* David Schwartz, *The Natural Gas Industry: Lessons for the Future of the Carbon Dioxide Capture and Storage Industry*, 19 Stan. L. & Pol'y Rev. 550, 557-58 (2008).

interstate natural gas commerce led to constitutional challenge.

In a series of decisions culminating in *Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), this Court held that states were prohibited, by the negative implications of the Commerce Clause of the United States Constitution (the "dormant commerce clause"), from directly burdening interstate commerce with natural gas regulation, even in the absence of federal regulation. *Id.* at 88-90.

What became known as the "*Attleboro* doctrine" provided that states could regulate retail natural gas sales, deemed to be intrastate activity, but not wholesale sales, deemed to be in the realm of interstate commerce reserved for the federal government. *See id.*[20] Additional decisions further defined the contours of where this line fell, elucidating, when taken together, a detailed boundary of state authority. *See, e.g.*, *Missouri ex rel. Barrett v. Kansas City Natural Gas Co.*, 265 U.S. 298 (1924) (holding that states could not compel an interstate pipeline to reduce its rates for natural gas sales to local distribution companies, because "the sale of gas in wholesale quantities…. Is

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[20] *See Energy Law & Transactions,* § 2.04[2] ("The [*Attleboro*] Court reasoned that retail, intrastate sales of electricity were 'essentially local' in character and only imposed an indirect burden on interstate commerce. Consequently, such sales were subject to state regulation. The Court, however, held that wholesale interstate transactions involving electricity were essentially national in character and imposed a direct burden on interstate commerce, and lay outside the states' regulatory authority." (internal quotations omitted)).

fundamentally interstate from beginning to end…. The paramount interest is not local but national").[21]

The boom of interstate natural gas sales in the 1920's made the lack of interstate natural gas regulation increasingly problematic. *History of Regulation*, *supra* n.18. In 1935, the Federal Trade Commission issued a report outlining "numerous abuses" by natural gas monopolies. Schwartz, *supra* n.19, at 558. The report—and pressure from state regulatory commissions—prompted Congressional action, leading to passage of the NGA. *Id*; *see also Energy Law & Transactions* § 3.02[1][c][i].

B. In The NGA, Congress Adopted the *Attleboro* Demarcation and Established A Dual-Regulatory System of Mutually-Exclusive Sovereign Power.

The NGA's explicit purpose was to fill the "regulatory void" created by the *Attleboro* doctrine. *See* H.R. Rep. No. 709, 75th Cong., 1st Sess. 1-2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess. 1-2 (1937); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 511 (1989) ("the legislative history of the NGA is replete with assurances that the Act 'takes nothing from the State [regulatory] commissions: they retain all the State power they have at the present time'" (quoting 81 Cong. Rec. 6721 (1937)).

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[21] *See also* Lindh, F., *Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle*, 10 Energy L.J. 277, 285 ("under the *Attleboro* doctrine, the Supreme Court attempted to separate into entirely distinct spheres the interstate and intrastate aspects of electricity and natural gas by means of a mechanical, bright line test").

Congress' intent was to create a seamless and complementary dual-regulatory system, with the states retaining all historic powers over retail sales. *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947) ("*Panhandle I*") (noting that the NGA, "though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions"); *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 631 (1972) (explaining that the NGA was intended by Congress to be "broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare").[22]

To achieve this end, Congress embraced the sharp interstate/intrastate division delineated in the *Attleboro* line of cases. *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 214 (1964) ("What Congress did [in establishing the reach of federal power in the NGA] was to adopt the test developed in the Attleboro line"); *Arkansas Elec.*, 461 U.S. at 379 ("Congress, partly to avoid drawing the precise line between state and federal power by the litigation of particular cases, had adopted the 'mechanical' line

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[22] *See also, e.g.*, *Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 506 (1942); *Fed. Power Comm'n v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 502-04 (1949) ("*Panhandle II*"); *Interstate Natural Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 690 (1947); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 609-10 (1944) (explaining that the NGA "was designed to take no authority from State commissions and was so drawn as to complement and in no manner usurp State regulatory authority" (internal quotations omitted)).

established in *Kansas City* and *Attleboro* as the statutory line dividing federal and state jurisdiction").

In adopting the *Attleboro* demarcation, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction," that would be easily determinable and applied. *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. at 215. Thus, this Court has "squarely rejected the view … that the scope of [FERC] jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest." *Id.* at 215-16; *see also Panhandle I*, 332 U.S. at 517 ("The line of the statute [is] thus clear and complete. It cut[s] sharply and cleanly between sales for resale and… sales for consumptive use").

C. The Wholesale/Retail Demarcation, Codified in the NGA, Has Remained Unchanged Since 1938.

In Section 1(b) of the NGA, Congress established federal jurisdiction over "sale in interstate commerce of natural gas for resale for ultimate public consumption," but explicitly excluded federal jurisdiction over "*any other* transportation or sale of natural gas." 15 U.S.C. § 717(b) (emphasis added). As this Court recognized soon after passage of the NGA in *Panhandle I:*

> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage [in the NGA] was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the

> explicit prohibition that the Act "shall not apply to any other … sale."

332 U.S. at 516 (quoting Section 1(b) of the NGA); *see also id.* at 517-18 (remarking that the NGA "had no purpose or effect to cut down state power…. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way");[23] *Nw. Cent.*, 489 U.S. at 510 ("When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. It 'did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act'" (quoting *Panhandle II*, 337 U.S. at 502-03)).

While other sections of the NGA grant FERC enumerated powers, all of these powers are limited by the fundamental jurisdictional grant in Section 1(b). *Panhandle II*, 337 U.S. at 508 (explaining that the powers of FERC in Sections 4, 5 and 7 of the NGA are subject to the jurisdictional limitations in Section 1(b)).[24] Indeed, in the NGA, FERC's

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[23] Petitioners' and the Solicitor General's arguments that the Wisconsin Respondents' lawsuits threaten the national uniformity desired in the federal realm are misplaced, as the Wisconsin Respondents' claims fall cleanly on the state side of regulation in which Congress intended to preserve each state's authority to regulate. It is not the Court's role to second-guess this regulatory system. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978). Petitioners' and the Solicitor General's argument that allowing these state antitrust claims to proceed might lead to widespread confusion is also misplaced, as the Wisconsin Respondents' claims require the same *mens rea* of knowing participation in a conspiracy to inflate retail prices as Sherman Act claims.

[24] *See also* Demarest, W., Jr., "Traditional" NGA Jurisdictional Limits Constrain FERC's Market Manipulation Authority, 31

enumerated powers are textually linked back to the jurisdictional authority granted to FERC in Section 1(b). *See, e.g.*, NGA, Section 4, 15 U.S.C. § 717c (enumerated powers are "subject to the jurisdiction of the Commission"); Section 5(a), 15 U.S.C. § 717d(a) (same); Section 7, 15 U.S.C. § 717f(b) (same); *cf. Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (internal quotation omitted)).

Consistent with FERC's explicitly limited jurisdiction, this Court has repeatedly made clear that the NGA did *not* disturb the states' historic role in regulating *retail* sales of natural gas for consumption. *See, e.g.*, *Panhandle I*, 332 U.S. at 521 (explaining that Congressional intent to permit continued state regulation is "clear, in view of the [NGA's] historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over"); *id.* at 520 ("We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority"); *Panhandle II*, 337 U.S. at 513 ("The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation

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Energy L. J. 471, 471-72 (2010) ("Even a cursory review of the court cases dealing with the Commission's exercise of delegated authority discloses a number of decisions [that turned on] the scope of the Commission's *jurisdiction* [pursuant to Section 1(b)]" as opposed to the enumerated powers in other sections of the NGA (emphasis added)).

of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other").

D. For More Than Seven Decades, This Court Has Determined Preemption Under the NGA on the Basis of the Wholesale/Retail Demarcation.

In an unbroken line of cases spanning more than seven decades,[25] this Court has confirmed the states' powers to regulate retail sales of natural gas for consumption. *See*, *e.g.*, *Public Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943); *Hope Natural Gas Co.*, 320 U.S. at 609-10; *Interstate Natural Gas Co.*, 331 U.S. at 690; *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm'n*, 341 U.S. 329, 334 (1951); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 684 n.13 (1954); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 27 (1961); *La. Power & Light Co.*, 406 U.S. at 631 (1972); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 186 (1983); *Nw. Central*, 489 U.S. at 506-07; *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) ("for a half

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[25] The Court has recognized that, while its interpretation of the Commerce Clause has evolved, Congress has remained satisfied for more than 75 years with the *Attleboro* demarcation codified in Section 1(b). *Arkansas Elec.*, 461 U.S. at 379 (explaining that Congress' decision to adopt the *Attleboro* precedent in the NGA "shifted this Court's main focus—in determining the permissible scope of state regulation of utilities—from the constitutional issues that concerned us in *Attleboro* to analyses of legislative intent"); *cf. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there" (internal quotation omitted)).

century Congress has been aware of our conclusion in [*Panhandle I*]… and in the years following that decision has only reaffirmed the power of the States in this regard"). Through the many opinions of this Court interpreting the NGA, the historic powers of the states to regulate natural gas have always been preserved.

The dividing line between federal and state regulation of the natural gas industry has always been the nature of the sale. From passage of the NGA in 1938 through the period in question (2000-2002), the federal government has maintained exclusive jurisdiction over wholesale sales of natural gas in interstate commerce, and the states have maintained their traditional jurisdiction over retail sales of natural gas for consumption.

Despite the clarity of the wholesale/retail division established by Congress in the NGA, this Court has had many occasions to review application of that demarcation to integrated energy markets. *Cf. Arkansas Elec.,* 461 U.S. at 377 ("Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom"). This Court has always been guided by the principle that, in analyzing whether a state regulation is preempted, the side of the wholesale/retail divide on which the regulated conduct falls controls, regardless of the inevitable spill-over effect that regulation might have on the other side of the divide.

This principle is well-illustrated in three decisions of this Court. In *Champlin Refining Co. v. Corp. Comm'n of State of Okla.*, 286 U.S. 210 (1932), the Court considered whether Oklahoma regulations

requiring well-operators in a common oil and natural gas field to *produce* gas ratably[26] violated the dormant commerce clause (and thus was on the federal side of the *Attleboro* line). The Court concluded that because production and gathering of natural gas is considered an intrastate activity akin to mining, Oklahoma was not prohibited from enforcing this requirement. *Id.* at 235.

The Court in *N. Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963), however, considered whether a Kansas state agency's order, requiring an interstate pipeline to *purchase* gas ratably from the wellhead producers in a common field, was preempted by the NGA. Distinguishing *Champlin*, the Court concluded that, because the order was directed at an interstate pipeline engaged in the transportation of natural gas, this fell on the interstate side of the *Attleboro* line codified in the NGA. *Id.* at 91-92. Therefore, the Kansas Order was preempted. *Id.*

Similarly, in *Northwest Central*, the Court considered Kansas' more evolved ratable-taking regulation, providing that rights to extract gas from a common field would be lost if well-head producers unduly delayed extraction (a regulation designed to encourage ratable taking). 489 U.S at 423. The Court held that, because the regulation targeted the *producers* of natural gas, it fell on the intrastate side

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[26] As the Court in *Northwest Central* explained, extracting natural gas from a common pool causes gas to flow towards the extracting well and away from others. Absent regulation, this might lead to a wasteful race to extract. Ratable-taking regulations are designed to prevent waste and preserve natural resources. *Nw. Cent.*, 489 U.S. at 497.

of the *Attleboro* demarcation and the Kansas regulation was not preempted. *Id.* at 497, 507-09.[27]

Understandably, the district court in *Northwest Central* found that the Kansas regulation would have a "probable" effect on wholesale prices subject to FERC regulation. 489 U.S. at 506, 508. Yet, since this Court determined that the regulation was safely within the retail realm of the states' regulatory powers, this fact did not change the result. The Court observed:

> In analyzing whether Kansas entered a pre-empted field, we must take seriously the lines Congress drew in establishing a dual regulatory system.... To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production, *for there can be little if any regulation of production that*

[27] All three of these cases dealt with the production of gas that would be sold to interstate pipelines. All involved regulations aimed to promote ratable production of natural gas by well-head producers in a common field. *Champlin,* 286 U.S. at 235; *N. Natural*, 372 U.S. at 84; *Nw. Cent.* 489 U.S. at 423. *Champlin* and *Northwest Central* involved regulations applied to well-head operators who *sold* to interstate pipelines, whereas the regulations in *Northern Natural* were applied to interstate pipelines who *bought* from well-head producers. There was an inevitable affect on both interstate activity (transport) and intrastate activity (production) that was impossible to ignore. However, that fact was irrelevant to the Court's analysis. The side of the *Attleboro* line on which the regulation falls is dispositive, regardless of the impact the regulation might have on the other side of the wholesale/retail divide.

> *might not have at least an incremental effect on the costs of purchasers in some market and contractual situation*….

Nw. Cent., 489 U.S. at 512-14 (emphasis added). Lastly, the Court explained:

> It is inevitable that jurisdictional tensions [will] arise as a result of the fact that [state and federally regulated elements coexist within] a single integrated system…. In the integrated gas supply system, these jurisdictional tensions will frequently appear in the form of state regulation of producers and their production rates that has some effect on the practices or costs of interstate pipelines subject to federal regulation. *Were each such effect treated as triggering [an affirmative finding of] conflict pre-emption, this would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish in § 1(b), and would render Congress' specific grant of power to the States to regulate production virtually meaningless*.

Id. at 515 (emphasis added).[28]

At the same time, this Court recognized in *Northwest Central* that there could be situations in

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[28] In *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621 (1972), this Court applied the same test. A retail purchaser of natural gas challenged FERC's authority to command interstate pipelines to curtail deliveries to both wholesale and retail customers. *Id.* at 631. The Court rejected the argument that the impact on retail customers deprived FERC of jurisdiction, because FERC was regulating transportation of natural gas, safely within its designated sphere of authority.

which state regulation purportedly in the intrastate realm could still be preempted by federal law, such as where it would be impossible to comply with both state and federal law, where state natural gas regulation prevents attainment of FERC's permissible regulatory goals, or where a state's regulation lacks any legitimate state purpose, and serves only to impact federal regulation. *Id.* at 516 (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 298 (1988)). While valid state regulation could be barred under these extreme circumstances, preemption analysis on these grounds "must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw. Cent.*, 489 U.S. at 516. The Court had occasion to examine such extreme cases of state regulation in *Mississippi Power, Transcon.,* and *Schneidewind*.

This Court considered whether Mississippi had the power to conduct a prudence review of wholesale electricity rates and allocations that FERC required utilities to purchase from an expensive nuclear power plant in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 362-63, 373 (1988). The Court concluded that such a review could have no purpose unless Mississippi had the power to override FERC's requirements, thus creating contradictory regulations in "matters squarely within FERC's jurisdiction" (wholesale electricity rates). *Id.* at 376; *see also Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47-48 (2003) (explaining *Mississippi Power* as a case in which the states tried to "trap" wholesale costs by denying power generators the ability to recover wholesale costs in

retail rates); *see also New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 911 F.2d 993, 1001 (5th Cir. 1990) (conceptualizing *Mississippi Power* as a filed-rate case). Because Mississippi would have made it impossible for the utilities to comply with both federal and state law, and the federal regulation was safely within FERC's jurisdiction over wholesale electricity rates under the Federal Power Act,[29] the state regulation was preempted.

In *Transcon. Gas Pipe Line Corp. v. State Oil & Gas Board of Miss.*, this Court, just as in *Northern Natural*, considered an attempt by state regulators to require interstate pipelines to purchase gas ratably from a common pool. 474 U.S. 409, 417, 421-22 (1986). Mississippi argued that, because Congress had deregulated prices of the gas purchased by interstate pipelines from that pool, Mississippi could regulate the pipelines. *Id.* This Court rejected Mississippi's argument, because a "federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Id.* at 422 (emphasis in original). Because Mississippi's regulatory ambitions would prevent achievement of Congress' deregulatory goals, Mississippi's regulation was preempted.

Lastly, this Court in *Schneidewind* considered a Michigan law that applied only to utilities, and that granted Michigan's utility-regulating authority veto power over the issuance of securities by natural gas companies subject to FERC's jurisdiction, unless

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[29] *Mississippi Power* involved the Federal Power Act, which the Court sometimes finds instructive in interpreting the NGA. *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

such issuance was for a "lawful purpose" and "essential to the successful carrying out of" that purpose, and allowed Michigan unfettered power to attach conditions to any such issuance. 485 U.S. at 297-98. The overreaching Michigan law superimposed state authority, *inter alia*, upon FERC's powers to: (1) "calculate a reasonable rate of return on invested capital" in wholesale sales of natural gas in interstate commerce (under Section 4(a) of the NGA); and (2) issue certificates of "public convenience and necessity" before a company engaged in wholesale, interstate sales "constructs, extends, acquires, or operates any facility" for interstate transportation or wholesale sales of natural gas in interstate commerce (under section 7 of the NGA). *Id.* at 301-02. Because Michigan's statute lacked any legitimate state purpose, and served only to impact FERC regulations, the law was preempted. *See id.* at 308 n.10 (noting that "the purported purposes of [Michigan's statute], as applied to [interstate pipelines], appear highly artificial at best"); *see also Nw. Cent.,* 489 U.S. at 513 n.10 (explaining that the Michigan statute in *Schneidewind* "could not plausibly be said to operate in a field expressly reserved by the NGA to the States").[30]

No such extreme situation exists here. On the contrary, Wisconsin's legitimate interest in enforcing

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[30] *Kurns v. Railroad Friction Products Corp.*, 132 S.Ct. 1261 (2012), has no bearing here, as it involved a challenge by plaintiffs to an area (locomotive design parameters) where Congress had affirmatively and exclusively occupied the *entire* field. *See id.* at 1266. By contrast, the present case involves an area of traditional state regulation *deliberately reserved to the states* by Congress in the NGA.

its antitrust laws in the retail natural gas arena historically reserved to Wisconsin does not disturb FERC's authority. First, there is no impossibility of compliance with FERC's requirements and Wisconsin's prohibition against forming conspiracies in restraint of trade to the injury of its citizens. Second, Wisconsin's antitrust laws, like the federal antitrust laws, do not render unachievable FERC's regulatory goals during the time in question. Third, Wisconsin's application of its antitrust laws to retail sales of natural gas to spur competition and redress anticompetitive injuries falls squarely within Wisconsin's proper police powers and longstanding Congressional sanction, and is by no means an attempt to regulate wholesale reporting practices or prices.[31]

Indeed, if petitioners could demonstrate that their anticompetitive behavior in the retail natural gas markets were the necessary result of compliance with FERC's pricing directives, petitioners would find immunity under the filed-rate doctrine. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-64 (1986); *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251, 71 S. Ct. 692, 695, 95 L. Ed. 912 (1951) ("[A customer] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission,

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[31] The Court in *Schneidewind* noted that "[o]f course, every state statute that has some indirect effect on rates and facilities of natural gas companies is not pre-empted" and carefully noted that its reasoning should not bar Michigan's power to enforce securities laws of general applicability. The Court determined that Michigan's law "is not that kind of regulation [because it] applies only to utilities and is not limited to securities sold within Michigan." 485 U.S. at 308.

and not even a court can authorize commerce in the commodity on other terms").

Petitioners raise no filed-rate defense here because FERC has already determined that petitioners' manipulative behavior violated the authorization under their blanket certificates to sell at market-based rates. *See* F.E.R.C., *In the Matter of Amendments to Blanket Sales Certificates*, Order Denying Rehearing of Blanket Sales Certificates Order, (FERC Dkt. No. RM03-10-001), 107 F.E.R.C. 61,174 (May 19, 2004)[32] (certificates "implicitly prohibited acts which would manipulate the competitive market for natural gas").[33]

The Solicitor General acknowledges the states' plenary authority over rate-setting of retail sales for consumption, and admits that FERC would lack authority to fix rates for such sales, even if they affected wholesale prices, "because such state price regulation of retail sales falls squarely within Section 1(b)'s proviso." U.S. Br. p. 28 n.6 (citing *Fed. Power*

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[32] *Available at:* http://www.ferc.gov/EventCalendar/Files/20040519212053_ RM03-10-001.pdf (last visited Nov. 19, 2014).

[33] *See also* F.E.R.C., *In Re: Enron Power Marketing, Inc., et al.*, Order Proposing Revocation of Market-Based Rate Authority and Termination of Blanket Marketing Certificates, (FERC Dkt. Nos. EL03-77-000 and RP03-311-000), 102 FERC ¶ 61,316 (Mar. 26, 2003) (*available at:* http://www.ferc.gov/Media/news-releases/2003/2003-1/EL03-77-000.pdf (last visited Nov. 19, 2014)) (explaining that, implicit in "[t]he Commission's grant of authority to sell at market-based rates, as opposed to cost-based rates … is a presumption that a company's behavior will not involve fraud, deception or misrepresentation. Companies failing to adhere to such standards are subject to revocation of their market-based rate authority."); *accord E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1048 (9th Cir. 2007) (explaining that manipulated rates are not FERC-approved market rates).

Comm'n v. Conway Corp., 426 U.S. 271, 281-82 (1976) (acknowledging that FERC "lacks authority to fix rates for direct industrial sales")).

The Solicitor General further concedes that the states could require retail sellers to report to separate, retail-only indices, and then regulate these indices. U.S. Br. p. 26 n.6. By that logic, Wisconsin, under its rate-setting authority, could have decided that petitioners' retail prices were too high, and fined them in an amount equal to the damages sought by the Wisconsin Respondents here, distributing the fines to the putative class. There is no basis for concluding that private rights of actions seeking to challenge retail rates on antitrust grounds would impermissibly thwart FERC's authority, while direct rate-setting of retail prices would not.

The Solicitor General errs in accepting petitioners' mischaracterization that the Wisconsin Respondents' antitrust claims for unlawful restraint of trade are "based on petitioners' reporting to price indices." U.S. Br. p. 27.

This is simply not the case. All that is necessary is to show that petitioners, in furtherance of a conspiracy in restraint of trade, knowingly overcharged the Wisconsin businesses who purchased natural gas for consumption at inflated rates. Until these retail sales are consummated, with collusive intent and requisite harm, no cause of action arises. *See supra* Section I(B). This places the claims squarely within the states' plenary authority over retail sales under Section 1(b) of the NGA.[34]

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[34] The Solicitor General's position is likely influenced by the fact that, in recent years, FERC has become embroiled in numerous lawsuits, in the D.C. Circuit and elsewhere, about whether its authority over practices, in the post-EPAct context, alters the

Because respondents' antitrust actions arise at the retail level, they fall under the plenary power reserved to the states by Congress, are beyond FERC's ability to regulate, and are not preempted.

III. FERC'S CURRENT INTERPRETATION OF ITS JURISDICTION IS OWED NO *CHEVRON* DEFERENCE HERE.

The Solicitor General suggests that *Chevron* deference to its current position should play a role in the Court's analysis. It should not. First, deference under the holding in *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.,* 467 U.S. 837 (1984), is appropriate only where a "statute is silent or ambiguous" regarding an agency's authority. *City of Arlington, Tx. v. FCC*, 133 S.Ct. 1863, 1868, 1875 (2013). The NGA is neither silent nor ambiguous as to the scope of FERC's authority. *See id.* (*Chevron* deference should not be afforded when "the statutory text forecloses the agency's assertion of authority"). To the contrary, Section 1(b) grants FERC plenary authority over wholesale sales, and grants the states

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wholesale/retail dichotomy. *See, e.g.*, *Elec. Power Supply Ass'n v. F.E.R.C.*, 753 F.3d 216, 221 (D.C. Cir. 2014) (considering and rejecting FERC's argument that it had jurisdiction over retail practices under the FPA because they "directly affect[]" wholesale rates). FERC may be understandably concerned that this case might influence that battle, even though the lawsuits here involve the fundamentally different pre-EPAct era. *Cf. id.* at 223-25 (assessing FERC's argument that its intrusion into the retail realm was warranted by new powers granted FERC in the EPAct). However, the limited question before the Court, involving unusual circumstances that cannot recur in the same manner, post-EPAct, should ultimately have no bearing on that debate. *Cf.* U.S. Cert. Br. pp. 21, 23 ("the circumstances giving rise to respondents' state-law antitrust claims are unlikely to recur").

plenary authority over retail sales. *See supra* Section II.

Second, FERC's limited conclusion that it had authority under the NGA to issue its 2003 Code of Conduct has no bearing on the outcome of this case. As the Solicitor General concedes, FERC concluded that it had this authority, but "did not analyze its authority further." U.S. Br. p. 34. *See Hillsborough Cnty., Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 718 (1985) (*Chevron* has no application in preemption analysis "if an agency does not speak to the question of preemption"). FERC did not announce that its regulations would displace antitrust laws, and did not conclude that it had authority to preempt state regulation of retail sales through antitrust laws. In fact, FERC repeatedly asserted that it was unable to "exercise regulatory authority over non-jurisdictional sellers' index-related practices associated with non-jurisdictional sales *before* Congress' 2005 enactment of EPAct." U.S. Br. p. 32 n.7 (emphasis added).

FERC recognized, in amending its Code of Conduct in 2003, "that the Commission does *not* have jurisdiction over the entire natural gas market," and that it was imposing "the proposed code of conduct only on the portion of the natural gas market under the Commission's jurisdiction." 68 Fed. Reg. 66,323, 66,325 (Nov. 17, 2003) (emphasis added). FERC even responded to concerns that imposing its requirements on only part of the market might unduly benefit those not subject to such requirements. *Id.* FERC did not attempt to assert control over collusive behavior in retail markets, and definitively determined it did not have jurisdiction to do so.

During the relevant time period and after, FERC concluded that it lacked the power to regulate market manipulation. *See* Federal Energy Regulatory Commission, Final Report on Price Manipulation In Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA0-2-2-000, at ES-17 (Mar. 2003) (recommending that Congress give authority to FERC or another federal agency to ensure that trading platforms for wholesale sales of electric energy and natural gas in interstate commerce are "monitored and provide price market information that is necessary for price discovery and competitive energy markets"); Testimony of Joseph Kelliher, FERC Chairman, before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives (Dec. 12, 2007) ("Kelliher Testimony")[35] ("[b]efore the Energy Policy Act, FERC did not have all the tools it needed to be a strong enforcement agency" and lacked "express authority [under the NGA] to prohibit market manipulation"); *id.* (FERC's powers under the amended NGA in 2005 gave it, for the first time, the "tools we needed" to "protect consumers from market manipulation," providing "strong grounding for our efforts to oversee wholesale energy markets").

In fact, FERC successfully lobbied Congress to amend the NGA to grant it the authority it lacked before 2005. FERC asked Congress to pass the EPAct for the explicit purpose of giving it powers to regulate market manipulation. F.E.R.C., Conference on

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[35] *Available at* http://www.ferc.gov/eventcalendar/Files/20071212102420-kelliher-testimony-12-12-07.pdf (last visited Nov. 19, 2014).

Enforcement Policy, AD07-13-000 (Nov. 14, 2007)[36] (acknowledging that FERC lacked regulatory authority to guard against market manipulation before Congress granted FERC additional powers in 2005 "inspired in large part by the market manipulation that occurred in 2000-2001").

On this record, FERC, merely by joining the Solicitor General's Brief, should not be afforded *Chevron* deference in suggesting to this Court that it had the sweeping authority under the NGA that it earlier disclaimed. *See Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency [authority]").

IV. UNDER THE FACTS HERE, A HEAVY PRESUMPTION AGAINST PREEMPTION SHOULD BE APPLIED.

This case lies at the confluence of a number of doctrines imposing strong presumptions against finding preemption here. First, two areas of traditional state regulation are involved: antitrust and retail sales of natural gas. *See supra* Section I(A). For this reason alone, a presumption against finding preemption is warranted. *CTS Corp. v. Waldburger*, ___ U.S. ___, 134 S.Ct. 2175, 2188 (2014), *reh'g denied*, ___ U.S. ___, 135 S.Ct. 23 (2014) (collecting cases and explaining "because the States are independent sovereigns in our federal system, the Court assum[es] that the historic police powers of the States were not to be superseded by the Federal

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[36] *Available at:* http://www.ferc.gov/media/statements speeches/kelliher/2007/11-14-07-kelliher.pdf (last visited Nov. 19, 2014).

Act unless that was the clear and manifest purpose of Congress…. The presumption has greatest force when Congress legislates in an area traditionally governed by the States' police powers"); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (explaining that courts should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Wos v. E.M.A. ex rel. Johnson,* 133 S.Ct. 1391, 1400 (2013) ("In our federal system, there is no question that States possess the traditional authority to provide tort remedies to their citizens as they see fit" (internal quotation omitted)).

In addition, these general presumptions are given a heightened application in the natural gas field, "so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw. Cent.*, 489 U.S. at 516; *see also New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973) ("Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one").[37] The Court also requires an explicit Act of Congress to alter traditional divisions of authority between the federal and state governments, and will not infer such an alteration merely from the fact of that an

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[37] Galle, B. and M. Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 Duke L.J. 1933, 1943-44 (2008) (noting that the application of these presumptions is a critical tool in respecting federalist principles).

area is regulated. *See United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Hillsborough Cnty.,* 471 U.S. at 717 (1985) ("To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence"). Petitioners' proposed replacement of seven decades of precedent with a radical new "direct effects" test must be scrutinized with these strong presumptions against preemption in mind. Petitioners' arguments do not survive such scrutiny.

V. PETITIONERS' RADICAL PROPOSED TEST WOULD UNRAVEL THE DUAL-REGULATORY SYSTEM IN THE NGA AND DRASTICALLY CURB STATE POWERS.

A. Petitioners' Proposed Test Would Dismantle the Complementary Dual-Regulatory System Created By Congress.

To understand the impact of petitioners' theory, it is important to first understand that the test petitioners argue is *required* (preemption applies if practices directly and simultaneously alter the rates in jurisdictional sales (Pet. Br. pp. 2, 28, 32, 33)) is not the test petitioners are *applying* (preemption applies if lawsuits might influence behavior, causing a chain-reaction that might ultimately impact the rates in wholesale sales (*id.* pp. 28, 32)).

Petitioners' conjecture is that, over time, a series of fabricated sales and wash trades by multiple market participants, acting in concert, could eventually change the way an index calculates rates, compiled some time after the series of false reporting. That change in the index-compiled rate could alter the price of future wholesale sales that future buyers and sellers choose to price off that index. Pet. Br. p. 28. Liability to lawsuits like those brought by the Wisconsin Respondents[38] "would force jurisdictional sellers to alter their behavior,"[39] *i.e.*, such lawsuits, if successful, could impact voluntary misreporting, which could change the way misreporting affects the private indices, which then could change the prices of future wholesale contracts if buyers and sellers choose to price off such indices. *Id.* p. 32.

Petitioners speculate that a change in incentives they have to refrain from misreporting might have a future effect, via a series of steps, on prices in future wholesale sales. *Cf.* U.S. Br. p. 27 (arguing that index manipulation could only impact *subsequent* sales). Despite their labeling of such speculative, indirect impact as a "direct effect," petitioners

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[38] It bears mentioning that the Wisconsin Respondents' lawsuits, first filed eight years ago, concerning conduct that took place more than a decade ago, have not had a "simultaneous" effect on anything.

[39] The upper limit of damages sought by the Wisconsin Respondents would amount to little more than some of the petitioners receive in tax breaks each year, and only a very small percentage of their combined annual profits. For example, ExxonMobil, ultimate parent of the Duke Defendant entities, received $600 million in tax breaks in 2011. Leber, R., "Exxon, Chevron Made $71 Billion Profit in 2012 As Consumers Paid Record Gas Prices," Feb. 1, 2013 (*available at:* http://thinkprogress.org/climate/2013/02/01/1525441/exxon-chevron-2012-profit/ (last visited Nov. 19, 2014)).

actually apply a "butterfly effects" test that is entirely new and patently inconsistent with a "direct effects" analysis. *See California Indep. Sys. Operator Corp.,* 372 F.3d at 403 (to "directly govern[] the rate in a jurisdictional sale," a practice must, without the mediation of other events or acts, have an instantaneous one-to-one impact on the rates on wholesale sales. Anything that does so "ultimately," or through an intermediary act or event is "indirect").[40]

Petitioners' test would discard Congress' wholesale/retail dichotomy and replace it with one in which FERC had exclusive reach but limited grasp. Production, transportation, wholesale and retail sales will always exist in an integrated market. *Nw. Central*, 489 U.S. at 515. What happens on one side of the *Attleboro* line always affects what happens on the other. Holding this relationship to be outcome-determinative for preemption purposes, as petitioners suggest, would have the federal realm subsume that of the states, contrary to Congress' intent and this Court's precedent. It would sweep away historic state regulation, leaving a void, and the uncertain question whether FERC has either the capability or the inclination to fill it.

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[40] Similarly, *Am. Gas Ass'n v. F.E.R.C.*, 912 F.2d. 1496 (D.C. Cir. 1990) does not support petitioners' theory. In that case, the court rejected the American Gas Association's (acting as an *amicus* at the *certiorari* stage) argument that any contract that would likely influence a jurisdictional rate should fall under FERC's authority. The Court discredited the view that FERC would have authority under Section 5(a) "to control wellhead rates merely because those rates are elements in the computation of pipelines' sales rates. Indeed, petitioners' theory is, more generally, an oxymoron—[FERC] jurisdiction over nonjurisdictional contracts." 912 F.2d. at 1506.

The interconnectivity of federal and state regulated markets has only been deepened by the voluntary acts of market participants. Some wholesale and some retail sellers of natural gas voluntarily provide sales information to private, third-party publishers, who voluntarily publish, for a profit, summaries that rely upon such information. Buyers and sellers voluntarily negotiate arms-length contracts with prices sometimes pegged to these indices.[41] Petitioners assert that this voluntary interconnectivity of the unregulated natural gas market prohibits lawsuits challenging retail sales such as this, brought under laws of general applicability, if such sales happen to be priced off the indices. Petitioners vehemently assert that any challenge to sales prices made off an index would somehow directly affect wholesale practices and rates, and is therefore preempted.

Any lawsuit, and presumably any state law or regulation, including the Wisconsin antitrust statute of general applicability, would likely run afoul of this proposed rule, prohibiting the very regulation of retail prices that all parties admit is properly within state authority. Pet. Br. p. 38; U.S. Br. pp. 25-26.

Put another way, in a market integrated by the voluntary acts of market participants, everything has

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[41] As FERC observed in 2004, the defendants—sophisticated buyers and sellers—were better and more currently informed than the indices, and were therefore "unlikely to rely on indices primarily for their price information." Report on Natural Gas and Electricity Price Indices, FERC, May 5, 2004 Docket Nos. PL03-3-004 and AD03-7-004-16, p. 16. The fact that petitioners' use of published indices as pricing references was neither necessary nor required represents another reason why their suggestion that reference to them means FERC controls the field is both factually wrong and legally untenable.

a consequential effect on everything else. If such a derivative effect were deemed to be dispositive in preemption analysis, there would be no state realm. This is the very consequence that the Court has been mindful to avoid for decades, and it should be rejected here. *Cf. Am. Gas Ass'n v. F.E.R.C.*, 912 F.2d at 1507 (accusing such arguments as lacking a "conceptual core and thus seem[ing] awkward and implausible as a jurisdictional boundary"); U.S. Br. p. 23 (noting that permitting a consequential effect to support a conclusion of preemption "would stretch the NGA's grant of authority to FERC beyond any logical mooring").

Such a test would also impermissibly allow market participants to vary FERC's jurisdiction. But market participants have no power to expand FERC's jurisdiction—only Congress can. This is particularly true when market participants voluntarily decide to report,[42] and wholesale and retail sellers voluntarily decide to price contracts off of the indices. Any theory that would allow FERC's jurisdiction to subsume the regulatory sphere reserved by Congress to the states, based on the voluntary acts of market participants, is fundamentally flawed. *Cf. Pennsylvania Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 420, (1952) ("[FERC's] power does not vary with the rise and fall of the Susquehanna River").

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[42] Even after the EPAct, neither jurisdictional nor non-jurisdictional sellers have any duty to report sales information to indices. F.E.R.C., Prohibition of Energy Market Manipulation, 18 C.F.R. Part 1c (FERC Dkt No. RM06-3-000, Order No. 670) (Jan. 19, 2006).

Petitioners' approach would allow market participants to manipulate FERC's authority for their own ends, and would allow wrongdoers, such as petitioners, to insulate themselves from state liability by duplicating misconduct perpetrated in the state realm in a federally-regulated area. By petitioners' perverse reasoning, misconduct that permeates both the wholesale and retail markets triggers a conclusion of preemption. Expanding the scope of misconduct from the retail to the wholesale realm, petitioners could therefore achieve total immunity from state law. This cannot be the right result.

Most disturbingly, petitioners' test would grant the violators of laws of general applicability *carte blanche* to self-impose complete immunity simply through laundering their misconduct through federally regulated activity. Such an evisceration of civil liability, in the name of achieving personal immunity for a league of acknowledged wrongdoers, would be manifestly unjust.

B. Petitioners Would Create a Regulatory Void in Which Neither the States Nor FERC May Act, Contrary to Congressional Intent in Enacting the NGA.

FERC lacked the power, during the period in question (2000-2002) to: penalize retail sellers for misreporting; fine retail sellers for manipulating private-market indices; or punish retail sellers for swindling retail purchasers.[43] Preventing the states from acting in these areas through the pretext of

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[43] FERC's enhanced penal powers, post-EPAct, are not in question here.

preserving FERC's authority would mean there was a no-holds-barred zone of unregulated activity, beyond the reach of federal or state power. This result is directly contrary to Congress' intent in creating a complementary and effective dual-regulatory system, creating exactly the sort of gap Congress sought to fill in 1937. *See, e.g.*, *Panhandle I*, 332 U.S. at 516 (explaining that the "primary purpose [of the NGA] was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions"); *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. at 631 (explaining that the NGA was intended by Congress to be "broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare").

Because FERC could not regulate retail sales during the relevant period, petitioners' theory would insulate natural gas companies from any retail regulation. *But see Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. at 631 ("when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created"). Such a regime would be devastating to effective federal and state regulation, as well as to the state and national economies, and be exactly the result that the entire body of natural gas regulation was designed to avoid.

C. Petitioners' Proposed Test for Evaluating Private Actions Is Administratively Unworkable.

Petitioners' test ignores the nature of the claim (antitrust) and focuses on a self-serving and unsupported assertion of what evidence plaintiffs may present at trial (index manipulation). Preemption, however, must be a threshold question, and it was the explicit will of Congress to make preemption under the NGA a bright line issue that is determinable on the basic nature of a statute or regulation. It is unworkable to have a test that might bar a private lawsuit on preemption grounds based on what the jury finds at trial.

For a Court to wait until the end of a trial to conduct a preemption analysis would result in a monumental waste of judicial and public resources. *But see* Fed. R. Civ. P. 1. This is not the result Congress intended. *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. at 215-16 ("our decisions have squarely rejected the view … that the scope of [FERC] jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis"). Yet a case-by-case analysis, which may not be complete until *after* the finding of facts at trial, is exactly the test petitioners are proposing.

D. The Application of Petitioners' Unprecedented "Butterfly Effects" Test Is Purely Speculative.

Petitioners' hypothesis[44] that an attenuated tie exists between lawsuits of this nature and wholesale prices is unsupported. Moreover, it is purely speculative and unlikely to be accurate,[45] given that each step of the argument is linked by future voluntary acts that might or might not occur. For instance, if petitioners wish to avoid state antitrust liability, the path of least resistance is ceasing to enter into anti-competitive conspiracies with other market participants. That is the basis of liability, the objective of the antitrust laws, and the behavior sought to be regulated. Compliance with the basic prohibitions of antitrust law would insulate petitioners from any such lawsuit that somehow touches on voluntary reporting, and it certainly would be the aim of both federal and state antitrust laws that such suits prompt petitioners to comply in this manner.

In addition, the analysis has been materially altered by the passing of the EPAct; *see* FERC, Energy Policy Act of 2005, Fact Sheet (Aug. 8,

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[44] *But see Arkansas Elec.*, 461 U.S. at 389 (rejecting the claim that a hypothetical conflict should trigger preemption); *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (same).

[45] Petitioners have no answer to this argument other than to assert that this issue was somehow waived by the Wisconsin Respondents, but the record does not reflect such a phantom waiver. The boundaries of FERC's jurisdiction are not waivable; they are set by act of Congress. In any event, if petitioners were correct, the proper response would be to remand to the court of appeals for consideration of this issue. *Cf.* U.S. Br. p. 29 n.4 (making the same recommendation).

2006)[46] ("The [EPact]... makes the most significant changes in Commission authority since the New Deal's Federal Power Act of 1935 and the Natural Gas Act of 1938"). The EPAct gave FERC new regulatory powers, designed specifically to prevent the recurrence of market manipulation. *See* 151 Cong. Rec. S. 9344 (July 29, 2005) ("[The EPAct] puts in place *the first ever* broad prohibition on manipulation of electricity and natural gas markets" (statements of Senator Cantwell) (emphasis added)). FERC after the EPAct is a fundamentally different regulatory body than it was prior to 2005. *See, e.g.*, Fact Sheet (explaining that the EPAct gave FERC, for the first time rule-making authority with respect to market manipulation).[47]

For this reason, it is unlikely that a fact pattern similar to that presented here will recur. Indeed, the Solicitor General, in its *certiorari* brief, joined by FERC, came to this same conclusion. *See, e.g.*, U.S. Cert. Br. pp. 21, 23 ("the question presented is of limited prospective importance due to significant changes in the regulatory environment in the wake of the Western energy crisis…. the circumstances giving rise to respondents' state-law antitrust claims are unlikely to recur"). For this reason, the ultimate impact of this case on participants in natural gas markets is likely to be nil.

What is certain, however, is that dismissing the Wisconsin Respondents' claims will deny the industrial and commercial plaintiffs any relief for the

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[46] *Available at:* http://www.ferc.gov/legal/fed-sta/epact-fact-sheet.pdf (last visited Nov. 19, 2014).

[47] Notably, Congress denied FERC authority to regulate the private indices in the EPAct. Energy Policy Act of 2005, § 316, Pub. L. No. 109-58, 119 Stat. 593 (2005).

injury they suffered at the hands of the petitioner conspirators. As petitioners well know, FERC cannot redress these injuries, as Congress deliberately provided the states the solitary power to remedy such wrongs. The tangible harm to the businesses at issue, and the real consequences to many business and commercial retail markets, under petitioners' approach, would be monumental. *Energy Law & Transactions* § 50.03[5][a][ii] (noting that, as of 2012, over five million separate businesses relied on retail natural gas purchases to support their commercial operations).

Most fundamentally, it would be perverse if the NGA, designed to create a comprehensive complementary system of regulation, prompted by historical monopolistic abuses by natural gas companies, were used to excuse anticompetitive behavior and bar relief to the victims of such wrongful conduct. *Cf. Hope Natural Gas Co.*, 320 U.S. at 610 (explaining that the "primary aim" of the NGA is "to protect consumers against exploitation at the hands of natural gas companies"). This is the naked truth of the matter before the Court, and it, perhaps more than anything else, demonstrates why petitioners' arguments are dangerous and wrong.[48]

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[48] *See Wis. Amicus* (urging that the Wisconsin Respondents' claims not be dismissed because the Wisconsin Constitution allows every person "a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property or character…." and therefore "The laws of Wisconsin make it clear that persons injured by anticompetitive conduct deserve an effective remedy" (citing Wis. Const. art. I, § 9)); *see also id.* at pp. 4, 15 ("Wisconsin is interested… [in] prevent[ing] the diminution of the ability of the Attorney General, as well as private parties, to respond to the energy crisis and to any future, similar misconduct….For years, the Attorneys General have fought to hold accountable the people and entities that

To respect petitioners' allegations and deceptive arguments to achieve their avaricious designs would be to mockery of everything the Act was designed to accomplish, and an abandonment of more than 70 years of unbroken precedent from this Court.

CONCLUSION

For these reasons, and in the interests of justice to those harmed by petitioners' collusive actions, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

November 21, 2014

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manipulated natural gas and energy markets. This hard work has helped not only to compensate victims, but to deter future misconduct").