No. 13-271

In the Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., ET AL.,

Petitioners,

v.

LEARJET INC., ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE GAS PROCESSORS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The Gas Processors Association (GPA) has served the U.S. energy industry since 1921 as an incorporated nonprofit trade association. GPA is composed of 130 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (NGLs) such as ethane, propane, butane, and natural gasoline. GPA members account for over 90% of the NGLs produced in the United States from natural gas processing.

This case is of importance to GPA and its members, because the U.S. Court of Appeals for the Ninth Circuit's decision imposes new regulatory burdens on GPA members' natural gas transportation, marketing, and sales activities downstream of those members' gas processing plants and gas gathering systems, which activities are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC). Under the Ninth Circuit's decision, a direct industrial purchaser of natural gas that thinks itself aggrieved by a midstream practice can evade FERC jurisdiction and cast about for a friendly state forum willing to impose more onerous restrictions than FERC. That is no way

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[1] This brief is filed with the consent of the parties. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

to conduct national gas policy. As courts have recognized, one of the principal purposes of the Natural Gas Act (NGA), 16 U.S.C. §§ 717 *et seq.* (2012), is to protect national natural gas policy from the influence of state regulators "with only local constituencies." *National Fuel Gas Supply Corp. v. Public Service Commission of New York*, 894 F.2d 571, 579 (2d Cir. 1990), *cert denied*, 497 U.S. 1004 (1990). The Ninth Circuit's decision is contrary to that critical purpose because it effectively turns over regulation of practices affecting the wholesale natural gas market to insular state courts and legislators.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision authorizes states to regulate practices that the NGA delegates to FERC. That decision, if left unreviewed, will impose new and unnecessary costs on natural gas companies, including midstream companies, as they struggle to conform to additional layers of potentially conflicting regulation. And it will allow state rules to oust FERC's rules regulating midstream activities promulgated under the NGA. Congress enacted the NGA to provide for federal regulation of natural gas companies. This Court should follow its prior precedents rejecting state infringement on the NGA. The Petition should be granted and the decision below should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONDONES STATE ATTEMPTS TO REGULATE ACTIVITIES WITHIN THE EXCLUSIVE JURISDICTION OF FERC THROUGH THE BACK DOOR OF RETAIL RATE REGULATION.

From this Court's earliest opinions on natural gas regulation, it has held that with respect to the interstate natural gas industry, "[t]he paramount interest is not local but national, admitting of and requiring uniformity of regulation." *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 309-310 (1924). That observation is as sound today as it was in 1924. Absent uniform federal regulation, interstate natural gas regulation would be effectively left in the hands of state regulators, regulators that often elevate local concerns above the needs for an efficient, competitive natural gas market. *See National Fuel Gas Supply Corp.*, 894 F.2d at 579. The genius of the NGA was to counteract the protectionist impulses of state and local regulators by placing regulation of the interstate wholesale market in the hands of "FERC, a federal body that can make choices in the interests of energy consumers nationally[.]" *Id.*

The Supreme Court has also recognized that state regulators could use their power over their retail markets to attempt to control wholesale practices with which they disagree. The Court accordingly has taken a dim view of stratagems that permit states to "disturb[] the uniformity of the federal scheme," explaining that they "seriously impair [FERC's] authority to regulate" jurisdictional sellers, because those sellers "will be forced to comply with varied state regulations of their . . . practices." *Transcontinental Pipe Line Corp. v. State Oil & Gas Board of Kansas*, 474 U.S. 409, 420, 423 (1986) (quoting *Northern Natural Gas Co. v. State Corp. Commission of Kansas*, 372 U.S. 984, 92 (1963)), *reh'g denied*, 475 U.S. 1091 (1986).

In order to protect the national gas market from local regulations that purport to regulate local concerns, but actually interfere with the interstate market, the Supreme Court has explained that state regulation is preempted, regardless of its nominal subject area, if it is "directed at . . . things over which [the NGA] has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988) (footnote omitted).

In *Schneidewind*, for instance, the Court found preempted a Michigan statute requiring companies that transported natural gas in interstate commerce and into the state to obtain state approval before issuing securities. Even though the NGA did not expressly authorize FERC to regulate the issuance of securities, the Court found the law preempted, because it "amount[ed] to regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." *Id.* at 304. The Michigan law's purpose was to keep natural gas companies from raising their equity levels above a certain point, so as to make sure the "company will charge only what Michigan considers to be a 'reasonable rate.' That

[was] a regulation of rates" governed exclusively by the NGA, and the statute was therefore preempted. *Id.* at 308.

In *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 360 n.6 (1988), similarly, the Court held that an agreement among four power companies allocating power from a nuclear power plant was a "contract affecting the wholesale rates . . . of those companies." The Court therefore held that Mississippi could not regulate the contract through its undisputed power to regulate retail rates. *Id.* at 374. The Court's reasoning was simple: "States may not regulate in areas where FERC has properly exercised its jurisdiction to . . . insure that agreements affecting wholesale rates are reasonable." *Id.* And that was true even though Mississippi was purporting to exercise its power to regulate the retail market. *Id.*

The Court's pragmatic approach to natural gas preemption—focusing on the effect of the regulation on the interstate market, rather than what it purports to regulate—makes sense in light of the goals of the NGA. If the Court is to honor Congress' goal of preventing local regulators from meddling in matters of national natural gas policy, the Court must continue to be on guard against states attempting to use their regulatory power over the retail market to sneak in wholesale regulation through the back door.

The Ninth Circuit's opinion fails to honor these important goals. Under the Ninth Circuit's opinion, the practical effect of a state regulation—including state antitrust laws—on FERC's ability to regulate the interstate natural gas market is irrelevant. Instead, all that matters is that the plaintiff purchased its particular natural gas in retail transactions outside of FERC's jurisdiction. But that reasoning opens up interstate natural gas companies to all forms of state regulation under the guise of the state regulating retail transactions not under FERC's control. Review is warranted to ensure that Congress's intended role for FERC as the regulator of the interstate natural gas market, a role repeatedly recognized and protected by this Court, is preserved.

II. THE DECISION BELOW CREATES ADDITIONAL, COSTLY REGULATORY BURDENS FOR MIDSTREAM COMPANIES AND THREATENS FERC-APPROVED PRACTICES.

The decision below also imposes additional, expensive regulatory burdens on natural gas midstream companies. Under the Ninth Circuit's rule, so long as a plaintiff alleges its natural gas was purchased in a transaction not subject to FERC's jurisdiction, the states can regulate any practice relating to the transaction, even if it is a practice that is subject to FERC oversight.

As a consequence, where FERC has authority over their activities, midstream companies can no longer focus their compliance efforts on implementing FERC-approved practices under FERC's precedent. Instead, companies must determine whether their practices are affecting retail rates in each of the states in which they operate. If so, companies must then conform those particular practices to the demands of each state's laws. This effectively destroys the scheme of regulation implemented by the NGA.

That would create tremendous practical difficulty for FERC-regulated companies. For midstream natural gas companies operating in the wholesale market and engaged in interstate sales of natural gas for resale and interstate transportation of natural gas, their practices do not change from state to state.

Even if the practical difficulties can be hurdled, the duplicative regulatory burden that the Ninth Circuit's rule creates will impose significant costs on midstream companies. On the state level, a study of insurance companies' compliance costs has found that multistate regulation increases expenses and premiums by 26 percent. Tyler Leverty, *The Cost of Duplicate Regulation*, Insurance Journal (May 21, 2012), *available at* http://www.insurancejournal.com/magazines/features/2012/05/21/248069.htm. Indeed, President Obama has declared that eliminating such cost and overlap "is the operating principle of our government." Barack Obama, Op-Ed, *Toward A 21st-Century Regulatory System*, Wall St. J., Jan. 18, 2011. But the Ninth Circuit's opinion authorizes states to impose an unprecedented set of burdensome regulations on midstream companies to the extent their activities are regulated by FERC.

In many cases, however, midstream companies may not be able—either for reasons of cost or logistics—to tailor their practices on a state-by-state level. In those cases, companies must make their practices conform to the rules of the most restrictive state—in other words, conform to the lowest common denominator among all the states in which they operate. *See* Dillon Klepetar, *Technology-Forcing and Law-Forcing: The California Effect in Environmental Regulatory Policy* § 4.1 (2012) (Western Political Science Association, 2012 Annual Meeting), *available at* http://wpsa.research.pdx.edu/meet/2012/klepetar.pdf. That approach, however, would make states, not FERC, the primary regulator of practices that affect both wholesale and retail natural gas rates. That result runs contrary to the Supreme Court's cases and Congress's intent.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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