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

BRIEF OF NOBLE AMERICAS ENERGY SOLUTIONS, NOBLE AMERICAS CORPORATION, AND NOBLE AMERICAS GAS & POWER, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Natural Gas Act occupies the field as to matters within its scope, preempting state regulation aimed at practices that directly affect the wholesale natural gas market. Respondents brought state-law claims against natural gas companies, seeking to impose liability based on industry practices that directly affected prices in the wholesale market. And yet the Ninth Circuit held that Respondents' claims were not preempted because Respondents' alleged damages resulted from retail gas purchases, which fall outside federal jurisdiction.

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

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INTEREST OF *AMICI CURIAE*[1]

Noble Americas Energy Solutions ("NES") supplies power and natural gas to retail customers' sites throughout the United States. It tailors its products and services to capture the benefits of deregulation while protecting its customers from unexpected increases in energy prices. Its cutting-edge risk management programs are flexible and designed to meet the unique needs of customers while providing a wide range of solutions to help meet or beat their budget goals for energy expenses.

NES is active in 20 states serving 2,000 customers behind 50,000 meters with a peak electric load in excess of 7,500 MW and natural gas load of 60,000 mmbtu/day in the west. NES offers commercial and industrial businesses energy commodity products and services to help them successfully manage their costs in volatile energy markets. NES provides customers with an integrated mix of services such as commodity supply, risk management, portfolio management, energy information management, scheduling, settlements and billing management.

Noble Americas Corp. ("NAC") is a commodity marketing and trading company specializing in commodity supply chain management services for

1. All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the petroleum products/crude oil, industrial metals/coal, logistics and shipping, and energy sectors. Operating from over 140 locations worldwide, NAC has built an energy platform that encompasses key global locations and which continues to grow, seeking new ways to create cross-divisional and cross-segment products and services. NAC handles the range of liquids and hard energy sources from thermal coals to gas and electricity.

Noble Americas Gas & Power ("NAGP") is a FERC-regulated power and gas marketer. NAGP transacts for its own account and acts as a wholesale marketer of electricity, natural gas, and natural gas liquids, and has sold, marketed, and traded wholesale power, capacity, ancillary services, related services, and wholesale natural gas in various markets in the United States and Canada. NAGP is a full service, natural gas and electricity marketing and trading business that caters to the physical supply needs of the North American gas and power markets and manages the price risk, credit and operational risk of its customers. The team leverages an extensive customer base and principal investments in strategic pieces of the production and logistics chain to generate steady returns and to gather critical market data for further profit growth. NAGP is now the fifth largest seller of electricity in the United States.

As energy market participants, *amici* NES, NAC, and NAGP rely upon the clear, established lines of

authority between federal and state regulation as defined by the Natural Gas Act, the Federal Power Act, and this Court's interpretive decisions. In regard to the natural gas market, *amici* have long understood that the Federal Energy Regulatory Commission (FERC) is solely charged with regulating any practices that affect wholesale gas prices, and that participants in this market should accordingly conform their actions to FERC's guidance. Likewise, FERC has traditionally been understood to exercise exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.

The Ninth Circuit's decision in this case has undermined the continuing validity of this regulatory framework, creating significant uncertainty for *amici* going forward. For these reasons, *amici* have a substantial interest in this Court's review of the Ninth Circuit's interpretation of preemption doctrine under the NGA.

SUMMARY OF ARGUMENT

This Court has repeatedly recognized the importance of uniform federal regulation under the Natural Gas Act. But the "transactional approach" adopted by the Ninth Circuit allows the States to aggressively impose their own policies on natural gas wholesale practices that impact a retail transaction. The Ninth Circuit's decision is both irreconcilable with this Court's precedent and out of step with

FERC's uniform regulation of practices affecting price indices.

To begin with, it is beyond serious dispute that the alleged price index manipulations in this action directly affect wholesale rates. As Respondents' expert explained, "the prices that were the subject of the manipulation *are* the prices of natural gas in this country." J.A. 593. (Decl. of Michael Harris in support of plaintiffs' motion for class certification) (emphasis added). Likewise, the District Court correctly explained that the indices "are the method by which jurisdictional rates are set and embody jurisdictional rates. Thus, manipulation of the indices directly affects jurisdictional rates." Pet. App. at 111a–112a.

The Ninth Circuit nevertheless held that Respondents' claims were not preempted because they arose from the retail purchase of natural gas. But the Ninth Circuit's transactional approach necessarily contemplates state regulation of practices directly affecting wholesale rates. This Court has made clear that such state regulations are preempted: "The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963) (internal citation omitted).

Significantly, the preemption issues here are not abstract. Rather, FERC has investigated in great depth the practices at issue in this case and, pursuant to its statutory authority, adopted a code of conduct governing such practices. Under the Ninth Circuit's transactional framework, FERC's carefully crafted scheme would be largely undermined. Because natural gas market participants' conduct would be subject to varying laws of the States whenever a retail purchase was based on or affected by a price index, FERC's uniform standards would be effectively nullified. Consistent with its own established precedent and practical regulation of the energy industry, this Court should reverse.

ARGUMENT

I. THE PRACTICES CHALLENGED BY RESPONDENTS, ALLEGED MANIPULATION OF THE PRICE INDICES, DIRECTLY AFFECT WHOLESALE NATURAL GAS RATES.

When Congress passed the Natural Gas Act (NGA), it determined that FERC would have exclusive regulatory authority over wholesale natural gas pricing issues, preempting any state regulation of the wholesale market.[2] This case raises the question whether the NGA preempts Respondents' state-law antitrust claims concerning

2. In industry parlance, wholesale natural gas sales are referenced as "jurisdictional" sales, and retail sales are referenced as "non-jurisdictional" sales.

Petitioners' alleged manipulation of gas prices during the western energy crisis from 2000 to 2002.

Specifically at issue in the underlying lawsuits are the assertions of Respondents (retail buyers of natural gas) that Petitioners manipulated natural gas price indices, artificially raising the prices paid by Respondents for retail purchases of natural gas. *See In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 723-25 (9th Cir. 2013). The Ninth Circuit's decision that Respondents' state-law antitrust claims are not preempted by the NGA turned on its focus on the specific retail (non-jurisdictional) sales complained of by Respondents. *Id*. at 731.

But FERC has exclusive authority over any practices affecting rates charged by natural gas companies in connection with the interstate sale of natural gas for resale. 15 U.S.C. § 717d(a). Thus, central to the Court's decision in this case will be its understanding of the operation of price indices in the natural gas market, and whether and how those indices affect both wholesale (jurisdictional) and retail (non-jurisdictional) sales. As *amici* demonstrate below, the manipulation of price indices that are used to establish rates in both jurisdictional and non-jurisdictional natural gas transactions is a practice that necessarily and directly affects jurisdictional rates.

A. FERC Regulates the Restructured Natural Gas Industry by Promoting Competitive Markets and Correcting Market Rules as Needed.

Both the natural gas and electricity industries perform three principal functions in delivering energy to consumers: (1) producing the basic energy commodity; (2) transporting the commodity through pipelines or over power lines; and (3) distributing the commodity to the final consumer. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-275, *Natural Gas and Electricity Markets, Federal Government Actions to Improve Private Price Indices and Stakeholder Reaction* (2005) (hereafter "GAO Report"). Historically, natural gas companies built networks of pipelines to deliver natural gas from where it was produced to the markets where local distribution companies served all local customers. Similarly, many local utilities in the electricity sector built their own systems of power plants and electricity transmission and distribution lines to serve the needs of all consumers in their local areas. *Id.* These local monopolies were overseen by state regulators, who restricted the entry of new companies and also approved investments, approved prices paid by customers, and determined the profit opportunities of these utilities. *Id.*

But due to rising prices and technological, economic, and policy developments beginning in the 1970s, the natural gas and electricity industries have

restructured from a regulated environment to one that places greater reliance on competition to determine entry, investment, process, and profits. *Id.*; *see also* David B. Spence & Robert Prentice, *The Transformation of American Energy Markets and the Problem of Market Power*, 53 B.C. L. Rev. 131, n.74 (2012) ("The impulse to restructure both the electric and the gas industries was part of a trend in economic thinking in the 1970s and 1980s that observed increased faith in the ability of markets to achieve efficient outcomes through competition and reduced faith in the ability of governments to achieve efficient outcomes through regulation.").

The enactment of the Natural Gas Policy Act of 1978, the Natural Gas Wellhead Decontrol Act of 1989, and subsequent FERC orders opened access to pipelines and required pipeline companies to completely separate transportation, storage, and sales services, all of which facilitated the shift of natural gas to more competitive markets. GAO Report. Likewise, the Public Utility Regulatory Policies Act of 1978 and the Energy Policy Act facilitated restructuring in the electricity industry. *Id.* In 1992, FERC ordered full unbundling of gas transmission services from gas sales by all pipelines.[3]

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3. *See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 57 Fed. Reg. 13,267, 13,270 (FERC Apr. 16, 1992) (to be codified at 18 C.F.R. pt. 284); *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol; Order Denying*

After these changes, pipeline customers were free to buy their gas at the best available price, hiring the pipeline only to transport the gas at posted, regulated rates.[4]

Formerly, to ensure that the prices utilities charged were just and reasonable, FERC had regulated rates by basing the prices on the utilities' costs to provide service plus a fair return on investment. Now, FERC seeks to ensure that the wholesale natural gas and electricity prices are just and reasonable by promoting competitive markets, issuing market-related rules that encourage efficient competition, and enforcing and correcting market rules as needed. GAO Report.

B. The Manipulation of Price Indices Necessarily and Directly Affects Both Jurisdictional and Non-Jurisdictional Sales of Natural Gas.

The physical trading of natural gas consumed in the United States happens mostly at twenty-four American trading hubs, such as the Henry Hub in Louisiana, and a few additional hubs in Canada. *See* U.S. ENERGY INFO. ADMIN., Office of Oil & Gas,

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Rehearing and Clarifying, *Order Nos. 636 and 636-A*, 57 Fed. Reg. 57,911, 57,914 (FERC Nov. 27, 1992).

4. Aware of the potential for sellers of gas to abuse market power, FERC granted this authority only to sellers that were unaffiliated with pipelines. FERC *Blanket Marketing Certificates*, 18 C.F.R. § 284.402 (2011).

Natural Gas Market Centers: A 2008 Update 1, 7 fig.3 (2009). The Henry Hub, which is interconnected with 13 different intra-and interstate pipelines, provides the benchmark price for North American natural gas. AM. PETROLEUM INST., *Understanding Natural Gas Markets* (2014).

Participants in the natural gas market buy and sell natural gas through "spot" transactions every day at trading points across North America. These "spot" transactions involve the buyer agreeing to pay a negotiated price for the natural gas to be delivered by the seller at a specified delivery point. *Id*.

In addition to such daily spot transactions, monthly spot transactions are often entered during the last five business days of the month, known in the industry as "bid week." During this time, buyers and sellers negotiate the purchase and sale of natural gas to be delivered throughout the coming month, including making delivery arrangements for pipelines. *Id*. Finally, natural gas is often purchased through longer-term contracts that provide for delivery of gas over a specified period of time, which can vary. *Id*.

For all of these transactions, which involve both wholesale (jurisdictional) and retail (non-jurisdictional) sales of natural gas, many energy market participants rely on price information obtained from price indices published in the trade press. GAO Report; *see also Policy Statement on*

Natural Gas and Elec. Price Indices, 104 F.E.R.C. ¶ 61,121, at 61,404 (July 24, 2003) ("Price indices are widely used in bilateral natural gas and electric commodity markets to track spot and forward prices. They are often referenced in contracts as a price term."). A number of trade publications provide index prices based on their survey of natural gas buyers and sellers to determine the prices they pay (or receive) for natural gas in daily or monthly transactions. AM. PETROLEUM INST., *Understanding Natural Gas Markets*.

Market participants use these indices to, among other things, help them make informed decisions about buying natural gas. For example, energy market participants use price indices as a benchmark in reviewing the prudence of gas purchases and often reference price indices in the contracts they develop for such purchases. GAO Report; *see also* FERC *Initial Report on Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, Docket No. PA02-2-000, at 35 (Aug. 2002) (explaining that "the natural gas and electricity industries rely on the prices published by the reporting firms as the actual forward prices for contract settlements, and many contracts are indexed to the published prices").

Notably, the indices are used for every type of natural gas sale, including wholesale and retail transactions. *See* FERC *Report on Natural Gas and Electricity Price Indices*, Docket Nos. PL03-03; AD03-

7-004, at 7 (May 5, 2004) (noting that "[n]atural gas producers, local distribution companies (LDCs), and others tend to buy at index-linked prices in lieu of negotiating fixed prices"); *see also* GAO Report (describing the confidence of "industry stakeholders" in the price indices and referencing, *inter alia*, "producer[s]," "marketer[s]," and "industrial consumer[s]"); *see also* J.A. 150-151. In fact, the use of index prices as contractual terms is so widespread that FERC has previously expressed concern that there be an adequate number of fixed-price contracts to form the basis of the index price. FERC *Report on Natural Gas and Electricity Price Indices* Docket Nos. PL03-03; AD03-7-004, at 7; *see also* J.A. 645 (documenting thousands of wholesale index-rate contracts during the time period 2000-2002). In short, "index dependencies permeate the energy industry." 104 F.E.R.C. at 61,404.

Thus, as the District Court correctly concluded in this case, when the price indices are subject to manipulation, both jurisdictional and non-jurisdictional prices are necessarily affected. Pet. App. 110a-111a; *see also id.* at 111a-112a ("[M]anipulation of the indices is not insignificant or tangential to jurisdictional rates. Although the indices are not themselves jurisdictional rates, they are the method by which jurisdictional rates are set and embody jurisdictional rates. Thus, manipulation of the indices directly affects jurisdictional rates.").

Respondents' expert agreed. Noting that the price indices "are widely used by private parties and government agencies and are the reference points and thus basis for natural gas transactions throughout North America," he explained why the challenged practices at issue in this case cannot be divided into retail transactions versus wholesale transactions: "[I]f a Defendant has manipulated price indices, everyone who purchases natural gas based on that price index will be harmed . . . all purchasers who bought at that price index will be harmed because they have purchased at a price that does not reflect the competitive dynamics of the market." J.A. 613 (Decl. of Michael Harris In Support of Respondents' Motion for Class Certification).[5]

In sum, because the natural gas price indices are used pervasively to price both wholesale and retail natural gas transactions on a daily basis, any successful manipulation of the indices would necessarily affect the entire market, including jurisdictional sales.

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5. Respondents' expert further explained that, to the extent Petitioners' were allegedly successful in manipulating the price indices and "created artificial prices," the altered prices were "not customer specific but rather market prices observed and relied upon by all." J.A. 615 (Decl. of Michael Harris In Support of Respondents' Motion for Class Certification).

II. RESPONDENTS' STATE-LAW CLAIMS ARE PREEMPTED BY THE NGA.

Because index manipulation affects the entire market, Respondents' state-law claims are preempted. It is well-settled under this Court's precedent that the NGA grants exclusive federal jurisdiction over practices directly affecting wholesale natural gas rates. Indeed, the federal regulatory scheme leaves no room for even indirect state regulation of practices affecting wholesale gas rates.

Moreover, all of the conduct at issue in this case is in fact regulated by FERC pursuant to its statutory authority, further confirming that this action is barred by preemption. As the Ninth Circuit's decision rests on a transaction-based test that is irreconcilable with this Court's precedent, it should be reversed.

A. The NGA Grants Exclusive Federal Jurisdiction Over Practices Directly Affecting Wholesale Natural Gas Rates.

Congress enacted the NGA to regulate interstate natural gas transportation via pipelines and the sale of natural gas for resale by local utilities. The NGA clearly demarcates between the federal and state regulatory domains, with the federal government—through FERC, formerly known as the Federal Power Commission—having exclusive control over,

among other things, "the sale in interstate commerce of natural gas for resale for ultimate public consumption" and the "natural-gas companies engaged in such . . . sale." 15 U.S.C. § 717(b).

Any entity that is "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale" is a "natural gas company" subject to FERC jurisdiction under the NGA, *id.* § 717a(6), regardless of the other activities in which the entity may be engaged.

The NGA gives FERC broad authority over these natural gas companies. *See* 15 U.S.C. § 717. To engage in wholesale transactions, a natural gas company must obtain FERC's authorization in the form of a certificate of public convenience and necessity. *Id.* § 717f(c)(1)(A). FERC is authorized to create rules and regulations that govern the conduct of natural gas companies holding these certificates. *See id.* §§ 717f(e), 717o. Consequently, FERC has "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," and over the conduct of natural gas companies participating in the wholesale natural gas markets. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988); *see also Illinois Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 507 n.1 (1942).

Thus, under the text of the NGA, FERC has exclusive authority to regulate (i) the rates for

wholesale gas transactions and (ii) any practices directly affecting those rates.[6]

B. The NGA Preempts Respondents' Claims.

In interpreting the NGA, this Court has held that "[t]he federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas or for state regulations which would indirectly achieve the same result." *N. Natural Gas Co.*, 372 U.S. at 91 (citation omitted). In other words, Congress "enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'" *Id.* (citation omitted); *see also Schneidewind*, 485 U.S. at 300.

Where, as here, a federal law occupies a field of commerce, it preempts the operation of all state laws in that field: "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). And preemption applies with equal force whether the state law takes the form of a legislative enactment or an award of damages through private suit. *Riegel v. Medtronic,*

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6. FERC is also empowered by the NGA to propose and assess civil penalties for violations of the NGA or regulations promulgated under the NGA's authority. *See* 15 U.S.C. § 717t–1; *see also* FERC, *2013 Report on Enforcement,* Docket No. AD07-13-006 (Nov. 21, 2013).

Inc., 552 U.S. 312, 325 (2008); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247-48 (1959).

Moreover, from a preemption standpoint it does not matter whether the alleged conduct is regulated only partially by the federal government. Where Congress has occupied the field, state law is preempted whenever "'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13 (1983) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)); *accord Schneidewind*, 485 U.S. at 310 n.13.

And as Petitioners have noted, Pet. Br. 29-30, in this case there is also an "'imminent possibility of collision between'" state and federal regulation of activities and practices related to natural gas price indexes, which "'further demonstrates the NGA's complete occupation of the field that [Respondents' suits] seek[] to regulate.'" *Id.* (quoting *Schneidewind*, 485 U.S. at 310). Pursuant to its authority under the NGA to issue certificates of public convenience and necessity, FERC has issued blanket marketing certificates for all natural gas companies to make wholesale sales. Order No. 644, *Amendments to Blanket Sales Certificate*, 105 F.E.R.C. ¶ 61,217, at P 2; *see also* 18 C.F.R. § 284.284(a); 18 C.F.R. § 284.402(a). In 2003, FERC—pursuant to its power under sections five,

seven, and sixteen of the NGA—"made explicit what was once implicit" by amending these blanket certificates to include a Code of Conduct. *See* Order No. 644, 105 F.E.R.C. ¶ 61,217 at P 2 (Nov. 17, 2003); *Order Denying Rehearing of Blanket Sales Certs.,* 107 F.E.R.C. ¶ 61,174 at 61,695 (May 19, 2004).

The Code of Conduct regulates the alleged conduct on which Respondents' claims rest. 105 F.E.R.C. ¶ 61,217, at P 7-14. Specifically, Respondents have complained about "wash trades," which are prohibited by the Code of Conduct and defined as "[p]re-arranged offsetting trades of the same product among the same parties . . ." *Id.* at P 11-12; 107 F.E.R.C. at 61,695. Respondents' assertions regarding alleged false reports to index publishers and collusion are also governed by the Code of Conduct. 105 F.E.R.C. ¶ 61,217, at P 58-73; 107 F.E.R.C. at 61,696; 18 C.F.R. § 284.403(b).

In sum, all of the conduct at issue in this case is conduct that FERC regulates pursuant to its statutory authority over "the process by which price indices influence and reflect the formation of wholesale prices for natural gas and electricity." *See* 104 F.E.R.C. at 61,403. FERC's statutory authority and actual exercise of that authority to regulate the Petitioners' alleged conduct confirms that Respondents' claims are barred by preemption.

C. The Ninth Circuit's "Transactional Approach" Is Irreconcilable With This Court's Precedent.

Contrary to the text of the NGA and this Court's precedent, the Ninth Circuit adopted a "transactional" theory to determine whether Respondents' claims were preempted. Under the Ninth Circuit's approach, preemption turns on the question whether a state-law claim concerns natural gas purchases made at retail or wholesale, rather than whether the actual conduct or practice at issue affects wholesale gas prices. *See In re W. States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716, 731 (9th Cir. 2013) ("federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction."). Employing its transactional analysis, the Ninth Circuit concluded that, because Respondents' state-law claims arise from retail purchases of natural gas, they are not preempted by the NGA. *See id.*

The Ninth Circuit's transactional preemption test is irreconcilable with this Court's precedent because it necessarily contemplates state regulation, albeit indirect regulation, of practices affecting wholesale gas prices. This Court, however, has made clear that "The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same

result." *N. Natural Gas Co.*, 372 U.S. at 91 (internal citation omitted).

In other words, "The Natural Gas Act precludes not merely direct regulation by the States." *Id.* Rather, through the NGA "Congress enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.'" *Id.* (quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954)). Thus, the Court has concluded that a Kansas conservation regulation—traditionally a function of state power—was preempted because it dealt "with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act." *Id.* at 91–92.

Similarly, in *Schneidewind* the Court addressed a Michigan statute requiring companies that transported natural gas in-state to obtain state approval before issuing securities. At the outset, the unanimous Court explained the "well-settled" principle that "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." 485 U.S. at 305. Therefore, the question was whether the Michigan statute attempted to regulate practices

within an exclusive federal domain. *Id*. The Court concluded that the statute was preempted because, "[i]n short, the things Act 144 regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority." *Id*. at 308.

Significantly, the Court noted that the *Schneidewind* petitioners' reliance on its earlier decision in *Rice v. Santa Fe Elevator Corp*. was misplaced, because "The test . . . is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Schneidewind*, 485 U.S. at 310 n.13 (quoting *Rice*, 331 U.S. 218). Thus, *Schneidewind* confirmed that preemption analysis under the NGA turns on whether the subject matter that the state law attempts to regulate affects jurisdictional sales, and not whether a particular transaction at issue was jurisdictional or non-jurisdictional. Because the Ninth Circuit's decision here turns this approach to preemption analysis on its head, focusing only on whether the transactions at issue were jurisdictional or non-jurisdictional, it runs directly afoul of *Schneidewind*.

Further, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988), the Court specifically addressed a preemption scenario very much like the circumstances presented

here.[7] Confronting an industry practice that affected both wholesale and retail rates, the Court concluded that "FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates." *Id.* at 371. *Mississippi Power* involved rate-setting with regard to electricity pools where the entities wholesaling the power were also purchasing and retailing the power. The Court held that the Mississippi Supreme Court "erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings." *Id.* at 374. The Court explained that it has "long rejected this sort of case-by-case analysis of the impact of state regulation upon the national interest." *Id.* The same concerns mandate rejection of the Ninth Circuit's transactional framework here, which would unmoor FERC's jurisdiction from the challenged practices and substantially undermine the uniformity of federal regulation.

Thus, consistent with the text of the NGA, the Court's established, pragmatic approach to preemption asks whether the actual practice being

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

regulated affects jurisdictional sales, not whether the particular transactions at issue involved only non-jurisdictional sales.[8] Because the Ninth Circuit's decision rests on the application of a different, transaction-based preemption test that directly contravenes this Court's precedent, it should be reversed.

III. LEFT UNDISTURBED, THE NINTH CIRCUIT'S TRANSACTIONAL APPROACH TO PREEMPTION UNDER THE NGA WILL SUBSTANTIALLY UNDERMINE UNIFORMITY OF REGULATION.

"Uniformity of regulation . . . was an objective of the Natural Gas Act." *Schneidewind*, 485 U.S. at 310. As such, this Court has held that "State regulation of production may be preempted as conflicting with FERC's authority over interstate transportation and rates . . . if state regulation prevents attainment of FERC's goals." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 516 (1989).

Here, FERC has investigated in great depth the practices at issue in this case and adopted a code of conduct with regard to the submission of information to the indices. *See supra* Part II.B. As FERC has explained, its standards for the reporting of

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8. *See, e.g., Schneidewind*, 485 U.S. at 310; *N. Natural Gas Co.*, 372 U.S. at 91; *Transcon. Gas Pipe Line Corp. v. State Oil and Gas Bd. of Miss.*, 474 U.S. 409, 419, 423 (1986); *Ark. La. Gas Co.*, 453 U.S. at 579.

information to indices "provide a measure of regulatory certainty" and should "encourage more industry participants to contribute to the formation of price indices." 104 F.E.R.C. at 61,404. But left undisturbed, the Ninth Circuit's transactional framework for assessing preemption under the NGA would substantially undermine FERC's regulation of price index reporting by imposing a myriad of state schemes governing the same interstate wholesale practices.

Specifically, the Ninth Circuit's approach necessarily contemplates that the States may aggressively impose their own policies on natural gas wholesale practices that impact a retail transaction. This would plainly negate uniform federal regulation of the same practices. *See Nevada ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186, 1193 (Nev. 2012), cert. denied, 133 S.Ct. 2853 (2013) ("the conclusion that there is no preemption leads to the imposition on interstate natural gas wholesalers 50 different sets of state rules concerning anti-competitive behavior. . . . the result would be a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market") (citing *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010)).

Significantly, in 2003 FERC wrote that "investigations of false reporting to price index developers has led some market participants to curtail their reporting, resulting in a decline in the

number of trades voluntarily reported to index developers." 104 F.E.R.C. at 61,404. FERC went on to note that this development "raised concerns about a lack of information about liquidity and whether market participants were making their decisions without adequate or accurate information about how many actual transactions were used to set the price." *Id*. Because of these concerns, FERC set out a safe harbor policy pertaining to the good faith submission of information to price indices. *See generally id*.

The Ninth Circuit's decision imperils the efficacy of this safe harbor created by FERC. Under its transactional approach to preemption, the submission of information to the indices in compliance with FERC's uniform regulatory policies would not necessarily protect a market participant from liability. Rather, so long as retail purchases were associated with such information, market participants would be at risk of running afoul of any number of States' antitrust laws and regulatory frameworks.[9] Given the uncertainties created by such a regulatory atmosphere, market participants who continued reporting information to indices

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9. Likewise, market participants would be subject to inconsistent time frames during which they might be subject to being sued under the varying statutes of limitation applicable to the States' antitrust laws. *See, e.g.*, COLO. REV. STAT. § 6-4-118 (four years); KAN. STAT. § 60–512(2) (three years); WIS. STAT. § 133.18(2) (six years). These enforcement inconsistencies would generate uncertainty that would likely be reflected in higher consumer prices.

would have to try to conform to the most restrictive States' regulations, requiring built-in costs of compliance. The predictable result would be that: (1) the NGA's goal of uniform regulation would be effectively thwarted; (2) the index prices and market prices more generally would be unfavorably skewed to account for the greatly expanded liability risks imposed on market participants; and (3) market participants would be more reluctant to submit information to the indices, rendering them less reliable and the market, in turn, less efficient.

Finally, in addition to creating the safe harbor provision, FERC prohibited acts "intended to . . . manipulate market prices" that "are without a legitimate business purpose." 68 Fed. Reg. at 66,327. FERC explained that "we believe that not only is the inclusion of the phrase ["legitimate business purpose"] necessary, it acts to ensure that such sellers acting in a pro-competitive manner will be able to show that their actions were not designed to distort prices or otherwise manipulate the market." *Id*. at 66,328. This standard "is clearly intended to give sellers some latitude in determining their business actions, while safeguarding market participants." *Id*. at 66,327. Moreover, the code of conduct was drafted "so that it does not create uncertainty" or "disrupt competitive commodity markets." *Id*. at 66,324.

But under the Ninth Circuit's transactional approach to preemption FERC's carefully structured

regulatory framework would be largely undone. Because natural gas market participants' conduct would be subject to the varying anti-competitive laws of the States whenever retail transactions were involved, FERC's "uniform" standard regarding sellers acting in a pro-competitive manner would, in many cases, be effectively nullified.

In short, because the Ninth Circuit's decision creates the "imminent possibility of collision between" state and federal regulation of price index manipulation and reporting, *Schneidewind*, 485 U.S. at 310, it should be reversed.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted.

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