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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 FOR 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?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit:

1. AEP Energy Services; American Electric Power Company, Inc.; CMS Field Services; CMS Marketing Services & Trading Company; Coral Energy Resources, L.P.; Duke Energy Trading and Marketing, LLC; Dynegy Marketing and Trade; DMT G.P. LLC; Dynegy Illinois, Inc.; Dynegy GP, Inc.; El Paso Merchant Energy, L.P.; El Paso Corporation; ONEOK Energy Marketing & Trading Co., L.P.; ONEOK, Inc.; Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Energy Marketing & Trading Company; Williams Power Company, Inc.; Xcel Energy, Inc.; Northern States Power Company; and e prime, Inc., Petitioners on review, were defendants-appellees below.[1]

2. Learjet, Inc.; Topeka Unified School District 501; Breckenridge Brewery of Colorado, LLC; BBD Acquisition Co.; Merricks, Inc.; Sargento Foods, Inc.; Ladish Co., Inc.; Carthage College; Briggs & Stratton Corporation; Arandell Corporation; Newpage Wisconsin System, Inc.; Reorganized FLI, Inc.; Sinclair Oil Corporation; Heartland Regional Medical Center; Prime Tanning Corp.; Northwest Missouri State University; and Multiut Corporation, Respondents on review, were plaintiffs-appellants below.

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[1] The Petitioners' corporate names are reproduced as they were typically listed in the docket below. Some Petitioners have undergone corporate reorganizations (and in some instances were sued under their names as reorganized). For purposes of recusal and completeness, updated corporate information is provided in the corporate disclosure statement at pp. iv-vi, *infra*.

3. Duke Energy Corporation; CMS Energy Corporation; and Reliant Energy, Inc., were defendants-appellees below.

4. Williams Merchant Services Company, Inc. was a defendant-appellee below. It was later known as Williams Merchant Services Company LLC, but that entity was dissolved on October 2, 2013.

RULE 29.6 DISCLOSURE STATEMENT

AEP Energy Services, Inc. is an indirect, wholly owned subsidiary of American Electric Power Company, Inc., which is a publicly owned corporation.

American Electric Power Company, Inc. is a publicly owned corporation. American Electric Power Company, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of American Electric Power Company, Inc.'s stock.

CMS Marketing Services and Trading Company is now known as CMS Energy Resources Management Co. It is a wholly owned indirect subsidiary of CMS Energy Corp., a publicly traded company.

CMS Field Services Inc. was a former wholly owned indirect subsidiary of CMS Energy Corp. CMS Field Services Inc. later changed its name to Cantera Gas Company and eventually was acquired by Copano Energy, L.L.C. Copano Energy, L.L.C. was acquired by Kinder Morgan Energy Partners LP, which is publicly traded. No other public company holds more than 10% of Kinder Morgan Energy Partners LP's stock.

Shell Energy North America (US), L.P., is the successor in interest to Coral Energy Resources, L.P. Shell Energy North America is not itself a corporation, and has no direct publicly owned parent corporation, but is indirectly wholly owned by Royal Dutch Shell plc. Royal Dutch Shell plc is registered as a public company, but no publicly held corporation owns more than 10% of its stock.

Duke Energy Trading and Marketing, L.L.C. has as its parent companies DETMI Management, Inc. (60% owner) and Mobil Natural Gas, Inc. (40% owner).

Neither DETMI Management, Inc. nor Mobil Natural Gas, Inc. is a publicly held corporation. However, DETMI Management, Inc. and Mobil Natural Gas, Inc. are indirectly, wholly owned by Duke Energy Corporation and ExxonMobil Corporation, respectively, both publicly held corporations.

Dynegy Marketing and Trade is now Dynegy Marketing and Trade, LLC and is an indirect subsidiary of Dynegy Inc. DMT G.P. L.L.C. was previously merged into another entity that is now Dynegy Power Marketing, LLC, and is an indirect subsidiary of Dynegy Inc. Dynegy GP Inc. was previously merged into another entity that was Dynegy Holdings LLC, which was subsequently merged into Dynegy Inc. as a result of Dynegy Holdings LLC's and Dynegy Inc.'s bankruptcy proceedings. Dynegy Illinois Inc. was dissolved in June 2009. Prior to its dissolution, Dynegy Illinois Inc. was a wholly owned subsidiary of Dynegy Inc. Franklin Advisers, Inc., which is a subsidiary of Franklin Resources Inc., a publicly traded company, owns more than 10% of Dynegy Inc.'s common stock.

El Paso Corporation has changed its name to El Paso LLC. El Paso LLC and El Paso Merchant Energy L.P. are indirect subsidiaries of Kinder Morgan, Inc., a publicly held corporation.

ONEOK, Inc. is a publicly held corporation. No parent entity or other publicly held corporation owns 10% or more of its outstanding stock.

ONEOK Energy Services Company, L.P., formerly known as ONEOK Energy Marketing & Trading Company, L.P., is an indirectly wholly owned subsidiary of ONEOK, Inc.

After the underlying lawsuits were filed, Reliant Energy, Inc. and Reliant Energy Services, Inc. underwent a series of name changes and corporate transactions. Reliant Energy, Inc. changed its name to RRI Energy, Inc. and subsequently merged with Mirant Corp. to become GenOn Energy, Inc.; 100% of its stock is now owned by NRG Energy, Inc. Reliant Energy Services, Inc. changed its name to RRI Energy Services, Inc. and subsequently changed its form from a corporation to a limited liability company, which is now known as RRI Energy Services, LLC. GenOn Energy, Inc. indirectly owns 100% of the stock of RRI Energy Services, Inc., which is now known as RRI Energy Services, LLC. T. Rowe Price Associates, Inc. and Capital Research Global Investors own more than 10% of the shares of NRG Energy, Inc.

The Williams Companies, Inc. is a publicly held Delaware corporation. No publicly held corporation owns more than 10% of its stock.

Williams Energy Marketing & Trading Company, subsequently known as Williams Power Company, Inc., then Williams Gas Marketing, Inc., and now as WPX Energy Marketing, LLC, is a wholly owned subsidiary of WPX Energy, Inc. As of December 31, 2011, WPX Energy, Inc. was no longer an affiliate of The Williams Companies, Inc.

e prime, Inc. is an indirect wholly owned subsidiary of Xcel Energy Inc., a publicly held corporation.

Northern States Power Company is a wholly owned subsidiary of Xcel Energy Inc., a publicly held corporation.

Xcel Energy Inc. is a publicly held corporation with no parent or corporate owner.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 715 F.3d 716. Pet. App. 1a. The District Court's July 18, 2011 opinion granting Petitioners summary judgment is unreported but available at 2011 WL 2912910. *Id.* at 64a. The District Court's November 2, 2009 opinion regarding preemption is unreported. *Id.* at 124a. Its initial May 14, 2008 opinion denying Petitioners summary judgment is unreported. J.A. 37-62.

JURISDICTION

The Ninth Circuit entered judgment on April 10, 2013. On June 20, 2013, Justice Kennedy extended the time to petition for certiorari to and including Saturday, August 24, 2013, and the petition was timely filed under Rule 30.1 on August 26, 2013. The petition

was granted on July 1, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent constitutional provisions and statutes are set forth in the addendum. App. 1a-4a.

INTRODUCTION

For more than 75 years, the Natural Gas Act ("NGA") has placed the wholesale natural gas market under exclusive federal control. By occupying the field and so precluding state regulation, the NGA ensures that the nation's critical natural gas industry develops under a uniform and predictable regulatory scheme.

This case requires only a straightforward application of established NGA preemption doctrine. The NGA gives the Federal Energy Regulatory Commission ("FERC") exclusive authority to regulate (i) the rates for many wholesale gas transactions and (ii) any "practice" by a "natural gas company" that directly "affect[s]" those rates. 15 U.S.C. §§ 717(b), 717d(a); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 308 (1988). Respondents allege that Petitioners, all of whom are FERC-jurisdictional natural gas companies, engaged in a practice called "index manipulation." Index manipulation directly affects wholesale gas rates within FERC's jurisdiction. FERC therefore has exclusive power to regulate that practice. Recognizing as much, FERC exercised its power by promulgating in the Code of Federal Regulations a code of conduct governing index manipulation and by revoking the marketing certificates of natural gas companies that it found had engaged in the practice.

That regulatory action underscores what was already the case even before FERC acted: Any *state* regulation

of index manipulation by such companies was ousted by the NGA. After all, it is "well settled" that "Congress occupied the field" in the NGA, and therefore that states cannot regulate in any area where the NGA reaches. *Schneidewind*, 485 U.S. at 305. In other words, "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring in the judgment). FERC has jurisdiction over index manipulation by the natural gas companies it regulates; accordingly, states do not.

Respondents nevertheless filed a bevy of class-action suits, seeking to use state law to regulate the very same index-manipulation practices FERC was regulating. Respondents alleged that Petitioners engaged in index manipulation and that it drove up the prices Respondents paid in retail gas transactions. Asserting state-law causes of action, they sought to punish Petitioners through massive verdicts.

Those claims are preempted. As this Court has made clear on several occasions, state-law regulation falls within the field occupied by the NGA when it is "directed at * * * things over which FERC has comprehensive authority" or when it "amounts to a regulation" of matters within the federal field. *Schneidewind*, 485 U.S. at 308. Respondents' lawsuits fall squarely within those descriptions. Their state-law claims target index manipulation by wholesale sellers within FERC's jurisdiction, and any relief ordered pursuant to those suits necessarily would regulate that practice. Under well-settled field preemption principles, Respondents' lawsuits cannot proceed. The Ninth Circuit's contrary conclusion—which flies in the

face of this Court's NGA precedents—should be reversed.

STATEMENT

A. Statutory Background

1. For the last three-quarters of a century, Congress has viewed "uniformity of regulation" as essential to the effective operation of the nation's interstate energy markets. *Northern Natural Gas Co.* v. *State Corp. Comm'n of Kansas*, 372 U.S. 84, 91 (1983). Before this time, the states had regulated local gas transactions, but each state's sphere of authority ended at the state line. *See, e.g.*, *Public Util. Comm'n of R.I.* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89-90 (1927). Congress accordingly enacted the NGA in 1938 to provide "a comprehensive scheme of federal regulation" of interstate gas transportation and sales. *Northern Natural*, 372 U.S. at 91. These same uniformity principles are equally applicable, and equally important, to electricity wholesalers regulated under the parallel Federal Power Act ("FPA").

Section 1(b) of the NGA established federal control over "the transportation of natural gas in interstate commerce," "the sale in interstate commerce of natural gas for resale for ultimate public consumption," and "natural gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b). The NGA, in other words, gave the federal government control over wholesale gas transactions and companies that engage in them. At the same time, Congress preserved the states' role in regulating local activities by providing that the NGA would "not apply to any other transportation or sale of natural gas * * * or to the production or gathering of natural gas." *Id.*

To ensure effective regulation of areas within federal control, the NGA vested an expert federal agency—the Federal Power Commission, later renamed FERC—with "a variety of powers." *Schneidewind*, 485 U.S. at 301. Among other things, Section 4(a) of the NGA grants FERC "extensive control over the rates at which * * * gas is sold for resale." *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U.S. 498, 507 (1942). It also requires FERC to ensure those rates are "just and reasonable." 15 U.S.C. § 717c. To carry out that mandate, Section 5 of the NGA empowers FERC to regulate natural gas companies with respect to "any rule, regulation, practice, or contract * * * affecting" a "rate * * * subject to the jurisdiction of the Commission." *Id.* § 717d(a).

2. Starting in the 1970s, Congress amended the NGA to remove from FERC's rate-setting jurisdiction certain portions of the wholesale market, including "first sales," which are "sales of natural gas that are not preceded by a sale to [a] * * * pipeline, local distribution company, or retail customer." *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027, 1037 (9th Cir. 2007); *see, e.g.*, Natural Gas Policy Act, Pub. L. No. 96-621, 92 Stat. 3350 (1978), Wellhead Decontrol Act, Pub. L. No. 101-60, 103 Stat. 157 (1989). FERC therefore now exercises control over some but not all of the wholesale gas market. In industry parlance, wholesale natural gas transactions within federal control are termed "jurisdictional sales," and natural gas companies that engage in those transactions are called "jurisdictional sellers." Matters excluded from FERC's authority are called "non-jurisdictional."

It is "well settled" that through the NGA "Congress occupied the field of matters relating to wholesale sales

and transportation of natural gas in interstate commerce." *Schneidewind*, 485 U.S. at 305. Moreover, this Court has confirmed that the limitations Congress imposed on FERC's jurisdiction in the statutes discussed above were deregulatory and did not diminish the NGA's field-preemptive scope. As it explained, Congress's "decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations." *Transcontinental Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 423 (1986) ("*Transcon*").

B. Regulatory Background

1. In 1992, FERC began issuing "blanket certificates" to interstate pipelines and marketers to sell wholesale natural gas at market rates. *See* 57 Fed. Reg. 57,952 (Dec. 8, 1992). FERC explained that this approach would "foster[] a competitive natural gas sales market where merchants of natural gas are influenced by market forces." *Id.* at 57,953. But it emphasized that it would continue to "monitor the operation of the market" so that it could take any necessary steps to combat market abuses. *Id.* at 57,958.

2. With gas sales left to market forces, private trade publications such as *Gas Daily* and *Inside FERC* increasingly began to track and compile information about gas transactions. J.A. 124-125. The publications worked like this: Many gas sales agreements contain a fixed price per unit of gas set at the time of contracting. J.A. 125. The trade publications solicited data from market participants on these fixed prices and other contract terms. J.A. 124-125, 148, 170-174. They then published "indices" summarizing market rates for natural gas. J.A. 124-125.

Before long, industry participants began entering into contracts that used these "index prices" as the rate for gas, rather than negotiating a specific fixed price. For example, a contract to deliver gas at the location known as "Texas Gas SL-Louisiana-Onshore South" might have a price term of "Index of Gas Daily–Midpoint (Texas Gas SL-Louisiana-Onshore South)" for the date "09/01/2001." *See* J.A. 641. This meant that the contract price would be the index price *Gas Daily* published for the Texas Gas SL-Louisiana-Onshore South location on September 1, 2001. *Id.* By directly incorporating the index price in this manner, the contract assured that the index price, whatever it turned out to be, would function as the actual rate for the transaction. During the time period at issue, both jurisdictional (wholesale) and non-jurisdictional (*e.g.*, retail) sales of natural gas were routinely priced with reference to the indices. J.A. 150-151; *see also, e.g.*, J.A. 637-641; J.A. 645 (documenting thousands of jurisdictional index-rate contracts between 2000 and 2002).

3. In 2002, FERC initiated an "investigation into whether any entity manipulated prices" in natural gas markets. *Order Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates*, 103 F.E.R.C. ¶ 61,343, at 62,295 (June 25, 2003). That probe prompted FERC to regulate several aspects of jurisdictional sellers' index-reporting practices.

a. First, FERC issued a policy statement regarding the natural gas indices. *Policy Statement on Natural Gas and Electric Price Indices*, 104 F.E.R.C. ¶ 61,121 (Apr. 30, 2003). It said it was "concern[ed]" about "the degree of reliance on index-based contracts as opposed to fixed-price contracts." *Id.* at 61,404. "[M]any

natural gas producers often sell with reference to an index and * * * many local distribution company purchasers buy at index-linked prices in lieu of negotiating fixed prices." *Id.* Given that "index dependencies" had "permeate[d] the energy industry," FERC stated that "the indices must be robust and accurate and have the confidence of market participants for such markets to function properly and efficiently." *Id.*

To that end, FERC's policy statement established standards for price-reporting practices, including "minimum standards for reporting transaction data to index developers." *Id.* at 61,408. FERC explained that industry participants complying with these standards would enjoy "safe harbor protection for good faith reporting of transactions data" and would "not be investigated or subjected to administrative penalties for inadvertent mistakes made in the course of reporting energy transaction information." *Id.* at 61,404. The Commission emphasized that its policy statement was intended to "provide a measure of regulatory certainty to the process of reporting transaction data." *Id.*

b. Around the same time, FERC ordered a number of jurisdictional sellers, including some Petitioners, to submit information concerning their index-reporting practices. *Order Directing Submission of Information With Respect To Internal Processes for Reporting Trade Data*, 103 F.E.R.C. ¶ 61,089 (July 29, 2003). FERC explained that "many gas * * * jurisdictional transactions are based on the published indices," and accordingly "the Commission needs to be sure that the indices are accurate and not subject to manipulation." *Id.* at 61,286. To that end, FERC gathered information from the companies as part of its "ongoing reform of

the natural gas * * * index publishing process." *Order Accepting Submission of Information With Respect To Internal Processes for Reporting Trading Data*, 104 F.E.R.C. ¶ 61,153, at 61,653 (June 25, 2003).

c. On June 25, 2003, FERC terminated Enron's blanket marketing certificate, in essence prohibiting it from engaging in the natural gas marketing and trading business. *See* 103 F.E.R.C. at 62,295. FERC found that Enron had engaged in misconduct, including "wash sales," where it traded gas back and forth in an alleged effort to create an illusion of higher demand. *Id.* at 62,303. If this behavior "affect[ed] the * * * index price reported for a market," FERC explained, it would also "affect the magnitude of payments on a contract linked to the index price." *Id.* Thus, the Commission deemed it necessary to revoke Enron's market-based rate authorities "to fulfill the Commission's obligation, pursuant to * * * Sections 4 and 5 of the NGA to protect natural gas customers from unjust and unreasonable rates." *Id.* at 62,295 (citations omitted).

d. Several months later, FERC promulgated a final rule amending all blanket marketing certificates held by jurisdictional sellers to require that they adhere to a code of conduct governing their index-related practices. 68 Fed. Reg. 66,323 (Nov. 26, 2003) ("Code of Conduct"). The Commission explained that it had designed the Code to be "clearly defined so that it does not create uncertainty, disrupt competitive commodity markets or simply prove ineffective." *Id.* at 66,324.

Among other "clearly-delineated" provisions, FERC specifically prohibited reporting false data to index publishers and wash trading. *Id.* at 66,324. The Commission noted that "all sellers of natural gas will

not be under the same set of regulations" because the Code of Conduct applied only to jurisdictional sellers (*i.e.*, the "natural gas companies" referenced in Section 1(b) of the NGA, such as Petitioners). *Id.* at 66,326. But "[t]he fact that the Commission does not regulate the entire natural gas market" did not "compel [it] to refrain from exercising its authority over that portion of the gas market which is within its jurisdiction to prevent the manipulation of prices." *Id.*

In response to a request for rehearing, FERC rejected arguments that it had "failed to meet its burden of proof under section 5 of the [NGA] to justify the imposition of" the Code of Conduct on all jurisdictional sellers. *Order Denying Rehearing of Blanket Sales Certificates Order*, 107 F.E.R.C. ¶ 61,174, at 61,689 (May 19, 2004). The Commission emphasized that it had ample authority to adopt the index-manipulation rules pursuant to Section 5 because "the prohibited practices are unjust and unreasonable, and * * * their explicit prohibition is necessary to ensure that market-based sales of gas will be adequately protected from manipulation and, therefore, will be just and reasonable." *Id.* at 61,690.

4. FERC took additional steps to regulate index manipulation after Congress expanded the Commission's authority in the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) ("EPAct"). Whereas FERC previously could only regulate *jurisdictional sellers*' manipulative conduct, the EPAct authorized FERC to regulate "*any* entity" engaging in that conduct. 15 U.S.C. § 717c-1 (emphasis added). In a final rule implementing the EPAct, FERC explained that, although the statute had not altered the "transactions subject to the Commission's jurisdiction," it had expanded the

entities subject to regulation to include any market participants engaged in manipulation in connection with a jurisdictional sale. 71 Fed. Reg. 4244, 4247 (Jan. 26, 2006). FERC further noted that the new regulations were "not intended to modify or supersede the Commission's Policy Statement on Natural Gas and Electric Price Indices," which continued to "provide[] guidance on how market participants should report price transaction information to price index developers." *Id.* at 4256-57.

C. Procedural History

1. In the wake of FERC's 2003-2004 index-manipulation orders, various commercial and industrial end users of natural gas, including Respondents, sued Petitioners, who are jurisdictional sellers, on state-law antitrust theories. Although Respondents filed separate suits in several different states, the allegations in each complaint were similar. Respondents alleged that Petitioners conspired to engage in index-manipulation practices—namely, wash trading and reporting false information to index publishers—that inflated index prices for gas. Pet. App. 15a; J.A. 298-299, 304-305. As a result, Respondents allegedly paid higher prices because they bought gas in retail transactions with prices pegged to the indices. Pet. App. 14a-15a.

Respondents mainly contended that Petitioners' alleged actions violated various states' antitrust and consumer-protection laws. *E.g.*, J.A. 244-245. Moreover, in many cases they maintained that state law authorized recovery of "the full amount of the payments the plaintiffs made for natural gas" as a "punitive" measure, even if the alleged practices only caused a minor increase in the purchase price. *E.g.*,

J.A. 245. Invoking these generous state-law remedies, Respondents looked for a payday that—in the aggregate—could total billions of dollars.

2. After the cases were transferred into a multi-district litigation in the District of Nevada, Petitioners moved for summary judgment on the ground that Respondents' state-law claims were barred by field preemption. The argument was based on an undisputed fact: Wholesale contracts, like retail contracts, routinely used published index prices as their price term. Pet. App. 111a; J.A. 124-128, 170-175, 632, 640, 645; *E. & J. Gallo Winery*, 503 F.3d at 1031-32 (describing the indices' "wide use as reference points in pricing natural gas sales * * *, including most of the transactions subject to FERC's jurisdictional authority"). Therefore, if alleged false reports or wash sales inflated a published index price, those practices necessarily would have inflated prices in *both* wholesale and retail transactions. Pet. App. 110a-111a; Learjet C.A. Opening Br. 11-12. Respondents' attempt to impose state-law regulation through lawsuits thus was directed at a subject matter the NGA's plain text places within the federal field—namely, "practice[s] * * * affecting" jurisdictional gas rates. 15 U.S.C. § 717d(a). Indeed, FERC had invoked that authority on multiple occasions to regulate the precise practices on which Respondents' state-law claims are premised. *See, e.g.*, Code of Conduct, 68 Fed. Reg. at 66,324. For these reasons, Petitioners maintained that the state-law suits could not proceed.

3. The District Court agreed that Respondents' claims were preempted.[2] The court observed that Respondents did not "seriously dispute that jurisdictional rates are set by reference to the indices"—a conclusion that squared with FERC's determination "after a fact-finding investigation, that jurisdictional rates were set at index during the relevant time period." Pet. App. 111a n.19; *see supra* at 8 (quoting FERC findings). Because the indices "are the method by which jurisdictional rates are set," Pet. App. 112a, the court found that Petitioners' alleged index-manipulation practices directly affected those jurisdictional rates. *Id.* at 110a-112a. It accordingly concluded that the alleged index-manipulation practices were subject to FERC's exclusive jurisdiction and that Respondents' claims—which attempted to regulate the same practices through state law—were preempted. *Id.* at 75a.

In reaching this determination, the District Court rejected Respondents' argument that their claims were not preempted because they purchased gas in retail transactions. The alleged index manipulation could not be parsed in this manner, the court reasoned,

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[2] The District Court initially denied Petitioners' motion to dismiss because the parties disputed whether Petitioners were jurisdictional sellers subject to FERC regulation. J.A. 73-74. After additional discovery, the District Court determined that Petitioners qualified as jurisdictional sellers during the relevant time period—*i.e.*, that each Petitioner had made wholesale sales that were not "first sales." Pet. App. 81a-102a. Considerable evidence supported that finding, and Respondents did not challenge it in the Ninth Circuit or in their briefs in opposition; thus, the issue is settled. *See Schneidewind*, 485 U.S. at 295 n.1 (declining to question party's status as a jurisdictional seller where opposing party abandoned argument challenging that status).

because the exact same conduct would have simultaneously affected wholesale and retail rates in precisely the same way. *Id.* at 110a-111a. Thus, although "FERC ha[d] no jurisdiction over [Respondents'] non-jurisdictional transactions," the agency "does have exclusive jurisdiction over any practice by a jurisdictional seller that directly affects a jurisdictional rate." *Id.* at 75a. The court further explained:

> That FERC has such jurisdiction is demonstrated not only by FERC's actual exercise thereof in relation to these practices, but by the fact that the Court would have little trouble rejecting a challenge to FERC's jurisdiction to prohibit jurisdictional sellers from engaging in false price reporting, wash trades, and other collusive or manipulative conduct that affected the price mechanism by which jurisdictional rates are set. * * * [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.

Id. at 111a-112a (footnote omitted). "Because FERC's jurisdiction is exclusive where it exists," the District Court concluded that "any state law claims based on any such practices are preempted." *Id.* at 75a.

4. Respondents appealed to the Ninth Circuit, which reversed the District Court's preemption holding. The court of appeals concluded that "federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction." *Id.* at 28a. Under this approach to preemption, it did not

matter that the alleged practices upon which Respondents based their claims—index manipulation—directly affected jurisdictional rates. Nor did it matter that FERC had the power to and in fact did regulate these practices. All that mattered for preemption purposes, in the Ninth Circuit's view, was that Respondents bought their gas at retail. *See id.*

The Ninth Circuit did not dispute that FERC's jurisdiction is exclusive where it exists. Nonetheless, the court identified what it believed were "two significant flaws" in the argument "that FERC had jurisdiction over the market manipulation at issue." *Id.* at 37a. First, pointing to the EPAct, the court invoked the "canon of statutory interpretation that counsels against reading acts of Congress to be superfluous" and reasoned that "Congress enacted the relevant provision of the EPA[ct] *because* FERC did not already have regulatory authority over the anticompetitive conduct at issue." *Id.* at 37a-38a. Second, the Ninth Circuit believed "a close reading" of the Code of Conduct revealed "that FERC limited the application of the Code to sales within its jurisdiction." *Id.* at 38a. The court accordingly green-lighted Respondents' state-law suits because, in its view, the NGA did "not grant FERC jurisdiction over claims arising out of false price reporting and other competitive behavior associated with nonjurisdictional sales." *Id.* at 38a-39a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The NGA preempts Respondents' state-law suits. This Court has long interpreted the NGA to occupy the field with respect to both jurisdictional gas rates and practices by jurisdictional sellers that directly affect

those rates. Index-reporting practices directly affect jurisdictional rates because wholesale contracts within FERC's jurisdiction routinely incorporate index prices as the relevant price term. FERC thus has repeatedly and properly regulated jurisdictional sellers' index reporting practices in accordance with its statutory authority. FERC's authority over those practices is exclusive: "States may not regulate in areas where FERC has properly exercised its jurisdiction to * * * insure that agreements"—or, in this case, practices—"affecting wholesale rates are reasonable." *Mississippi Power*, 487 U.S. at 374.

Because the NGA occupies the field of index-reporting practices by jurisdictional sellers, Respondents may not maintain state-law suits that will have the effect of regulating those same practices. This Court has held that a state regulation falls within the field occupied by the NGA when it is "directed at * * * things over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308. Respondents' claims meet that description because their suits seek to impose liability under state law based on index-reporting practices that the NGA places under exclusive federal control.

Respondents' suits also create an imminent risk that state law will interfere with federal regulatory prerogatives, further demonstrating that the claims are preempted. FERC's orders regulating index-reporting practices sought to give jurisdictional sellers clear rules to guide their conduct. Respondents' use of state law to impose liability for those same practices threatens to undermine that uniform regulatory scheme and replace it with a morass under which individual states can impose their own conflicting standards. Even if particular conduct would pass

muster under FERC's standards, a lay jury might impose liability and sanctions under state law far exceeding those permitted by federal law. And under the Ninth Circuit's approach, this risk of collision extends not only to index-related practices but to any conduct that directly and simultaneously affects retail and wholesale prices. The NGA was enacted to avoid this regulatory chaos. Under a straightforward application of this Court's precedents, Respondents' claims are preempted.

II. The Ninth Circuit's contrary conclusion is erroneous. Emphasizing that Respondents bought gas at retail and that FERC has no jurisdiction over retail sales, the Ninth Circuit held that state law is not preempted when a plaintiff's claim is "associated with" or "aris[es] out of" non-jurisdictional transactions. Pet. App. 28a, 39a. But that approach is contrary to this Court's cases. To enforce the line between state and federal jurisdiction, this Court considers whether the practice at issue *directly affects* jurisdictional rates. This preserves state authority over matters with only attenuated effects on jurisdictional rates. But it does not save Respondents' claims because index-reporting practices directly affect jurisdictional rates. Indeed, Respondents conceded this point below. Although the Learjet Respondents have belatedly argued that the effect was indirect, that claim is both waived and meritless in light of the record evidence demonstrating that index prices literally functioned as "the rate" of gas in jurisdictional contracts linked to the indices.

The remaining justifications the Ninth Circuit offered to support its approach to preemption suffer from similar flaws. The court's decision permitting Respondents' suits to proceed should be reversed.

ARGUMENT

I. THE NGA PREEMPTS RESPONDENTS' STATE-LAW CLAIMS.

The Supremacy Clause of the Constitution "provides a clear rule that federal law 'shall be the supreme Law of the Land.' " *Arizona* v. *United States*, 132 S. Ct. 2492, 2500 (2012) (quoting U.S. Const. art. IV, cl. 2). Even absent an express preemption provision, state law must yield when Congress has "indicate[d] an intent to occupy a given field." *Schneidewind*, 485 U.S. at 300. For decades, this Court has recognized that the NGA reflects that intent. It is "well settled" that "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Id.* at 305. The NGA thus "leaves no room either for direct state regulation" in the field or for state regulation that would "achieve the * * * result" of regulating in that field. *Northern Natural*, 372 U.S. at 91. Thus, even when state regulations nominally involve some topic outside the NGA's reach, they are preempted if their regulatory effects are "directed at * * * things over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308; *accord Transcon*, 474 U.S. at 419 (finding preemption when state law was "aimed directly at" jurisdictional transactions).

This is such a case. Under Section 5(a) of the NGA, FERC has comprehensive authority over jurisdictional sellers' practices that directly affect wholesale gas rates. Index manipulation directly affects jurisdictional rates because the indices "are the method by which jurisdictional rates are set and embody jurisdictional rates." Pet. App. 112a; *accord* 103 F.E.R.C. at 62,303 (same finding by FERC). FERC thus has exclusive authority to regulate those

practices; indeed, FERC repeatedly *has* regulated them. Respondents' state-law claims, which seek to impose liability for the very same practices, are preempted.

A. The NGA Occupies The Field Of Practices—Including Index Manipulation—That Directly Affect Jurisdictional Rates.

1. "The NGA long has been recognized as a 'comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce.' " *Schneidewind*, 485 U.S. at 300 (quoting *Northern Natural*, 372 U.S. at 91) (some internal quotation marks omitted). The statute charges FERC with the responsibility to ensure that wholesale rates are just and reasonable, 15 U.S.C. § 717c, and grants the agency "a number of tools" to effectuate that mandate. *Schneidewind*, 485 U.S. at 301. Chief among these is FERC's authority under Section 5(a) to regulate "any rule, regulation, practice, or contract * * * affecting" wholesale gas rates. 15 U.S.C. § 717d(a).

This Court has long made clear that the NGA's field-preemptive effect sweeps as broadly as the NGA itself. The statute therefore preempts state regulation not only of jurisdictional rates themselves, but also of practices and contracts directly affecting those rates. As the Court explained in *Mississippi Power*, "Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates." 487 U.S. at 374.[3] There " 'can be no divided

[3] *Mississippi Power* was a FPA preemption case, but "the relevant provisions of [the FPA and the NGA] are in all material respects substantially identical," and this Court has an "established

authority' " when "[C]ongress has established an exclusive form of regulation." *Arkansas La. Gas Co.*, 453 U.S. at 580 (citation omitted). Accordingly, "[s]tates may not regulate in areas where FERC has properly exercised its jurisdiction to * * * insure that" matters "affecting wholesale rates are reasonable." *Mississippi Power*, 487 U.S. at 374.

Although the authority granted by Section 5(a) is one of FERC's "substantial powers," it is not unlimited: The effect on wholesale rates must be direct. *Schneidewind*, 485 U.S. at 304, 308; *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n of Kansas*, 489 U.S. 493, 514, 517-518 (1989); *see infra* at 35-37 & n.5. As FERC has explained in interpreting the scope of its authority, Section 5(a) does not reach a regulation, practice, or contract "that is only tangentially related to jurisdictional rates." *Order Granting in Part and Denying in Part Requests for Clarification and Rehearing*, 119 F.E.R.C. ¶ 61,076, at 61,636 (Apr. 20, 2007). Section 5(a) does, however, empower FERC to regulate any "practices that directly affect or are closely related to" wholesale rates. *Order on Rehearing and Clarification*, 139 F.E.R.C. ¶ 61,132, at ¶ 358 (May 17, 2012) (internal quotation marks omitted). With respect to those practices, state law is preempted.

2. The index-manipulation practices at issue in this case fall within the field occupied by the NGA. Wholesale contracts for gas regularly incorporate index prices as the rate for gas. *See supra* at 7. Thus, any practices affecting an index price directly affect the

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practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).

rate paid in jurisdictional gas transactions. *See* Pet. App. 110a-112a. For example, if wash trades or fictional price reports cause an index publisher to report an inflated price for gas, those practices will inevitably boost the rate paid in all wholesale contracts pegged to that index. *See* 103 F.E.R.C. at 62,303 (observing that conduct that "affect[s] the * * * index price reported for a market" will "affect the magnitude of payments on a contract linked to the index price"). Because the indices are used to set jurisdictional rates, Pet. App. 112a, any manipulative conduct by jurisdictional sellers that alters the indices falls within FERC's authority over practices affecting wholesale gas rates.

FERC's repeated exercise of jurisdiction over index-manipulation practices proves the point. Again and again, FERC has invoked its Section 5(a) authority to regulate jurisdictional sellers' index-related conduct, from enacting a policy statement setting forth standards of behavior, 104 F.E.R.C. at 61,403; to revoking blanket marketing certificates as a penalty for index manipulation, 103 F.E.R.C. at 62,295; to promulgating the Code of Conduct expressly forbidding false reporting to the indices and wash trades, 68 Fed. Reg. at 66,323. Along the way, FERC explained why it had statutory authority to enact those policies, and it rejected a challenge that it lacked authority to regulate index manipulation under Section 5(a). The agency wrote that "many gas * * * jurisdictional transactions are based on the published indices." 103 F.E.R.C. at 61,286. And it later concluded that "the prohibited practices are unjust and unreasonable, and that their explicit prohibition is necessary to ensure that market-based sales of gas will be adequately protected from

manipulation and, therefore, will be just and reasonable." 107 F.E.R.C. at 61,690.

FERC's conclusion that it had authority to regulate was quite correct. As the United States put it: "Because manipulation of the indices * * * directly affected the wholesale price of natural gas," it qualifies as "a 'practice * * * affecting' the rates charged by natural gas companies in jurisdictional sales within the meaning of" Section 5(a). U.S. Cert. Br. 12-13. FERC's interpretation of the scope of its authority follows from Section 5(a)'s plain text—but if there were any room for doubt, the Commission's determination would warrant deference. *See City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1871-73 (2013).

In short, FERC's jurisdiction over index manipulation "is demonstrated not only by FERC's actual exercise thereof in relation to these practices," but also "by the fact that the Court would have little trouble rejecting a challenge to FERC's jurisdiction to prohibit jurisdictional sellers from engaging in false price reporting, wash trades, and other collusive or manipulative conduct that affected the price mechanism by which jurisdictional rates are set." Pet. App. 111a. And FERC's exclusive jurisdiction to prohibit those practices preempts state regulation of the same conduct: "It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Mississippi Power*, 487 U.S. at 377 (Scalia, J., concurring in the judgment). Because "FERC's exclusive jurisdiction applies not only to rates, but also to [matters] that affect wholesale rates," *id.* at 371 (majority op.), the NGA occupies the field.

B. Respondents' State-Law Actions Fall Within The Preempted Field.

FERC's exclusive authority to regulate index-manipulation practices means that Respondents' state-law claims—which seek to impose liability for those very same practices—are preempted.

1. To determine whether a state law regulates within the field preempted by the NGA, this Court examines whether it is "directed at * * * things over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308. "The test * * * is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Id.* at 310 n.13 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)). No matter a state law's nominal subject, it fails this test if it "amounts to a regulation" of issues within federal control. *Schneidewind*, 485 U.S. at 307; *see also Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1268 (2012) (finding a state-law claim preempted because it was "directed to the same subject" as a federal statute that had long been interpreted to preempt the field).

2. In a series of NGA and FPA cases, this Court has underscored that the preemption analysis does not change when a state purports to regulate matters within state authority: If the law amounts to regulation in the federal field, it is preempted.

The leading case is *Schneidewind.* There, the Court struck down a Michigan law that required natural gas companies transporting gas in Michigan to obtain state approval before issuing securities. The Court recognized that Michigan had a legitimate interest in " 'securities regulation' in the traditional sense of the term," but that did not save the law from preemption

because it had the "effect" of "regulat[ing] matters that Congress intended FERC to regulate." 485 U.S. at 308-309 & n.11. It wrote that "[b]y keeping a natural gas company from raising its equity levels above a certain point, Michigan seeks to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.' " *Id.* at 308. "[B]ut the NGA ha[d] equipped FERC * * * to address the precise concerns [the Michigan law] purports to manage"—including the "authority to regulate and fix practices affecting rates," which "allows the agency to address directly any unduly leveraged, unduly risky, or unduly capitalized investments." *Id.* at 309. The Court concluded that the Michigan law "amount[ed] to a regulation of" those jurisdictional matters and so impermissibly "intrud[ed] on a field of regulation that federal legislation has occupied." *Id.* at 307, 309 & n.12.

Northern Natural provides another example. In that case, Kansas contended that it could require an interstate pipeline to purchase gas proportionately from producers within the state because Kansas sought to regulate only "the 'production or gathering' of natural gas, which is exempted from" federal regulation by Section 1(b). 372 U.S. at 89. The state further contended that its regulation was "essential for the conservation of natural gas, and that conservation is traditionally a function of state power." *Id.* at 93.

Despite these invocations of traditional state authority, the Court had no trouble concluding that the state law was preempted because the Kansas order was "aimed directly at" jurisdictional sellers and jurisdictional transactions. *Id.* at 94. Even though the nominal subject of the law implicated matters within state authority, the Supremacy Clause forbade "the particular means chosen by" Kansas to regulate that

subject. *Id.* at 93. "[A]ny readjustment of purchasing patterns which [the law] might require," the Court reasoned, "could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers." *Id.* at 92. Given the potential for "interference * * * with the prices of natural gas wholesales," *id.* at 93, the Court invalidated the state law "in order to assure the effectuation of the comprehensive federal regulation ordained by Congress." *Id.* at 92.

3. Nor does the NGA lose its preemptive force simply because a practice falling within FERC's jurisdiction also affects matters otherwise subject to state control. In *Mississippi Power*, for example, four utilities entered into an agreement allocating the costs of constructing and operating a nuclear power plant. 487 U.S. at 361. Because the utilities engaged in both wholesale purchases and retail sales, their power allocation agreement simultaneously affected rates for both types of transactions. *Id.* at 357.

But that simultaneous effect did not diminish the scope of FERC's jurisdiction. Instead, the Court concluded that the allocation agreement qualified as a contract "affecting * * * wholesale rates." *Id.* at 360 n.6. That triggered FERC's authority over the agreement. *Id.* at 371. And the Court made clear that FERC's authority was exclusive: It held that Mississippi could not "exercise its undoubted jurisdiction over retail sales" to examine the prudence of the allocation agreement for purposes of setting retail rates. *Id.* at 372. Because "[s]tates may not regulate in areas where FERC has properly exercised its jurisdiction * * * to insure that agreements affecting wholesale rates are reasonable," Mississippi could not

review the agreement even as it related to retail sales without "traversing matters squarely within FERC's jurisdiction." *Id.* at 374, 376.

Federal Power Commission v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), makes the same point. The Court there held that FERC had authority to require pipelines to curtail retail gas deliveries, along with wholesale gas deliveries, in times of gas shortage. *Id.* at 623, 642. In this situation, the Court reasoned, it would be impossible to regulate retail and wholesale transactions separately because curtailment of one type of sale affects the volume of gas that remains to be delivered in the other type of sale. *See id.* at 632. Thus, states could not separately regulate curtailment by invoking their authority over retail sales; in this area, like the others the NGA commits to federal control, "the desirability of uniform federal regulation is abundantly clear." *Id.* at 633-635.

4. a. Under a straightforward application of these precedents, Respondents' claims are preempted. Respondents' suits seek to impose state-law liability on jurisdictional sellers for alleged false price reporting to index publishers and for alleged wash sales. *See* Pet. App. 15a; *e.g.* J.A. 304-305. Those are the very same index-manipulation practices that FERC has regulated under Section 5(a) because they directly affect wholesale rates. *See* Code of Conduct, 68 Fed. Reg. at 66,323. Respondents' claims accordingly are "directed at" matters within FERC's exclusive jurisdiction. *Schneidewind*, 485 U.S. at 308.

And there is no doubt that Respondents' lawsuits will "amount[] to a regulation" of practices within the federal field. *Id.* at 307. As this Court has recognized, "[t]he obligation to pay compensation can be, indeed is

designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). The Court thus has subjected regulation-by-lawsuit to the same preemption analysis as any other state regulatory action. *See, e.g., Kurns*, 132 S. Ct. at 1265; *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 325 (2008). Here, Respondents' suits are not just "aimed directly at" index-manipulation practices the NGA commits to federal control, *Northern Natural*, 372 U.S. at 94; they also would "exert[]" regulation over those index-manipulation practices "through an award of damages," *Garmon*, 359 U.S. at 247. The Supremacy Clause forbids this result.

b. The fact that Respondents happened to suffer their alleged injuries in retail sales does not save their claims. Their suits are "unmistakably and unambiguously aimed" at the practice of index manipulation. *Northern Natural*, 372 U.S. at 92; *see* Pet. App. 53a (observing that Respondents "predicated their antitrust claims on the [alleged] manipulation of the price indices"). That their suits claim damage in retail transactions is therefore irrelevant. Just as Michigan could not invoke its authority over securities to escape preemption in *Schneidewind*, and just as Kansas could not invoke its authority over production and conservation to justify its regulation in *Northern Natural*, Respondents cannot invoke state authority over retail purchases to justify their regulation of index-manipulation practices by jurisdictional sellers that directly affect jurisdictional rates. Section 5(a) places such practices squarely within federal power, preempting *any* purchaser—whether retail or wholesale—from using state law to impose liability for those same practices.

c. It does not matter that index-manipulation practices simultaneously affect not just wholesale rates but also retail rates priced with reference to the same indices. *Mississippi Power* and *Louisiana Power* teach that this kind of simultaneous effect on non-jurisdictional matters does not eliminate the Commission's jurisdiction or alter the NGA's preemptive scope. *See Mississippi Power*, 487 U.S. at 372, 376; *Louisiana Power*, 406 U.S. at 632-635.

As a practical matter, index-reporting practices cannot be divided into separate wholesale and retail spheres. The same indices are used by both wholesale and retail purchasers to set the price terms in their contracts, so any practices affecting an index price will necessarily affect the rates paid for gas in both types of transactions. In this sense, the practices at issue here are analogous to the power-allocation agreement in *Mississippi Power.* That agreement required a utility to incur costs associated with a particular power plant, which simultaneously increased the utility's wholesale and retail rates. Yet even though the allocation agreement necessarily impacted the price for electricity at retail, this Court concluded that FERC had exclusive authority to regulate the agreement because it was a contract affecting wholesale rates. *Mississippi Power*, 487 U.S. at 372, 376. And FERC's jurisdiction over the agreement ousted the state from further regulation notwithstanding that the agreement also affected retail rates. *Id.* In short, when a contract—or practice—directly affects both markets, FERC has jurisdiction, and that jurisdiction is exclusive due to NGA field preemption. So it is here.

Louisiana Power adds the insight that uniform federal regulation is essential when a single act simultaneously affects retail and wholesale

transactions, because in that circumstance states have no ability to confine their regulation to the retail side of the line. When pipeline capacity is curtailed in times of gas shortage, for example, state law purporting to regulate only retail deliveries of gas will necessarily affect the amount of gas that remains to be delivered at wholesale and, therefore, is preempted. *Louisiana Power*, 406 U.S. at 632-633; *see also Schneidewind*, 485 U.S. at 310. So too here, state law cannot be used to regulate jurisdictional sellers' index-reporting practices because such state regulation necessarily would also affect index-priced jurisdictional rates.

In short, because Respondents' claims "necessarily deal with matters which directly affect the ability of [FERC] 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," they "invalidly invade the federal agency's exclusive domain." *Northern Natural*, 372 U.S. at 91-92.

C. The Imminent Possibility Of Collision Between State And Federal Regulation Further Demonstrates That Respondents' Claims Are Preempted.

1. Because the NGA grants FERC exclusive jurisdiction over wholesale rates and any practices by jurisdictional sellers directly affecting those rates, state law is preempted even absent a direct conflict with federal law. *See Arizona*, 132 S. Ct. at 2502 ("Where Congress occupies an entire field * * * even complementary state regulation is impermissible."). But "the imminent possibility of collision between" state and federal regulation of index-related practices

"further demonstrates the NGA's complete occupation of the field that [Respondents' suits] seek[] to regulate." *Schneidewind*, 485 U.S. at 310.

In its Policy Statement setting forth standards of conduct for index reporting, FERC emphasized that it was "provid[ing] a measure of regulatory certainty to the process of reporting transaction data." 104 F.E.R.C. at 61,404. To that end, FERC carefully crafted index-reporting rules and offered safe-harbor protection to jurisdictional sellers reporting sales to the indices in accordance with those rules. The Commission continued to fine-tune its regulatory approach in the Code of Conduct when it prohibited acts "intended to * * * manipulate market prices" that "are without a legitimate business purpose." 68 Fed. Reg. at 66,327. The Commission noted that the "legitimate business purpose" standard was necessary to "ensure that * * * 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," and it emphasized that it would "examine all relevant facts and circumstances surrounding [challenged] activity to evaluate whether there is a legitimate business purpose attributable to the behavior." *Id.* at 66,328. FERC explained that "th[e] code is clearly defined so that it does not create uncertainty, disrupt competitive commodity markets, or simply prove ineffective." *Id.* at 66,324. And it stressed that it would regularly evaluate "the effectiveness and consequences of these regulations" given the "dynamic" nature of the industry. *Id.*

Respondents' attempt to regulate the exact same conduct under state law threatens to undermine the

federal scheme.[4] Even if a particular practice would qualify for safe-harbor protection under FERC's Policy Statement or would fall within FERC's definition of a "legitimate business purpose," lay juries might nevertheless impose liability under state law. As the Tennessee Supreme Court has recognized in reviewing claims similar to those Respondents raise, there is no Platonic ideal of a competitive market that all antitrust laws strive to protect; on the contrary, "there is much disagreement as to the meaning of a 'competitive' market, and, therefore, when antitrust law should intervene." *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843, 869 (Tenn. 2010) (holding that the NGA preempted state-law suit by retail purchasers challenging index manipulation). What FERC might consider a legitimate business transaction, a state-court jury might deem a manipulative wash sale. What FERC might view as a legitimate way of reporting transactions to the trade press, a state-court jury might consider deceptive. *See id.* Conflicting judgments on these matters would eviscerate the

[4] It is no answer to observe that FERC had not yet formally promulgated the Code of Conduct during the time period at issue in Respondents' suits. As FERC explained, its "original grant of certificate authority" to Petitioners and other jurisdictional sellers "implicitly prohibited acts which would manipulate the competitive market for natural gas." 107 F.E.R.C. at 61,690. FERC accordingly entered into consent agreements with many jurisdictional sellers, including some Petitioners here, to resolve allegations of misconduct during the time period targeted by Respondents' suits. *See, e.g.*, *Order Approving Stipulation and Consent Agreement*, 110 F.E.R.C. ¶ 61,305 (Mar. 23, 2005). In any event, it is the *existence* of FERC's jurisdiction, and not just its exercise, that creates the possibility of collision with state regulation of the same conduct. *See Mississippi Power*, 487 U.S. at 375.

"regulatory certainty" FERC has deemed essential to the effective operation of interstate gas markets. 104 F.E.R.C at 61,404. Moreover, the threat of liability would force jurisdictional sellers to alter their behavior to conform to the law in the most restrictive state, rather than the rules imposed by FERC. This " 'prospect of interference with the federal regulatory power' " confirms that Respondents' suits are preempted. *Schneidewind*, 485 U.S. at 310 (quoting *Northern Natural*, 372 U.S. at 91-92).

Moreover, the potential for conflict extends beyond the conduct penalized to the remedy imposed. Respondents seek remedies under state laws that, in marked contrast to federal law, require antitrust defendants in certain circumstances to disgorge the *full price* paid for gas—not just the amount of the alleged overcharge. *See* Kan. Stat. Ann. § 50-115 (2011) (now repealed); Wis. Stat. Ann. § 133.14; Colo. Rev. Stat. § 6-4-121. Indeed, many Respondents strategically declined to plead federal antitrust actions so that they could pursue these extravagant state-law sanctions. Pet. App. 40a-41a; *see* U.S. Cert. Br. 17 (explaining that the NGA does not displace federal antitrust laws). Thus, even if all state antitrust laws shared the same objectives as their federal counterparts, "[p]ermitting the [s]tate[s] to impose [their] own penalties would * * * conflict with the careful framework Congress adopted." *Arizona*, 132 S. Ct. at 2502.

2. The risk of collision extends not only to index-manipulation practices, but to any other practice (or rule, regulation, or contract) that directly and simultaneously affects retail and wholesale prices for gas. After all, gas companies frequently engage in conduct that affects the rates in *all* transactions, not just jurisdictional sales—from accounting practices

allocating costs and addressing depreciation to investment decisions such as whether to enter into a bona-fide financial hedge. FERC regulates such practices given their direct effect on wholesale rates. *See, e.g.*, *In re Entergy Servs., Inc.*, 137 F.E.R.C. ¶ 61,029, 2011 WL 4703181, at *13 (Oct. 7, 2011) (accounting practices); Code of Conduct, 68 Fed. Reg. at 66,328 (hedges). If states may compete with FERC to regulate these practices by pointing to their simultaneous effects on retail rates, "the inevitable result would be varied regulatory programs of state courts and agencies * * * applying a variety of" different and possibly irreconcilable state laws. *Louisiana Power*, 406 U.S. at 633.

The NGA was enacted to prevent this regulatory chaos. Shared state and federal jurisdiction over the same conduct is anathema to it. States therefore lack authority to regulate practices that directly affect jurisdictional rates, even if retail rates also are affected: "Not the federal but the state regulation must be subordinated, when Congress has so plainly occupied the regulatory field." *Northern Natural*, 372 U.S. at 93. To guard against the "imminent possibility of collision" when companies face competing demands from multiple regulators, and to vindicate "the Natural Gas Act's objective of uniformity," Respondents' claims are preempted. *Id.* at 92, 98.

II. THE NINTH CIRCUIT'S PREEMPTION ANALYSIS IS FUNDAMENTALLY FLAWED.

Against all this, the Ninth Circuit permitted Respondents' suits to proceed on the theory that that result implements Section 1(b)'s division between jurisdictional sales regulated by the federal government and non-jurisdictional sales regulated by

the states. Pet. App. 29a. A contrary interpretation, the Ninth Circuit believed, would have no " 'conceptual core' delineating transactions falling within FERC's jurisdiction and transactions outside of FERC's jurisdiction." *Id.* at 32a. To prevent this result, the court held that state claims can permissibly target index manipulation "associated with" non-jurisdictional sales, even if the plaintiff's claim amounts to regulation of matters subject to FERC's authority. Pet. App. 31a.

That preemption analysis suffers from a fundamental flaw: This Court has already considered the limits of FERC's Section 5(a) authority and drawn a different line than the Ninth Circuit did here. Under this Court's precedents, FERC may regulate practices that *directly affect* jurisdictional rates, but may not regulate practices that only indirectly do so. Moreover, FERC is barred from using its Section 5(a) authority to regulate rates in retail transactions; Section 1(b) specifically excludes this rate-setting authority from FERC's powers. These limits on federal power are well established and clearly have a "conceptual core," even though the Ninth Circuit did not perceive it. They properly preserve state authority over matters of local concern. But they do not save Respondents' claims from preemption: The alleged index manipulation directly affected jurisdictional rates, and federal regulation of that practice is not prohibited retail rate-setting.

A. The Ninth Circuit's Analysis Ignores This Court's Caselaw Delineating The Scope Of FERC's Jurisdiction.

1. In its attempt to draw a line between the state and federal fields, the Ninth Circuit focused on the type of *transaction* in which Respondents bought gas and ignored the alleged *practices* giving rise to liability. Pet. App. 28a. That was error. The Ninth Circuit ignored that this Court has already drawn a different line between state and federal power in this area: The NGA grants FERC exclusive authority over practices and contracts that directly affect wholesale rates, but does not displace state regulation over practices and contracts with only attenuated effects.

Schneidewind explicitly adopted this test. The Court acknowledged there that "[o]f course, every state statute that has some indirect effect on rates and facilities of natural gas companies is not preempted." 485 U.S. at 308. But that did not mean the Michigan statute regulating jurisdictional sellers' issuance of securities could escape preemption. The statute was preempted, the Court said, because its "effect" on wholesale rates "is not 'indirect.'" *Id.*; *see also, e.g.*, *Transcon*, 474 U.S. at 422 (finding state regulation preempted when it affected jurisdictional seller's purchasing patterns and so "directly undermine[d] Congress' determination" to let market forces dictate those patterns).

The Court reiterated the direct-effects test in *Northwest Central*, which the Ninth Circuit erroneously thought supported its "narrow[]" construction of FERC's jurisdiction. Pet. App. 29a-

30a.[5] In *Northwest Central*, a Kansas regulation provided that producers would forfeit their rights to extract gas from a given field if they delayed production for too long. 489 U.S. at 497. The regulation was a conservation measure meant to prevent imbalance in the field between those wells that were actively producing and those that were not, protecting all of the well owners' production rights in the long run. *Id.* at 499-504. Although Section 1(b) of the NGA expressly preserves state control over gas production, an interstate pipeline contended the regulation was preempted because it "might have some effect on interstate rates" by creating incentives for the pipeline to alter its cost structures. *Id.* at 512-513.

This Court rejected the pipeline's argument, ruling that any effect was too remote to strip the state of its authority to regulate non-jurisdictional matters. *See*

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[5] The Ninth Circuit also relied on two D.C. Circuit cases to support its narrow reading, Pet. App. 30a-34a, but they, too, simply apply the direct-effects test. In *American Gas Association* v. *FERC*, 912 F.2d 1496, 1506 (D.C. Cir. 1990), the court held that FERC could not rely on Section 5 to regulate certain terms in non-jurisdictional contracts because those contracts affected jurisdictional rates only "indirectly." Yet the court affirmed that FERC has authority under Section 5(a) to regulate matters that "directly govern[] the rate in a jurisdictional sale[.]" *Id.* And in *California Independent System Operator Corp.* v. *FERC*, 372 F.3d 395 (D.C. Cir. 2004), the D.C. Circuit again affirmed that FERC's Section 5(a) authority reaches "those methods or ways of doing things on the part of the utility that directly affect the rate," but does not extend to "all those remote things beyond the rate structure that might in some sense indirectly or ultimately" affect wholesale rates, such as the composition of an independent system operator's board of directors. *Id.* at 403. These precedents confirm FERC's exclusive jurisdiction here because Petitioners' alleged index manipulation directly affected jurisdictional rates.

id. at 514. As the Court explained, "there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers." *Id.* But "[t]o 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." *Id.* (emphasis added).

In relying on this direct-effects test, *Northwest Central* rejected a simplistic divide between jurisdictional and non-jurisdictional matters—the very divide the Ninth Circuit adopted here. As the Court explained, "[t]he congressionally designed interplay between state and federal regulation under the NGA does not * * * permit States to attempt to regulate pipelines[] * * * in the mere guise of regulating production." *Id.* at 518. Thus, no matter whether a "rule is labeled" as a regulation of non-jurisdictional matters, it may be preempted if its "purpose * * * is to influence" jurisdictional sellers and activities. *Id.* *Northwest Central* thus confirms *Schneidewind*'s direct-effects test.[6]

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[6] Notably, this Court has relied on the distinction between direct and indirect effects to assess the preemptive scope of a wide variety of statutes. For example, in interpreting the Federal Aviation Administration Authorization Act of 1994, which preempts state laws "related to a price, route, or service of any motor carrier * * * with respect to the transportation of property," 49 U.S.C. § 14501(c)(1), the Court has permitted state regulation that has " 'only a tenuous, remote, or peripheral' " impact on motor carriers' prices, routes, and services. *Dan's City Used Cars, Inc.* v. *Pelkey*, 133 S. Ct. 1769, 1778 (2013) (quoting *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008)). To be preempted, state law must have a " '*significant* impact' " on the matters subject to federal control. *Rowe*, 552 U.S. at 375 (citation

2. The Ninth Circuit thought it necessary to "narrow[]" FERC's Section 5 authority, Pet. App. 29a, because it fretted that FERC might attempt to regulate retail or other non-jurisdictional sales as a " 'practice' affecting jurisdictional rates." *Id.* at 32a. That concern was misplaced. Both the direct-effects test and Section 1(b) itself guard against any hypothetical attempt by FERC to use Section 5(a) to "nullify[] the jurisdictional provisions of Section 1(b)." Pet. App. 31a.

First, any attempt would founder on the requirement of a direct effect. To be sure, some non-jurisdictional sales—such as a wellhead sale by a producer to an interstate pipeline—may *indirectly* influence the price a jurisdictional seller charges in wholesale transactions by altering the seller's costs. But as the Court recognized in *Northwest Central*, this kind of "effect on [jurisdictional sellers'] cost structures" qualifies as indirect. 489 U.S. at 512. The direct-effects test accordingly prevents the kind of overreaching the Ninth Circuit feared.

Moreover, Section 1(b) itself provides a backstop against direct federal regulation of retail sales. It provides that FERC's rate-setting authority extends to "the sale in interstate commerce of natural gas for resale," but not "to any other * * * sale of natural gas." 15 U.S.C. § 717(b). That prohibition makes clear that it is *states* that have authority to set retail rates.

In any event, there is no such FERC overreach here. By promulgating the Code of Conduct, FERC was not

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omitted). The Court has applied the same test under the Airline Deregulation Act of 1978, interpreting it to preempt only state laws that have a "significant effect upon fares." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992).

dictating prices in retail transactions; rather, it was prohibiting conduct that directly affects prices in wholesale transactions. Unlike in *Northwest Central*, it cannot be said that FERC's regulation of index-manipulation practices "would be largely to nullify that part of NGA § 1(b) that leaves to the States control over" retail rates. 489 U.S. at 514. The Ninth Circuit was wrong to use that justification to adopt a cramped interpretation of FERC's Section 5(a) authority.

Indeed, the Ninth Circuit's approach to preemption creates the very problems the court purported to solve. The Ninth Circuit insisted that courts must respect Section 1(b)'s jurisdictional limitations. But the court of appeals' preemption analysis permits states to end-run that provision's delineation of matters subject to *federal* control. If any state law "associated with" a non-jurisdictional transaction is permissible, Pet. App. 31a, then states will have free rein to regulate jurisdictional practices "in the mere guise of regulating" retail sales. *Northwest Central*, 489 U.S. at 518. Here, for example, if Petitioners must conform their index-reporting practices to state law, FERC will lack exclusive authority over practices that directly impact wholesale rates. And that will be true even though Section 1(b) expressly grants the Commission power over "the sale in interstate commerce of natural gas for resale" and the "natural gas companies engaged in" such sales, 15 U.S.C. § 717(b), and even though Section 5(a) was intended to give FERC effective tools to ensure that wholesale rates are just and reasonable. That result turns the Supremacy Clause inside out.

3. Recognizing that the Ninth Circuit's approach to preemption cannot be squared with this Court's precedents, the Learjet Respondents belatedly have argued that their suits are not preempted because

Petitioners' alleged index manipulation supposedly had only an *indirect* effect on wholesale rates. Learjet Br. in Opp. 19-20. That claim is both waived and meritless.

a. The Learjet Respondents waived their indirect-effects argument by failing to make it below. Before the Ninth Circuit, all parties agreed that Petitioners' alleged index-manipulation practices directly affected jurisdictional rates. In the words of the Learjet Respondents, index prices were "used to set the price in jurisdictional transactions like sales for resales." Learjet C.A. Opening Br. 12. And Respondents' expert candidly agreed that alleged index manipulation had a "direct impact" on transactions priced with reference to the indices. J.A. 594. As that expert averred, "the prices that were the subject of the manipulation *are* the prices of natural gas in this country." J.A. 593 (emphasis added).[7]

Given the parties' agreement that index manipulation would directly affect jurisdictional rates, it is not surprising that the Ninth Circuit failed to pass upon Respondents' newly minted claim that the effect was attenuated. In their brief in opposition, the Learjet Respondents maintained that "the Ninth Circuit decided this appeal on the premise that

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[7] Ignoring this record evidence, the Learjet Respondents now claim that they challenged the District Court's finding of a direct effect on jurisdictional rates. Learjet Br. in Opp. 19-20 n.3. But they cite nothing for this proposition because there is nothing in the Ninth Circuit record to support it. Notably, the Wisconsin Respondents did not join this effort to rewrite history. They do not dispute that index manipulation directly affected wholesale rates; they instead contend, wrongly, that this direct effect is "irrelevant, because the test is whether the sales in question are wholesale or retail." Wisconsin Br. in Opp. 19 n. 20.

petitioners' reporting practices had at most an indirect effect on wholesale rates." Learjet Br. in Opp. 20 (emphasis omitted). But that supposed premise appears nowhere in the court of appeals' decision. Under the Ninth Circuit's approach to preemption, it is wholly irrelevant whether effects are direct or indirect; the only thing that matters is whether plaintiffs purchased their gas at retail rather than wholesale. Because Respondents did not "seek consideration" of an indirect-effects argument below and the Ninth Circuit "did not address" it, the claim is waived. *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004).

Indeed, instead of pressing an indirect-effects theory below, the Learjet Respondents expressly urged the court of appeals to adopt its flawed transaction-based approach to preemption. Respondents asserted that "FERC's jurisdiction end[s]—and the States' beg[ins]" based on "the nature of the transaction at issue." Learjet C.A. Opening Br. 35. The District Court erred, they argued, by declining to apply a "transaction-based analysis" focused solely on whether the plaintiffs' purchases were at retail or wholesale. *Id.* at 39. While Respondents may regret those arguments, they cannot escape the consequences of them: "When issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. Even if Respondents had preserved an indirect-effects argument, it is meritless. The record amply demonstrates that the price terms of jurisdictional transactions were routinely pegged to the indices, so any alleged manipulation inflating index prices directly affected wholesale rates.

The record is replete with evidence that jurisdictional sellers entered into contracts for wholesale transactions that adopted the index rate as the sales price for gas. For instance, Petitioner CMS Marketing Services sold over 14.5 million MMBtu of wholesale natural gas at index prices between 2000 and 2002. J.A. 632. Petitioner Duke Energy Trading and Marketing sold 55,000 MMBtu of index-priced wholesale natural gas per day in September 2001. J.A. 640-641. And Petitioners AEP Energy Services, Coral Energy Resources, e-prime, and RRI Energy Services collectively sold 1.9 billion MMBtu of wholesale natural gas at index prices between 2000 and 2002 in 5,954 separate transactions. J.A. 645. Given all this, it is not surprising that FERC expressly found that "many Commission-jurisdictional transactions * * * are based on the indices." J.A. 150.

Because the index price functioned as the rate of wholesale gas in these contracts, any index manipulation directly affected that rate. As FERC put it, any "inaccuracy [resulting from index manipulation] in the published index price fed back into the markets" by altering the price term in jurisdictional index-linked contracts. J.A. 148; *see also* U.S. Cert. Br. 16. For example, if wash sales and false price reporting inflated a particular index price by $1.00 per MMBtu, that $1.00 increase would be reflected in each and every wholesale contract priced with reference to that index. It is difficult to conceive of an effect more direct than that.

That leaves the Learjet Respondents arguing that "it was mostly petitioners themselves who happened to use inflated indexes as pricing points in wholesale transactions." Learjet Br. in Opp. 20. But Respondents do not explain why this would make the

effect between inflated indices and wholesale rates indirect. The *sine qua non* of market pricing is that prices are set by market participants, such as Petitioners and their contracting partners, rather than FERC. And that is precisely why FERC regulated Petitioners' index-reporting practices: If the index-linked rates for natural gas were to be just and reasonable, as the NGA demands, 15 U.S.C. § 717c, "the indices must be robust and accurate and have the confidence of market participants." 104 F.E.R.C. at 61,404. Respondents' last-ditch effort to cast this as an indirect-effects case fails.

B. The Ninth Circuit's Remaining Justifications For Adopting Its Preemption Approach Are Flawed.

The Ninth Circuit cited a grab bag of other interpretive tools to support its preemption analysis, including the presumption against preemption, the superfluity canon, the jurisdictional boundaries of the Code of Conduct, and the supposed congruence between state and federal law. Its reliance on each was misplaced.

1. The Ninth Circuit erroneously believed a "presumption against preemption" applied in this case and carried "particular force in light of Congress's deliberate efforts to preserve traditional areas of state regulation of the natural gas industry." Pet. App. 24a. At the outset, it is unclear whether the presumption should apply at all in a case like this one, which involves "[s]tate regulat[ion] in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (holding the presumption "is not triggered" in this circumstance). But in any event, even if the

presumption in favor of the States' "historic police powers," *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009), would have applied at some time in the past, it has long been overcome. It is now "well settled" that through the NGA "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind*, 485 U.S. at 305. The Ninth Circuit erred by disregarding this Court's repeated holdings that the NGA reflects that clear and manifest intent. *See Kurns*, 132 S. Ct. at 1266-70 (ignoring plaintiff's argument that a presumption against preemption should apply and explaining that the Court was not "address[ing] the LIA's preemptive effect on a clean slate" because it had previously ruled that the LIA occupied the field).

2. The Ninth Circuit also erred in invoking the superfluity canon. Pet. App. 37a. The court of appeals pointed to the 2005 EPAct, which grants FERC authority to regulate manipulative conduct by "any entity" in connection with jurisdictional sales. *Id.* at 37a-38a. According to the Ninth Circuit, the EPAct's existence must mean that FERC lacked authority to regulate manipulative conduct, such as index manipulation, before the EPAct was enacted. It concluded: "Congress enacted the relevant provision of the EPA *because* FERC did not already have regulatory authority over the anticompetitive conduct at issue." *Id.*

But the Ninth Circuit's premise was simply wrong, and so was its conclusion. Before the EPAct was enacted, FERC had authority to regulate *jurisdictional sellers'* market manipulation that directly affected jurisdictional rates. *See* 68 Fed. Reg. at 66,326; U.S. Cert. Br. 4-5. The EPAct expanded FERC's jurisdiction

to cover *any* entity's market manipulation in connection with jurisdictional rates. 15 U.S.C. § 717c-1; *see also* 71 Fed. Reg. at 4247-48. For example, prior to the EPAct, FERC would not have had authority to regulate index manipulation by a gas producer because such a producer is not a jurisdictional seller. *See* 15 U.S.C. §§ 3301(21), 3431. After the EPAct, FERC could regulate index manipulation by such an entity.

Thus, the EPAct did not change what conduct is within FERC's jurisdiction, as the Ninth Circuit believed. Instead, it changed *whose* conduct is within FERC's jurisdiction. And that change is wholly irrelevant to this case because Petitioners are all jurisdictional sellers who were subject to FERC's regulation of their index-reporting practices long before the EPAct was enacted. The canon against superfluity has no application here.

3. In the same vein, the Ninth Circuit misunderstood FERC's interpretation of its own jurisdiction. The Ninth Circuit insisted that "a close reading of the Code [of Conduct] reveals that FERC limited the application of the Code to sales within its jurisdiction," leading the court to conclude that "the Code of Conduct * * * does not support [Petitioners'] argument that FERC had jurisdiction over the anticompetitive behavior related to nonjurisdictional sales." Pet. App. 38a (emphasis omitted).

The Ninth Circuit confused jurisdictional *sales* with jurisdictional *sellers*. To be sure, FERC emphasized that the Code of Conduct only governed the index-reporting practices of jurisdictional sellers like Petitioners because Section 5(a) grants the agency no authority to regulate the practices of non-jurisdictional sellers. 68 Fed. Reg. at 66,325-26. As FERC

explained, "[t]he fact that the Commission does not have authority to regulate all sellers in the natural gas market cannot prevent the Commission from explicitly imposing code of conduct rules on all sellers within its jurisdiction which the Commission determined is necessary to prevent the manipulation of prices." 107 F.E.R.C. at 61,690. But the Code of Conduct did not, as the Ninth Circuit seemed to believe, exclude jurisdictional sellers from federal regulation any time the indices happened to be used to set the price in retail contracts.

Indeed, it is literally impossible to parcel out index-reporting practices into separate retail and wholesale spheres, because the same indices are used to set prices in both types of contracts. Thus in this case there is no category of "anticompetitive behavior associated with nonjurisdictional sales" alone. Pet. App. 39a. Any index-reporting practices are simultaneously "associated with" both jurisdictional and non-jurisdictional sales.

4. Finally, the Ninth Circuit's belief that state antitrust law complements federal law in this context, Pet. App. 27a, is both wrong and irrelevant. It is wrong because, as previously discussed, *supra* at 32, "conflict is imminent whenever two separate remedies are brought to bear on the same activity." *Arizona*, 132 S. Ct. at 2503 (internal quotation marks omitted). And it is irrelevant because "[w]here Congress occupies an entire field," as it has through the NGA, "even complementary state regulation is impermissible." *Id.* at 2502. The Ninth Circuit "ignore[d] the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself." *Id.* The NGA grants FERC exclusive authority over jurisdictional sellers' index-

reporting practices, thereby "foreclose[ing] any state regulation in the area, even if it is parallel to federal standards." *Id.* That should have been the end of the Ninth Circuit's inquiry into the matter—and the end of Respondents' suits.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's judgment should be reversed.

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September 2014

ADDENDUM

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1. The Supremacy Clause, U.S. Const. art. vi, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

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

> 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.

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

> 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 juris-

diction 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.

4. Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c provides:

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

5. 15 U.S.C. § 717c-1 provides:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section

78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

6. Kan. Stat. Ann. § 50-115 (2011) provided:

Recovery of damages by person injured by combination; exception. Except as provided in K.S.A. 12-205, and amendments thereto, any person injured or damaged by any such arrangement, contract, agreement, trust or combination, described in K.S.A. 50-112 and 50-113, and amendments thereto, may sue for and recover in any court of competent jurisdiction in this state, of any person, the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced or controlled in price by such combination, or the full amount of money borrowed.

7. Wis. Stat. Ann. § 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.

8. Colo. Rev. Stat. § 6-4-121 provides:

> All contracts or agreements made by any person while a member of any combination, conspiracy, trust, or pool prohibited under this article which are founded upon, or are the result of, or grow out of, or are connected with any violation of this article, either directly or indirectly, shall be void, and no recovery thereon or benefit therefrom shall be had by or for any such person. Any payments made upon, under, or pursuant to such contract or agreement to or for the benefit of such person may be recovered in an action by the party making the payment or his heirs, personal representatives, or assigns.