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

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF ARGUMENT

Underneath the regulatory jargon, this is a simple case. The Natural Gas Act preempts the field, *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 305 (1988), and "FERC's exclusive jurisdiction applies not only to rates" but also to jurisdictional gas companies' contracts and practices that directly "affect wholesale rates," *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988). Thus, "States may not regulate" such contracts and practices. *Id.* at 374. Yet Respondents seek to use state law to regulate practices that FERC has always had authority to regulate and that FERC *in fact does regulate*. This is a straightforward case of field preemption.

Respondents primarily argue that their suits are not preempted because they seek to regulate "matters that Section 1(b) of the Act reserves to the States." Learjet Br. 17 (citing *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493 (1989)). But what Respondents' lawsuits target—alleged index manipulation—is *not* something that Section 1(b) "reserves to the States." It is a *practice* by FERC-regulated wholesalers that *affects* prices in both wholesale and retail sales. The statute and cases say that such a practice falls within FERC's jurisdiction, which is exclusive. And FERC itself so concluded, in a finding entitled to *Chevron* deference.

Perhaps recognizing that their suits are not within Section 1(b)'s reservation of state authority, Respondents try to expand that provision: They say Section 1(b) reserves to the states all matters that "arise" out of or "concern" retail sales. Learjet Br. 17-18. But the NGA's plain language refutes that notion. The statute gives FERC exclusive jurisdiction over wholesale rates and the states exclusive jurisdiction over retail rates. 15 U.S.C. § 717(b). But when it comes to *practices that affect rates*, there is no such symmetry: Section 5(a) gives FERC exclusive jurisdiction over any "practice * * * affecting" wholesale rates, *id.* § 717d(a), and does not reserve authority to the states to regulate practices affecting retail rates. Thus, where, as here, a practice affects both wholesale rates and retail rates, the NGA places that matter squarely within FERC's exclusive jurisdiction.

That conclusion is consistent with *Northwest Central*, which rejects Respondents' "arise from" test. *Northwest Central* explains that when a state's regulation arises out of a state-regulated area, but is

aimed at something in the federal field, it is field-preempted. 489 U.S. at 513-514.

Respondents' remaining theories fare no better. They say this is a conflict-preemption case, but it is not. They say the NGA does not field-preempt statutes of general applicability, but that too is incorrect. And finally, they say they do not seek to regulate the same thing as FERC at all: They are aiming at a conspiracy to inflate retail rates, they say, while FERC regulates index manipulation. But that notion collapses upon even cursory review. Respondents did not allege collusion in the abstract, or some retail-specific conspiracy. They alleged collusion *to manipulate indices*, and actual manipulation of those indices. And their complaints rely heavily on FERC's index-manipulation findings. Respondents' claims and FERC's regulation are directed at the same thing.

Unable to prevail on the question the Court granted certiorari to decide—whether the NGA "preempts state-law claims challenging industry practices that *directly affect* the wholesale natural gas market," Pet. i (emphasis added)—Respondents attack the question's factual predicate and argue that the practices did not directly affect the wholesale market. The argument fails on many fronts. First, Respondents' own complaints allege that "[d]efendants' conspiracy *directly affected* prices for natural gas." J.A. 357, 412 (emphasis added). Second, Respondents' expert conceded the point. Third, the District Court determined, on undisputed evidence, that the alleged index-manipulation practices directly affect wholesale rates. Fourth, Respondents waived the issue below. And finally, the direct effect is obvious: Index prices were routinely incorporated as the price term in jurisdictional transactions.

FERC thus had (and has) jurisdiction to regulate Petitioners' alleged index-manipulation practices, and states do not. That conclusion creates no unfairness: FERC has authority to punish index manipulation, and Respondents could have sought recompense under the *federal* antitrust laws—they simply did not timely do so. The Ninth Circuit should be reversed.

ARGUMENT

I. RESPONDENTS' LAWSUITS ARE PREEMPTED.

A. FERC Has Exclusive Jurisdiction Over Practices Directly Affecting Jurisdictional Rates.

The rule in this case is straightforward: FERC has exclusive jurisdiction under NGA Section 5(a) to regulate any "practice * * * affecting" wholesale rates. 15 U.S.C. § 717d(a). That provision gives FERC authority to regulate practices that directly—as opposed to incidentally or tangentially—affect those rates. *Schneidewind*, 485 U.S. at 304, 308; *Order on Rehearing and Clarification*, 139 F.E.R.C. ¶ 61,132, ¶ 358 (May 17, 2012) ("practices that directly affect or are closely related to" wholesale rates); *ISO New England, Inc.*, 122 F.E.R.C. ¶ 61,144, ¶¶ 61,762-63 (Feb. 21, 2008); Opening Br. 35-36.

Because FERC has exclusive jurisdiction to regulate practices directly affecting wholesale rates, states "may not regulate" them. *Mississippi Power*, 487 U.S. at 374. This ouster of state regulation is a matter of field preemption. *Schneidewind*, 485 U.S. at 305. There "can be no divided authority" when, as here, "[C]ongress has established an exclusive form of regulation." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 580 (1981) (citation omitted).

The NGA thus creates an exclusive federal field. In determining when a state has invaded that field, this

Court asks whether the state's regulation is "directed at" something FERC may regulate, *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 92 (1963), or "amounts to a regulation" of matters within FERC's sphere, *Schneidewind*, 485 U.S. at 307; Opening Br. 23. If so, it is preempted, no matter its purpose or putative subject area. *Northwest Central*, 489 U.S. at 518.

These precedents resolve this case. FERC has exclusive jurisdiction to regulate practices that directly affect jurisdictional rates; FERC regulates index-manipulation practices because they directly affect jurisdictional rates; and Respondents' state-law suits, which amount to regulation of the same practices, are field-preempted. That should be the end of the matter.

B. Respondents Cannot Avoid Field Preemption By Relying On Section 1(b).

Respondents and their *amici* argue that Respondents' suits are not preempted because they arise out of retail sales, and NGA Section 1(b) reserves regulation of retail sales to the states. Learjet Br. 17; States Br. 11-13. That is incorrect as a simple matter of statutory interpretation. Respondents' damage claims may *arise* out of retail sales, but they *regulate* index manipulation. And index manipulation is not a matter reserved to the states under Section 1(b). It is, instead, a practice that directly affects both wholesale and retail rates. The NGA's plain language provides that when it comes to such practices, FERC's exclusive jurisdiction prevails.

1. Petitioners agree that there are some matters Section 1(b) reserves to the states, and in those areas there can be no field preemption. *See* Opening Br. 38.

But what Respondents' suits seek to regulate does not fall within those areas.[1]

Section 1(b) reserves to the states authority over the non-jurisdictional "sale of natural gas." 15 U.S.C. § 717(b). The Court has explained that this "proviso of § 1(b) withheld from [FERC] only rate-setting authority with respect to direct sales." *Federal Power Comm'n* v. *Louisiana Power & Light*, 406 U.S. 621, 638 (1972). FERC therefore is "fence[d] off" from setting rates in retail transactions, just as it was fenced off in *Northwest Central* from dictating timing of production by natural-gas producers. 489 U.S. at 511. These limitations coexist comfortably with this Court's direct-effect test: FERC has exclusive authority to regulate practices that directly affect jurisdictional rates, but FERC may not use that authority to regulate things that the NGA says only states may regulate.

But what Respondents' suits seek to regulate is not retail transactions *per se*—a reality underscored by the fact that many of the Petitioners they seek to punish did not even *engage* in retail transactions with any Respondent. *See* J.A. 246-249. Respondents' suits instead seek to regulate *practices* by jurisdictional gas companies that would *affect* retail and wholesale rates alike. Indeed, Respondents effectively concede as much by asserting that their suits would regulate "matters" that "arise from" retail transactions, rather than retail transactions themselves. Learjet Br. 17, 25;

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[1] Respondents say Petitioners "do not dispute" that their claims "implicate 'the jurisdictional provisions of Section 1(b).' " Learjet Br. 25 (citation omitted). Not true. The whole point of Petitioners' opening brief was that though Respondents claim their suits operate in the state field, they in fact regulate in the NGA-occupied field. Opening Br. 23-29, 38.

see infra at 9-12 (discussing Respondents' "arise from" test).

That is a key concession, and a key difference, because the NGA carefully distinguishes between rates on the one hand and practices affecting rates on the other. The NGA gives FERC jurisdiction over wholesale rates in Section 1(b), 15 U.S.C. § 717(b), and it separately gives FERC jurisdiction over practices affecting such rates in Section 5(a), *id.* § 717d(a). By contrast, the NGA gives states jurisdiction over retail rates in Section 1(b), but reserves to them no separate statutory authority over *practices affecting* such rates. *See id.* § 717(b); INGAA Br. 16-17.

The NGA thus settles the issue of jurisdiction over practices that affect wholesale and retail rates alike: Congress explicitly gave FERC jurisdiction over such practices; it made FERC's jurisdiction exclusive where it exists; and it chose *not* to include such practices within the area reserved for state control. That decides this case. No one disputes that the alleged index-manipulation practices affect wholesale and retail rates in the same way.[2] FERC accordingly concluded it has jurisdiction to regulate those practices. Opening Br. 9-10. That conclusion is entitled to *Chevron* deference, *infra* at 24-25, and is correct. As the District Court concluded, it would "have little trouble rejecting

[2] Respondents now run from the fact that index manipulation is at issue; instead, they claim they alleged collusion in the abstract, Wisconsin Br. 14, or a specific conspiracy to manipulate *retail* prices in particular, Learjet Br. 38. Neither recharacterization is accurate. Instead, relying heavily on FERC's investigation of how index manipulation may have affected the jurisdictional market, the complaints allege collusion to *manipulate indices*, and actual manipulation of those indices—the very practice FERC regulates. *See infra* at 21-25.

a challenge to FERC's jurisdiction to prohibit jurisdictional sellers" from manipulating indices because indices "are the method by which jurisdictional rates are set." Pet. App. 111a.

That distinguishes *Northwest Central*. *Northwest Central* addressed a matter—the timing of producers' natural-gas production—indisputably within the states' reserved Section 1(b) authority over the "production and gathering" of natural gas. 489 U.S. at 513. FERC thus was "fence[d] off" from regulating. *Id.* at 512. By contrast, Respondents seek to regulate behavior that is *not* within the states' reserved authority, and FERC has jurisdiction to, and did, regulate that behavior. *Northwest Central* has no application.

This case also differs from *Northwest Central* in a second critical respect: In *Northwest Central*, the state's regulation was "directed to" the behavior of state-regulated gas producers, not FERC-regulated interstate pipelines. 489 U.S. at 512. To the Court that was dispositive. It explained that in *Northern Natural*, *Schneidewind*, and *Transcontinental Pipe Line Corp.* v. *State Oil & Gas Board*, 474 U.S. 409 (1986) (*Transco*), state regulations were preempted because they were " 'unmistakably and unambiguously directed at' " FERC-regulated interstate pipelines and interstate gas companies. *Northwest Central*, 489 U.S. at 513 & n.10 (citation omitted). Thus, the state had " 'invalidly invade[d] the federal agency's exclusive domain.' " *Id.* (citation omitted; alteration in original). The state regulation in *Northwest Central* was different, and not preempted, because it was "directed to the behavior of gas producers"—a group regulated by the states. *Id.* at 512.

Here, Respondents' lawsuits are "directed at" behavior of jurisdictional gas companies that affected jurisdictional rates. *Id.* at 513. They accordingly "amount[] to a regulation" of matters within FERC's sphere. *Schneidewind*, 485 U.S. at 307. *Northwest Central* confirms that such state regulation is not insulated by Section 1(b).

2. Unable to take shelter under Section 1(b) as written, Respondents propose to expand that provision dramatically: They say it protects state authority not just over retail sales, but over all matters that "arise from," or "concern," retail sales. Learjet Br. 17-18; Wisconsin Br. 16-21.

That rule is spun from whole cloth. And it suffers from two fatal flaws.

First, it is inconsistent with the statutory text, which says retail "*sale[s]*" are reserved to the states, 15 U.S.C. § 717(b) (emphasis added), not everything "arising from" such sales. Petitioners' "arising from" test amounts to an effort to bring things that *affect* retail sales within Section 1(b). But that is not how the statute works. The NGA gives FERC jurisdiction over wholesale rates; it gives states jurisdiction over retail rates; and it gives *FERC* jurisdiction over practices affecting wholesale rates. "[C]ritically, there is no parallel provision reserving states similar jurisdiction over practices that affect nonjurisdictional rates." INGAA Br. 17. Respondents' theory thus seeks to flip the statute on its head. And it would undercut "the uniformity of regulation which was an objective" of the NGA, *Northern Natural*, 372 U.S. at 91-92, by authorizing any retail buyer to sue under state law anytime that buyer theorizes that some upstream event affected retail gas prices. INGAA Br. 19-20.

Second, Respondents' "arises from" rule is refuted by *Northwest Central* itself. *Northwest Central* explained that the state regulations before it, and those at issue in *Northern Natural* and *Transco*, all concerned the same thing: efficient gas production. 489 U.S. at 497-489, 513. And Section 1(b) commits gas production to the states. Under Respondents' rule, then, none of the regulations should have been field-preempted; all "concern[ed] a matter that Section 1(b) reserves to states." Learjet Br. 18. But that was not the result. Instead, the regulation in *Northwest Central* escaped preemption because it was "directed at" natural-gas producers, but the regulations in *Northern Natural* and *Transco were* field-preempted because they were "directed at" FERC-regulated pipelines engaged in jurisdictional activity. 489 U.S. at 513. The regulations' targets and effects determined whether they were field-preempted, not what they "concerned" or "arose from."[3]

Respondents' "arising from" test likewise contradicts *Louisiana Power*. There, a utility brought a state-law breach-of-contract action against an interstate pipeline that curtailed retail deliveries. 406 U.S. at 625. The pipeline argued that the suit interfered with FERC's authority to regulate interstate natural-gas transportation, and the utility responded—like Respondents here—that Section 1(b)'s proviso "creates a complete exemption of direct sales." *Id.* at 637. This Court

[3] Respondents rely on *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355 (1986). But the statute there granted *states* authority over "practices * * * in connection with intrastate communication services," allowing states priority when a practice affected both spheres. *Id.* at 370, 373. It was the inverse of the NGA.

disagreed. Even though the utility's contract claim *arose* from a retail sale, its suit intruded on FERC's exclusive power over interstate transportation. *Id.* at 641. The suit had to yield.

3. Respondents' proposed "arising from" test, in short, cannot be reconciled with the NGA's text or controlling precedent. That dooms their efforts to distinguish *Schneidewind* and *Mississippi Power*.

Respondents say *Schneidewind* did not "involve[] a state law operating in 'the field expressly reserved by the NGA to the States,' " whereas this case does because it "arises from" retail sales. Learjet Br. 24 (citation omitted). But "arises from" is not the test. Instead, the key point is that in both *Schneidewind* and this case, state law was being used to regulate a practice by jurisdictional gas companies that directly affected wholesale rates. *Schneidewind* holds that such a regulation is field-preempted. 485 U.S. at 306-309.

As for *Mississippi Power*, Respondents try a more complex gambit. They acknowledge that in *Mississippi Power* the state was trying to exercise its "undoubted jurisdiction over retail sales" but was preempted—a result inconsistent with their "arises from" test. Learjet Br. 24. They try to explain away that result by positing that *Northwest Central* created a "framework for dealing with overlaps in jurisdiction"—namely, when authority overlaps, state law is preempted only if it actually conflicts with federal law. Respondents then claim that *Mississippi Power* was only a *conflict* preemption case, "consistent with *Northwest Central*'s framework." *Id.* at 14, 24.

Both pieces of that theory are pulled from thin air. *First*, *Northwest Central* developed no "framework for

dealing with overlaps in jurisdiction"; it instead found that FERC had *no* jurisdiction. 489 U.S. at 512, 515. *Second*, *Mississippi Power* is a field-preemption decision. This Court wrote that "FERC's *exclusive jurisdiction* applies not only to rates but also to power allocations that affect wholesale rates"; that states must "give effect to Congress' desire to give FERC *plenary authority* over interstate wholesale rates"; and that Mississippi's "effort to *invade the province of federal authority* must be rejected." 487 U.S. at 371, 373, 377 (emphases added). That is field-preemption language. And Justice Scalia's concurrence explained that "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Id.* at 377. Respondents accuse us of "fixating" on that statement, Learjet Br. 24-25, but as Justice Scalia recognized, the principle was "common ground" with the majority, 489 U.S. at 377.

This is a case, just like *Mississippi Power*, where a unitary practice affected wholesale and retail rates. Consistent with the NGA's text, this Court has confirmed that only the federal government has jurisdiction in that circumstance.

C. FERC's Exclusive Jurisdiction Preempts State Laws Of "General Applicability" Where Those Laws Are Used To Regulate Practices Affecting Jurisdictional Rates.

Respondents assert that where a state law is of "general applicability," a claim based on that law cannot be field-preempted. Learjet Br. 28-35; Wisconsin Br. 22; States Br. 9-11. Respondents made no such argument below, and it is simply wrong. No matter how "general" a state law is, it is preempted as applied if used to invade a federal field.

1. Respondents' argument rests entirely on exaggerating the import of a footnote in *Schneidewind*. The Court there found facially preempted a Michigan securities regulation aimed at gas companies. 485 U.S. at 306-309. The Court observed in passing that its holding did not mean more general state securities regulation was necessarily imperiled: "[O]ne area FERC does not exclusively control is 'securities law' in the traditional sense of the term. * * * [S]uch traditional 'securities regulation' is not FERC's direct concern." *Id.* at 308 n.11.

That, of course, is true. A securities issuer's false statement typically would not directly affect wholesale rates or any area reserved to FERC. But nothing in *Schneidewind*'s footnote remotely suggested a sweeping rule that *no* application of a generally applicable law can ever be field-preempted. Nor do the NGA cases bear that out. This Court held state-law breach-of-contract actions preempted in *Louisiana Power*, 406 U.S. at 641, and *Arkansas Louisiana Gas*, explaining that "the mere fact [parties] brought th[eir] suit under state law would not rescue it, for when [C]ongress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce,' " 453 U.S. at 580 (citation omitted).

Respondents' contrary rule would make little sense. One can easily imagine a state using a generally applicable statute to target things within FERC's exclusive jurisdiction—for example, a state agency purporting to regulate interstate gas transportation under the aegis of a generally applicable environmental law. There is no reason why field preemption should apply differently than it would if the state enacted a more specific statute. The question is simply whether the state and

federal laws "operate upon the same object." *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926).

This Court's non-NGA cases drive the point home. In *Kurns* v. *Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), for example, a tort plaintiff argued that " 'a preempted field does not necessarily include state common law.' " *Id.* at 1269 (citation omitted). The majority and concurrence rejected the argument. They wrote that the "scope of the agency's power under the" statute "determine[d] the boundaries of the preempted field," *id.* at 1270 (Kagan, J., concurring), and that "[t]hat categorical conclusion admits of no exception for state common-law duties," including common-law tort suits, *id.* at 1269 (majority op.); *accord Farmer* v. *United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 300 (1977) ("[I]t is well settled that the general applicability of a state cause of action is not sufficient to exempt it from pre-emption.").

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1982), on which Respondents rely, is inapposite. *Silkwood* held that tort remedies were not field-preempted because *Congress specifically intended to leave them in place. Id.* at 253-256. There is no such evidence here.

2. Respondents advance the related argument that "state antitrust claims fall outside the Act's field-preemptive reach." Learjet Br. 30-31. The answer is the same: The NGA does not *categorically* preempt state antitrust law, but it does field-preempt applications of state antitrust law that invade the federal field.

Respondents' contrary argument is as follows: "[T]he NGA does not displace federal antitrust law" and "state antitrust law only mirrors federal antitrust law"; accordingly, "there is no reason why the NGA should

preempt state antitrust law." Learjet Br. 31-32; States Br. 16. That argument ignores fundamental field-preemption principles. Even if state antitrust law was identical to federal antitrust law—and it is not, *see infra* at 16-17—it would still be preempted when it invades the NGA-occupied field. "Where Congress occupies an entire field * * * even complementary state regulation is impermissible." *Arizona* v. *United States*, 132 S. Ct. 2492, 2502 (2012). That is why this Court has held state antitrust law field-preempted in cases where federal antitrust law is not—a holding impossible under Respondents' theory. *See*, *e.g.*, *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 635 (1975) (federal antitrust law applied, but "it does not follow that state antitrust law may apply as well").

3. Finally, Respondents' lengthy argument that there is no conflict here, Learjet Br. 32-35, is irrelevant because Petitioners advance a field-preemption claim.

To be sure, several NGA field-preemption cases discuss the "imminent possibility of collision" between state and federal law. *E.g.*, *Schneidewind*, 485 U.S. at 310; *Northern Natural*, 372 U.S. at 92. But they do so not in service of a separate conflict-preemption analysis—no such argument was pressed in the cases just cited—but instead to "support" a field-preemption finding. *Schneidewind*, 485 U.S. at 310. That "imminent possibility" supports field preemption here, too, *see* Opening Br. 29-33, but it does not make this a conflict-preemption case.

Because this is a field-preemption case, Respondents' assertions about the consistency of state antitrust suits with federal natural-gas regulation are immaterial. Respondents' suits are preempted because they regulate in an NGA-occupied field, regardless of whether

they are consistent, parallel, or even helpful to FERC's regulation. *See Arizona*, 132 S. Ct. at 2502. It also makes no difference that states find antitrust laws a useful way to regulate the wholesale-rate-affecting practices of jurisdictional gas companies. States Br. 15-16. The Supremacy Clause does not give way "simply because [antitrust law] is a matter of special concern to the States." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982).

In any event, the assurances of Respondents and their *amici* that state antitrust suits are perfectly harmonious with uniform natural-gas regulation ring hollow. Although some states may hew to federal antitrust doctrine, there is no requirement they do so. *See Smith* v. *Bayer*, 131 S. Ct. 2368, 2377-78 (2011). And in fact " 'there is much disagreement as to the meaning of a 'competitive' market, and, therefore, when antitrust law should intervene.' " Washington Legal Found. Br. 17 (citation omitted). That creates the risk of multiple, inconsistent state regulatory schemes governing matters Congress entrusted to FERC. *See* Opening Br. 31-32.

D. Respondents' Policy Concerns Are Baseless.

Respondents argue that preemption would allow jurisdictional companies to get away with manipulating indices; would make it impossible for retail purchasers to be compensated; and would create a regulatory gap during the relevant time period. Learjet Br. 47-48; Wisconsin Br. 24-27, 56-62; States Br. 7-9. Not so.

1. FERC has, and has exercised, substantial authority to regulate index manipulation. FERC revoked Enron's blanket market certificate due to index ma-

nipulation and related offenses, ending its ability to sell wholesale gas. 103 F.E.R.C. ¶ 61,343 (June 25, 2003). Moreover, FERC has asserted that it may order "disgorgement of unjust profits." 68 Fed. Reg. 66,332, 66,333-34 (Nov. 26, 2003). And Petitioners have paid millions to federal regulators to settle allegations similar to Respondents'. *See* J.A. 251, 254, 262.

Nor are retail purchasers left out in the cold. As Respondents admit, *they could have sued under federal antitrust law*. Learjet Br. 11-12; Wisconsin Br. 11. Indeed, Respondents belatedly tried to do so when the District Court found their state-law claims preempted. Pet. App. 40a-41a. The District Court properly rejected that bid as untimely, *id.*—a holding Respondents bemoan but do not challenge.

2. Respondents' assertions of a regulatory gap are similarly baseless. FERC has *always* had authority to regulate index manipulation by jurisdictional sellers that directly affects jurisdictional rates, and after the EPAct it can regulate such manipulation by other entities, too. Opening Br. 44-45. Federal antitrust suits likewise are available.

That distinguishes this case from *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 521-522 (1947), where ousting the states would have left *no* regulator—state or federal—in charge. Here, there is comprehensive regulation over the field; it is just not divided the way Respondents would prefer.[4]

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[4] Respondents' policy arguments also rely on exaggerated, and disputed, factual assertions. For example, Respondents and their *amici* say the "dramatic spike" in gas prices in 2000 "was the result" of index manipulation, Wisconsin Br. 6, but FERC found

II. RESPONDENTS' DIRECT-EFFECT ARGUMENTS ARE FORECLOSED AND MERITLESS.

Because FERC has exclusive jurisdiction to regulate practices that directly affect wholesale rates, this case should be over. Respondents conceded that index manipulation directly affects wholesale rates, the District Court resolved the issue against them, and Respondents waived the issue on appeal. Respondents nevertheless purport to challenge the direct-effect finding in this Court, minting several new arguments in the process. Each is meritless.

A. Respondents' Arguments Are Foreclosed.

1. Respondents' complaints repeatedly allege that "[d]efendants' conspiracy *directly affected prices for natural gas*," including gas "traded" in the wholesale market. J.A. 357, 412 (emphasis added). That is the opposite of what they now argue.

Nor was that a one-time concession. Respondents' expert admitted that "the prices that were the subject of the manipulation *are* the prices of natural gas in this country" and that the alleged index-manipulation practices had a "direct impact" on gas prices. J.A. 593-594 (emphasis added). Consequently, the District Court held that "[n]o genuine issue of fact remains that

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that the "root causes" of the crisis were "supply shortfalls and a fatally flawed market design," J.A. 85, not index manipulation. Respondents also assert, as if it were an established fact, that the alleged index manipulation saddled direct retail buyers with far higher gas prices. *E.g.*, Wisconsin Br. 6-7. But Petitioners submitted evidence, which Respondents never rebutted, demonstrating that misreporting had nowhere near the effects on published price indices that Respondents hypothesize. *See, e.g.*, Dist. Ct. Dkt. No. 1635 5-11; Dkt. No. 1668 ¶¶ 5-8, 11-23, 29.

such practices directly affect the jurisdictional rate." Pet. App. 110a.

2. Respondents' no-direct-effect argument is also waived. On appeal, Respondents did not challenge the District Court's direct-effect holding; rather, they argued the District Court was wrong to apply a direct-effect test at all, and should have applied a "transaction-based analysis" instead. Learjet C.A. Opening Br. 39. Respondents thus waived any challenge below to the District Court's direct-effect finding. Having done so, Respondents cannot challenge that finding in this Court. *See Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

The Learjet Respondents insist (Br. 36 n.7) they preserved the issue by referencing *American Gas Ass'n* v. *FERC*, 912 F.2d 1496 (D.C. Cir. 1990), in their Ninth Circuit briefs. In their opening brief below, however, the Learjet Respondents cited that case only for the proposition that the court should apply a transaction-based analysis and limit FERC's powers to " 'jurisdictional contracts.' " Learjet C.A. Opening Br. 36 (quoting *American Gas*, 912 F.2d at 1505). They did not challenge the District Court's direct-effect determination.

As for their reply brief, a reply cannot preserve an issue the opening brief waived. *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2251-52 (2011); *Joseph* v. *United States*, No. 13-10639, 2014 WL 2880493, at *1 (U.S. Dec. 1, 2014) (statement of Kagan, J., respecting denial of certiorari). And even if a reply brief could so do, Respondents' brief did not. It included a single sentence arguing that the effects of index-manipulation practices were " 'attenuated.' " Learjet Br. 36 n.7. That lone statement—made in passing while arguing

that the District Court should have applied a transaction-based analysis, *see* Learjet C.A. Reply Br. 4—is not enough to preserve appellate review of the District Court's factual finding because "[a]rguments made in passing and inadequately briefed are waived." *Maldonado* v. *Morales*, 556 F.3d 1037, 1048 n.4 (9th Cir. 2009). Having waived the argument below, Respondents cannot raise it here. Indeed, this Court granted certiorari on the very premise that Respondents' "state-law claims challeng[e] industry practices that directly affect the wholesale natural gas market." Pet. i.

B. In Any Event, Respondents' Challenge To The District Court's Direct-Effect Determination Fails.

Even if the District Court's direct-effects finding were before this Court, Respondents have offered no reason to disturb it.

1. The undisputed evidence establishes that index-manipulation practices directly affected jurisdictional rates. As the District Court correctly concluded, there was no dispute that "jurisdictional rates were set at index," and Respondents presented "no evidence" to the contrary. Pet. App. 111a n.19; *see E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027, 1032 (9th Cir. 2007) ("most of the transactions subject to FERC's jurisdictional authority" were pegged to indices); Learjet C.A. Opening Br. 12 (conceding indices were "used to set the price in jurisdictional transactions"). FERC concluded the same. Pet. App. 111a-112a; J.A. 150.

2. Respondents nonetheless advance various contrary arguments, most for the first time in this Court. Each is baseless.

a. Respondents say their suits are aimed at the "practice of conspiring to inflate prices in *retail* trans-

actions," and that that practice has no effect, direct or otherwise, on *wholesale* rates. Learjet Br. 38 (emphasis added); Wisconsin Br. 23. That is a bid to reframe the case at the eleventh hour. The record is devoid of evidence of a retail-only conspiracy, and Respondents have never claimed—until now—that such a conspiracy might exist. Instead, their complaints alleged a conspiracy to manipulate indices generally—a conspiracy directly affecting wholesale *and* retail rates. *See, e.g.*, J.A. 301 (alleging an "agree[ment] to report their false trades to the industry publications"); J.A. 357 (alleging a scheme to deliver "false * * * information * * * in an attempt to skew the price indices and, thus, the price of natural gas"); *id.* (alleging a scheme to report false information "to manipulate the natural gas price indices"). Nor did FERC identify or even suggest a retail-only conspiracy. The FERC report on which Respondents rely so heavily instead found that Petitioners attempted to manipulate indices, which would affect rates generally. *E.g.*, J.A. 88-89. Indeed, the nearly 200 pages of FERC staff reports in the Joint Appendix do not once use the word "retail." J.A. 84-240. There is no support for the idea that there was specific collusion to manipulate *retail* prices.

The Wisconsin Respondents advance a similar argument: that their claims are not directed at the federal field because they target *collusion*, not index manipulation. Wisconsin Br. 14, 21-24. Nonsense. Respondents do not allege collusion in the abstract; they allege collusion *to manipulate indices*, and successful manipulation of those indices. That is why Respondents' complaints discuss index manipulation, the effects of index manipulation, and FERC's index-manipulation findings on practically every page. *See* J.A. 240-313, 318-367. Even the Learjet Respondents admits the

case is about companies allegedly "conspir[ing] with one another *to manipulate the indices*." Learjet Br. 8 (emphasis added). The District Court was correct that Respondents "cannot prevail" without showing that Petitioners "collusively manipulated the price indices." Pet. App. 115a. The pieces cannot be separated.

b. Respondents also contend that "many" transactions reported to the indices "concerned sales (or supposed sales) outside of FERC's jurisdiction." Learjet Br. 39. Even if that were true,[5] it is irrelevant. The question is not whether FERC has jurisdiction over the *sales* being reported. It is whether FERC has jurisdiction over Petitioners' conduct in reporting those sales—that is, whether their reports directly affected jurisdictional rates. The nature of the underlying sales is immaterial. Whether gas is sold at wholesale or retail, the sale price is compiled into a common index. Thus, because jurisdictional rates are pegged to the index, false reports of either wholesale or retail sales will directly affect jurisdictional rates. *See* U.S. Br. 27.

c. Respondents next contend that the effect of index reports on wholesale rates is not direct because it "stemmed only from petitioners' intervening choice to reference index prices in their own wholesale contracts." Learjet Br. 39, 45-46. That is incorrect in two respects. *First*, when parties use indices in wholesale contracts, they peg the sale price to some specified index published *in the future*. The decision to use an index price is made by the parties before the index price is published. *See* J.A. 640-641. Thus, the effect of any ensuing index manipulation on the wholesale

[5] FERC determined that it "has jurisdiction over most of the transactions that form the basis of the indices." J.A. 150.

rate is automatic; there is no "intervening" force. *Second*, it is not true that the effect of alleged index-manipulation practices was limited to Petitioners' "own wholesale contracts." Learjet Br. 39. The Ninth Circuit has observed that "most of the transactions subject to FERC's jurisdictional authority" were pegged to indices, *Gallo*, 503 F.3d at 1032, and FERC's survey of natural-gas companies confirmed the same. FERC received responses from *180* companies—far beyond the Petitioners here—and those companies priced "somewhere between 50 and 75 percent of their natural gas sales and purchases based on some form of natural gas index." FERC, *Report on Natural Gas and Electricity Price Indices* 25 (May 5, 2004), Dist. Ct. Dkt. No. 1882-28.

In any event, *Schneidewind* and *Northern Natural* rebut Respondents' view of what constitutes a "direct" effect. In *Schneidewind*, the Court held that a natural-gas company's capitalization directly affects rates, even though other factors inevitably influence the price of each sale. 485 U.S. at 308. And in *Northern Natural*, the Court held that a company's "purchasing patterns" bear an "intricate relationship" with the rates it eventually charges, even though other factors inevitably influence the resale price. 372 U.S. at 92. The effect here is far more immediate.

4. Finally, if there were any doubt that index-manipulation practices directly affect wholesale rates, FERC's exercise of its jurisdiction resolves it. Opening Br. 21-22; U.S. Br. 32-35. FERC promulgated a Code of Conduct expressly prohibiting jurisdictional sellers from manipulating price indices, 68 Fed. Reg. at 66,324-337, and concluded that it had jurisdiction over index manipulation even before the Code issued, *see* 107 F.E.R.C. ¶ 61,174, ¶¶ 61,688-90 (May 19, 2004);

U.S. Br. 6. As the Solicitor General explains (Br. 34), FERC's interpretation of its jurisdiction should be given broad deference and upheld because it represents a reasonable reading of the NGA. *See City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1871-73 (2013). Respondents' state-law actions fall within FERC's jurisdiction, as interpreted by FERC itself, and are preempted.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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