No. 13-271

IN THE

Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

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

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INTRODUCTION

The decision below squarely conflicts with the decisions of two state courts of last resort and is irreconcilable with this Court's straightforward rule for analyzing preemption: When a state-law claim is "aimed at" a subject Congress committed to federal control, that claim is preempted. *Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1268 (2012).

Applying this rule, the Supreme Courts of Tennessee and Nevada found the Natural Gas Act preempted state-law claims in cases arising out of the same facts at issue here. In both cases, as here, plaintiffs were retail customers; Respondents are flatly wrong to assert the contrary. And in both cases plaintiffs challenged the same practices at issue here—index manipulation, wash trading, and churning. The only material difference between those cases and this one was the preemption analysis. The Tennessee and Nevada courts asked whether plaintiffs' state-law claims were aimed at a part of the gas market subject to federal control. The Ninth Circuit, by contrast, focused not on what activity plaintiffs aimed to regulate, but on the type of *transaction* in which they allegedly suffered damage. The split between that formalistic approach and the practical one adopted by this Court, and two state high courts, is stark. This Court should resolve it.

Tellingly, the principal brief in opposition does not defend the Ninth Circuit's transaction-based approach. Instead, Respondents flee from the record by insisting that this case is about practices that had only an "incidental," "indirect" effect on wholesale gas rates. Learjet Opp. i, 5, 8. That, they theorize, is why the Ninth Circuit held there was no preemption,

and why its holding aligns with this Court's precedent. *Id.* at 20.

Respondents' assertions are factually incorrect. The District Court found based on extensive—and undisputed—record evidence that *"[n]o genuine issue of material fact remains* that [index-manipulation] practices *directly affect the jurisdictional rate*" because indices are the very "method by which [wholesale] rates are set." Pet. App. 110a-111a (emphases added). It therefore concluded that FERC had exclusive jurisdiction over the practices. Respondents did not challenge that factual predicate on appeal, and the Ninth Circuit did not take issue with it. Instead, the panel announced an erroneous legal rule—state-law claims are not preempted if the plaintiffs bought gas in retail transactions—that rendered the direct-effects question irrelevant. Respondents cannot eliminate the conflict by rewriting the Ninth Circuit's decision.

Respondents' other arguments also fail. They say the Energy Policy Act of 2005 (EPAct) changed the scope of FERC's authority such that the Ninth Circuit's holding will not apply in future cases. That is wrong three times over. First, the EPAct did not change FERC's ability to regulate alleged deceptive practices by "jurisdictional" companies like Petitioners; it merely expanded FERC's authority so it could also regulate deceptive practices by "any entity." Second, the EPAct did not change the fact that FERC can regulate only practices that directly affect jurisdictional rates. The EPAct thus does nothing to blunt the Ninth Circuit's erroneous holding; under the panel's approach, every state can compete with FERC to regulate anytime a deceptive practice

directly affects wholesale rates but also happens to affect *retail* rates.

Finally, the Ninth Circuit's holding is not limited to deceptive-practices cases, and so the EPAct's provision forbidding market manipulation could not have neutralized that holding even if the statute said what Respondents claim. To the contrary, as Petitioners' *amici* explain, the Ninth Circuit's rule authorizes states to impose their idiosyncratic regulatory regimes on gas and power companies in a wide range of areas that, until now, were regulated only by FERC. That is a recipe for regulatory chaos across two major industries, both crucial to the U.S. economy. The writ should be granted, or, at a minimum, the Court should call for the views of the Solicitor General.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CANNOT BE SQUARED WITH *LEGGETT* OR *JOHNSON*.

Respondents argue that neither *Leggett* nor *Johnson* involved retail transactions, and that those cases accordingly cannot conflict with the decision below. Learjet Opp. 10-12; Wisconsin Opp. 22-24. Respondents are incorrect.

1. Respondents get *Leggett*'s facts wrong. The Tennessee Supreme Court identified the plaintiffs as "retail customers." *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843, 849 (Tenn. 2010). Just like in this case, those plaintiffs alleged that practices of index manipulation, "churning," and "wash trades" caused them to pay higher "retail" prices. *Id.* at 848-49. And just like Respondents here, the *Leggett* plaintiffs argued that "their claims are not pre-empted because they are based on consumer transactions"—i.e., retail purchases. *Id.* at 872. But *Leggett*, unlike

the Ninth Circuit, rejected that argument. It explained that though plaintiffs were retail consumers, their claims were nonetheless preempted because they "necessarily intrude[d] on the federal domain, even if the transactions to which they were direct parties fell outside the scope of the NGA." *Id.*

Respondents cite that passage to claim that "the Tennessee Supreme Court deemed the plaintiffs to be 'wholesale' purchasers." Learjet Opp. 10. It did no such thing. It instead held that the type of transaction in which plaintiffs bought gas *did not matter*; all that mattered was that their claims "necessarily intrude[d] on the federal domain." 308 S.W.3d at 872.

That is the polar opposite of the Ninth Circuit's holding. Respondents here brought state-law claims that "necessarily intrude on the federal domain" by seeking to impose liability for practices that FERC has the power to regulate—and does regulate—because they directly affect wholesale rates. Those claims would be preempted in Tennessee. This conflict on an important preemption question merits this Court's review.

2. Respondents likewise are wrong about the facts of *State ex rel. Johnson* v. *Reliant Energy, Inc.,* 289 P.3d 1186 (Nev. 2012). The *Johnson* plaintiffs, too, were retail purchasers who alleged that they paid higher retail prices because of churning and similar alleged manipulations. *See id.* at 1188 & n.2. Indeed, the first paragraph of the *Johnson* plaintiffs' petition for certiorari stated: "The principal allegation is that [defendants'] * * * manipulative natural gas trading activity * * * caused substantial overcharges in *retail natural gas and electricity prices paid by Southern Nevada consumers*." Pet. for

Certiorari 1, No. 12-980, 2012 WL 7037173 (Dec. 26, 2012) (emphasis added).

That fact destroys Respondents' argument. They nonetheless point triumphantly at Reliant's statement in *Johnson* that plaintiffs' claims there "challeng[ed] only wholesale transactions." Learjet Opp. 12. They miss the point of that statement altogether. Reliant was saying the same thing Petitioners are saying here: Even though plaintiffs allegedly suffered damage in retail transactions, their claims are preempted because what they *challenge* are practices affecting the wholesale market. The Nevada court recognized as much. The Ninth Circuit did not.

As Reliant said, the Ninth Circuit's field-preemption framework "is at odds with the decision[ ] of * * * the Nevada Supreme Court." Br. in Opp. 15*,* No. 12-980, 2013 WL 2428988 (June 3, 2013). This case—wrongly decided, unlike *Johnson*—"present[s] an ideal vehicle to resolve that conflict[.]" *Id.*

II. THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENT.

Respondents likewise fail to harmonize the Ninth Circuit's decision with this Court's decisions in cases like *Kurns* and *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988).

1. The Learjet Respondents try to justify the Ninth Circuit's holding by shoehorning it into the "indirect effects" box. Their efforts fail.

a. NGA Section 5 gives the federal government exclusive control over gas-company practices that affect jurisdictional rates. 15 U.S.C. § 717d(a). Courts have recognized that there must be some limit on that principle since most anything a gas

company does can be understood to affect rates in some attenuated way. Courts accordingly have held that " 'practices' is 'limited to those methods or ways of doing things * * * that directly affect the rate" and does not include "all those remote things * * * that might in some sense indirectly or ultimately do so." Pet. App. 105a (quoting *California Indep. Sys. Operator Corp.* v. *FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004)); *accord Northwest Cent. Pipeline* v. *State Corp. Comm'n*, 489 U.S. 493 (1989).

b. Respondents insist that this is an indirect-effects case. Learjet Opp. i, 5, 8, 18-22. They say the conduct they seek to regulate through lawsuits "had at most an incidental effect on wholesale rates." *Id.* at i. And they depict the Ninth Circuit's decision as an indirect-effects holding that "resides comfortably in the mainstream" of this Court's "incidental or indirect effect" decisions, including *Northwest Central*. *Id.* at 5.

But Respondents' premise is pure fiction. In fact, it was undisputed below that the practices at issue had a direct effect on wholesale rates. The District Court surveyed the summary-judgment record and found that the indices Petitioners allegedly manipulated were used to price " 'most transactions subject to FERC's jurisdictional authority.' " Pet. App. 111a n.19. Indeed, Respondents' own expert stated that "it can be said that the prices that were the subject of the manipulation *are* the prices of natural gas in this country," including wholesale prices. *Id.* at 112a & n.20. On that record, the District Court unsurprisingly found that "[n]o genuine issue of material fact remains" that Petitioners' alleged index-manipulation practices "directly affect the jurisdic-

tional rate." *Id.* at 110a-111a. This is no indirect-effects case.

Respondents strain to explain away the record in a footnote: "The district court once used the phrase 'directly affect,' but respondents challenged that characterization on appeal as incorrect. The Ninth Circuit * * * agreed with respondents." Learjet Opp. 19-20 n.3. Every assertion in that footnote is wrong. The District Court spent pages explaining how index manipulation directly affected wholesale rates. Pet. App. 110-112 & nn. 19-20. And Respondents' claim that they "challenged" the District Court's finding is false, which is why they provide no citation. Instead—and consistent with the District Court's undisputed finding—Respondents conceded that index prices were "used to set the price in jurisdictional transactions[.]" Resp. CA9 Opening Br. 11-12.

Nor did the Ninth Circuit "agree[ ] with Respondents" that the effect on wholesale rates was indirect. Learjet Opp. 19 n.3. The panel did not say a word about the issue. The panel could sidestep it precisely because of the erroneous holding that the NGA does not preempt state-law claims "arising out of transactions outside of FERC's jurisdiction." Pet. App. 28a. That approach rendered irrelevant the directness of the effect on wholesale rates—the very factor that this Court has called the "crux" of the NGA-preemption issue, *Schneidewind*, 485 U.S. at 306, and that the District Court correctly deemed dispositive.

In the end, Respondents' counterfactual focus on indirect effects is a failed attempt to distract from the key point: The Ninth Circuit adopted a "transactional" preemption test. That test is irreconcilable with this Court's teaching that a state-law claim

"aimed" at a subject committed to federal control is preempted. *Kurns*, 132 S. Ct. at 1268.

2. The Wisconsin Respondents take a different tack. They admit that under the Ninth Circuit's rule, "the test is whether the sales in question are wholesale or retail." Wisconsin Opp. 19 n.20. And they try to defend that rule, to no avail.

Respondents observe that the NGA gives the federal government power to regulate wholesale sales and the states power to regulate retail sales. Wisconsin Opp. 17. They argue that the panel's decision hews to that demarcation because Respondents' state-law claims "exclusively challenge retail sales" and thus "fall on the state side of the jurisdictional line." *Id.*

That is just the Ninth Circuit's fundamental mistake, rephrased. To be sure, Respondents seek damages based on retail purchases, but their claims do not "exclusively challenge retail sales." Instead, as the Learjet Respondents admit, Respondents' claims are directed at, and seek to impose liability for, "conduct"—index manipulation and other practices—that preceded Respondents' retail sales. Learjet Opp. i. They cannot do so under this Court's precedent. The practices Respondents challenge directly affected wholesale rates, and therefore federal law is the exclusive mechanism to regulate those practices. *See Mississippi Power & Light Co.* v. *Mississippi ex. rel. Moore*, 487 U.S. 354, 377 (1988) ("[I]f FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.") (Scalia, J., concurring). Respondents' argument, like the decision below, ignores this Court's teaching that suits "directed at * * * things over which [the NGA] has comprehensive authority" fall on the federal side of the line. *Schneidewind*, 485 U.S. at 308; *Trans-*

continental Pipe Line Corp. v. *State Oil & Gas Bd.*, 474 U.S. 409, 419 (1986); *see Kurns*, 132 S. Ct. at 1268.[1]

Respondents also assert that Petitioners' approach would allow FERC to regulate retail sales and thus "would nullify the jurisdictional limits of federal power[.]" Wisconsin Opp. 32. But that just repeats the misconception discussed above. No one is saying FERC can regulate retail sales. On the contrary, the states retain their full measure of authority over those sales; for example, only states can regulate retail prices, and only states can regulate whether retail purchasers may use published indices to set retail prices. By contrast, federal regulation of index-reporting practices does not "regulate" retail sales. Instead, it ensures uniform federal regulation of a practice that directly affects jurisdictional gas rates nationwide. *See Schneidewind,* 485 U.S. at 310 (referring to "the uniformity of regulation which was an objective" of the NGA) (quotation marks omitted). The assertion that the Ninth Circuit's rule is necessary to avoid "unravel[ing] the dual regulatory system," Wisconsin Opp. 32, is baseless.

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[1] Respondents fail to distinguish *Kurns*. Learjet Opp. 21-22; Wisconsin Opp. 21 n.22. As Respondents acknowledge, *Kurns* held that the locomotive-equipment field was preempted, regardless of how the plaintiff's claim arose. That is this case: Congress occupied the field of gas-company practices that directly affect wholesale rates. That Respondents' damages *arose* from retail transactions is irrelevant; the point is that their suits are *aimed at* the preempted area. *See* 132 S. Ct. at 1268.

III. THE QUESTION PRESENTED IS OF DEEP IMPORTANCE AND REVIEW IS REQUIRED NOW.

Finally, the "prudential" reasons Respondents proffer to deny certiorari deserve no weight.

1. Respondents maintain that any decision in this case would have "no import beyond this precise litigation" because the EPAct, Pub. L. No. 109-58, 119 Stat. 594 (2005), amended the NGA to give FERC jurisdiction over the practices at issue. Learjet Opp. 7, 12-14. That claim rests on two incorrect premises. The first premise is that prior to the EPAct, FERC had no power to regulate those practices. In fact, FERC always had authority to regulate deceptive jurisdictional-gas-company practices directly affecting wholesale rates; this authority is just a subset of its power to regulate *any* jurisdictional-gas-company practices directly affecting wholesale rates. *See* 15 U.S.C. § 717d(a). That is why FERC regulated these practices in 2003, two years before the EPAct was enacted. *See* Pet. 9.

The second premise is that the EPAct somehow expanded FERC's authority in a way that neutralizes the Ninth Circuit's erroneous holding. Wrong again. The EPAct extended FERC's jurisdiction to cover "any entity"—rather than just jurisdictional companies—whose deceptive practices directly affect the jurisdictional market. 15 U.S.C. § 717c-1. But the EPAct did not change the substantive reach of FERC's authority; it remains limited to practices that directly affect wholesale rates. *See* FERC Order No. 670, *Prohibition of Energy Market Manipulation*, ¶ 16 (2006) (interpreting EPAct not to "expand the types of transactions subject to the Commission's jurisdiction"). The EPAct thus does nothing to cure the Ninth Circuit's conclusion that states share

authority with FERC to regulate practices that directly affect both wholesale and retail rates. Before and after the EPAct, the panel's holding allows every state to regulate in a field FERC is supposed to occupy alone.

Moreover, the Ninth Circuit's transaction-based approach to preemption is not limited to deceptive practices. The decision instead threatens to destroy regulatory uniformity anytime a contract or practice simultaneously affects wholesale and retail markets. Respondents are therefore wrong to assert that "[t]he opinion below has no significance for any entity other than" the parties here. Wisconsin Opp. 29.

Indeed, Respondents' assertion is completely belied by the multiple *amicus* briefs filed by associations representing all segments of the gas and power industries, from traders to pipelines to utilities. As *amici* explain, the Ninth Circuit's decision will fragment energy regulation by permitting all 50 states to impose their laws on any and all practices that affect wholesale rates, so long as retail sales are also affected.

That regulatory chaos will radiate throughout the gas and power industries, with ramifications far beyond alleged index manipulation. To take just one example, FERC regulates certain "accounting and financial reporting of its jurisdictional companies." FERC, *Accounting Matters*.[2] And yet any number of accounting practices could, under the Ninth Circuit's preemption test, subject gas companies to the whims of state-court juries asked to decide whether a practice is unfair under state law. *See* Br. of Washington

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[2] *Available at* http://www.ferc.gov/legal/acct-matts.asp.

Legal Found. 14-16. The Ninth Circuit's erroneous transaction-based test poses an ongoing, substantial threat to the interstate energy market.

2. Respondents further oppose review because the Ninth Circuit remanded the case for further proceedings. Learjet Opp. 23. But the Ninth Circuit's decision is its last word on the preemption question; remand will not change the legal issue decided by the Ninth Circuit or diminish its precedential impact. And this Court routinely reviews preemption cases in an identical procedural posture, where the lower court found no preemption at the summary-judgment stage and remanded for further proceedings. *See, e.g.*, *Dan's City Used Cars, Inc.* v. *Pelkey*, 133 S. Ct. 1769 (2013); *Altria Group, Inc.* v. *Good*, 555 U.S. 70 (2008); *Unum Life Ins. Co.* v. *Ward*, 526 U.S. 358 (1999). There is no barrier to review. Because the Ninth Circuit's preemption analysis critically undermines "the uniformity of the federal scheme," *Transcon*, 474 U.S. at 423, immediate review—and reversal—is warranted.

CONCLUSION

The petition should be granted. In the alternative, the Court may wish to call for the views of the Solicitor General.

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