No. 13-271

In The
Supreme Court of the United States

In Re Western States Wholesale
Natural Gas Antitrust Litigation

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR RESPONDENTS LEARJET, INC., *et al.*; HEARTLAND REGIONAL MEDICAL CENTER, *et al.*; BRECKENRIDGE BREWERY OF COLORADO, LLC, *et al.*; REORGANIZED FLI, INC.; and SINCLAIR OIL CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Given that respondents' claims arise out of retail transactions over which the Natural Gas Act, § 1(b), 15 U.S.C. § 717(b), forbids FERC from exercising jurisdiction, and that the conduct respondents challenge had at most an incidental effect on wholesale rates, did the court of appeals correctly hold that the Act – as it existed before it was amended in 2005 – does not preempt respondents' state-law claims that petitioners made false reports so as to artificially inflate prices for retail purchases of natural gas?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statements of the various respondents are grouped below according to the underlying lawsuit to which they belong.

In *Learjet*: Learjet, Inc. is wholly owned by Bombardier Corp. which is in turn wholly owned by Bombardier Inc. Bombardier Inc. is not publicly traded in the U.S., but is publicly traded on the Toronto, Canada stock exchange. Plaintiff Topeka Unified School District 501 is state entity and a public school district in Topeka, Kansas, and is therefore not owned by any publicly-held corporation.

In the *Sinclair* cases: Plaintiff Sinclair Oil Company is a wholly-owned subsidiary of the Sinclair Companies. Neither the Sinclair Oil Company nor the Sinclair Companies are publicly traded and no publicly-held company owns more than 10% of the stock of either Sinclair Oil Company or the Sinclair Companies.

In *Breckenridge*: Breckenridge Brewery of Colorado, LLC is jointly owned by BWD Holdings, LLC and Breckenridge Brewery of Denver. No publicly-traded company owns more than 10% of the stock of Breckenridge Brewery of Denver, BWD Holdings, LLC, or Breckenridge Brewery of Colorado, LLC. Plaintiff BBD Acquisition Co. is owned by BWD Holdings, LLC. Both BBD Acquisition Co. and BWD Holdings, LLC are privately-held corporations, and

RULE 29.6 CORPORATE DISCLOSURE STATEMENT – Continued

no publicly-held corporation owns 10% or more of their stock.

In *Heartland*: Heartland Regional Medical Center is a private non-profit entity, with Heartland Health, also a private non-profit, as its sole member. As such, Heartland Regional Medical Center is not publicly-held by any corporation. Plaintiff Northwest Missouri State University is a state entity and a public university in Maryville, Missouri, and is therefore not owned by any publicly-held corporation. Plaintiff Prime Tanning, Corp. (currently known as Tasman Leather Group LLC) is owned by Tasman Industries, Inc. Tasman Industries, Inc. is a private corporation, and no publicly-traded corporation owns 10% or more of its stock.

In *Reorganized FLI, Inc*.: Reorganized FLI, Inc. is a nongovernmental, private corporate entity. Reorganized FLI, Inc. has no parent corporation and no publicly-held corporation owns 10% or more of the shares of its stock.

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STATEMENT OF THE CASE

A. Factual and Legal Background

The Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq*., enacted by Congress in 1938, has recognized from its inception a dual federal-state regulatory system. *See, e.g., Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.,* 332 U.S. 507, 514-15 (1947). Thus, the NGA's core jurisdictional provision, Section 1(b), 15 U.S.C. § 717(b), sets out areas that the Federal Energy Regulatory Commission ("FERC") may, *and may not,* regulate:

> 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.

15 U.S.C. § 717(b) (emphasis added); *see also Panhandle Eastern*, 332 U.S. at 519 (noting "meticulous" Congressional allocation of NGA regulatory authority between states and federal government, and stating

that federal regulatory area "did not include direct consumer sales, whether for industrial or other uses").

By the 1990's, after market changes, users of natural gas were able to buy directly from gas producers, paying only transportation fees to pipelines and utilities. Because these were not "sales for resale," they were outside FERC's jurisdiction under Section 1(b) of the NGA. While buying directly was impractical for most residential consumers, most large industrial and commercial users (like the respondents and proposed class members in these cases) began buying their own gas themselves or through an agent.

To establish a pricing method for this new direct market, parties began to refer to privately-published indexes as reference points. In the 1980's, small private publications like *Inside FERC* and *Gas Daily* had begun collecting reports from gas traders about the volumes and prices of natural gas being sold at various trading points ("hubs") around the country. RE1341. That data was compiled to create and publish price indexes for those hubs on a monthly or daily basis. *Id*. As natural gas marketing began including more direct sales, consumers began using these indexes to set prices for the gas they were buying. *Id*. By the mid-1990's, the vast majority of all retail gas sales referenced an index price for a particular hub or location – for example, the price term in a natural gas sales contract might read "*Inside FERC* Southern Star Central + $0.31 per MMBtu." *See Policy Statement on Natural Gas & Electric*

Price Indices, 104 FERC ¶ 61121, at 2-3 (July 24, 2003), 2003 WL 21725984. While index prices were predominantly used to set the price in wholly non-jurisdictional transactions like the retail sales respondents challenge here, occasionally private parties, often including petitioners, might also choose them as a base point for pricing in jurisdictional transactions like sales for resale.

The method of determining price indexes had what proved to be a major flaw – there was no system to ensure that the reported information accurately described the market. There was no formal reporting process, and no way to independently verify the reports. RE1341. And FERC had no regulatory authority over the private publications or their indexes.

Energy traders, left to police themselves, often changed or simply made up the trades they reported to the publishers. RE1341-66. In fact, some petitioners have acknowledged that their traders fabricated virtually all reports to the publications during the relevant timeframe. *See, e.g.*, RE1351 (finding that 99% of El Paso's reported trades were false or inaccurate). Traders employed by many of the petitioners have been formally investigated, fined, and even imprisoned for their illegal conduct. *See* generally RE904-1325. Indeed, petitioners here, including Dynegy, AEP, Williams, CMS, ONEOK, and El Paso, have admitted their employees falsely reported data and have paid federal agencies millions of dollars to settle charges related to that market manipulation. *See* RE1340.

B. Procedural History

1. Respondents in all cases are industrial and commercial users of natural gas who purchased gas for their own consumption. *See, e.g.*, RE1504. They allege that petitioners conspired to manipulate privately-published index prices by reporting fictitious transactions and "wash" sales to the index publishers, thereby artificially inflating the retail prices paid by respondents to petitioners. None of the retail sales at issue in these cases were or could be regulated by FERC. *See Panhandle Eastern*, 332 U.S. at 507.

The district court held that respondents' state antitrust claims were impliedly preempted by the NGA. Although NGA § 1(b), 15 U.S.C. § 717(b), forbids federal regulation of retail natural gas sales, the district court held that a different NGA section, § 5(a), 15 U.S.C. § 717d, allowed FERC to regulate "practices affecting jurisdictional rates," and therefore preempted respondents' retail claims by implication.

2. The Ninth Circuit, in an opinion by Judge Bea, unanimously reversed. Adopting the D.C. Circuit's approach to harmonizing NGA §§ 1(b) and 5(a), the Ninth Circuit reasoned that Section 5(a) should apply only to activity by jurisdictional sellers "directly governing the rate in a jurisdictional sale" so as to preserve "the jurisdictional provisions of § 1(b), which reserve to the states regulatory authority over non-jurisdictional sales. . . ." Pet. App. 31a-32a. Because respondents here brought "claims arising out

of transactions outside FERC's jurisdiction," Pet. App. 28a, the court of appeals held there was no implied preemption.

REASONS FOR DENYING THE WRIT

The Natural Gas Act creates a scheme of dual federalism. Section 1(b), 15 U.S.C. § 717(b), gives FERC authority over certain wholesale sales but reserves to the States exclusive regulatory power – and thus expressly forbids FERC from exercising jurisdiction – over "any other transportation or sale of natural gas" (that is, retail sales). Another provision of the Act, Section 5(a), 15 U.S.C. § 717d(a), allows FERC to regulate "practice[s]" affecting certain wholesale rates. In order to implement these two statutory provisions in harmony, this Court has held for decades that the Act does *not* preempt state regulation over practices that have merely an incidental or indirect effect on wholesale transactions. The federal courts of appeals – most prominently, the D.C. and Fifth Circuit – have followed suit. To hold otherwise, these courts have recognized, would render meaningless the jurisdiction NGA § 1(b) gives states over retail transactions, because virtually any industry "practice" might incidentally "affect" wholesale rates. The Ninth Circuit's decision resides comfortably in the mainstream of this longstanding precedent.

Petitioners nevertheless seek certiorari, contending that the Ninth Circuit's unremarkable holding conflicts with decisions from two state supreme courts and will disrupt energy regulation. But the alleged conflict is illusory. The state court decisions petitioners cite both addressed preemption of different kinds of transactions than those at issue here – transactions that those courts deemed to be *wholesale* in nature and thus clearly within FERC's jurisdiction, not the retail sales to consumers that are the sole subject of these lawsuits. Furthermore, petitioners' disruption argument (echoed by their *amici*, which consist largely of trade associations of which petitioners are influential members[1]) simply depend on a mischaracterization of the Ninth Circuit's holding. The court of appeals did not hold that state law can impose liability for conduct that "directly affects" wholesale rates, so long as the plaintiffs' claims "nominally relate to a subject matter – retail transactions – over which the NGA exercises no authority."

[1] For example, members of the American Gas Association include defendants CMS Energy Corporation, Duke Energy Corporation, ONEOK, Inc., and Xcel Energy, Inc., and certain affiliates or subsidiaries of defendant El Paso, Inc. *See* American Gas Association, Member Addresses and Places of Business, http://www.aga.org/membercenter/Pages/MembershipDirectory-links.aspx (last visited October 23, 2013). Similarly, defendants Dynegy, Xcel Energy, and Coral Energy Resources, LP (n/k/a Shell Energy N.A.) are all members of the Western Power Trading Forum. *See* Western Power Trading Forum, Membership and Staff, http://www.wptf.org/?q=node/3 (last visited October 23, 2013).

Pet i, 19. Instead, the court of appeals held that respondents' claims here are not preempted because they challenge misdeeds that did *not* "directly govern" wholesale rates (Pet. App. 31a); the claims actually "ar[o]s[e] out of transactions outside of FERC's jurisdiction." Pet. App. 28a. Not even petitioners assert that such reasoning contravenes this Court's precedent.

At any rate, further review is unwarranted for additional, prudential reasons. In 2005, Congress amended the NGA in an attempt to alter FERC's jurisdiction, such that the question petitioners frame is unlikely to arise again anyway – and any decision this Court rendered here would have no import beyond this precise litigation. And even if this Court were inclined – contrary to all its usual practices – to review a case with no potential impact beyond the parties involved, certiorari would still be inappropriate in light of the case's current interlocutory posture. Contested factual issues have yet to be developed, and petitioners may well raise still more legal arguments to avoid liability. Far better for this Court to save its resources for, at the very most, a single review of this one-off case.

I. The Opinion Below Does Not Conflict With Either of the State Court Decisions Relied on by Petitioners.

The Ninth Circuit's decision follows the well-established path charted for decades by other federal

courts of appeals. And, contrary to petitioners' contentions, the decision does not conflict with holdings from the Tennessee or Nevada Supreme Courts.

1. The Ninth Circuit explained – and petitioners nowhere dispute – that it found "persuasive" and thus followed "the D.C. Circuit's approach to reading the word 'practices' [in § 717d] narrowly as to not expand unduly the scope of FERC's jurisdiction" into areas that the NGA reserves for state regulation. Pet. App. 34a; *see also Conoco, Inc. v. FERC*, 90 F.3d 536, 552 (D.C. Cir. 1996); *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1505 (D.C. Cir. 1990). Under the D.C. Circuit's test, a defendant in a case arising, as here, from retail transactions cannot prevail on preemption grounds simply by showing that the plaintiffs are challenging a practice that might have some incidental effect on wholesale rates. *Id.* Finding preemption under these circumstances, the D.C. Circuit has explained, would be "oxymoron[ic]," for it would effectively grant FERC jurisdiction over transactions that the NGA reserves for state regulation. *Am. Gas Ass'n*, 912 F.2d at 1506.

American Gas, in particular, rejected an argument much like petitioners' argument here. Gas companies there argued that FERC had jurisdiction to review certain agreements because those agreements undeniably "affected" to some degree costs that determine rates in jurisdictional transactions. *Id.* The D.C. Circuit rejected that argument, reasoning that such an attenuated effect on wholesale rates could not override Section 1(b)'s clear limits on

FERC's jurisdiction. *Id.*; *see also Cal. Ind. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (giving "practices affecting a . . . jurisdictional rate" language from analogous section 206 of the Federal Power Act, 16 U.S.C. § 824e(a), the same narrow reading it had earlier given "contracts affecting . . . a jurisdictional rate in *American Gas*). The "effect" in the present case and the "effect" in *American Gas* are similarly attenuated, and thus the "effect" here should similarly be "beyond [§ 717d]'s reach." *Am. Gas Ass'n*, 912 F.2d at 1506.

The Ninth Circuit's holding is also consistent with the law in the Fifth Circuit – the other federal court of appeals with considerable expertise and importance in this area. *See Texas Pipeline Ass'n v. FERC*, 661 F.3d 258, 262-63 (5th Cir. 2011) (refusing to read NGA § 23, allowing FERC to regulate "market participants," as extending FERC's jurisdiction beyond the limitations of NGA § 1(b)); *Shell Oil Co. v. FERC*, 566 F.2d 536 (5th Cir. 1978) (rejecting FERC's attempt to extend its jurisdiction to natural gas companies otherwise within its jurisdiction when they engaged in transactions outside FERC's Section 1(b) authority).

2. Petitioners claim that two state courts of last resort – the Supreme Courts of Tennessee and Nevada – have issued opinions that directly conflict with the Ninth Circuit's holding here. Petitioners briefly cited both opinions below but never argued that an adverse decision here would conflict with either one. Nor did petitioners seek en banc review

based on any such alleged split, as litigants usually would when they believe a federal court of appeals' holding has created a conflict on an important issue of law. Perhaps this is because the conflict petitioners now allege is so easily refuted.

The plaintiffs in both state-court cases were not challenging ultimate retail sales like those at issue here, but rather what both courts deemed to be *wholesale* natural gas sales that both courts assumed were within FERC's jurisdiction. Neither case even addressed – much less agreed with – the legal argument petitioners advance here, namely that the NGA impliedly preempts claims arising from *retail* transactions because they concern a "practice" that, under Section 5(a), "affected" wholesale rates.

a. Contrary to petitioners' assertion, *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010), did not involve plaintiffs who were truly "retail purchasers," Pet. 13. Instead, because of the particulars of the transactions giving rise to the plaintiffs' claims, the Tennessee Supreme Court deemed the plaintiffs to be "wholesale" purchasers. *Id.* at 872. To the extent that these transactions are properly deemed to be wholesale in nature, they constitute the very kind of "sales for resale" that NGA § 1(b) explicitly allocates to FERC's jurisdiction.

The present case, on the other hand, involves challenges to *retail* sales of natural gas; petitioners, in fact, concede that this case involves "claims asserted by litigants who purchase[d] gas in *retail transactions*."

Pet. i (emphasis added). Thus, petitioners, unlike the defendants in *Leggett*, do not claim that the transactions at issue here should be properly deemed to be "wholesale" in nature under NGA § 1(b). Rather, petitioners contend that even though respondents' claims arise from retail transactions, and thus fall on the state-side of the dichotomy that Section 1(b) creates, the claims are nevertheless preempted because they challenge conduct that petitioners insist falls under Section 5(a) as a "practice" affecting wholesale rates. The Tennessee Supreme Court never addressed any such argument, and nothing in *Leggett* suggests that court would accept it.

b. The Nevada Supreme Court's decision also presents no conflict. In *State ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012), *cert. denied*, 133 S. Ct. 2853 (2013), the court, like the court in *Leggett*, was addressing claims directed at wholesale, FERC-jurisdictional sales. The contrast with the present case – where respondents are making claims about non-jurisdictional *retail* sales made to them by petitioners – is stark.

Petitioners, in fact, emphasized this very distinction when they successfully opposed certiorari last Term in *Johnson*. There, the respondents (one of which is a petitioner here) succinctly assured this Court that there was no conflict between *Johnson* and the present case because *Johnson* involved wholesale transactions that the Ninth Circuit's opinion below would recognize as within FERC's jurisdiction:

> Because the instant case [*Johnson*] challenges only wholesale transactions within FERC's jurisdiction, the outcome below would have been no different under the Ninth Circuit's approach [in *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007)].
>
> For similar reasons, the Ninth Circuit's recent decision in *In re: Western States Wholesale Natural Gas Antitrust Litigation*, F.3d, 2013 SL 1449919 (9th Cir. Apr. 10, 2013), does not support review in this case, as it also would not allow Petitioners' antitrust claims challenging wholesale transactions *within FERC jurisdiction*.

Br. in Opp. at 13-14, *Nevada v. Reliant Energy, Inc.*, 133 S.Ct. 2853 (June 3, 2013) (No. 12-980) 2013 WL 2428988 (emphasis original). The present case, as petitioners recognize in their Question Presented, involves challenges to retail transactions that NGA § 1(b) expressly excludes from FERC's jurisdiction. There is no conflict with the state court decisions flagged by petitioners, or indeed with any decision of any court.

II. The Issue That Petitioners Raise Lacks Ongoing Significance.

While petitioners assert that the Ninth Circuit's holding is "tremendously important," Pet. 24, the reality – for two reasons – is that the holding lacks ongoing significance.

1. The law has changed since the conduct at issue here took place. The conduct that gave rise to the present cases occurred over ten years ago, in 2000-2002. At that time neither Congress nor FERC were regulating how natural gas companies used the market indexes to which they reported both jurisdictional and non-jurisdictional transactions. Retail sales based on the indexes remained beyond FERC's reach, by statute, for the reasons the Ninth Circuit has explained. *See* Pet. App. 31a-32a. At the same time, FERC had taken a "hands off" approach to the wholesale market to any extent it related to the indexes. Consequently, the question here is whether the NGA, as it existed and was implemented by FERC during 2000-2002, preempted plaintiffs' state antitrust claims.

The federal regulatory climate that forms the backdrop of this case, however, no longer exists. In 2005, Congress passed the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) ("EPAct"), in which Congress intended, among other things, to empower FERC to curb the very sort of anticompetitive conduct petitioners engaged in here. (As explained more fully below, this statutory amendment underscores the correctness of the Ninth Circuit's decision, because it assumes that FERC previously lacked the authority to regulate this kind of conduct.) What became 15 U.S.C. § 717c-1 states:

> 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 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) 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.

The 2005 EPAct permanently changes the NGA preemption analysis. While the Ninth Circuit considered only a narrow challenge to the interplay between NGA § 1(b) and § 5(a), any future preemption challenge in a case such as this will involve whether the EPAct, and the expansion of FERC's jurisdiction that Congress intended to establish in Section 717c-1,[2] precludes state-law claims challenging retail sales based on unlawfully manipulated private indexes. The Ninth Circuit's opinion – addressing whether, in 2000-2002, NGA § 5(a) by implication extended FERC jurisdiction to retail sales – can have no precedential value in such an inquiry.

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[2] Congress clearly intended in 2005 to grant FERC expanded authority to regulate manipulative practices. *See* 151 Cong. Rec. S7451-04 (2005) (comments of Senator Feinstein noting that FERC was unable to police the market manipulation rampant in 2000-2002 in California without the authority vested by the EPAct in 2005); *see also* 151 Cong. Rec. S8335-01 (2005) (stating that the EPAct gave "*new* protections for consumers from market manipulation.") (emphasis added).

2. Even with respect to the law as it existed before the 2005 amendments, there is no genuine concern that respondents' state-law claims will subject petitioners to liability for conduct for which they otherwise would not be liable. This is because, unlike an ordinary defendant claiming preemption, petitioners do not contend that federal law would absolve them from the misdeeds that respondents allege. To the contrary, there is every reason to believe that federal antitrust law – just like the state law at issue here and every other state's law – would deem petitioners liable for colluding to misreport prices. *See, e.g., Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002).

III. The Opinion Below is Fully Consistent With This Court's Decisions Addressing the Natural Gas Act's Jurisdictional Dichotomy.

The Ninth Circuit's decision, recognizing – like the D.C. and Fifth Circuits before it – the clear division between federal and state jurisdiction set up by the Natural Gas Act, is fully consistent with this Court's precedent. Petitioner simply mischaracterizes the court of appeals' decision in contending otherwise.

1. Congress used the NGA to construct a dual federal-state regulatory scheme, set out in Section 1(b) of the Act, that expressly excludes retail sales of natural gas from FERC's jurisdiction. More than 60 years ago, this Court acknowledged the jurisdictional

confines of the NGA in *Panhandle Eastern,* and held that the NGA was specifically intended to let the states continue regulating in areas they had traditionally occupied, like direct sales of natural gas for consumption, which are the same sales challenged here. 332 U.S. at 519. In expressly rejecting a pipeline's claim that Congress by enacting the NGA had "occupied the field," this Court recognized that the NGA left retail sales of natural gas to state regulation:

> Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach. *That area did not include direct consumer sales*, whether for industrial or other uses. Those sales had been regulated by the states and the regulation had been repeatedly sustained.

Panhandle Eastern, 332 U.S. at 519 (emphasis added). Thus, the Court concluded, the NGA created a dual regulatory system that preserved the States' traditional authority:

> The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the

> states and in no manner usurping their authority.

Id.

This Court's decisions have consistently adhered to the NGA's dual jurisdictional scheme recognized in *Panhandle Eastern*. In *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), this Court recognized that NGA § 1(b) "specified the areas into which this power [of the Commission] was not to extend." *Id.* at 503. The Court then refused to read other provisions of the Act, *including Section 5*, to expand the Commission's jurisdiction into areas – like the retail sales now at issue – that are excluded from Section 1(b) jurisdiction. *Id*. at 508 ("Nothing in the sections [NGA §§ 4(a), (b), (c), 5(a) and 7(c)] indicate that the power given to the Commission over natural-gas companies by Section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission. . . .").

This Court's 1989 decision in *Northwest Central Pipeline v. State Corp. Commission of Kansas*, 489 U.S. 493 (1989), is particularly instructive. There a pipeline company, like petitioners here, tried to use Section 5 of the Act to expand FERC's jurisdiction for preemption purposes, arguing that the challenged conduct "affected" jurisdictional rates, even though it was directed at natural gas production, a matter (like retail sales) clearly left to the states under NGA § 1(b). *Northwest Central*, 489 at 506-07. This Court

rejected that attempt, recognizing that it would strip the core jurisdictional provision in Section 1(b) of the Act of any real meaning:

> To 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, for there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations.

Id. at 514.

This Court's analysis applies here with equal force. As the Ninth Circuit recognized, expanding FERC's jurisdiction to any practice that might "affect" a jurisdictional rate, and then holding all regulation of those practices to be preempted, would strip the States of the ability to regulate retail sales, an area expressly left to them by Section 1(b) of the Act. Pet. App. 31a-32a. Everything from state minimum wage laws to purely local environmental regulations could conceivably have an "incremental effect" on wholesale natural gas rates. Yet if the NGA's scheme of dual federalism is to be preserved, only state-law regulation that is actually "directed at" wholesale rates can be covered by Section 5; state-law regulation of practices that have merely "some indirect effect on rates and facilities of natural gas companies is not preempted." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988)

In other words, Section 5's reference to "practices . . . affecting rates" cannot expand the basic jurisdictional grant of Section 1(b), just as it could not expand FERC's jurisdiction to cover exempt "production" in *Northwest Central*. Congress cannot have intended to preempt by implication the entire field of state antitrust regulation of retail sales of natural gas when Section 1(b) of the NGA expressly excludes those same retail sales from FERC regulation.

2. Instead of coming to grips with the line this Court's jurisprudence draws between state regulation of practices "directed at" wholesale rates and those that merely generate "some indirect effect" on them, petitioners assume away this whole line-drawing issue in their question presented. The Petition for Certiorari asks whether the NGA preempts an industry practice that "directly affect[s]" the wholesale natural gas market. Pet. i. Petitioners' *amici* likewise act as if the Ninth Circuit held that state law may directly regulate wholesale rates so long as the plaintiffs in a lawsuit happened to purchase natural gas at retail.

Yet one searches in vain for any words in the Ninth Circuit's opinion stating that petitioners' misreporting directly affected wholesale rates, much less reliance on any statement from respondents "conced[ing]" (Pet. 8) such an effect.[3] To the contrary,

[3] The district court once used the phrase "directly affect," *see* Pet. App. 110a, but respondents challenged that characterization

(Continued on following page)

the Ninth Circuit decided this appeal on the premise that petitioners' misreporting had at most an *indirect* effect on wholesale rates. Pet. App. 31a. And for good reason: not only are many more retail sales priced by private parties based on indexes, but it was mostly petitioners themselves who happened to use inflated indexes as pricing points in wholesale transactions among themselves. Lest there be any confusion as to the Ninth Circuit's understanding of the law, the court of appeals effectively acknowledged that the case would have been different if respondents' state-law claim had "directly govern[ed]" wholesale rates. *Id.*

Petitioners are thus unable to cite any decisions from this Court that genuinely call into question the Ninth Circuit's analysis. Each case petitioners cite involved challenges to activity in the wholesale market that falls clearly on the FERC side of Section 1(b) regulatory jurisdiction. And each addressed state regulation directed at matters within FERC's unquestioned jurisdiction. *Schneidewind* concerned, in effect, an attempt by Michigan to regulate the reasonableness of rates charged by natural gas wholesalers. As this Court put it, Michigan's attempt to regulate a jurisdictional seller's issuance of securities "amount[ed] to regulation in the field of gas

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on appeal as incorrect. The Ninth Circuit, based on the record as it currently exists, agreed with respondents.

transportation and sales for resale that Congress intended FERC to occupy." *Id.* at 304.

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988), is similar. There the State of Mississippi tried to use a state statute to challenge, in effect, the reasonableness of a wholesale electric power allocation already approved by FERC, a matter well within FERC's regulatory authority. *See* 487 U.S. at 371 ("States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair."). In contrast, no such state infringement of federal regulation is implicated here. Petitioners have always been subject to state antitrust enforcement of their direct retail sales. State regulation of anticompetitive conduct at the retail level – the only conduct challenged by these lawsuits – does not overlap in the slightest with federal regulation of natural gas "sales for resale."

Petitioners' reliance on *Kurns v. Railroad Friction Products Corp.*, 132 S.Ct. 1261, 1265 (2012), is similarly misplaced. Unlike this case, the plaintiff's claims in *Kurns* (that he contracted mesothelioma installing asbestos brake pads on locomotives) fell squarely within a federally occupied field. Eighty-six years before *Kurns*, this Court had declared that the federal government had general authority over the entire subject of locomotives: "It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Naiper v. Atlantic Coast Line R. Co.*, 272

U.S. 605, 611 (1926) (holding state laws requiring certain devices be included in locomotives for worker safety were preempted). It simply made no difference whether the *Kurns* plaintiff's claims arose from making repairs to the locomotive, or from the locomotive's operation on the railroad line – the entire field of locomotives was preempted. *Kurns*, 132 S.Ct. at 1268-69.

Here, though, Congress never "manifested the intent to occupy the entire field" of all natural gas transactions. To the contrary, as this Court has repeatedly held, Congress has expressly left regulation of retail sales to the States.

3. Finally, the Ninth Circuit's holding is entirely consistent with FERC's past litigation positions and regulatory issuances. As the Ninth Circuit noted, FERC has previously argued (successfully) to the D.C. Circuit that it is not enough to trigger its exclusive jurisdiction for state regulation to potentially indirectly "influence" wholesale rates; the state law must "directly govern[ ]" such rates. Pet. App. 31a (quoting FERC's argument in *American Gas Ass'n*, 912 F.2d at 1506).

Furthermore, FERC itself has recognized that it lacked statutory authority in 2000-2002 to regulate the sort of retail transactions that are the subject of the present suit. Although petitioners suggest (Pet. 9) that FERC's 2003 "Code of Conduct" was a regulation of the very practices now at issue, the exact opposite is true. In its Order Denying Rehearing

issued January 29, 2004 in *National Ass'n of Gas Consumers,* 106 FERC ¶ 61,072 at ¶ 11, FERC recognized that "[t]he purpose of the code of conduct is to ensure the integrity of the gas market that remains subject to the Commission's jurisdiction." And it specified in that same order that its jurisdiction, and thus the Code of Conduct, did not extend to retail sales: "[T]he Commission does not have commodity jurisdiction over . . . natural gas sales to end users (direct sales or retail sales)."

Moreover, Congress's attempted expansion of FERC's authority in the 2005 EPAct necessarily shows that FERC lacked this authority over defendants during the period relevant to these cases, approximately 2000 through 2002. *See Cal. Indep. Sys. Operator Corp.,* 372 F.3d at 401 (congressional acts should not be read to be superfluous); *see also supra* at 13 n. 2.

IV. The Interlocutory Posture of this Case Makes It A Particularly Inappropriate Candidate For Review.

The fact that this case remains in the discovery stage, with critical factual and legal developments still yet to occur, *see* Pet. App. 63a, separately makes this case a poor candidate for certiorari.

The interlocutory posture of this case "alone furnishe[s] sufficient ground" for this Court to deny the petition for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916). Where

"the Court of Appeals remand[s] the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.,* 389 U.S. 327, 328 (1967) (per curiam). Accordingly, "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown,* 240 U.S. at 258.

That general rule is especially apt here. As noted above, petitioners' whole legal argument proceeds from the premise that the respondents are challenging industry practices that "directly affect[ed] the wholesale gas market." Pet. i. But the factual underpinning of that assertion is missing. And at this stage of proceedings, all genuine issues of material fact must be assumed in respondents' favor. *See* Pet. App. 23a. It thus makes little sense for this Court to step in now, before the facts are fully developed.

In addition, petitioners may raise still more legal arguments aimed at escaping liability, just as they previously tried to argue that their fictitious sales reports and index manipulation were protected by the filed rate doctrine, or were preempted by the Commodity Exchange Act. In situations like this, the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States,* 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari). This practice avoids piecemeal litigation. And it is particularly sensible when, as here, the litigation at issue is consolidated such that no other lawsuit is likely to

subject petitioners to liability while this case plays out on remand.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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