No. 13-271

In the Supreme Court of the United States

ONEOK, INC., ET AL.,

Petitioners,

v.

LEARJET, INC., ET AL.,

Respondents.

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

BRIEF OF THE STATE OF KANSAS AND OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Natural Gas Act preempts general state antitrust laws that do not target the natural gas industry when those laws are applied to a conspiracy that inflated natural gas prices in direct retail transactions to entities such as school districts, hospitals, manufacturers and others?

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INTERESTS OF THE *AMICI* STATES

The *amici* states have several interests at stake in this case. First, the amici states generally have longstanding state antitrust laws to address anticompetitive behavior in order to protect both businesses and consumers in their respective states. Many of these laws in fact predate the Sherman Act, and in many States the Attorneys General play a special and substantial role in enforcing state antitrust norms.

Second, the States long have been the primary regulators of the natural gas industry in most respects. Only when Congress enacted the Natural Gas Act (NGA) in 1938, did the federal government assume primary responsibility and authority for limited sectors of the industry, in particular wholesale transactions and interstate transportation. But the federal government, at least until this case, has always disavowed any intent to preempt state regulation of retail sales of natural gas.

Kansas has one of the largest natural gas fields in the nation, and thus long has regulated the production aspect of the industry, regulation this Court specifically has upheld as not preempted by federal law. *Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493 (1989). Kansas, like most states, also regulates retail sales through its antitrust laws, laws that do not target natural gas but apply generally to anticompetitive behavior that can skew and harm retail markets for natural gas. Thus, Kansas is not insensitive to the interests and needs of natural gas producers—a very important industry to Kansas—nor to the interstate transportation of natural gas, with

pipelines crisscrossing Kansas and vast amounts of gas being stored in Kansas at any given time. *In re Appeals of Various Applicants from a Decision of the Division of Prop. Val. of the State of Kansas*, 313 P.3d 789 (Kan. 2013), *cert. denied*, *Missouri Gas Energy, et al. v. Kansas Div. of Prop. Val.*, 135 S. Ct. 51 (2014).

But, like the other *amici* states, Kansas also is sensitive to the interests and needs of its governmental entities, hospitals, manufacturers, and citizens with respect to consumer protection and unfair business practices. This case directly implicates strong state interests in antitrust enforcement and consumer protection more generally, and does so in a context that presents no threat to federal interests, nor any improper threat to natural gas producers and wholesalers. In fact, permitting state antitrust lawsuits in this context will further and complement federal interests.

INTRODUCTION

This case arises from petitioners' conspiracy to inflate the price of natural gas in retail sales to high-volume, direct purchaser consumers such as corporate businesses like Learjet and governmental entities such as the Topeka, Kansas Unified School District. Petitioners conspired to manipulate price indices that in turn determined the prices that these direct retail customers paid for natural gas. The success of the scheme is undeniable; it resulted in skyrocketing prices for natural gas in the relevant time period. After the nature and scope of the conspiracy became clear, these state antitrust lawsuits were brought by respondents, which include manufacturers, public entities, and hospitals.

As the case comes to this Court, the question is whether the NGA creates "field" preemption that precludes these lawsuits. To be clear, petitioners make no claim of "conflict" preemption, nor could they given the concession and settled law that the NGA does not displace application of the federal antitrust laws here. Their argument is that because (1) the NGA gives the Federal Energy Regulatory Commission (FERC) exclusive authority to regulate wholesale transactions and (2) the manipulated indices at issue here were based on fraudulent wholesale transactions, the NGA necessarily preempts state regulation that has *any* connection to price indices in the wholesale market.

That argument is inconsistent with the NGA's plain text, this Court's consistent interpretations of the Act over time, the history behind the NGA, and the dual federal and state regulation that Congress has carefully respected and preserved in this context.

SUMMARY OF ARGUMENT

I. The NGA on its face draws a clear distinction between state and federal power. Section 1(b) provides that federal power applies "to the transportation of natural gas in interstate commerce" and "to the sale in interstate commerce of natural gas for resale." The Act in the same subsection, however, disavows federal preemption of any other aspects of natural gas regulation, plainly stating that it "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). Thus, by its own terms, the NGA does not apply either to "retail" sales

of natural gas, nor to the application of state antitrust laws to such sales.

II. This Court's precedent interpreting the NGA emphasizes and has strictly enforced the separation between federal and state regulatory spheres under the Act. As long ago as 1947, the Court stressed that the NGA's words "plainly mean that the Act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' Direct sales for consumptive use of whatever sort were excluded." *Panhandle Eastern Pipeline Co. v. Public Serv. Com'n of Indiana*, 332 U.S. 507, 516-17 (1947). Given that "[w]hen it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry," *Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493, 510 (1989), "[t]o find field preemption [of a state regulation] merely because purchasers' costs and hence rates might be affected would be largely to nullify" the state authority that the NGA so carefully preserves. *Id*. at 514.

Instead, under the NGA, if state regulation of production or retail transactions implicates a practice also affecting wholesale rates, the Court applies *conflict* preemption principles, and not field preemption principles, *Northwest Central*, 489 U.S. at 515, unless the state regulation's "central purpose is to regulate matters that Congress intended FERC to regulate." *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 309 (1988). That description does not fit general state antitrust or consumer protection laws. *Cf*. 485 U.S. at 308 n. 11 (suggesting that the NGA would not preempt general "blue sky" laws that govern the registration

and sale of securities sold within the State, even as applied to natural gas companies).

III.A. Finally, the history of state regulatory predominance and later limited federal authority confirm that the Act's plain language should be given effect and that the Court should continue to adhere to the careful and deliberate division of authority Congress has provided in the NGA. There is no dispute that "[t]hree things and three only Congress drew within its own regulatory power …. These were (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Panhandle Eastern*, 332 U.S. at 516.

In fact, the "line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses." *Id*. at 517. Furthermore, the "Act, though extending federal regulation, had no purpose or effect to cut down state power." *Id*. Thus, in the NGA, Congress "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." *Id*. at 519.

B. Instead, state antitrust laws are well within the traditional police power of the States. Even when plaintiffs seek to apply such laws to practices used not only to influence retail prices but also having an effect on wholesale rates, the NGA does not displace such laws absent an actual "conflict" with federal law. There is no conflict in this case, and petitioners do not even argue that there is, nor could they. *Otter Tail Power*

Co. v. United States, 410 U.S. 366 (1973) (the NGA does not preclude the application of federal antitrust laws).

The Kansas antitrust statute, K.S.A. 50 – 112, for example, dates back to 1889, and precedes the Sherman Act. If the Court reads the NGA nonetheless to "field" preempt these traditional and general state laws, that result will essentially undermine the very protections that the political process provided to the States when Congress "carefully divided" federal and state power under the NGA. *Cf. Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528 (1985).

ARGUMENT

This Court has never held that the NGA preempts state antitrust laws that apply to retail natural gas transactions, nor should it, absent a clear *conflict* between application of such a law and federal law. In fact, this Court's decisions in the context of the NGA strongly suggest that a state law should not be preempted under the NGA unless such a law both (1) targets the natural gas industry and (2) conflicts with FERC's limited responsibility and *actual regulation* in this area.

I. The NGA Draws A Clear And Sensible Line Between Federal And State Power.

The NGA on its face draws a clear distinction between state and federal power. Section 1(b) provides that federal power applies "to the transportation of natural gas in interstate commerce" and "to the sale in interstate commerce of natural gas for resale." The Act in the same subsection, however, disavows any federal preemption of any other aspects of natural gas regulation, plainly stating that it "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). Thus, by its own terms, the NGA does not apply either to "retail" sales of natural gas, nor to the application of state antitrust laws to such sales.

This Court has recognized and enforced this clear distinction for over 75 years. In *Panhandle Eastern Pipe Line Co. v. Public Serv. Com'n of Indiana*, 332 U.S. 507 (1947), the Court considered "whether Indiana has power to regulate sales of natural gas made by an interstate pipeline carrier direct to industrial consumers in Indiana." *Id*. at 508-509. It is worth noting that, fundamentally, that is the exact same question at issue in this case: Can Kansas and other states apply their general antitrust laws to "sales of natural gas made by an interstate pipeline carrier direct to industrial consumers" such as large companies, hospitals, and school districts?

The same answer is required here as the Court gave in 1947: "We think there can be no doubt of the answer to be given …, namely, that the states are competent to regulate the sales." 332 U.S. at 514. Importantly, the NGA expressly and deliberately avoided altering the established principle that, "as the decisions stood in 1938, the states could regulate sales direct to consumers, even though made by an interstate pipeline carrier." *Id*. In fact, "[t]hree things and three only Congress drew within its own regulatory power [in the NGA]," *id*. at 516. "These were (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale [i.e., wholesale activity];

and (3) natural gas companies engaged in such transportation or sale." *Id*.

As the Court sensibly recognized, the "omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage [of the NGA] was not inadvertent. It was deliberate." 332 U.S. at 516. Thus, the Court reached the only conclusion the NGA permits: "Direct sales for consumptive use of whatever sort were excluded [from the NGA's scope]." *Id*. at 517. As the Court put it, the "line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses." *Id*. Furthermore, the Court emphasized that the NGA "had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective …." *Id*.

The Court went on to emphasize that it "would be an exceedingly incongruous result if a statute so motivated" were read "to cut down regulatory power and to do so in a manner making states less capable of regulation than before the statute's adoption." 332 U.S. at 519. Ultimately controlling in this case, is the Court's following observation: "The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take only territory which this Court had held the states could not reach. That area did not include direct consumer sales …." *Id*.

The NGA "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." 332 U.S. at 520. Instead, and

determinative of the claims in this case, the "'primary aim of [the NGA] was to protect consumers against exploitation at the hands of natural gas companies.'" *Id*.

Are the petitioners here arguing that their activities in the relevant time period somehow benefitted consumers of natural gas? Both their well-documented conspiracy and its detrimental effects on a wide range of purchasers and consumers demonstrate otherwise. FERC does have exclusive authority over wholesale transactions, and maybe FERC's failure to identify quickly and pursue the petitioners' anti-competitive conspiracy is bad luck for the wholesale purchasers under the NGA regime, but there is absolutely no reason to immunize petitioners from the consequences of their illegal conduct with respect to direct retail purchasers.

FERC did not approve of the activity at issue here, nor did it regulate in ways that endorsed such activity. There simply is no need to apply "field" preemption here to protect legitimate federal interests, but there is a compelling need to protect state prerogatives and direct purchasers. The Court has made that proposition clear since 1947, and should continue to adhere to it today.

II. This Court's Precedents Consistently And Sensibly Enforce The Line The NGA Draws Between Federal And State Power.

This Court should decline the invitation of petitioners and the United States to construe NGA Section 5(a), 15 U.S.C. § 717d(a), to blur the line that NGA Section 1(b) draws and that this Court has

consistently and carefully enforced for almost 80 years. It does not matter, for purposes of field preemption, whether a state law regulating direct retail transactions also implicates a practice that directly affects wholesale rates. Only a law that (1) targets the natural gas industry in (2) an area the NGA explicitly preserves for federal regulation should be field preempted. State antitrust laws, by definition, cannot and do not satisfy those conditions.

The proposition is amply illustrated by the Court's decision in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), a case that confirms and proves the States' point about the limited scope of NGA preemption. In *Schneidewind*, the Court concluded that a state law which allowed state authorities "to examine a security issuance of a natural gas company to determine whether it is 'to be applied to lawful purposes and … is essential to the successful carrying out of the purposes," *id.* at 307, improperly interfered with the federal government's exclusive control over wholesale natural gas markets. The Court reasoned that such a state regulation targeting the natural gas industry was preempted because "[i]n short, the things [the state law] is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority." *Id.* at 308. Although recognizing that "every state statute that has some indirect effect on rates and facilities of natural companies is not pre-empted," the Court emphasized that the "*central purpose* [of the state law at issue in *Schneidewind*] is to regulate matters that Congress intended FERC to regulate." *Id.* at 309 (emphasis added).

Even so, the Court readily recognized that the law at issue in *Schneidewind targeted* natural gas companies, but that the result would be different if the issue were a state law of *general* applicability regulating *all* industries and businesses. Thus, the Court explained that, "[o]f course, one area FERC does not exclusively control is 'securities regulation' in the traditional sense of the term, i.e., protection of investors from fraudulent or deceptive practices." 485 U.S. 293, 308 n.11. Thus, the Court strongly implied, if not held, that "traditional 'securities regulation' [such as 'blue sky' laws] is not FERC's direct concern" and would not be preempted by the NGA. In contrast, the law at issue in *Schneidewind*, "is not that kind of regulation," *id*., and instead "applies only to utilities …." *Id*.

The decision of this Court that most clearly dictates the outcome here is *Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493 (1989), decided the Term after *Schneidewind*. As the Court well knows, Kansas sits on top of one of the largest natural gas fields in the nation and probably the world. Thus, Kansas is concerned with production of natural gas, not just consumption. In *Northwest*, Kansas issued a regulation "providing for the permanent cancellation of producers' entitlements to quantities of Kansas-Hugoton gas." 489 U.S. at 497. Producers filed suit, arguing that the Kansas regulation was preempted by the NGA. But this Court disagreed.

Noting that the "natural gas industry is subject to interlocking regulation by both federal and state authorities," 489 U.S. at 506, the Court emphasized that the NGA "carves out a regulatory role for the

States … providing that the States retain jurisdiction over intrastate transportation, local distribution, and distribution facilities, and over 'the production or gathering of natural gas.'" *Id*. at 507. Rejecting the companies' claim of "field" preemption, the Court pointed out that when "it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry." *Id*. at 510. Congress did not exercise "'the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act." *Id*. (quoting *FPC v. Panhandle Eastern Pipe Line Co*., 337 U.S. 498, 502-03 (1949)).

Specifically, in *Northwest*, the Court warned sternly and expressly against "an extravagant mode of interpretation" of the NGA that would preclude traditional state regulation of the natural gas industry's production and retail markets simply because elements of those markets also have bleed-over impact on wholesale rates. 489 U.S. at 512. Thus, the Court reasoned that to "find field pre-emption of Kansas' regulation merely because purchasers' costs and hence [wholesale] rates might be affected would be largely to nullify that part of the NGA … 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 observations are even more compelling in the context presented in this case: the Kansas antitrust laws at issue here do not increase producers' costs in any respect; they simply protect direct retail purchasers from unlawful, anticompetitive behavior of natural gas producers.

Thus, as in *Northwest*, even if petitioners' index-reporting practices directly affected wholesale rates, the *only* proper preemption inquiry is not one of "field" preemption but, rather, the question whether the application of Kansas (and other States') general antitrust laws "conflict" with the NGA. *See* 489 U.S. at 515 ("Thus, conflict pre-emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role."). Critically, the Court defined the "conflict" analysis as follows in *Northwest*: conflict preemption applies only "if it is impossible to comply with both federal and state law; if a state regulation prevents attainment of FERC's goals; or if a state regulation's impact on matters within federal control is not an incident of efforts to achieve a proper state purpose." *Id*. at 516.

None of those conditions exist in this case. Petitioners cannot and do not claim "impossibility" of compliance with federal and state law (indeed, federal and state antitrust laws apply the same rules and pursue the same goals here). Nor does application of state antitrust laws prevent attainment of FERC's goals, goals which necessarily include precluding anticompetitive conspiracies such as those at issue here. Finally, there is no credible claim that applying state antitrust laws here does not seek to achieve a "proper" state purpose.

Ultimately, there is no basis for a claim that the application of general state antitrust laws here to the natural gas industry's retail sales (just as those laws are and will be applied to other industries' retail sales) somehow contravenes federal interests. The result of

accepting the arguments of the petitioners and the United States is that FERC would have a lot less backup or alternative help in detecting and stopping anticompetitive conspiracies intended to and with the effect of cheating direct natural gas purchasers.

Thus, petitioners effectively want FERC to be the primary government watchdog to identify, investigate, and pursue any anticompetitive sales activities in the natural gas industry, knowing full well that FERC is not equipped or able to catch and prosecute all such conduct on its own. The *amici* States say "effectively" because the arguments petitioners make that state laws affecting any "practice" related to the wholesale market are preempted will give the natural gas industry *ample* room to maneuver in ways that almost always will connect wholesale and resale price practices, leading to a conclusion of NGA preemption on petitioners' theory. Such a result would place more faith in the prosecutorial capacity of a federal administrative agency than the States have acceded to in this context, that Congress has explicitly authorized under the NGA, or that history and experience have proven justified.

III. State Antitrust Laws Of General Applicability Are Fully Consistent With The Purposes And Goals Of The NGA.

Kansas, like many States, prohibits "all arrangements, contracts, agreements, trusts, or combinations between persons made with a view … to prevent full and free competition …" in commercial markets. K.S.A. 50 – 112. Thus, such practices are "hereby declared to be against public policy, unlawful and void." *Id*. Such laws have been on the books, in

many States, since *before* the federal Sherman Act was even enacted.

Furthermore, the Kansas Attorney General, like most State Attorneys General, plays a special role in the enforcement of the State's antitrust laws. The Attorney General, for example, can seek a "civil penalty" against violators of the state antitrust laws. *See* K.S.A. 50 – 160 ("the attorney general may petition for recovery of civil penalties").

And States have invoked their antitrust laws against natural gas and electric power companies to challenge anticompetitive activities for over one hundred years. *See, e.g.*, *Attorney General [of New York] v. Consolidated Gas Co. of New York*, 108 N.Y.S. 823 (1908) (seeking to vacate charter of natural gas company that was engaging in monopolistic activities); *State ex rel. Spillman, Atty. Gen. v. Interstate Power Co.*, 226 N.W. 427 (Neb. 1929) (Attorney General challenging monopolistic activity in the electric power industry); *State [of Louisiana] v. United Gas Pub. Serv. Co.*, 150 So. 835 (La. 1933) (state Attorney General pursuing antitrust claims against natural gas company); *Perfecto Gas Co. v. State [of Texas]*, 228 S.W.2d 918 (Tex. 1950) (Texas Attorney General suing several gas companies under Texas antitrust laws); *Younger v. Jensen, et al.*, 605 P.2d 813 (Cal. 1980) (California Attorney General initiating investigation into alleged antitrust violations by natural gas companies in Alaska with respect to gas being marketed in California); *Illinois v. Panhandle Eastern Pipeline Co.*, 935 F.2d 1469 (7th Cir. 1991) (Illinois suing natural gas companies for state antitrust law violations); *Arizona ex rel. Goddard v. El Paso Corp., et*

al., No. CV2003-004677 (Maricopa County Superior Court 2003) (Arizona suing natural gas companies for state antitrust law violations); *Nevada v. Reliant Energy, Inc., et al.*, 289 P.3d 1186 (Nev. 2012) (state law antitrust suit brought by the Attorney General of Nevada). *Cf. Missouri Pub. Serv. Com'n v. ONEOK, Inc.*, 318 S.W.2d 134, 138 (Mo.Ct. App. 2009) (dismissing state law antitrust claims brought by state agency in part because "the action was not brought in the name of the state," *i.e.*, by the Missouri Attorney General).

Furthermore, the Attorney General has a special role when, as here, public entities have "been so injured or damaged by any [anti-competitive] conspiracy." K.S.A. 50 – 162. In such cases, "the attorney general shall have the authority to institute and prosecute any such actions or proceedings on behalf of the state of Kansas or any city, town, or political subdivision [like the Topeka Unified School District, a plaintiff in this case] …." *Id*. Further evidence that Kansas and other States' antitrust laws are fully consistent with the goals and purposes of federal antitrust laws is the common statutory requirement in many states, including Kansas, that "the Kansas restraint of trade act shall be construed in harmony with ruling judicial interpretations of federal antitrust law by the United States supreme court." K.S.A. 50 – 163.

Given the strong and indisputable predominance of state regulation in this area (addressing anti-competitive conspiracies that inflate prices to retail purchasers), coupled with the self-consciously and very deliberately restrained exercise of federal commerce power that Congress enacted in the NGA, the Court

should maintain and continue to enforce the longstanding line it has recognized between federal and state regulatory power in the context of wholesale versus direct retail sales of natural gas. Expanding the NGA beyond its clear terms, undermines the federalism principle of *Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528 (1985), that the political process is where Congress determines how far to extend its commerce power in areas where that body may have the federal power to regulate the States and override contrary state law. Here, Congress very deliberately chose in 1938 not to exercise the full extent of its potential commerce power and, instead, purposely left most regulation of the natural gas industry to the States.

This Court should respect, indeed embrace, the lines that Congress so clearly drew in 1938, and leave any changes in the scope of field preemption effected by the NGA to Congress. *See Panhandle Eastern*, 332 U.S. at 522 ("The … answer, in case that experience should vary, is the power of Congress to correct abuses in [state] regulation if and when they appear.")

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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