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

SUPPLEMENTAL BRIEF FOR PETITIONERS

NEAL KUMAR KATYAL
Counsel of Record
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
ELIZABETH B. PRELOGAR
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

[additional counsel listed on inside cover]

Additional counsel:

DOUGLAS R. TRIBBLE
KEVIN M. FONG
PILLSBURY WINTHROP
SHAW PITTMAN LLP
Four Embarcadero Center,
22nd Floor
San Francisco, CA 94105
(415) 983-1000

Counsel for the defendant CMS entities

MICHAEL J. KASS
VLP LAW GROUP LLP
739 Calmar Avenue
Oakland, CA 94610
(510) 629-6089

Counsel for the defendant Dynegy entities

MARK E. HADDAD
MICHELLE B. GOODMAN
NITIN REDDY
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for the defendant CMS entities

JOSHUA D. LICHTMAN
FULBRIGHT &
JAWORSKI L.L.P.
555 South Flower Street,
Forty-First Floor
Los Angeles, CA 90071
(213) 892-9200

Counsel for Shell Energy North America (U.S.), L.P.

AARON STREETT
BAKER BOTTS LLP
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995
(713) 229-1234

Counsel for GenOn Energy, Inc.

ROXANNA A. MANUEL
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
865 S. Figueroa St., 10th
Floor
Los Angeles, CA 90017
(213) 443-3000

Counsel for Shell Energy North America (U.S.), L.P.

OLIVER S. HOWARD
AMELIA A. FOGLEMAN
CRAIG A. FITZGERALD
GABLE GOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103-4217
(918) 595-4800

Counsel for the defendant ONEOK entities

BRENT A. BENOIT
STACY WILLIAMS
LOCKE LORD LLP
3400 J.P. Morgan Chase Tower
600 Travis
Houston, TX 77002
(713) 226-1200

Counsel for El Paso LLC

SARAH JANE GILLETT
HALL, ESTILL, HARDWICK, GABLE, GOLDEN, & NELSON, P.C.
320 S. Boston Ave., Suite 200
Tulsa, OK 74103-3706
(918) 594-0400

Counsel for the defendant Williams and WPX entities

MICHAEL JOHN MIGUEL
KASOWITZ BENSON TORRES & FRIEDMAN LLP
2029 Century Park East
Suite 750
Los Angeles, CA 90067
(424) 288-7900

Counsel for e prime, Inc.

STEVEN J. ROUTH
ORRICK, HERRINGTON, & SUTCLIFFE, L.L.P.
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

Counsel for the defendant AEP entities

JOEL B. KLEINMAN
ADAM PROUJANSKY
LISA M. KAAS
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, D.C. 20006
(202) 420-2200

Counsel for Duke Energy Trading and Marketing, L.L.C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The United States agrees the Ninth Circuit's preemption analysis went off the rails. In the Solicitor General's words, the Ninth Circuit broke from this Court's teaching that the Natural Gas Act (NGA) "has preemptive force" when a state law has the effect of regulating in the federal field, no matter the law's "nominal subject." U.S. Br. 13. Ignoring this directive, the Ninth Circuit wrongly ousted the Federal Energy Regulatory Commission (FERC) from its role as exclusive regulator of the practices targeted by Respondents' state-law suits. U.S. Br. 11.

But after 18 pages detailing this error, the United States pivots and recommends the Court deny review. Like many a compromise, the reasons behind this position do not withstand scrutiny, and indeed contradict one another. First, the United States seizes on irrelevant factual distinctions to maintain there is no split between the Ninth Circuit and the Tennessee and Nevada Supreme Courts. But the cases squarely align on the only fact that mattered below: whether plaintiffs bought gas at retail. Second, perhaps hoping to protect the United States from the consequences of the Ninth Circuit's decision, the Solicitor General strains to confine the opinion to its facts. Unfortunately, the court's bright-line, transaction-based preemption analysis cannot be read so narrowly. It authorizes (indeed, invites) the 50 States to compete with FERC to regulate a host of practices beyond index manipulation. That regulatory chaos will impede the energy industry's orderly growth, in this case alone spawning protracted litigation with billions of dollars at stake.

It has been a quarter century since the Court opined on NGA and Federal Power Act (FPA) preemption. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988). The Ninth Circuit's refusal to follow *Schneidewind* requires correction to avoid undermining regulation of the gas and power markets, hotbeds of innovation critical to the U.S. economy.

The writ should be granted.

ARGUMENT

I. THE UNITED STATES AGREES THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

The United States confirms that the Ninth Circuit's decision "conflicts with relevant decisions of this Court." S. Ct. R. 10(c). This is "one of the strongest possible grounds" for certiorari, S. Shapiro *et al.*, *Supreme Court Practice* § 4.5, p. 250 (10th ed. 2013)—a point the government seemingly overlooks.

As the Solicitor General emphasizes, "this Court has looked to the effect of a state law, not its nominal subject, to determine whether the NGA has preemptive force." U.S. Br. 13. The Ninth Circuit did exactly the opposite, focusing single-mindedly on Respondents' retail transactions, rather than on whether their lawsuits would effectively regulate conduct subject to FERC's jurisdiction. That approach conflicts with *Schneidewind*, which held that state law is field-preempted if it is "directed at * * * precisely the things over which FERC has comprehensive authority," even if the regulation addresses a subject otherwise committed to state jurisdiction. U.S. Br. 14 (quoting *Schneidewind*, 485 U.S. at 308). And it contradicts this Court's instruction that "practices * * * 'affecting' the jurisdictional rate are

not themselves limited to the jurisdictional context." U.S. Br. 12 n.1 (quoting *FPC* v. *Conway Corp.*, 426 U.S. 271, 281 (1976)).

As the United States explains (at 14-15), the Ninth Circuit also misunderstood *Northwest Central Pipeline Corp.* v. *State Corporation Commission*, 372 U.S. 84 (1963). It thought *Northwest Central* supported its "narrow[]" interpretation of FERC's authority, Pet. App. 29a, but the case "establish[ed] only that the practices regulated by FERC" must "have a direct effect, not an incidental effect, on jurisdictional gas rates." U.S. Br. 14. Under the Ninth Circuit's rule, however, that direct effect is irrelevant if plaintiffs purchased gas at retail.

This Court routinely grants certiorari when a lower-court opinion "appears to be inconsistent with prior decisions of this Court." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 926 (1982). It should do so again here.

II. THE NINTH CIRCUIT'S DECISION SPLITS WITH THE TENNESSEE AND NEVADA SUPREME COURTS.

Although the United States agrees the Ninth Circuit erred, it tries to minimize the conflict with *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010) and *State ex rel. Johnson* v. *Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012), cert. denied, 133 S. Ct. 2853(2013). U.S. Br. 18-21. The split is real.

1. The United States ignores that *Leggett* and *Johnson* acknowledged the split. Both expressly rejected the Ninth Circuit's reasoning in *E. & J. Gallo Winery Corp.* v. *EnCana Corp*, 503 F.3d 1027 (9th Cir. 2007). *Leggett*, 308 S.W.3d at 871-872;

Johnson, 289 P.3d at 1193. And the Ninth Circuit thought *Gallo* controlled this case. U.S. Br. 8-10. *Leggett* and *Johnson* therefore necessarily reject the decision below.

2. That leaves the United States parsing the opinions in search of some distinction. U.S. Br. 18-20. Its effort fails.

As to *Leggett*, the United States acknowledges that the plaintiffs argued their index manipulation claims were not preempted because they arose out of non-jurisdictional transactions—the same argument Respondents make here. U.S. Br. 18-19. The United States further recognizes that the Tennessee Supreme Court " 'simply disagreed' with the plaintiffs' contention that their status as retail customers" made any difference. U.S. Br. 19 (quoting *Leggett*, 308 S.W.3d at 872). But the United States nevertheless suggests that *Leggett* can be distinguished because the plaintiffs purchased gas from utilities that had acquired the gas in upstream wholesale transactions. U.S. Br. 18-19.

There is just one problem: Not a word in the Ninth Circuit's decision indicates that makes any difference. As the Ninth Circuit saw things, "federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction"—period. Pet. App. 28a. Under that bright-line rule, it does not matter if there was some *prior* wholesale transaction that the retail purchasers' suit will effectively regulate. The Ninth Circuit allows the suit to proceed if the *plaintiff*'s particular transaction was non-jurisdictional.

Leggett was part of this very case when it was filed. Pet. 12. And while the Tennessee high court recog-

nized that state-law suits may "intrude upon the federal domain, even if the [plaintiffs'] transactions * * * fell outside the scope of the NGA," 308 S.W.3d at 872, the Ninth Circuit circumscribed the federal domain to exclude any conduct "associated with transactions falling outside of FERC's jurisdiction." Pet. App. 24a. That is a square split.

The United States fares no better trying to distinguish *Johnson*. Its discussion gives the impression that the plaintiffs there purchased gas at wholesale. U.S. Br. 19-21 (asserting the transactions "fell squarely within FERC's jurisdiction"). But that is wrong: The *Johnson* plaintiffs were "*retail* purchasers" who claimed that index manipulation "caused them to pay higher *retail* prices for gas." Br. in Opp. 6, 13, No. 12-980, 2013 WL 2428988 (June 3, 2013) (emphases added). Indeed, they raised the same claim as Respondents: that "end consumers of natural gas" were injured because the retail prices they paid for gas were "tied to * * * [inflated] 'index' prices." Pet. for Certiorari, No. 12-980, 2012 WL 7037173, at *3-*4 (Dec. 26, 2012).

The government nevertheless seizes on Reliant's observation that the alleged *misconduct* in *Johnson* occurred in FERC-jurisdictional sales. U.S. Br. 20. But that refers to the transactions reported *to* the index, whereas the Ninth Circuit focuses on the transactions coming *out of* the index. The government recognizes the difference: "Respondents' argument that their state-law claims are not preempted is based on the non-jurisdictional nature of their *transactions* with petitioners, not the manipulation of non-jurisdictional sales information reported to the indices." U.S. Br. 17. Many of the index inputs in this case occurred in jurisdictional transactions,

just like in *Johnson*. But that is beside the point. What matters is index *outputs*—and as to those, the Ninth Circuit and the Nevada Supreme Court disagree on whether the NGA preempts retail plaintiffs' index-manipulation claims.

3. Stepping back, the government's myopic focus on factual minutia ignores the square methodological conflict among these decisions. The Ninth Circuit believes state antitrust law "complement[s]" the regulatory scheme. Pet. App. 27a. The Tennessee Supreme Court, in contrast, held that state antitrust law "is not 'complementary,' regardless of whether it shares other goals of federal legislation, because it conflicts with the federal policy of uniformity." *Leggett*, 308 S.W.3d at 869. The Nevada Supreme Court, too, warned that imposing "50 different sets of state rules concerning anticompetitive behavior" would create a "maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market." *Johnson*, 289 P.3d at 1193. These flatly divergent views will sow conflicting results in future NGA preemption cases if the Court does not intervene now. Br. of Washington Legal Found. (WLF) 13-14; Br. of Electric Power Supply Ass'n *et al.* (EPSA) 12-13.

III. THE NINTH CIRCUIT'S ERROR IS IMPORTANT.

A. The Ninth Circuit's Erroneous Holding Is Not Limited To Index Manipulation.

In what ultimately amounts to wishful thinking, the United States suggests the Ninth Circuit's flawed approach to preemption is "of limited prospective importance." U.S. Br. 21. It offers two reasons why: (1) regulatory oversight reduces opportunities for index manipulation going forward; and

(2) preemption analysis in future manipulation cases will implicate the Energy Policy Act of 2005 (EPAct), which grants FERC express authority to regulate that conduct.[1]

These arguments might carry some weight if the Ninth Circuit's preemption analysis were limited to index manipulation—though even then, the billions at stake counsel in favor of reviewing a decision the government agrees is erroneous. *See infra* at 9-10. But the Ninth Circuit's flawed understanding of NGA preemption did not turn on—and cannot be confined to—the particular conduct targeted by Respondents' state-law suits. The court's far broader rationale will wreak havoc in future preemption cases.

1. The critical feature of this case, in the Ninth Circuit's view, was not that it involved manipulation but that it was brought by retail purchasers. The court declared that its "preemption analysis [wa]s governed by * * * the distinction between categories of sales that fall within FERC's jurisdiction * * * and the categories of sales that fall outside of FERC's jurisdiction." Pet. App. 15a-16a. As the court saw things, suits challenging conduct "associated with * * * nonjurisdictional sales" are not preempted, even if the same conduct is simultaneously associated with wholesale transactions. Pet. App. 36a. The Ninth

[1] The government mentions "significant changes in the regulatory environment," U.S. Br. 21, but FERC's jurisdiction over Petitioners' alleged index manipulation has not changed one bit. FERC had—and exercised—"exclusive authority" over those practices before the EPAct's enactment. U.S. Br. 10; *Amendments to Blanket Sales Certificate*, 68 Fed. Reg. 66,323 (Nov. 17, 2003) (*2003 Amendments*).

Circuit stated this bright-line, transaction-based rule in no uncertain terms and with no limiting principle: "[F]ederal preemption doctrines do not preclude state law claims *arising out of transactions outside of FERC's jurisdiction*." Pet. App. 28a (emphasis added).

That is a breathtaking change in the law—and one with profound consequences. The Ninth Circuit's transaction-based limitation on NGA preemption will permit states to regulate *any* practice—not just index manipulation—that directly affects jurisdictional rates if retail rates are also affected. The United States comforts itself with the notion that a simultaneous effect on jurisdictional and non-jurisdictional sales is "unique." U.S. Br. 12, 16. But as *amici* explain, plaintiffs will easily find other practices that straddle the state/federal divide. WLF Br. 15; EPSA Br. 13.

To flesh out one example: FERC regulates various accounting practices, including how jurisdictional companies account for depreciation and allocate capital costs. *In re Entergy Servs., Inc.*, 137 FERC ¶ 61029, 2011 WL 4703181, at *13 (2011). Now, under the Ninth Circuit's rule, a plaintiff can oust FERC's exclusive authority by arguing that a particular depreciation or cost-allocation practice misstated a company's financial data, resulting in increased retail rates. The Ninth Circuit would permit this state-law suit because it challenges a "practice[] associated with * * * nonjurisdictional sales." Pet. App. 36a.

Or consider a suit premised on an interstate pipeline's decision to curtail capacity in response to equipment breakdowns or supply fluctuations that

leave it unable to satisfy its contractual commitments. FERC has authority to regulate pipeline-capacity reductions because they affect jurisdictional rates. *El Paso Natural Gas Co., Order on Reh'g*, 132 FERC ¶ 61155, 2010 WL 3328640 (2010). But they affect non-jurisdictional rates, too—and the Ninth Circuit thus would let retail purchasers enter the fray with state-law suits. EPSA Br. 12-13.

To give another example, FERC has rightly approved certain bona fide financial hedges that have a "legitimate business purpose." *2003 Amendments*, 68 Fed. Reg. 66,323, ¶ 41. But even if a particular hedge would pass muster with FERC, the Ninth Circuit's rule paves the way for retail purchasers to argue that they paid higher prices because a hedge was unfair in violation of state law. WLF Br. 16.

In short, "[p]laintiffs' attorneys will have no trouble finding an economist who, for a fee, will gladly testify that the alleged industry practice in question * * * impacts both wholesale and retail rates alike." WLF Br. 14. Because the Ninth Circuit's transaction-focused approach to preemption is not linked to index manipulation and cannot be limited to this case's facts, it will undermine FERC's exclusive control of any number of practices that affect both retail and wholesale prices.

Regulated entities are gravely concerned about this ruling—as the wide-ranging *amicus* participation here demonstrates—and the United States' mere hopes cannot stymie what 50 State Governments will do, or quell the industry's strong fears. Congress enacted the NGA and FPA to provide certainty to these critical industries, not subject them to the

whim of multiple regulators, who will force them to operate at the lowest common denominator.

2. Nor can the EPAct provide comfort. The United States observes that the Act will apply to future market-manipulation cases. U.S. Br. 23. But the EPAct does absolutely nothing to alter the preemption analysis for claims *not* related to manipulation—likely the lion's share of cases going forward, given the many ways regulated companies' practices impact retail prices. *See* EPSA Br. 12-13; WLF Br. 16. The Ninth Circuit's exceedingly narrow interpretation of FERC's authority thus poses a great potential for mischief in future cases.

Indeed, the Ninth Circuit's errors run so deep that the EPAct does not even resolve the problems with *this* case. If Respondents' claims arose today, the court still would find no preemption. The EPAct expands FERC's jurisdiction to include "any entity" that engages in manipulation, U.S. Br. 23, but jurisdictional sellers like Petitioners were already covered. And although the EPAct requires a nexus between the fraudulent conduct and jurisdictional transactions, *id.*, the Ninth Circuit would deem that nexus irrelevant when retail purchasers bring claims, just as it ignored the direct effect on wholesale transactions here. All that matters to the Ninth Circuit is a fact the government buries in its Statement: the EPAct does "*not expand[] the types of transactions subject to the Commission's jurisdiction under the NGA*." U.S. Br. 6 (internal quotation marks omitted; emphasis added).

In other words, the EPAct does not alter the state/federal division between retail and wholesale transactions. The Ninth Circuit's transaction-based

preemption analysis thus survives the EPAct unscathed: The court would permit retail purchasers to target index manipulation today, as before, because those "claims aris[e] out of transactions outside of FERC's jurisdiction." Pet. App. 28a.

B. The Ninth Circuit's Erroneous Ruling Will Result In Years Of Needless Litigation With Billions At Issue.

Moreover, the United States completely ignores the tremendous *present* consequences of the Ninth Circuit's decision.

1. There are billions of dollars in controversy in this litigation. Pet. 25. The Wisconsin Respondents, for example, invoke state-law remedies that eschew actual damages and instead authorize recovery of the *entire amount* paid for gas by a class comprising thousands of purchasers over several years. D. Ct. Dkt. No. 1846 at 2, 55-56. Just for *one* of those years, for *one* state, the Wisconsin Respondents allege gas sales totaling $1.75 to $3.5 billion. *Id.* at 3.

That is just the tip of the iceberg. The Learjet Respondents invoke a Kansas law that similarly authorizes full refunds. D. Ct. Dkt. No. 1857 at 33; Kan. Stat. Ann. § 50-115. And yet another class is seeking treble damages under Missouri's antitrust statutes. D. Ct. Dkt. No. 1863 at 32-33, 38. Taken together, Respondents' claims are staggering.

The United States does not even acknowledge the billions in dispute. But when its own money is on the line, it has argued "that enormous monetary stakes count as a significant reason to grant certiorari." Reply Br. for Petitioners, *U.S. Dep't of Interior* v. *Kerr-McGee Oil & Gas Corp.*, No. 09-54, 2009 WL

2943389, at *9 (Sept. 11, 2009). And this Court has agreed. *See, e.g.*, *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Mitchell*, 463 U.S. 206, 211 n.7 (1983).

That principle applies equally to private petitioners. *See Supreme Court Practice* § 4.13, p. 269-270; *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., statement respecting denial of certiorari) ("[E]normous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari."). Indeed, the Court has previously granted review in an NGA case "in light of the economic interests at stake." *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Dist. Cos.*, 498 U.S. 211, 214-215 (1991). It should follow suit here.

2. Review is also warranted to prevent years of needless additional litigation. The United States agrees these cases should not proceed at all, and yet the Ninth Circuit's decision necessitates merits discovery, consideration of pending class-certification motions, preparation of expert reports, pre-trial motion practice, and—eventually—trials in six different district courts. This Court should intervene now to short-circuit such protracted proceedings and restore certainty to these highly-regulated national markets. This case squarely presents the issues, and additional record development cannot further illuminate the question presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
ELIZABETH B. PRELOGAR
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

June 2014