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 RESPONDENTS IN OPPOSITION

JENNIFER GILLE BACON*
WILLIAM E. QUIRK
GREGORY M. BENTZ
ANTHONY BONUCHI
ANDREW J. ENNIS
POLSINELLI PC
900 W. 48th Place
Suite 900
Kansas City, Missouri 64112-1895
(816) 753-1000
(816) 753-1536 Fax
jbacon@polsinelli.com

Counsel for Respondents
**Counsel of Record*

[Additional Counsel Listed At End Of Brief]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

SUPPLEMENTAL BRIEF FOR RESPONDENTS

The Solicitor General correctly advises this Court to deny certiorari. Respondents file this supplemental brief to make three short points, lest this Court be misled by petitioners' response to the Solicitor General's brief.

1. There should be no doubt after the Solicitor General's filing that the Ninth Circuit's decision does not conflict with *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010), or *State ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012), *cert. denied*, 133 S. Ct. 2853 (2013). As the Solicitor General observes (U.S. Br. 20-21), the courts in those cases found preemption based on Section 1(b) of the Natural Gas Act, while here petitioners argue for preemption under Section 5(a). Since petitioners' assertions involve a different statutory provision in the Act, not analyzed by the Tennessee or Nevada Supreme Courts, these opinions cannot possibly conflict with the opinion below.

Notwithstanding the Solicitor General's accurate explication of the differences between the holdings in these three cases, petitioners continue to crop selected quotations from *Leggett* and *Johnson* to insist that "a square split" exists. Supp. Br. 5. The fervor of petitioners' contention in the face of plainly apparent proof to the contrary should give this Court pause before crediting *any* of the assertions in their filings. If petitioners are this eager to stretch the truth on an issue that is fully subject to this Court's

fact-checking, it is fair to wonder about the statements petitioners make on issues that this Court is less able to verify.

2. This Court should not be influenced by petitioners' suggestion (Supp. Br. 11) that "billions" are at stake here. As the Solicitor General confirms (U.S. Br. 17), and the petitioners have acknowledged, petitioners would be subject to federal antitrust law even if they were not subject to parallel state law claims. Accordingly, this is not the normal kind of preemption case in which the defendants' argument, if successful, would take them outside the scope of antitrust law. At most, this case involves whether the "highly unusual" conduct that is "unlikely" ever to give rise to another lawsuit in light of the newly changed statutory landscape (U.S. Br. 21-23) should generate antitrust liability under federal, as opposed to state, law. That choice-of-law question is hardly a matter of great practical importance.

3. Continuing to overclaim, petitioners assert that the Ninth Circuit's decision is a "breathtaking change in the law." Supp. Br. 8. The decision, however, nowhere says – as petitioners contend – that it turns solely on the fact that respondents purchased at retail. Instead, Judge Bea's decision for the court of appeals adopted a more nuanced reading of the Act, suggesting – in harmony with longstanding D.C. Circuit precedent – that FERC could regulate even retail conduct if the effect on jurisdictional rates were sufficient. *See* Pet. App. 31a-32a (finding persuasive the D.C. Circuit's conclusion that Section 5 applies to

activity involving jurisdictional sellers "directly governing the rate in a jurisdictional sale"). The panel simply concluded that the index reporting practice on the facts before it did not have a substantial enough effect on such rates to overcome the states' explicit authority over retail transactions.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

JENNIFER GILLE BACON*
WILLIAM E. QUIRK
GREGORY M. BENTZ
ANTHONY BONUCHI
ANDREW J. ENNIS
POLSINELLI PC
900 W. 48th Place
Suite 900
Kansas City, Missouri 64112-1895
(816) 753-1000
(816) 753-1536 Fax
jbacon@polsinelli.com

Counsel for Respondents
**Counsel of Record*

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ADDITIONAL COUNSEL

ROBERT L. GEGIOS
STEPHEN D. R. TAYLOR
RYAN M. BILLINGS
AMY IRENE WASHBURN
KOHNER, MANN & KAILAS, S.C.
4650 N. Port Washington Road
Washington Bldg., 2nd Floor
Milwaukee, WI 53212
(414) 962-5110

Counsel for the Wisconsin Respondents

DONALD D. BARRY
BARRY LAW OFFICES, LLC
DONALD D. BARRY, CHARTERED
5340 S.W. 17th Street
P.O. Box 4816
Topeka, Kansas 66604
(785) 273-3151

Counsel for Respondents Learjet, Inc. et al., Heartland Regional Medical Center, et al., Breckenridge Brewery of Colorado, LLC, et al., Arandell Corp., et al., Wisconsin System, Inc., et al., and Reorganized FLI, Inc.

ERIC I. UNREIN
FRIEDEN, UNREIN & FORBES, L.L.P.
555 S. Kansas Avenue, Suite 303
Topeka, KS 66603
(785) 354-1100

Counsel for Respondents Learjet, Inc. et al. and Reorganized FLI, Inc.

ISAAC L. DIEL
SHARP MCQUEEN, P.A.
6900 College Blvd., Suite 285
Overland Park, Kansas 66207
(913) 661-9931

Counsel for Respondent Reorganized FLI, Inc.

PHILIP M. BALLIF
DURHAM JONES & PINEGAR
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
(801) 415-3000

Counsel for Respondent Sinclair Oil Corporation

GARY D. MCCALLISTER
GARY D. MCCALLISTER & ASSOCIATES, LLC
120 N. LaSalle Street, Suite 2800
Chicago, Illinois 60602
(312) 345-0611

Counsel for Respondents Learjet, Inc. et al. and Reorganized FLI, Inc.

THOMAS J. H. BRILL
LAW OFFICES OF THOMAS H. BRILL
8012 State Line Road, Suite 102
Leawood, KS 66208-3712
(913) 677-2004

Counsel for Respondent Reorganized FLI, Inc.

MELVIN GOLDSTEIN, ESQ.
MATTHEW A. CORCORAN, ESQ.
GOLDSTEIN & ASSOCIATES, PC
1757 P Street, NW
Washington, DC 20036
(202) 872-8740

Counsel for Respondent Sinclair Oil Corporation