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 OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Natural Gas Act preempt state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by end users who purchased gas in retail transactions?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

REASONS FOR GRANTING THE PETITION 7

I. THE NINTH CIRCUIT'S PREEMPTION ANALYSIS CONFLICTS WITH THIS COURT'S OWN PRECEDENTS 8

II. THE NINTH CIRCUIT'S RULE WOULD DISRUPT A UNIFORM INTERSTATE REGULATORY SCHEME AND SERVE AS AN UNNECESSARY DRAG ON FREE ENTERPRISE 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES:

Ali v. Federal Bureau of Prisons,
552 U.S. 214 (2008) 11

Arizona v. United States,
312 S. Ct. 2492 (2012) 12

Bates v. Dow AgroSciences LLC,
544 U.S. 431 (2005) 1, 2

Bruesewitz v. Wyeth,
131 S. Ct. 1068 (2011) 2

Buckman Co. v. Plaintiffs' Legal Comm.,
531 U.S. 341 (2001) 2

California v. FPC,
369 U.S. 482 (1962) 17

Charleston & W. Carolina R. Co. v. Varnville Furniture Co.,
237 U.S. 597 (1915) 12

Cipollone v. Liggett Group,
505 U.S. 504 (1992) 8

E. & J. Gallo Winery v. EnCana Corp.,
503 F.3d 1027 (9th Cir. 2007) 4, 5

Fed. Power Comm'n v. Hope Natural Gas Co.,
320 U.S. 591 (1944) 9

Page(s)

Geier v. American Honda Motor Co.,
529 U.S. 861 (2000) 2

Jones v. Rath Packing Co.,
430 U.S. 519 (1977) 8

Leggett v. Duke Energy Corp.,
308 S.W.3d 843 (Tenn. 2010) 13

Mississippi Power & Light Co. v.
Mississippi ex rel. Moore,
487 U.S. 354 (1988) 10

Mutual Pharm. Co. v. Bartlett,
133 S. Ct. 2466 (2013) 2

Nevada ex rel. Johnson v. Reliant Energy, Inc.,
289 P.3d 1186 (Nev. 2012) 14

Northern Natural Gas Co. v. State Corp. Comm'n,
372 U.S. 84 (1963) 11

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 12

Schneidewind v. ANR Pipeline Co.,
485 U.S. 293 (1988) 6. 9

Transcon. Pipe Line Corp. v. State Oil & Gas Bd.,
474 U.S. 409 (1986) 9

United States v. Locke,
529 U.S. 89 (2000) 12

Page(s)

STATUTES:

15 U.S.C. § 717 *et seq*. .... *passim*

15 U.S.C. § 717(a)... 8, 11

15 U.S.C. § 717(b).. 3

15 U.S.C. § 717(c) 3

15 U.S.C. § 717d(a).. 3, 4, 6

RULES:

S. Ct. R. 37... 1

OTHER AUTHORITIES:

Am. Petroleum Inst., *Understanding Natural Gas Markets* (2006) 15

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 13-271

BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited, accountable government. To that end, WLF regularly appears as *amicus curiae* before this Court in cases involving preemption issues, to point out the economic inefficiencies that often result when multiple layers of government seek to regulate the same activity. *See, e.g.*, *Bates v. Dow AgroSciences*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for Respondent with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

LLC, 544 U.S. 431 (2005); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). WLF also participates in important preemption cases where liability under state tort laws threatens the predictability and uniformity provided by federal regulatory schemes. *See, e.g., Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Bruesewitz v. Wyeth*, 131 S. Ct. 1068 (2011).

WLF is particularly concerned that individual freedom and the American economy both suffer when state law, including state antitrust law, imposes upon an entire industry an unnecessary layer of regulation that frustrates the objectives or operation of specific regulatory regimes, such as (in this case) the Natural Gas Act (NGA) and the Federal Energy Regulatory Commission (FERC). The rule adopted by the Ninth Circuit exposes natural gas companies to massive state regulation—in the form of state antitrust liability—for conduct that is the exclusive province of a comprehensive federal regulatory regime.

WLF is also concerned that the Ninth Circuit's approach to preemption under the NGA would result in a windfall for enterprising plaintiffs' attorneys, who can circumvent FERC's comprehensive regulatory scheme by simply identifying some practice of interstate gas companies that impacts gas prices, locating a plaintiff who purchased natural gas at retail, then filing suit seeking damages under state consumer protection laws. WLF firmly believes that FERC, not the plaintiffs' bar, should be deciding how interstate natural gas practices are regulated.

STATEMENT OF THE CASE

In 1938, Congress enacted the NGA, which gives the federal government exclusive authority to regulate the wholesale natural gas market, including the practices of natural gas companies affecting wholesale gas rates. *See* 15 U.S.C. § 717 *et seq*. Under Section 1(b) of the NGA, the FERC enjoys exclusive jurisdiction over (1) the "transportation of natural gas in interstate commerce," (2) most sales of natural gas at wholesale, and (3) "natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b).

The NGA also authorizes FERC to ensure that rates for jurisdictional sales are "just and reasonable." 15 U.S.C. § 717c. To accomplish this aim, Section 5 of the NGA empowers FERC to regulate natural gas sellers with respect to "any rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a).

Petitioners are natural gas companies governed by the NGA and FERC's comprehensive regulatory scheme. Respondents, several commercial and industrial end users of natural gas, sued Petitioners in various states under state antitrust law. Pet. App. 67a. Respondents' complaints alleged that Petitioners had engaged in a practice of improperly inflating index rates for natural gas, which allegedly caused Respondents to pay higher

retail rates.[2] *Id*. at 14a-15a. The Panel on Multidistrict Litigation consolidated the suits in the District of Nevada. *Id*. at 12a.

Because the evidence was undisputed that Petitioners' alleged practices would necessarily increase wholesale gas prices as well as retail prices, Petitioners moved for summary judgment on the grounds that Respondents' state-law claims were preempted by the NGA. Pet. App. 110a-111a. In other words, Petitioners argued that Respondents' state law claims sought to regulate a "practice . . . affecting" wholesale gas rates under 15 U.S.C. § 717(d)a. *See id*. at 111a.

The district court agreed. Granting summary judgment in favor of Petitioners, the court found that any index manipulation by Petitioners would have unquestionably affected jurisdictional wholesale gas rates. Pet. App. 110a-111a. As a result, the practices challenged by Respondents under state law were subject to FERC's authority over jurisdictional sellers, and thus the state law claims were preempted. *Id*. at 75a. As the district court explained, "[b]ecause FERC's jurisdiction is exclusive where it exists, any state law claims based on any such practices [i.e., those affecting wholesale gas rates] are preempted." *Id.*

On appeal, the Ninth Circuit reversed. Pet. App. 25a. Relying on its earlier opinion in *E. & J.*

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[2] Index rates are published rate compilations, as reported by industry publications, which buyers and sellers use to price natural gas in the wholesale and retail markets.

Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1037 (9th Cir. 2007), a decision based almost entirely on the filed-rate doctrine, the appeals court rejected the district court's holding that the NGA provides for exclusive federal jurisdiction over any practice by a FERC-jurisdictional seller than affects jurisdictional rates. Pet. App. 25a-28a. The panel concluded that federal preemption turns not on whether the lawsuit would have the effect of regulating in the federal field, but rather on the specific kind of transaction (retail or wholesale) by which plaintiffs sustained their alleged injuries. *Id.* According to the appeals court, because Respondents allegedly suffered harm in retail transactions, and the NGA does not regulate retail sales, no preemption exists. *Id.* Under the Ninth Circuit's view, then, state antitrust law trumps FERC's plenary authority anytime a practice affecting wholesale rates also happens to affect retail rates.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding simply cannot be squared with this Court's longstanding preemption precedents under the NGA. Since Congress enacted the NGA in 1938, the Court has consistently recognized that Congress intended the NGA to unify regulation in the natural gas wholesale market and to squarely place authority over that market with FERC. At the same time, the Court has taken a dim view of those approaches, such as the one adopted below, that would allow states to disturb the uniformity of the federal scheme that Congress set in place. In drawing the line between state regulations that impair FERC's authority from those that do not, the Court has emphasized that state regulation is

preempted if it is "directed at . . .things over which [the NGA] has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

The decision below ignores this well-settled view. Under the Ninth Circuit's approach, Respondents' claims are not preempted because they invoke only the state courts' supervision of state *retail* transactions, which are outside of FERC's jurisdiction, as opposed to wholesale transactions. But Section 5 of the NGA exclusively reserves to FERC the power to regulate natural gas sellers with respect to "any rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a). The fact that a given practice may affect retail rates *as well as* wholesale rates is of no consequence. As this Court's prior holdings make clear, the relevant question is whether Respondents' state-court actions are "directed at" conduct in the field that the NGA occupies. But if plaintiffs are allowed to manipulate state-law duties as a backdoor way to regulate practices that affect wholesale rates for natural gas, this Court's field preemption precedents will be rendered a dead letter.

The Ninth Circuit's rule is also in conflict with the Tennessee and Nevada Supreme Courts, both of which have rejected the "transactional" approach to preemption adopted below, calling it a recipe for regulatory chaos. By permitting private plaintiffs to second guess FERC under the guise of state-law civil suits, the decision below permits juries to reach judgments that differ from FERC's as to how to regulate natural gas companies' conduct affecting

wholesale rates. But if federal regulatory agencies are to perform the important expert functions assigned to them by Congress, they must have the ability to decide, free from hindrances imposed by state law, how best to regulate jurisdictional conduct in their given field of expertise.

The Ninth Circuit's preemption analysis turns not on any underlying legal principle, but on the ability of the plaintiffs' bar to identify a wholesale-market practice in the natural gas field that may also plausibly be said to affect prices in the state's retail market. Because this approach turns primarily on the semantics of how broadly the issue is framed, a creative plaintiffs' lawyer will easily be able to make the argument and find a suitable retail plaintiff in a wide range of cases. But a single plaintiffs' lawyer should not be permitted to trump FERC by deciding whether nationwide practices affecting the wholesale market are permissible. Absent discretionary review by this Court, the Ninth Circuit's decision thus threatens to disrupt the uniform federal regime envisaged by Congress by allowing attorneys motivated by large jury awards to create potentially 50 different state regulatory regimes binding the natural gas industry.

REASONS FOR GRANTING THE PETITION

The Petition presents issues of exceptional importance to the natural gas industry as well as to natural gas consumers across the country. At issue is whether the holding below undermines Congress's federal scheme under the NGA by removing plenary regulatory discretion from FERC and placing it in the hands of state court juries. This case offers the

Court an excellent vehicle to decide whether each of the 50 states should be allowed to decide whether a given industry practice affecting both wholesale and retail sales of natural gas should be subject to state-law liability based on the state's notions of what constitutes an "anticompetitive" practice.

The interests of fairness, predictability, and stare decisis were all injured in this case. WLF joins with Petitioners in urging this Court to grant the petition for writ of certiorari.

I. THE NINTH CIRCUIT'S PREEMPTION ANALYSIS CONFLICTS WITH THIS COURT'S OWN PRECEDENTS

The question of whether a state law or rule is preempted by federal law turns on the intent of Congress, which is the "ultimate touchstone." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). The intent of Congress can be determined if it is "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* (quoting *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977).

When Congress enacted the NGA 75 years ago, it explicitly recognized the importance of uniform federal regulation of the natural gas industry. Because "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest," Section 1(a) of the NGA provides that uniform regulation of such businesses "is necessary in the public interest." 15 U.S.C. § 717(a). Informed by this clear statement of Congressional policy, this Court has long held that

the NGA was intended to unify regulation in the natural gas wholesale market and to squarely place authority over that market with FERC. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 609-610 (1944) (stating that the "basic purpose" of the NGA was to "occupy the field" as to the "fixing of 'just and reasonable' rates").

At the same time, this Court has scrutinized those approaches that would allow the states to "disturb[] the uniformity of the federal scheme," in light of concerns that such state regulation might "seriously impair [FERC's] authority to regulate" jurisdictional sellers who would then "be forced to comply with varied state regulations of their . . . practices." *Transcon. Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 420-23 (1986). In distinguishing state regulations that impair FERC's authority to regulate the field from those that do not, the Court has consistently held that a state regulation is preempted, regardless of its purported subject area, if it is "directed at . . . things over which [the NGA] has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

In *Schneidewind*, for example, the Court found that the NGA preempted a Michigan statute that required companies transporting natural gas in-state to obtain state approval before issuing securities. Although nothing in the NGA expressly authorizes FERC to regulate the issuance of securities, the Court nevertheless found that Michigan's law "amount[ed] to regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." *Id.* at 304. In so

holding, the Court looked to the Michigan law's purpose, which was to prevent natural gas companies from raising equity levels above a certain point so as to ensure that the companies "will charge only what Michigan considers to be a 'reasonable rate.'" *Id.* at 308. The Court held that such an approach constituted a "regulation of rates" under the NGA and was thus preempted.

Likewise, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 360 n.6 (1988), the Court determined that an agreement among four power companies to allocate power from a nuclear power plant constituted a "contract affecting the wholesale rates . . . of those companies." Consequently, the Court held that Mississippi could not regulate that contract even under the State's undisputed power to regulate retail rates. *Id.* at 374. As the Court explained, "States may not regulate in areas where FERC has properly exercised its jurisdiction to . . . insure that agreements affecting wholesale rates are reasonable." *Id.* As a result, the Court found the state law preempted even though Mississippi was purporting to exercise its power to regulate the *retail* market. *Id.*

The appeals court's decision below simply cannot be reconciled with these precedents. Under the Ninth Circuit's approach, Respondents' state law claims are not preempted here because they invoke only the State's supervision of *retail* transactions, which are outside of FERC's jurisdiction, as opposed to wholesale transactions. But that misguided approach asks the wrong question. As this Court's prior holdings make clear, the relevant question is whether Respondents' state-law actions are "directed

at" conduct in the field that the NGA occupies. The answer to that question is yes—Respondents' suits obviously seek to punish Petitioners' alleged price-reporting and index-manipulation practices (which affect wholesale rates for natural gas as much as they affect retail rates).

Yet Section 5 of the NGA exclusively reserves to FERC the power to regulate natural gas sellers with respect to "any[3] rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a). Under this Court's longstanding NGA-preemption jurisprudence, then, Respondents' claims are preempted. *See Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963) (holding that the NGA "leaves no room either for direct state regulation" in the field "or for state regulations which would indirectly achieve the same result"). But if, as the Ninth Circuit insists, plaintiffs are allowed to manipulate state-law duties as a backdoor way to regulate practices that affect wholesale rates for natural gas, this Court's field preemption precedents will be rendered a dead letter.

Equally misguided is the Ninth Circuit's suggestion that state antitrust laws can somehow avoid federal preemption because they merely "complement Congress's intent to move to a less regulated market" by "support[ing] fair competition."

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[3] "Read naturally, the word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'" *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008). If "any" is to truly mean "any," it must also mean those practices that affect wholesale and retail rates alike.

Pet. App. 27a. As this Court has repeatedly made clear, complementarity is no defense against field preemption: "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to do." *United States v. Locke*, 529 U.S. 89, 115 (2000) (quoting *Charleston & W. Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915)). Indeed, the Court has routinely found complementary state laws preempted even if the state law in question purports to enforce exactly the same standards for exactly the same reasons. *See, e.g., Arizona v. United States,* 312 S. Ct. 2492, 2502-03 (2012) ("Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted."); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235 (1947) ("[I]f a licensed warehouseman complied with each requirement, he did all that he need do. He could not be required by a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act.").

II. THE NINTH CIRCUIT'S RULE WOULD DISRUPT A UNIFORM INTERSTATE REGULATORY SCHEME AND SERVE AS AN UNNECESSARY DRAG ON FREE ENTERPRISE

By permitting private plaintiffs to second guess FERC under the guise of state-law civil suits, the decision below permits juries to reach judgments that differ from FERC's as to how to regulate the

conduct of natural gas companies that affect wholesale rates. But if federal regulatory agencies are to perform the important expert functions assigned to them by Congress, they must have the ability to decide, free from hindrances imposed by state law, how best to regulate jurisdictional conduct in their given field of expertise. At the same time, allowing juries to award damages under potentially conflicting state laws would interfere with Congress's delicate balance of statutory objectives and adoption of a uniform federal regulatory scheme, including enforcement via federal antitrust law.

Ironically, it is the *state* courts that have increasingly come to recognize just how harmful applying state antitrust laws to Petitioners' interstate practices would be. Indeed, both the Tennessee and Nevada Supreme Courts have rejected the "transactional" approach to preemption adopted below as a recipe for regulatory chaos. In *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 869 (Tenn. 2010), the Tennessee Supreme Court rejected materially identical claims, emphasizing that "if we were to hold that this state could impose restrictions on the interstate wholesale gas market by way of its antitrust laws, we would imply that every other state could do so as well." Of course, because each state has its own unique view of how a properly "competitive" market should behave, such an approach would inexorably lead to chaos. As the court in *Leggett* concluded, a finding of no preemption would force natural gas companies to "comply with the rules of fifty different states regarding what reporting practices or transactions might qualify as competitive." 308 S.W.3d at 869.

Only last year, the Nevada Supreme Court reached the same conclusion in *Nevada ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012). Specifically rejecting the approach of the Ninth Circuit in *Gallo*, the Nevada high court explained that "[f]rom a practical standpoint, if each state intervened in this field with different regulations, the result would be a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market." *Id.* at 1193. Consequently, the court concluded, "State antitrust law cannot coexist peacefully with the natural gas federal regulations." *Id.*

Under the Ninth Circuit's rule, whether a state is permitted (under the Supremacy Clause) to regulate any given wholesale-market practice in the natural gas field hinges on whether that practice can also plausibly be said to affect prices in the state's retail market. Because this approach turns primarily on the semantics of how broadly the issue is framed, a creative plaintiffs' lawyer will easily be able to make the argument and find a suitable retail plaintiff in a wide range of cases. In other words, the Ninth Circuit's preemption analysis turns not on any underlying legal principle, but merely on the amply demonstrated ability of the plaintiffs' bar to identify a suitable party plaintiff.

Natural gas is a fungible commodity widely distributed through a variety of distribution channels, and the interstate markets for natural gas are closely interrelated. It only takes a modicum of imagination to argue that virtually *anything* that happens in the wholesale market, or any other area of the natural gas market regulated by FERC,

ultimately affects retail, end-use buyers. Plaintiffs' attorneys will have no trouble finding an economist who, for a fee, will gladly testify that the alleged industry practice in question—whether it be an accounting practice, shipping practice, or (as here) a price reporting practice)—impacts both wholesale and retail rates alike.

As here, a ready supply of potential plaintiffs will not prove difficult to find. Many large end-users of natural gas—including the Respondents in this case—purchase their gas directly from the interstate market, so as to eliminate the costs that accompany a middleman distributor. *See* Am. Petroleum Inst., *Understanding Natural Gas Markets* 19 (2006) ("[M]any industrial customers have the option to purchase natural gas from a marketer or producer instead of from the distribution company."). Once an entrepreneurial plaintiffs' attorney is successful in signing up direct purchasers like Respondents as clients, suddenly a state law claim that would have been preempted by a wholesale purchaser becomes *not* preempted under the Ninth Circuit's rule.

Armed with a suitable plaintiff and a plausible argument for affecting retail rates, the plaintiffs' bar will be able to use the Ninth Circuit's rule to wrest regulatory control away from FERC on matters as technical as how a natural gas wholesaler accounts for depreciation, how it allocates costs of capital expenditures, or how it hedges against financial risk. If a plaintiff can argue that any of these practices affect retail rates, even by merely affecting a natural gas company's cost structure, then the Ninth Circuit's rule will pave the way for the plaintiff to avoid preemption and impose state-

law duties on a federally regulated industry. That cannot possibly be the result that Congress intended.

Such technical regulatory issues are squarely within FERC's ambit, and only FERC has the required expertise and broad view of the market to regulate natural gas wholesalers intelligently and consistently. But if the Ninth Circuit's approach to preemption is allowed to stand, juries in state courts throughout the country will be empowered to decide whether any given practice—no matter how technical—is inappropriate and subject to liability.

For example, a business transaction that FERC rightly understands to be a bona fide financial hedge—the sort of hedge that American companies engage in every day for perfectly legitimate financial reasons—could now be deemed "manipulative" by a jury applying one of 50 different states' laws, resulting in massive liability for the natural gas company. Even worse, many of these suits are brought as class actions, where only a one-cent impact on each sale of natural gas can quickly add up to hundreds of millions of dollars in the hands of a sufficiently motivated plaintiffs' attorney and his experts.

Amicus WLF believes strongly that companies should not be put in a position where they cannot dependably rely on FERC's guidance about what they may and may not do. Nor should a single plaintiffs' lawyer be permitted to trump FERC by deciding whether nationwide practices affecting the wholesale market—practices routinely engaged in by all or most of the natural gas industry—are permissible. Absent discretionary review by this

Court, the Ninth Circuit's decision thus threatens to disrupt FERC's uniform regime by allowing attorneys motivated by large jury awards to create their own binding rules for the natural gas industry.

In any event, the Ninth Circuit's highly idiosyncratic approach to field preemption is unnecessary to combat truly anticompetitive practices. This Court has long recognized that the NGA authorizes *federal* antitrust suits challenging the allegedly anticompetitive practices of natural gas companies. *See, e.g., California v. FPC*, 369 U.S. 482 (1962). WLF believes that Respondents' state-law claims are motivated by a desire to take advantage of certain states' more liberal damages provisions, *see* Pet. 27-28, and to avoid the unifying force of this Court's antitrust doctrines, by taking refuge in often less well-developed and more plaintiff-friendly state court antitrust jurisprudence. While such state laws may garner much higher jury awards, and thus higher fees, for plaintiffs' attorneys, Congress has already determined that such laws are unnecessary to ensure a competitive market for interstate natural gas.

The natural gas industry has proven to be an economic boon throughout much of the country. If allowed to stand, the holding below will create vast uncertainty in the marketplace, potentially deterring industry stakeholders from investing hundreds of millions, if not billions, of dollars in resources into the natural gas market and serving as an unnecessary drag on the free enterprise system. Because the appeals court's decision below has significant nationwide implications, WLF respectfully urges this Court to grant the Petition

and settle, once and for all, the vitally important questions presented in this case.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the Petition.

Respectfully submitted,

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