No. 13-271

IN THE

Supreme Court of the United States

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 THE WISCONSIN RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals correctly follow settled law when it held that under the Natural Gas Act (15 U.S.C. § 717 *et seq.*)—as it existed before significant amendments to the statute by Congress in 2005—claims brought under state antitrust laws challenging exclusively retail sales of natural gas for consumption are not preempted by federal law?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. AEP Energy Services; American Electric Power Company, Inc.; CMS Field Services; CMS Marketing Services & Trading Company; Coral Energy Resources, L.P.; Duke Energy Trading and Marketing, LLC; Dynegy Marketing and Trade; DMT G.P. LLC; Dynegy Illinois, Inc.; Dynegy GP, Inc.; El Paso Merchant Energy, L.P.; El Paso Corporation; ONEOK Energy Marketing & Trading Co., L.P.; ONEOK, Inc.; Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Energy Merchant & Trading Company; Williams Merchant Services Company, Inc.; Williams Power Company, Inc.; Xcel Energy, Inc.; Northern States Power Company; and e prime, Inc., petitioners on review, were defendants-appellees below.[1]

2. Learjet, Inc.; Topeka Unified School District 501; Breckenridge Brewery of Colorado, LLC; BBD Acquisition Co.; Merrick's, Inc.; Sargento Foods Inc.; Ladish Co., Inc.; Carthage College; Briggs & Stratton Corporation; Arandell Corporation; NewPage Wisconsin System, Inc.; Reorganized FLI, Inc.; Sinclair Oil Corporation; Heartland Regional Medical Center; Prime Tanning Corp.; Northwest Missouri State University; and Multiut Corporation, respondents on review, were plaintiffs-appellants below.

3. Duke Energy Corporation; CMS Energy Corporation; and Reliant Energy, Inc., respondents on review, were defendants-appellees below.

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[1] The parties' names reflect their listings in the docket below. Some entities have undergone corporate reorganizations subsequent to the period in question (2000-2002).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Wisconsin Respondents disclose their corporate affiliations as follows:

Arandell Corporation has no parent and no publicly held corporation owns 10% or more of its stock.

ATI Ladish LLC, f/k/a Ladish Company, Inc., is a wholly owned subsidiary of Allegheny Technologies Incorporated. No publicly held corporation owns 10% or more of the stock of Allegheny Technologies Incorporated, which is publicly traded on NASDAQ.

Briggs & Stratton Corporation has no parent and BlackRock, Inc., which is publicly traded on the New York Stock Exchange, is the only publicly held corporation that owns 10% or more of its stock.

Carthage College has no parent and no publicly held corporation owns 10% or more of its stock.

Merrick's, Inc., is a wholly owned subsidiary of Merrick Animal Nutrition, Inc. No publicly held corporation owns 10% or more of the stock of Merrick's, Inc., or Merrick Animal Nutrition, Inc.

NewPage Wisconsin System, Inc., is a wholly owned subsidiary of NewPage Consolidated Papers, Inc. No publicly held corporation owns 10% or more of the stock of NewPage Wisconsin System, Inc., or NewPage Consolidated Papers, Inc.

Sargento Foods Inc. has no parent and no publicly held corporation owns 10% or more of its stock.

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The unanimous April 10, 2013, opinion of the United States Court of Appeals for the Ninth Circuit, reversing the United States District Court for the District of Nevada's grant of summary judgment, is reported at 715 F.3d 716. Pet. App.[2] 1a. The district court's July 18, 2011, opinion, granting petitioners' motion for summary judgment, is unreported, but available at 2011 WL 2912910. *Id.* at 64a. The district court's November 2, 2009, opinion, granting petitioners' motion for reconsideration of the district court's earlier denial of petitioners' motion for summary judgment, is unreported. *Id.* at 124a.

JURISDICTION

The court of appeals entered judgment on April 10, 2013. On June 20, 2013, Justice Kennedy extended the time to file a petition for certiorari up to and including Saturday, August 24, 2013. The petition was filed August 26, 2013. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1(b) of the Natural Gas Act, codified at 15 U.S.C. § 717(b), provides:

> (b) Transactions to which provisions of chapter applicable
> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of

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[2] "Pet. App." refers to the Petitioners' Appendix accompanying the petition.

> 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.

Section 5(a) of the Natural Gas Act, codified at 15 U.S.C. § 717d(a) (emphasis in original), provides:

> (a) Decreases in rates
> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of

> such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Wisconsin Statutes Section 133.14 provides:

> All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by s. 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. Any payment made upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered from any person who received or benefited from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party.

Wisconsin Statutes Section 133.18 provides, in relevant part:

> (1)(a) Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees. Any recovery of treble damages shall, after trebling,

be reduced by any payments actually recovered under s. 133.14 for the same injury.

...

(2) A civil action for damages or recovery of payments under this chapter is barred unless commenced within 6 years after the cause of action accrued. When, in a civil class action, a class or subclass is decertified or a class or subclass certification is denied, the statute of limitations provided in this section is tolled as to those persons alleged to be members of the class or subclass for the period from the filing of the complaint first alleging the class or subclass until the decertification or denial.

...

(4) A cause of action arising under this chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action.

(5) Each civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date.

INTRODUCTION

For more than a century, the states have regulated retail sales of natural gas for consumptive use. At the urging of the states, Congress enacted the Natural Gas Act of 1938 ("NGA") to address exploitation of consumers by natural gas companies in the "regulatory void" of interstate commerce beyond the reach of state regulation. In an effort to fill this "regulatory void" while preserving all historic state powers, Congress, through the NGA, created a dual-regulatory system, with the states retaining their jurisdiction over retail

sales of natural gas for consumptive use, and federal jurisdiction limited to wholesale sales of natural gas in interstate commerce. This Court, in an unbroken line of opinions spanning over seven decades, has respected this dual-regulatory system created by Congress. The law on this issue is settled and supports the opinion below.

Despite this, and without addressing the long history of dual-regulation or the reasoning of the opinion below, petitioners argue that the court of appeals made new, radical law when it held that the NGA (as it existed between 2000 and 2002) precludes federal jurisdiction over retail sales of natural gas for consumptive use. Actions challenging retail sales of natural gas for consumptive use, made in furtherance of a conspiracy in violation of state antitrust laws, are not preempted by the NGA. This was the law for 75 years before the determination of the court of appeals, and no further review and unnecessary delay in redressing the plaintiffs' claims is warranted.

Petitioners vainly attempt to manufacture an "intolerable" conflict between the opinion below and the opinions of the Tennessee supreme court in *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010) ("*Leggett*"), and the Nevada supreme court in *State ex rel. Johnson v. Reliant Energy, Inc.,* 289 P.3d 1186 (Nev. 2012), *cert. denied*, 133 S. Ct. 2853 (2013) ("*Reliant*"). Petitioners also attempt to repackage the careful analysis of the court of appeals as somehow contrary to prior opinions of this Court and, by this method, to challenge collaterally seven decades of opinions of this Court.

Both attempts fail. The opinion below follows the clear line established by Congress, and recognized on

numerous occasions by this Court, that federal jurisdiction under the NGA goes no farther than wholesale, interstate sales of natural gas, while the states have retained plenary authority over retail sales of natural gas. The opinions in *Leggett* and *Reliant*—which explicitly addressed challenges to wholesale, interstate sales of natural gas—only confirm that wholesale sales in interstate commerce are the province of the federal government. Neither case disturbs the settled law that, under the NGA, retail sales of natural gas for consumptive use are within the states' authority.

In addition, the review by this Court that petitioners seek would have only a narrow application. The Energy Policy Act of 2005 ("EPAct") amended the NGA in a way that has made the statutory analysis below meaningful only to the present litigants and academia. Any review by this Court would reach an incredibly limited niche issue: analysis of the NGA's historical preemption, under the statutory scheme in place between 2000 and 2002, of actions alleging a market-manipulation conspiracy in violation of state antitrust laws that exclusively challenge retail sales of natural gas for consumptive use. The petition therefore fails to present an important federal question for this Court to review.

In a transparent attempt to evade liability for their admittedly wrongful price manipulation, petitioners, supported by the *amicus curiae* groups (each of which includes petitioners or petitioners' counsel as members), try to transform the narrow, mainstream opinion of the court of appeals into a radical change in preemption law. However, the dual-regulatory system, which they claim would be intolerable, was deliberately created by Congress in 1938 and has functioned effectively for 75 years. The argument that the division

between federal and state regulatory jurisdiction—unchanged for over seven decades—will now suddenly be catastrophic for the natural gas industry is a disingenuous attempt by a small number of defendants to achieve personal immunity from state antitrust laws through judicial dismantling of the dual-regulatory system created by Congress. The argument is also strikingly similar to the industry complaints that reached this Court in the years immediately following passage of the NGA. This Court has rejected such assertions time and again, recognizing that it is not the task of this Court to grant petitioners a free pass for unlawful behavior at the expense of manifest Congressional intent, the historic powers of the states and decades of settled law. The petition should be denied.

STATEMENT OF THE CASE

In addition to the following, the Wisconsin Respondents[3] incorporate by reference the recitation of facts and reasoning in the opinion below. Pet. App. 1a-63a ("*Western States*").

Between 2000 and 2002, petitioners engaged in an unprecedented anti-competitive conspiracy to manipulate the retail natural gas market in Wisconsin. Pet. App. 12a-15a. They did so by multiple devices, including engaging in sham and illusory trades to create a false sense of demand, price volatility and shortages of the supply of natural gas. *Id.* One way petitioners accomplished this was by falsely reporting, to independent, third-party publications such as *Gas Daily* and *Inside FERC*, fictitious prices, volumes and

[3] "Wisconsin Respondents" refers to the plaintiffs solely in the Wisconsin actions, as described below.

sales of natural gas. *Id.* Another way was to engage in "wash" sales (a prearranged set of transactions in which a sale of natural gas was countered by an offsetting transaction) falsely to increase the perception of demand for natural gas. *Id.*

The Wisconsin Respondents purchased natural gas for consumptive use. Pet. App. 19a-23a. They were damaged by petitioners' wrongful conduct because petitioners' anti-competitive manipulations drove up the retail price of natural gas far beyond what an honest market would have supported. *Id.* The Wisconsin Respondents brought three putative class actions pursuant to Wisconsin antitrust law: *Arandell-Wisconsin*,[4] *NewPage*[5] and *Arandell-Michigan.*[6] These putative class actions exclusively involve industrial and commercial entities which purchased natural gas at retail for their own consumption in Wisconsin between January 1, 2000, and October 31, 2002.[7] All three actions were eventually transferred to the United States District Court for the District of Nevada and consolidated for pretrial purposes with the other cases in MDL-1566, *In re Western States Wholesale Natural Gas Antitrust Litigation*. The district court exercised diversity jurisdiction over the actions. 28 U.S.C. § 1332(d)(2) (class action diversity).

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[4] Ninth Circuit Appeal No: 11-16869; Dist. Ct. Case No.: CV-S-07-1019-PMP (PAL) (D. Nev.).

[5] Ninth Circuit Appeal No: 11-16876; Dist. Ct. Case No.: CV-S-09-915-PMP (PAL) (D. Nev.).

[6] Ninth Circuit Appeal No: 11-16880; Dist. Ct. Case No.: 2:09-CV-1103-PMP (PAL) (D. Nev.).

[7] R. 1395 (*Arandell-Wisconsin*); R. 1544 (*NewPage*); R. 1611 (*Arandell-Michigan*). "R." refers to the Record on Appeal before the court of appeals.

Petitioners moved for summary judgment in these actions in December 2009, arguing that state antitrust claims are preempted by the Natural Gas Act, 15 U.S.C. § 717 *et seq.* On July 18, 2011, the district court granted summary judgment to petitioners on preemption grounds, and entered an amended final judgment on August 18, 2011. Pet. App. 119a-121a. Respondents timely appealed, and the United States Court of Appeals for the Ninth Circuit reversed the district court's judgment on April 10, 2013. *Id.* at 63a.

On August 26, 2013, petitioners brought before this Court a petition for writ of certiorari. On September 27, 2013, the Electric Power Supply Association,[8] Interstate Natural Gas Association of America,[9] Natural Gas Supply Association[10] and Western Power Trading

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[8] Its members include the parent of the Dynegy petitioners; the successor to petitioner Coral Energy Resources, L.P. (Cert. Pet. p. iv); and Dickstein Shapiro LLP, counsel for petitioner Duke Energy Trading and Marketing, L.L.C. *See* EPSA's Members, *available at:* http://www.epsa.org/forms/CompanyFormPublic/showMembers (last visited Oct. 23, 2013).

[9] Its foundation members include the parent of petitioners CMS Field Services Inc., El Paso Merchant Energy L.P. and El Paso Corporation (Cert. Pet. p. iv-v.); and an affiliate of petitioner The Williams Companies, Inc.; its members include petitioner ONEOK, Inc., *See* INGAA Foundation Members and Members, *available at:* http://www.ingaa.org/common/default.aspx?id=32 (listing the foundation members) and http://www.ingaa.org/Members/963.aspx (listing members) (last visited Oct. 23, 2013).

[10] The NGSA's membership is not publicly available, but Frans Everts, President of Shell Energy North America (U.S.), L.P., successor to petitioner Coral Energy, is the organization's Secretary-Treasurer. *See* Natural Gas Supply Association Secretary-Treasurer, *available at:* http://www.ngsa.org/about-ngsa/secretary-treasurer/ (last visited Oct. 23, 2013).

Forum[11] submitted a combined *amicus* brief, and the American Gas Association,[12] the Gas Processors Association[13] and the Washington Legal Foundation[14] submitted separate *amicus* briefs in support of the petition.

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[11] Its members include the parent of the Dynegy petitioners; the successor to petitioner Coral Energy; and petitioner Xcel Energy Inc. *See* Western Power Trading Forum, Membership and Staff, *available at*: http://www.wptf.org/?q=node/3 (last visited Oct. 23, 2013).

[12] Its members include an affiliate of petitioner Reliant Energy; the parent of petitioner Duke Energy (Cert. Pet. pp. iv-v); petitioner ONEOK, Inc.; and petitioner Xcel Energy. *See* American Gas Association, Member Addresses and Places of Business, *available at*: http://aga.org/membercenter/Pages/MembershipDirectory-links.aspx (last visited Oct. 23, 2013).

[13] Its members include an affiliate of petitioner Reliant Energy; an affiliate of Duke Energy's owner (Cert Pet. p. v); the parent of the CMS and El Paso petitioners (*id.* at iv-v.); ONEOK Partners, of which petitioner ONEOK, Inc. is the general partner; an affiliate of the successor to petitioner Coral Energy (*id.* at iv); an affiliate of petitioner The Williams Companies; and petitioner Xcel Energy. *See* Gas Processors Association, GPA Member Companies, *available at*: https://www.gpaglobal.org/membership/companies/ (last visited Oct. 23, 2013).

[14] The Board Members of its Legal Policy Advisory Board include Coleen Klasmeier of Sidley Austin LLP, whose firm serves as counsel for the CMS petitioners, and Rob McKenna of Orrick, Herrington & Sutcliffe LLP, whose firm serves as counsel for the AEP petitioners. *See* Washington Legal Foundation, Legal Policy Advisory Board, *available at*: http://www.wlf.org/org/legalpolicy.asp (last visited Oct. 23, 2013).

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT ON THE QUESTION PRESENTED

A. A Demarcation Between Federal and State Authority Over the Natural Gas Industry Has Existed For 75 Years.

In the mid-1800s, natural gas was predominantly manufactured from coal and delivered locally within the same municipality in which it was produced.[15] Local governments deemed natural gas distribution to be a business affecting the public interest, and they regulated the rates charged by passing laws preventing abuse of market power by producers of natural gas.[16]

The advent of interstate pipeline technologies changed the nature of the industry and the manner of its regulation. Schwartz, *supra* note 16, at 558. Between 1911 and 1928, several states attempted to regulate interstate natural gas pipelines, which at the time were unregulated by the federal government. *History of Regulation, supra* note 15. In a series of decisions culminating in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), this Court held that states were prohibited, by the negative implications of the Commerce Clause of the United States Constitution (the "dormant commerce clause"), from directly burdening interstate commerce with respect to natural

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[15] Natural Gas Supply Ass'n, *Natural Gas Regulations: History of Regulation*, *available at*: http://www.naturalgas.org/regulation/history.asp (amicus here) (last visited Oct. 23, 2013).

[16] *Id.*; *see also* David Schwartz, *The Natural Gas Industry: Lessons for the Future of the Carbon Dioxide Capture and Storage Industry*, 19 Stan. L. & Pol'y Rev. 550, 557-58 (2008).

gas, even in the absence of federal regulation. 273 U.S. at 88-90. What became known as the "*Attleboro* doctrine" provided that states could regulate retail natural gas sales, but not the wholesale, interstate market reserved for the federal government. *See id.*

The boom of interstate natural gas sales in the 1920s made the lack of interstate natural gas regulation increasingly problematic. *History of Regulation*, *supra* note 15. In 1935, the Federal Trade Commission issued a report outlining "numerous abuses" by natural gas companies. Schwartz, *supra* note 16, at 558. The report—and pressure from state regulatory commissions—prompted Congressional action, leading to passage of the Natural Gas Act of 1938 ("NGA"), codified at 15 U.S.C. § 717 *et seq. Id.*

The NGA's explicit purpose was to fill the "regulatory void" created by the *Attleboro* doctrine with respect to interstate sales of natural gas, establishing a codified, seamless *dual-regulatory* system wherein the states retained all historic powers over retail sales of natural gas for consumption, while the federal government regulated wholesale sales of natural gas in interstate commerce. *See Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 631 (1972) (explaining that the NGA was intended by Congress to be "broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare").[17]

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[17] *See also, e.g.*, *Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.,* 314 U.S. 498, 506 (1942); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947) ("*Panhandle I*") (explaining that the NGA, "though extending federal regulation, 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, by adding the weight of federal regulation to supplement

Thus, Section 1(b) of the NGA established federal jurisdiction over "sale in interstate commerce of natural gas for resale for ultimate public consumption" but explicitly excluded federal jurisdiction over "*any other* transportation or sale of natural gas." 15 U.S.C. § 717(b) (emphasis added). As this Court recognized soon after passage of the NGA in *Panhandle I:*

> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage [in the NGA] was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply to any other … sale."

332 U.S. at 516 (quoting Section 1(b) of the NGA); *see also id.* at 517-18 (remarking that the NGA "had no purpose or effect to cut down state power.… The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way"); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 510 (1989) ("When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. It 'did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it

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and reinforce it in the gap created by the prior decisions"); *Fed. Power Comm'n v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 502-04 (1949) ("*Panhandle II*"); *Interstate Natural Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 690 (1947); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 609-10 (1944) (explaining that the NGA "was designed to take no authority from State commissions and was so drawn as to complement and in no manner usurp State regulatory authority" (internal quotations omitted)).

contemplated the exercise of federal power as specified in the Act'" (quoting *Panhandle II*, 337 U.S. at 502-03)).

This Court articulated the limits of federal preemption of state law under the NGA in *Northern Natural Gas Co. v. State Corp. Commission of Kansas*, 372 U.S. 84 (1963), in which this Court considered whether a Kansas state agency's order, requiring the Northern Natural Gas Company to purchase a proportional amount from each well connected to a common field, was preempted by the NGA. *Id.* at 88-89. In finding the order preempted by federal law, the Court explained that, pursuant to the NGA, wholesale sales of natural gas in interstate commerce fall under federal jurisdiction. *Id.* at 91.

This Court has repeatedly made clear, however, that the NGA did *not* disturb the states' historic role in regulating *retail* sales of natural gas for consumption. *See, e.g.*, *Panhandle I*, 332 U.S. at 521 (explaining that Congressional intent to permit continued state regulation is "clear, in view of the [NGA's] historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over"); *id.* at 520 ("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").

Subsequent opinions of this Court confirmed the states' powers to regulate retail sales of natural gas for consumption. *See*, *e.g.*, *Public Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943); *Hope Natural Gas Co.*, 320 U.S. at 609-10; *Interstate Natural Gas Co.*, 331 U.S. at 690; *Panhandle E. Pipe Line Co. v.*

Mich. Pub. Serv. Comm'n, 341 U.S. 329, 334 (1951); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 684 n.13 (1954); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 27 (1961); *La. Power & Light Co.*, 406 U.S. at 631 (1972); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 186 (1983); *Nw. Pipeline*, 489 U.S. at 506-07; *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) ("for a half century Congress has been aware of our conclusion in [*Panhandle I*]… and in the years following that decision has only reaffirmed the power of the States in this regard"). Thus, the dividing line between federal and state regulation of the natural gas industry has always been the nature of the sale.

In the 1970s, a natural gas shortage, perceived to have been partially the result of excessive, inflexible federal regulation, led to a series of Congressional acts deregulating the natural gas industry.[18] In response, FERC also engaged in deregulation efforts.[19] Certain

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[18] *See* Natural Gas Policy Act of 1978 ("NGPA"), Pub. L. No. 95-621, 92 Stat. 3350 (1978) (replacing strict price controls with price ceilings that would change on a monthly basis based on inflation and other factors); Natural Gas Wellhead Decontrol Act of 1989 ("WDA"), Pub. L. No. 101-60, 103 Stat. 157 (1989) (removing "first sales" of natural gas from federal jurisdiction); Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2866 (1992) (making sales of natural gas from Canadian and Mexican sellers to buyers in the United States "first sales" exempt from federal jurisdiction).

[19] *See* Pipeline Service Obligations and Revisions To Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267-02, 13,267 (Apr. 16, 1992) (requiring interstate pipelines to "unbundle" their transportation of natural gas from natural gas sales); *id.* at 13,270 (issuing blanket certificates to interstate pipelines allowing them to sell natural gas at market-based rates); Regulations Governing Blanket Market Certificates, 57 Fed. Reg. 57,952-01, 57,957-58 (Dec. 8, 1992) (issuing blanket

state and private actors mistakenly interpreted deregulation by Congress and FERC as constituting an invitation to the states to regulate sales of natural gas formerly subject to federal jurisdiction. For instance, in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Miss.* ("*Transcon*"), the Mississippi Oil and Gas Board argued that deregulation in the NGPA permitted Mississippi to regulate activity formerly subject to federal jurisdiction. 474 U.S. 409, 421-22 (1986). This Court held that federal law preempted Mississippi's regulation, because a "federal decision to forgo regulation in a given area [*i.e.*, deregulation in the NGPA] may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Id.* at 422 (citing *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)) (emphasis in original); *see also id.* ("The proper question is … whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC").

Accordingly, from passage of the NGA in 1938 through the period in question (2000-2002), the federal government maintained exclusive jurisdiction over wholesale sales of natural gas in interstate commerce, and the states maintained their traditional jurisdiction over retail sales of natural gas for consumption.

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sales certificates for all other interstate, wholesale sales of natural gas).

B. The Court of Appeals Recognized and Applied Settled Law.

The court of appeals considered whether: "Section 5(a) of the NGA, which provides FERC with jurisdiction over any 'practice' affecting jurisdictional rates, preempt[s] state antitrust claims arising out of price manipulation associated with transactions falling outside of FERC's jurisdiction [because they concern retail sales for consumptive use]?" Pet. App. 24a. In answering this question, the court of appeals followed the longstanding demarcation between federal and state authority over sales of natural gas established by Congress in 1938 and recognized in numerous opinions of this Court over the past 75 years.

The court of appeals first examined the history of natural gas regulation as explained in *Panhandle I*, and the dual-regulatory system established by Congress in the NGA and recognized by this Court in *Panhandle I* and *Northwest Pipeline*. Pet. App. 24a-25a. The court observed that in Section 1(b) of the NGA, Congress deliberately and explicitly excluded retail sales of natural gas for consumptive use from FERC's jurisdiction. *Id.* at 17a ("The line of the statute [is] thus clear and complete. It cut[s] sharply and cleanly between sales for resale and … sales for consumptive use" (quoting *Panhandle I*, 332 U.S. at 517)). Because the Wisconsin Respondents' claims, by class definition, exclusively challenge retail sales of natural gas for consumption, they fall on the state side of the jurisdictional line. Pet. App. 28a ("federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction").

Petitioners, while conceding that retail sales of natural gas for consumption are not subject to federal

jurisdiction, argued that the present claims are preempted because the general language in Section 5(a) of the NGA granting FERC authority over the practices of natural gas companies engaging in interstate wholesale sales supersedes the explicit language in Section 1(b) specifically excluding retail sales of natural gas for consumptive use from federal jurisdiction. Pet. App. 24a. In rejecting petitioners' argument, the court of appeals looked to this Court's opinion in *Northwest Pipeline* as an illustration of the Court's strict application of the jurisdictional limits of Section 1(b) in the face of arguments for a broad reading of federal authority under other provisions of the NGA.

In *Northwest Pipeline*, this Court held that a Kansas regulation—providing that rights to extract gas would be lost if pipelines unduly delayed extraction—was not barred by federal law. 489 U.S. at 497, 507-09. The pipelines in that case had claimed that Kansas's regulation would increase costs and thereby affect rates in wholesale sales in interstate commerce, and thus Kansas's regulation must be preempted by the NGA. In rejecting the pipelines' argument, this Court explained:

> 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 situation.

Pet. App. 29a-30a (quoting *Nw. Pipeline*, 489 U.S. at 514).

In other words, federal law does not preempt state regulation of natural gas in areas traditionally subject to state regulation merely because state regulation might have a bleed-over impact on areas of the natural gas industry subject to federal jurisdiction. Any other approach would destroy the dual-regulatory role carefully established by Congress, nullify the jurisdictional provisions of the NGA and thwart Congressional intent. Pet. App. 31a-32a (explaining that petitioners' arguments lack a "conceptual core" that would distinguish federal from state regulatory authority, and would eviscerate the dual-regulatory role established by Congress).

Following this Court's clear precedent, the court of appeals concluded that state antitrust actions exclusively challenging *retail* sales of natural gas for consumptive use are not preempted by the NGA.[20] Pet. App. 38a-39a; *cf. Panhandle II*, 337 U.S. at 508 (explaining that the powers of FERC in Sections 4, 5

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[20] Petitioners argue that the actions are "directed at" practices affecting wholesale sales, and suggest a phantom "concession" supposedly made by respondents. Cert. Pet. 4, 8-9. Contrary to petitioners' unsupported assertion, the actions are, and have always been by class definition, explicitly "directed at" artificially inflated prices paid by class members in retail purchases of natural gas for consumption, and the Wisconsin Respondents have made no "concession" contrary to the allegations made in the Wisconsin complaints. *See supra* Statement of the Case. Petitioners' argument is also irrelevant, because the test is whether the sales in question are wholesale or retail; suits challenging wholesale natural gas transactions in interstate commerce are preempted, while suits limited to retail sales of natural gas for consumption are not.

and 7 of the NGA are subject to the jurisdictional limitations in Section 1(b)).[21]

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), cases cited by petitioners, both involved situations where states had attempted to vault across the federal-state jurisdictional divide into areas subject to FERC's jurisdiction, and do not impact the issue presented here.

In *Schneidewind*, this Court struck down a Michigan law that granted Michigan veto power over the issuance of securities by natural gas companies unless such issuance was for a "lawful purpose" and "essential to the successful carrying out of" that purpose, and allowed Michigan unfettered power to attach conditions to any such issuance. 485 U.S. at 297-98. The overreaching Michigan law intruded, *inter alia*, upon FERC's powers to: (1) "calculate a reasonable rate of return on invested capital" in wholesale sales of natural gas in interstate commerce (under Section 4(a) of the NGA) and; (2) issue certificates of "public convenience and necessity" before a company engaged in wholesale, interstate sales "constructs, extends, acquires, or operates any facility" for interstate transportation or

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[21] *See also* William F. Demarest, Jr., "*Traditional" NGA Jurisdictional Limits Constrain FERC's Market Manipulation Authority*, 31 Energy L. J. 471, 471-72 (2010) ("Even a cursory review of the court cases dealing with the Commission's exercise of delegated authority discloses a number of decisions where the lawfulness of the exercise of regulatory power was resolved on the basis of the scope of the Commission's *jurisdiction* [pursuant to Section 1(b)]" as opposed to the enumerated powers in other sections of the NGA (emphasis added)).

wholesale sales of natural gas in interstate commerce (under section 7 of the NGA). *Id.* at 301-02; *see also Nw. Pipeline*, 489 U.S. at 513 n.10 (explaining that the Michigan statute in *Schneidewind* "could not plausibly be said to operate in a field expressly reserved by the NGA to the States").

Similarly, in *Mississippi Power*, this Court held that Mississippi lacked the power to second-guess the wholesale electricity rates set by FERC charged by a nuclear power plant. 487 U.S. at 362-63, 373-74 (concluding that Mississippi lacked authority to investigate the propriety of wholesale rates explicitly set by FERC after extensive hearings); *see also Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47-48 (2003) (explaining *Mississippi Power* as a case in which the states tried to "trap" wholesale costs by denying power generators the ability to recover wholesale costs in retail rates); Pet App. 36a (rejecting petitioners' assertion that the market manipulation here is analogous to FERC's authority to regulate practices affecting wholesale rates in *Mississippi Power*).

Neither *Schneidewind* nor *Mississippi Power* disturbed the contours of the dual-regulatory system regarding natural gas regulation established by Congress and recognized by this Court, and neither case is at odds with the opinion of the court of appeals.[22]

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[22] *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), also has no bearing here, as it involved a challenge by plaintiffs to an area (locomotive design parameters) where Congress had affirmatively and exclusively occupied the *entire* field. *See id.* at 1266. By contrast, the present case involves an area of traditional state regulation *deliberately reserved to the states* by Congress in the NGA.

C. The Tennessee and Nevada Supreme Court Opinions Do Not Conflict With the Opinion of the Court of Appeals.

The opinions of the supreme courts of Tennessee and Nevada in *Leggett* and *Reliant* also reside comfortably within the wholesale-retail demarcation established by Congress in 1938. In *Leggett*, the Tennessee supreme court held that Congressional deregulation of the natural gas industry did not invite state antitrust actions challenging wholesale sales of natural gas made by regulated utilities. 308 S.W.3d at 871-72. The Tennessee supreme court found that plaintiffs *conceded that they were challenging wholesale sales on the federal side of the demarcation line,* and thus traditionally subject to FERC's jurisdiction, but considered whether the WDA and related deregulatory acts of Congress signaled (an implied) Congressional intent to re-delegate traditional federal authority back to the states.[23] The court in *Leggett* held that Congress intended to leave the deregulated portions of the *wholesale* natural gas market in question unoccupied by any regulator, and thus held that the plaintiffs' claims were preempted by federal law. *Id.* at 861 (following *Transcon*'s reasoning that a "federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate") (quoting *Transcon*, 474 U.S. at 422 (emphasis in

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[23] "Plaintiffs … argue that … especially in light of the deregulatory steps taken in the WDA—their claims are not pre-empted… [and] assert that, due to the enactment of the WDA, many of the *wholesale* natural gas transactions that were subject to FERC jurisdiction at the time of *Transcon* and *Northern Natural* no longer are." *Id.* at 864-65 (emphasis added).

Transcon)). In so doing, the *Leggett* court again confirmed the federal-state divide created by Congress in the NGA (rooted in the *Attleboro* doctrine) and recognized by numerous opinions of this Court. *See* 308 S.W.3d at 871.

Similarly, in *Reliant*, the Nevada supreme court held that *wholesale* sales of natural gas—that FERC had determined in an investigation were jurisdictional sales—could not be challenged by a state antitrust action. 289 P.3d at 1188, 1193. Plaintiffs in *Reliant conceded that Reliant's sales were wholesale sales historically subject to federal jurisdiction*, but argued that preemption was "inapplicable … because even though the field historically had been preempted, at the time of the alleged market manipulation, the field had been deregulated [by such acts of Congress as the WDA] and was no longer subject to FERC control." *Id.* at 1189. Relying heavily on *Leggett*, the court in *Reliant* concluded that Congress had not invited state intrusion upon historically federal (*i.e.*, wholesale) sales of natural gas "through the use of purposeful deregulation," and held that the action was barred by federal law. *Id.* at 1193.

The opinions in *Leggett* and *Reliant* therefore stand only for the proposition that, absent clear Congressional intent to delegate authority over wholesale, interstate natural gas commerce to the states, state actions challenging *wholesale* sales of natural gas remain preempted by federal law even after federal deregulation within the wholesale natural gas industry. *Cf.* Brief for Respondent 20-21 & n.5, *Nevada v. Reliant Energy, Inc.*, 133 S. Ct. 2853 (2013) (No. 12-980), 2013 WL 2428988 (filed by then-respondent Reliant Energy Services, Inc., petitioner in this action) ("Lower courts have faithfully applied this Court's

teaching to hold preempted state antitrust claims that intrude on FERC's exclusive jurisdiction over *wholesale* natural-gas rates. No court has held to the contrary in a case challenging *only transactions within FERC's jurisdiction*" (internal footnote citing *Leggett* and comparable cases omitted (emphasis added)); *see also id.* at 10, 13-14 (stressing that "no court disagrees with the Nevada Supreme Court's holding [in *Reliant*] that antitrust claims challenging *wholesale* transactions *within FERC's jurisdiction* are preempted" and arguing that, if the facts of *Reliant* had been presented to the court of appeals below in this matter, the court of appeals would have dismissed the action on preemption grounds (first emphasis added)).

There is no genuine conflict between the holding below and the holdings in *Leggett* and *Reliant*. *See* Eugene Gressman, *et al.*, *Supreme Court Practice* 241 (9th ed. 2007) (explaining that, for certiorari to be granted, there "must be a real or intolerable conflict on the same matter of law or fact, not merely an inconsistency in dicta" (internal quotation omitted)). To the contrary, the opinion below, *Leggett* and *Reliant* all represent fact-bound applications involving transactions falling on different sides of the same demarcation line between federal and state power over the natural gas industry established by Congress and articulated clearly in numerous opinions of this Court.[24]

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[24] As a backup argument, petitioners make a half-hearted attempt to manufacture a conflict on the issue of the *presumption* to be applied in preemption cases, arguing that *Leggett* applied a *presumption of preemption* in suits challenging wholesale sales of natural gas, and the opinion below invoked a *presumption of no preemption* in suits challenging retail sales of natural gas for consumption. Cert. Pet. 16. This is a distinction without a difference. What matters is the limitation of federal jurisdiction in

II. ADDITIONALLY, THE PETITION FAILS TO IDENTIFY AN IMPORTANT FEDERAL QUESTION ON THE NARROW ISSUE PRESENTED

In 2005, Congress amended the NGA. The impact of any new pronouncement of law by this Court on the question presented under the former NGA (as it existed during the 2000 to 2002 period relevant to the pending actions) would consequently be limited to the parties in present litigation. In addition to the lack of any conflict in the law (*see supra* Section I), the legal issues implicated by the petition are narrow and present no important federal question. *See* Supreme Court Rule 10(a),(c) (explaining that review by the Court is generally warranted only if there is an "important federal question").

A. Amendments To the Natural Gas Act After the Period In Question Here Have Substantially Altered the Scope of FERC's Regulatory Powers.

Between 2000 and 2002, petitioners engaged in an unprecedented conspiracy in restraint of trade, a fact recognized by Congress, FERC and the courts.[25] In

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Section 1(b) of the NGA. Actions challenging *wholesale* sales of natural gas, like *Leggett* and *Reliant*, are preempted as a matter of law, and actions limited to *retail* sales, like the actions below, are not.

[25] *See*, *e.g.*, 151 Cong. Rec. S. 9344 (July 29, 2005) (containing the comments of Senator Cantwell, describing the unethical manipulation of the natural gas market between 2000-2002 as historically "disastrous"); Testimony of Joseph Kelliher, FERC Chairman, before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives (Dec. 12, 2007) ("Kelliher Testimony") *available at* http://www.ferc.gov/eventcalendar/Files/20071212102420-kelliher-testimony-12-12-07.pdf (last visited Oct. 23, 2013)

response, FERC conducted an investigation into manipulation of the energy markets and in 2003 issued a detailed report ("FERC Report").[26] The FERC Report explained that natural gas prices "rose to extraordinary levels." Pet. App. 14a (quoting the FERC Report). FERC concluded that a "fatally flawed market design" stemming "from efforts to manipulate price indices compiled by trade publications" was a substantial factor in causing the rise in natural gas prices. FERC Report at ES-1. As a result of the FERC Report and the systemic anti-competitive behavior it revealed,[27] FERC formally asked Congress to amend the NGA and grant FERC "new regulatory tools."[28]

(describing the unparalleled market manipulation between 2000 and 2002); Pet. App. 14a (recounting the results of a FERC fact-finding investigation that concluded that natural gas prices between 2000 and 2002 "rose to extraordinary levels").

[26] Federal Energy Regulatory Commission, *Final Report on Price Manipulation In Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, Docket No. PA0-2-2-000, (Mar. 2003).

[27] *See* FERC Report at ES-17 (recommending that Congress give direct authority to FERC or another federal agency to ensure that trading platforms for wholesale sales of electric energy and natural gas in interstate commerce are "monitored and provide price market information that is necessary for price discovery and competitive energy markets").

[28] Kelliher Testimony; *see also* Federal Energy Regulatory Commission, Conference on Enforcement Policy AD07-13-000 (Nov. 14, 2007) (statement of FERC Chairman Kelliher), *available at* http://www.ferc.gov/media/statements-speeches/kelliher/2007/11-14-07-kelliher.pdf (last visited Oct. 23, 2013) (acknowledging that FERC lacked regulatory authority to guard against market manipulation before Congress granted FERC additional powers in 2005 "inspired in large part by the market manipulation that occurred in 2000-2001").

Congress responded by enacting the EPAct.[29] The EPAct significantly amended the NGA, granting FERC, *on a prospective basis only*, dramatic new powers.[30] As FERC explained in 2007, "[b]efore the Energy Policy Act, FERC did *not* have all the tools it needed to be a strong enforcement agency" and lacked "express authority [under the NGA] to prohibit market manipulation." Kelliher Testimony (emphasis added). FERC's powers under the amended NGA gave it, for the first time, the "tools we needed" to "protect consumers from market manipulation," providing "strong grounding for our efforts to oversee *wholesale* energy markets." *Id.* (emphasis added).

Since passage of the EPAct, FERC has operated under statutory parameters substantially different from its powers during the period in question here (2000-2002). *Cf. Western States*, Pet. App. 37a-38a (acknowledging the principle of statutory construction that courts should not deem Congressional acts to be

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[29] Energy Policy Act of 2005 ("EPAct"), Pub. L. No. 109-58, 119 Stat. 594 (2005). *See also* 151 Cong. Rec. S. 9344 (July 29, 2005) ("This bill also takes steps to respond to the disastrous western energy crisis.... This Energy bill puts in place *the first ever* broad prohibition on manipulation of electricity and natural gas markets" (statements of Senator Cantwell) (emphasis added)).

[30] *See, e.g.*, EPAct at § 315, 119 Stat. at 692 (amending the NGA to give FERC authority to prohibit manipulative or deceptive conduct, modeled on 10(b) of the Securities Exchange Act of 1934); Kelliher Testimony (explaining that the EPAct significantly amended the NGA by (a) prohibiting entities from engaging in deceptive conduct in activities subject to FERC's jurisdiction; (b) directing FERC to facilitate price transparency in jurisdictional markets and granting FERC authority to require market participants to disseminate information about the price and availability of natural gas; and (c) granting FERC enhanced civil penalty authority to assist FERC in its new monitoring rules).

superfluous, and thus reasoning that Congress's act in passing the EPAct, granting FERC new authority, was prompted by the fact that FERC did not have these powers prior to 2005).[31]

B. The Amendments To the Natural Gas Act and Other Unique Factors Narrowly Confine the Question Presented To the Named Conspirators In Pending Actions.

The amendments to the NGA in 2005 have made FERC today a different regulatory agency than it was in the period in question here (2000-2002). For instance, if petitioners' wrongful conduct occurred today and resulted in a state lawsuit in which a preemption issue was raised, analysis of the scope of FERC's authority would implicate interpretation of the new Section 4A of the NGA, which prohibits manipulative or deceptive devices in connection with wholesale sales of natural gas in interstate commerce. *See* EPAct at § 315, 119 Stat. at 692 (2005) (creating the new Section 4A of the NGA, codified at 15 U.S.C. § 717c-1). Any further articulation by this Court of the preemptive powers of the "old FERC" under the *prior* version of the NGA will not determine the preemptive powers of the "new FERC" in similar situations going forward under the *current* version of the NGA. Thus, the review

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[31] Nevertheless, there is nothing in the EPAct or its legislative history to indicate Congressional intent to deprive the states of their historic authority over retail sales of natural gas for consumptive use, or to make FERC a regulatory enforcer of the important public policy objectives achieved by antitrust laws. *Cf. Goldfarb v. Va. State Bar,* 421 U.S. 773, 787 (1975) (explaining that, because antitrust laws reflect overarching and fundamental policies, there is a "heavy presumption" that Congress did not repeal antitrust laws by implication in legislation granting an agency authority over given commercial activity).

petitioners seek from this Court of the federal-state demarcation of authority over the natural gas industry in antitrust cases during the relevant time period is dated and relevant only to the parties to this litigation.

Additionally, the limitations period for bringing antitrust suits under the former NGA (prior to the statute's amendment in the EPAct) has passed.[32] Due to the passage of time, any interpretation of antitrust preemption issues under the former NGA would only impact suits already pending and the named defendants in these suits. The opinion below has no significance for any entity other than those named defendants in pending litigation whose participation in a conspiracy to manipulate retail natural gas markets between 2000 and 2002 is proven at trial.

Therefore, while the preemption question here is of obvious significance to the present litigants, the issue presented is incredibly narrow and the scope of the petition is, in reality, limited to those litigants. The petition thus fails to present an important federal question. *See Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923) (explaining that only issues important to the public, as opposed to merely the parties involved in the lawsuit at bar, are worthy of review by this Court); *see also Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (explaining that a federal question must be "beyond the academic or the episodic" to warrant granting a petition for certiorari review); *Caldwell v. Quarterman*, 549 U.S. 970, 127 S. Ct. 431, 432 (2006) (Stevens, J., respecting denial of certiorari) (explaining that denial of certiorari is

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[32] *See, e.g.,* Wis. Stat. § 133.18 (establishing a six-year period for antitrust violations in Wisconsin).

appropriate when the opinion in question is a "narrow holding… unlikely to produce injustice").

III. THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 1(b) OF THE NATURAL GAS ACT PRECLUDES FEDERAL JURISDICTION OVER RETAIL SALES OF NATURAL GAS FOR CONSUMPTION

The court of appeals came to the only possible answer to the question before it: the *general* language in Section 5(a) of the NGA, authorizing FERC's regulation of "practices" in wholesale sales, cannot nullify Section 1(b)'s *specific* language, carving retail sales for consumptive use out of FERC's jurisdiction and leaving those sales to historic state regulation.

In reaching this result, the court of appeals advanced multiple reasons supporting the conclusion that the general language of Section 5(a) the pre-EPAct NGA could not possibly negate Section 1(b)'s specific language limiting federal jurisdiction.[33] Petitioners

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[33] They include: (1) this Court's instruction that courts should not lightly find that the states' historic police powers are superseded by federal law; (2) the explicit carve-out for the states' benefit in Section 1(b) of the NGA of retail sales for consumptive use; (3) this Court's opinion in *Panhandle I* explaining the importance of this carve-out and this Court's opinion in *Northwest Pipeline* explaining the careful division of federal and state authority over the natural gas industry created by Congress; (4) the court of appeals' own careful analysis and rejection in *E&J Gallo Winery v. Encana Corp.*, 503 F.3d 1027 (9th Cir. 2007), of the notion that rates published by independent third-party indices must be considered "filed rates" approved by FERC and thus exempt from state regulation; (5) the principle of statutory construction that provisions should be read not in isolation, but within the context of the structure of the statute of which the provision is part; (6) opinions of this Court and others reading Section 5(a) of the NGA narrowly, so as to comport with Section 1(b); (7) the principle that

mostly ignore the analysis of the court of appeals. Contrary to petitioners' assertion, there is nothing novel in the conclusion of the court of appeals, as it tracks numerous opinions of this Court on the same issue. *See, e.g.*, *Panhandle II*, 337 U.S. at 508 (explaining that the enumerated powers in Sections 4, 5 and 7 of the NGA could not have been intended to "swallow [the jurisdictional limitations in Section 1(b) and] thus extend the power of the Commission to the constitutional limit of congressional authority over commerce. The repetition of the words 'subject to the jurisdiction' [in Section 1(b)] makes clear to us the intent to keep the Commission's hands out of the excepted local matters"); *see also supra* Section I.A.

For example, as the court of appeals noted, if the word "practices" in Section 5(a) of the NGA were defined as broadly as petitioners insist—to prohibit state regulation of retail sales simply because those sales involved prices derived from unlawful conduct that might also independently have been committed with respect to wholesale sales in interstate commerce—federal power would subsume state power, and would occupy the entire natural gas field. Pet. App. 31a-32a (explaining that under the broad reading of Section 5(a) of the NGA proposed by petitioners, "there is no conceptual core delineating transactions falling within FERC's jurisdiction and transactions outside of FERC's jurisdiction," and that, under petitioners' view, FERC would assume jurisdiction over

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Congressional acts are not to be deemed superfluous, and thus passage of the EPAct by Congress is presumed to be prompted by a need to grant FERC additional powers it did not already have; and (8) FERC's own Code of Conduct, which explains that FERC does not have authority over retail sales for consumptive use, like those in question here. Pet. App. 23a-39a.

the entire natural gas industry (internal quotation omitted)). Petitioners' approach would nullify the jurisdictional limits of federal power embodied in Section 1(b) of the NGA and would unravel the dual-regulatory system intentionally established and maintained by Congress. *See id.*; *cf. Am. Gas Ass'n. v. F.E.R.C.*, 912 F.2d 1496, 1506 (D.C. Cir. 1990) (characterizing a similar argument—that NGA Section 5(a) grants FERC "jurisdiction over non-jurisdictional contracts"—advanced by then-petitioner (now *amicus curiae*) the American Gas Association, as "oxymoron[ic]").

The court of appeals painstakingly followed the settled demarcation between the federal and state regulatory spheres in the natural gas industry and came to the only result possible on the facts before it.[34] There is no need for this Court to review the decision below.

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[34] Petitioners assert that the opinion in *Gallo* was the linchpin of the lower court's decision. This is simply false. The court of appeals discussed *Gallo* in remarking that state-law antitrust actions are not *prima facie* preempted by the NGA. Pet. App. 25a-36a. *Gallo* focused on whether the "filed rate doctrine," an affirmative defense not presented to the Court in the petition, barred state antitrust claims. 503 F.3d at 1043 (explaining "First, we must consider whether the Filed Rate Doctrine can bar damage claims based on an index … that is not a rate itself" and second, assuming *arguendo* an affirmative answer to the first question, whether the damage claims are barred even though "Gallo is making retail purchases *which are outside FERC's jurisdiction*" (emphasis added)).

IV. PETITIONERS' CHALLENGE TO THE DUAL-REGULATORY SYSTEM CREATED BY CONGRESS DOES NOT MERIT REVIEW BY THIS COURT

Petitioners' assertion that the opinion below will fragment the natural gas industry is utterly without basis. The opinion of the court of appeals did not alter the dual-regulatory system established by Congress over the natural gas industry, which has been in place for 75 years without the disastrous consequences predicted by petitioners.

Petitioners' insistence that one national standard under FERC's banner is required is also disingenuous. FERC has acknowledged that it did not have jurisdiction to combat anti-competitive market manipulation in retail sales of natural gas for consumption during the 2000-2002 time period in question. *See, e.g.*, Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323, ¶ 21 (Nov. 26, 2003) (acknowledging that FERC does not and cannot regulate the entire natural gas market but only exercises its "authority over that portion of the gas market *which is within its jurisdiction* to prevent the manipulation of prices" (emphasis added)); Pet. App. 36a-38a (citing FERC's Code of Conduct, which explains that FERC does not have authority over non-jurisdictional sales like the retail sales for consumptive use in question here); *see also supra* Section II.B.[35]

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[35] Petitioners obfuscate the conduct in question to imply that their manipulations fell under FERC's authority. Petitioners manipulated the natural gas markets to inflate prices well beyond what normal markets would bear, and reported these manipulated rates to independent third-party publications, which drew on them to formulate and publish price indices, that then were presented as indicative of prevailing "market rates" for natural gas. Petitioners

Petitioners do not genuinely fear future harm to the natural gas industry, nor do they posit any basis for such fear. They simply seek personal immunity from redress for their unprecedented manipulation between 2000 and 2002 of the retail natural gas market. *Cf. La. Power & Light Co.*, 406 U.S. 621, 631 (1972) (explaining that courts should not create a "no man's land" in the regulation of natural gas, given Congress' intent to develop a "comprehensive and effective" dual-regulatory system). For their own unique, self-serving interests, including apparently to delay having to answer for their wrongdoing at trial, petitioners cloak their attempt to escape responsibility for their collusion in principles of federalism. In so doing, they trample over the express Congressional intent to create an effective, clear, workable dual-regulatory system in the NGA. *Cf. Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) ("[O]ur decisions have squarely rejected the view … that the scope of [federal] jurisdiction over interstate sales of gas … is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis").

This transparent ploy to muddle the argument, and inject ambiguity and confusion into an area of law that

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speciously suggest that they sold at rates reflective of market conditions, and thus met the terms of their blanket certificates. However, FERC did not require petitioners to manipulate the markets, and what the Ninth Circuit found in *Gallo* holds true—a manipulated rate is by no means FERC-approved. *Gallo*, 503 F.3d at 1048.

is settled and clear, should not succeed. As this Court explained in *Panhandle I:*

> The [vital state interest in regulating intrastate natural gas activity] lead[s] to the conclusion that the states are not made powerless to regulate the sales in question by any supposed necessity for uniform national regulation but that on the contrary the matter is of such high local import as to justify their control, even if Congress had remained wholly silent and given no indication of its intent that state regulation should be effective. But in this case, in addition to those considerations taken independently, the policy which we think Congress has clearly delineated [in the NGA] for permitting and supporting state regulation removes any necessity for determining the effect of the commerce clause independently of action by Congress and taken as operative in its silence. The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage.

332 U.S. at 523-24. Petitioners' attempt to subvert Congressional intent to further their desire to avoid liability for their wrongful acts cannot be countenanced.

The Court has clearly stated that its role is not to second-guess the division of regulatory authority established by Congress. As this Court explained in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978):

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the

> meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.... [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches.

CONCLUSION

For the reasons stated, the Court should deny the petition.

Respectfully submitted,

October 28, 2013.

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