No. 12-

IN THE

Supreme Court of the United States

THE STATE OF NEVADA, IN ITS PROPRIETARY CAPACITY AND AS PARENS PATRIAE; PEGGY MAZE JOHNSON AND LAUNA WILSON, INDIVIDUALLY AND AS CLASS REPRESENTATIVES FOR ALL OTHERS SIMILARLY SITUATED; AND LARRY LANCTO, INDIVIDUALLY AND AS CLASS REPRESENTATIVE FOR ALL OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

RELIANT ENERGY, INC.; RELIANT RESOURCES, INC.; CENTERPOINT ENERGY, INC.; AND KATHLEEN M. ZANABONI, AN INDIVIDUAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Supreme Court of Nevada holding that the Nevada Attorney General's action for damages under the Nevada state antitrust law is preempted as a matter of law by federal regulation of natural gas markets is in conflict with decisions of the Seventh and Ninth Circuits in *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) and *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007).

2. Whether it was error for the Nevada Supreme Court to base its "field preemption" conclusion on this Court's decision in *Transcontinental Pipe Line Co. v. State Oil & Gas Bd. of Mississippi*, 474 U.S. 409 (1986) without regard to subsequent limitations of that decision in *Puerto Rico Department of Consumers Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) and subsequent changes in the relevant statutory and regulatory framework enacted by Congress and the Federal Energy Regulatory Commission.

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STATEMENT OF THE CASE

This case is an action by the Nevada Attorney General (Nevada AG) proceeding in *parens patriae* for enforcement of Nevada's antitrust laws. The principal allegation is that in 2000 and 2001 the defendants and bankrupt co-conspirator Enron engaged in deceptive and manipulative natural gas trading activity on the "Enron Online" natural gas trading platform and caused substantial overcharges in retail natural gas and electricity prices paid by Southern Nevada consumers. The district court dismissed the case on the pleadings on the ground that the "complaint centers on misconduct in the wholesale gas market which is within FERC's exclusive jurisdiction." App. 23a, 25a.

The Supreme Court of Nevada affirmed the lower court's dismissal based on the preemption defense. The Court applied the preemption conclusion and analysis of the Tennessee Supreme Court in *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010) and rejected the conclusion of *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007) that state antitrust law is not preempted. The Court concluded that the "field preemption" plank of this Court's implied preemption doctrines required dismissal of the case even though there was no actual regulation of the relevant transactions and market. App. 4a, 19a.

A. Facts

In 2000-2001, the western United States experienced a severe and prolonged energy crisis. During this period, the wholesale price of electricity in Nevada, California and other western states skyrocketed to unprecedented levels. App. 2a; *see also Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 554 U.S. 527, 539-541 (2008)(describing crisis). Accompanying these electricity price spikes – and contributing to them – was a significant increase in the wholesale price of natural gas. App. 2a. After the crisis subsided, investigations by regulators and others concluded that market manipulation by electricity and natural gas commodity traders had been one of the causes of the elevated natural gas and electricity prices. *See, e.g., Morgan Stanley*, 554 U.S. at 540 (citing *Californians for Renewable Energy, Inc. v. Sellers of Energy and Ancillary Services*, 119 F.E.R.C. (CCH) ¶ 61,058, pp. 61,243, 61,247 (2007)).

One investigation of natural gas markets in the Southwest by the Staff of the Federal Energy Regulatory Commission[1] identified certain egregious and manipulative trading practices by respondent Reliant Resources, Inc. and its chief western trader, Mary Kathleen Zanaboni. The Staff concluded that Reliant's trading tactics substantially elevated natural gas prices in the Southwest. *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, "Final Report on Price Manipulation in Western Markets," FERC Docket No. PA02-2-000 (March 2003) (FERC Staff Report). Based on the facts identified in the FERC Staff Report, in December, 2004, the State of Nevada in its proprietary

1. This agency is referred to as the "FERC" or the "Commission." References to the "Commission" may cover the FERC and/or its predecessor agency, the Federal Power Commission.

capacity as a natural gas consumer and as *parens patriae* on behalf of natural gas consumers in the State filed suit in Nevada state district court against Reliant Energy, Inc.; Reliant Resources, Inc.; Centerpoint Energy, Inc. and Kathleen M. Zanaboni (collectively, Reliant) alleging violations of Nevada's Unfair Trade Practices Act, N.R.S. Chapter 598A.[2] The State alleged that Reliant, along with units of non-party co-conspirator Enron Corporation (Enron), had participated in a conspiracy to manipulate the natural gas "spot" markets in the western United States during the November 2000 through May 2001 time period.

The price fixing conspiracy alleged by the Nevada AG involved "churning" trades initiated by Reliant on the Enron Online electronic trading platform and a secret "netting" agreement between Reliant and Enron. "Churning" was the rapid-fire buying and selling of natural gas volumes in a market tied to delivered gas supplies at a pipeline junction at Topock, Arizona, near the Arizona borders with California and Nevada. The secret verbal netting agreement allowed Reliant to trade volumes of natural gas greatly in excess of its actual requirements but to settle each day's trades with Enron on a net basis. Reliant, which was at the relevant time a major generator of electricity in the Southwest, engaged in these transactions to obtain natural gas for its plants at prices that were relatively lower than those of its competitors. Reliant was indifferent, however, to the absolute price levels caused by its tactics because Reliant's purchase

2. The State of Nevada was joined by three class representative plaintiffs. Since the filing of the case, Reliant has gone through a series of mergers and now operates as GenOn Energy.

costs were always recovered through its electricity sales. *See* App. 4a. Reliant's spurious churning trades and resulting prices and volumes were visible to the market, but the spurious character was not. The transactions were not transparent because the Enron Online platform was a "one-to-many" electronic trading platform in which Enron was the counter-party to all transactions, so only Enron and Reliant knew the real facts. What was visible was a false and artificial appearance of scarcity and volatility that produced extreme spikes in spot natural gas prices. Reliant and Enron's price manipulation inflated published "index" prices at the Topock location. Under the gas pricing practices then prevalent in the natural gas market, natural gas costs for end consumers in Southern Nevada and California were tied to these Topock "index" prices and flowed through to end consumers of natural gas and electricity through the index pricing mechanism.

B. Statutory and Regulatory Framework

Federal regulation of the natural gas industry began with passage in 1938 of the Natural Gas Act (NGA) (15 U.S.C. § § 717, *et seq.*). Early on, substantial questions arose concerning the Commission's jurisdiction over commodity sales by producers to interstate pipelines. Initially, this Court held that commodity sales were a state law matter, but later held that such wellhead sales to interstate pipelines were subject to the Commission's rate supervisory jurisdiction. *Compare Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) *and Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). Regulation of producer sales proved unsuccessful and Congress initiated a trend of deregulation of natural gas commodity transactions from 1978 through the 2000-2001 period relevant to the present case. Congress began the deregulatory process with the Natural Gas Policy Act of 1978 (NGPA) (15 U.S.C. § § 3301, *et seq.*), and completed it with the Wellhead Decontrol Act (Decontrol Act) of 1989 (Pub. L. No. 101-60, 103 Stat. 157).

The structure of the natural gas industry for regulatory purposes has three phases: production, transportation and distribution. *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1122 (D.C. Cir. 1996), *cert. denied sub nom., Associated Gas Distributors v. FERC*, 520 U.S. 1224 (1997)("*UDC* "). Federal regulation of the natural gas industry was traditionally focused on its interstate components. The NGA granted the Commission jurisdiction over (i) "the transportation of natural gas in interstate commerce, ... (ii) the sale in interstate commerce of natural gas for resale ... and (iii) natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b) (numerical indices added). Matters related to intrastate transportation, local distribution, and "the production or gathering of natural gas" are areas of state authority exempt from federal authority under the NGA. *Id.; see also Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 506-507 (1989) ("*Northwest Central*").

Under the original regulatory scheme of the NGA, natural gas companies conducted all sale or transport operations under "certificates of public convenience and necessity" issued under section 7 of the NGA. 15 U.S.C. § 717f. NGA sections 4 and 5 require all rates for sale or transportation to be "just and reasonable." 15 U.S.C. § § 717c and 717. The regulatory scheme of the NGA did not, however, create a "rate-making [or] rate-changing procedure" in which the Commission would impose a single tariff structure for whole classes of transactions or customers. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956). The statutory design of the NGA rather contemplated that differing rates would be set through privately negotiated contracts with individual customers that were required to be filed with the Commission and to be subject to review under the just and reasonable standard. *Id.* at 339, 341. Significantly, the NGA does not authorize the Commission to decide antitrust issues, but requires referral of antitrust issues to the Attorney General. *See* NGA § 20(a)(15 U.S.C. § 717s(a)).

Over time, the 1954 *Phillips* mandate for regulation of producer prices came to be seen as a failure. *UDC, supra,* 88 F.3d at 1123. This led Congress in 1978 to pass the NGPA. 15 U.S.C. §§ 3301, *et seq.* The NGPA did not amend the NGA's jurisdictional provisions, but instead introduced the concept of "first sales" of natural gas (15 U.S.C. § 3301(21)) and took such first sales "outside the coverage of the NGA." *Northwest Central*, 489 U.S. at 502; *see also Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474 U.S. 409, 421 (1986). According to the FERC,

> The NGPA created new statutory rates for the wholesale gas market, for so-called "first sales" of natural gas, *in lieu of rates established by the Commission*. As part of the new rate structure, the NGPA also started the process of decontrolling wellhead prices of natural gas. Upon decontrol, NGPA Section 601 *removed much of the pricing of the nation's natural gas supplies from the Commission's regulatory jurisdiction*.

Order 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol. ("FERC Order 636"), 57 Fed. Reg. 13262, 13270-71 (April 16, 1992)(emphasis added). This exclusion of "first sales" from FERC rate jurisdiction covers not only producer sales, but also sales of natural gas in the downstream chain of distribution. *Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 325-326 (U.S. 1983). Like the NGA, the NGPA includes a provision referencing the antitrust laws that sets up a limited defense to antitrust liability. NGPA § 304(e) (15 U.S.C. §3364(e)).

In 1989, Congress passed the Wellhead Decontrol Act (Decontrol Act). Pub. L. No. 101-60, 103 Stat. 157. By this Act, "Congress completed the process of deregulating the producer sales market." *UDC*, 88 F.3d at 1125. The Act completed the termination of FERC's jurisdiction over all "first sales" of natural gas as defined in 15 U.S.C. § 3301(21). It amended the NGPA section 601(a)(1)(A)(15 U.S.C § 3431(a)) to read: "For purposes of section 1(b) of the Natural Gas Act, *the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply* to any natural gas solely by reason of any first sale of such natural gas." (Emphasis added.) Moreover, it declared that "for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable." Pub. L. No. 101-60, § 3(b)(7) (*amending* NGPA § 601(15 USC § 3431). Because the NGA is the sole basis for FERC jurisdiction over natural gas commodity sales, this provision eliminated all FERC power to regulate rates in the "first sale" segment of the commodity market. *Gallo, supra,* 503 F.3d at 1046. As summarized by the FERC,

> The Wellhead Decontrol Act removed "first sales" as defined in the NGPA, from the Commission's "sale for resale" jurisdiction. NGPA Section 2(21)(A) sets forth a general rule stating that all sales in the chain from the producer to the ultimate consumer are first sales until the gas is purchased by an interstate pipeline, intrastate pipeline, or local distribution company.

National Association of Gas Consumers v. All Sellers of Natural Gas in the United States of America in Interstate Commerce, 106 FERC ¶ 61,072, 61,248 (2004).

1. FERC Policies Deregulating Wholesale Markets.

Prior to the 1989 Decontrol Act, the FERC changed its regulatory policies in order to foster a competitive natural gas commodity market. *UDC*, 88 F.3d at 1122-1127. The policy's focus was to induce pipelines to withdraw from their traditional "merchant" business of buying and reselling gas and to become, instead, "open access" pipelines engaged solely in transportation services. These policies were voluntary under FERC Order 436 propounded in 1985 but became mandatory under FERC's 1992 Order 636, *supra.* Thereafter, "pipeline sales," the sole segment of the commodity market that remained subject to the FERC's traditional NGA jurisdiction, became a vanishingly small segment of the market.[3] With

3. The voluntary program under Order 436 reduced pipeline sales to end user markets from 90% of sales to 21%. *UDC* at 1125. Order 636 eliminated the advantage of bundling of sales and transportation and was intended to reduce this percentage further. *Id.* at 1126. Discovery would be required to determine the exact

pipelines transformed from proprietary gas resellers to open access transporters, the natural gas commodity market became populated by various merchant energy companies who were shippers on the pipelines. FERC policy promoted a completely free market with respect to these participants in the commodity markets. The key initiative was the FERC's "blanket certificate program" issued under FERC's Order 547.[4] The order, covering

ratio of first sales to pipeline sales in the Topock market. However, pipelines are obligated to report such sales to FERC and petitioner submitted a declaration establishing that two of the three long distance pipelines serving the Southern Nevada market made no pipeline sales, and the sales reported by the third constituted a very small percentage of that pipeline's capacity.

4. The order is terse and bears extensive quotation:

> The Federal Energy Regulatory Commission (Commission) is issuing a final rule governing jurisdictional sales for resale of natural gas by all persons who are not interstate pipelines. The final rule issues blanket certificates of public convenience and necessity authorizing certificate holders to make jurisdictional gas sales for resale at negotiated rates, with pregranted abandonment. The blanket sales certificates (marketing certificates) are issued by operation of the rule itself -- there is no need or requirement for persons to file applications seeking such authorization.... Further, the marketing certificates issued by the final rule are of limited jurisdiction. As such, the holders of marketing certificates are not subject to any other regulation under the Natural Gas Act jurisdiction of the Commission by virtue of transactions under the certificates.

Order 547, Regulations Governing Blanket Marketer Sales Certificates, 57 Fed. Reg. 57952 (November 30, 1992), *reh'g denied*, 62 FERC P 61,239 (1992).

every market participant that is not an interstate pipeline or local gas utility, essentially defines a wholly free market using the language of regulation. "Certificates" to allow market participation were issued "by operation of the rule" without necessity of application to the FERC, and provided for "pre-granted abandonment," i.e., the right to exit the market without necessity of FERC permission. Moreover, the certificates did not require any regulatory filings, but were of "limited jurisdiction," meaning the holders "are not subject to *any other regulation* under the Natural Gas Act jurisdiction of the Commission by virtue of transactions under the certificates." Order 547 (emphasis added). This automatic "blanket" certificate program eliminated all filing requirements and allowed non-pipeline sellers to make "first sales" of natural gas at prices free of regulatory obligation or supervision. *See e.g., National Ass'n of Gas Consumers, supra*, 106 F.E.R.C. (CCH) 61,072 at ¶ 61,248.

C. State Court Proceedings in the Nevada AG Suit

The Nevada AG's state court complaint against Reliant alleged a single violation of Nevada's Unfair Trade Practices Act, N.R.S. Chapter 598A. After removal of the Nevada AG's suit to federal court and a remand to state court, Reliant moved to dismiss, arguing that federal regulation of natural gas preempted Nevada's antitrust law and that Nevada courts lacked personal jurisdiction over them.[5]

5. Reliant also maintained that FERC had examined and exonerated its manipulative conduct in the Topock market, citing FERC approval of a settlement agreement between Reliant and the FERC's Office of Market Oversight and Investigations. *See Reliant Energy Services, Inc.*, 105 F.E.R.C. (CCH) ¶ 61,008 (2003). The Supreme Court of Nevada did not mention or rely on the settlement order in making its preemption ruling.

The Nevada AG opposed the motions to dismiss, arguing that the federal energy regulatory scheme did not provide antitrust immunity, citing, among other authorities, *California v. Federal Power Commission*, 369 U.S. 482 (1962), *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) and *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992). The Nevada AG also disputed Reliant's contention that state antitrust claims were preempted by FERC's authority under the NGA, particularly in light of the effective deregulation of the wholesale gas commodity market.

The state trial court issued a minute order on April 3, 2007 dismissing all defendants on federal preemption grounds, and additionally holding that Nevada lacked personal jurisdiction over Ms. Zanaboni. App. 5a. The trial court entered its judgment on September 27, 2007 in a three-page order. App. 22a-24a. A motion to alter or amend the state trial court judgment citing the Ninth Circuit's decision in *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007) was denied.

The Nevada AG filed a timely notice of appeal to the Supreme Court of Nevada. The Nevada AG's lead argument on appeal was that Nevada state antitrust laws are not preempted by federal energy regulatory statutes under well-established precedents of this Court, including *California* and *Otter Tail, supra,* and of the Seventh Circuit in *Illinois, supra*. Petitioner also objected to the field preemption rationale of the Tennessee Supreme Court in *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010), and renewed the non-preemption argument based on the Ninth Circuit's *Gallo* case. The objections pointed out that *Leggett* conducted no analysis of the relationship of antitrust law and the federal regulatory scheme.

Moreover, Petitioner argued that the *Transcontinental* case relied upon in *Leggett* is inapposite both because the underlying disputes involved purely regulatory conflicts between the FERC and state regulators that are remote from general law enforcement cases under antitrust laws and because the preemption standard applied by *Transcontinental* is inconsistent with the presumption against preemption applicable to state antitrust cases.

The Supreme Court of Nevada issued its opinion on September 27, 2012 affirming the trial court's dismissal of the Nevada AG's complaint. App. 2a-3a. The court's opinion is silent as to the Nevada AG's contention that the NGA does not provide antitrust immunity to participants in natural gas markets under this Court's precedents. Instead, the Nevada Supreme Court analyzed the case solely as a matter of federal preemption, concluding that the Nevada AG's claims were barred under field preemption principles. App. 7a-14a.

The Nevada Supreme Court explicitly recognized the inconsistency between the *Leggett* and *Gallo* cases and followed *Leggett*. App. 14a. The opinion justified rejection of *Gallo's* non-preemption conclusion on the policy ground that allowing state antitrust enforcement suits "would devastate 'two of the additional purposes of the federal statutory scheme: national uniformity and freedom from burdensome government intervention.'" App. 18a (*quoting Leggett*, 308 S.W.3d at 868-69). Such enforcement of state laws, the court concluded, would result in "a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market," *id.* at 19a, a result the court found inconsistent with what it perceived to have been Congress' "purposeful deregulation" of natural gas commodity markets. *Id.* Without discussion of the conflicting *California/Otter Tail* line of cases, the Supreme Court of Nevada concluded that "[s]tate antitrust law cannot coexist peacefully with the natural gas federal regulations." *Id.*

REASONS FOR GRANTING THE PETITION

The decision of the Nevada Supreme Court is in conflict with two decisions of United States Courts of Appeals holding that federal natural gas legislation and regulation is not preemptive of state antitrust law. The Nevada Supreme Court recognized that its decision and that of the Tennessee Supreme Court in *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010) conflicts with the holding of *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007). App. 14a. This conflict is a particularly clear one because this case, *Leggett* and *Gallo* arise out of the same general set of events.[6]

The case below is also in conflict with the decision of the Seventh Circuit in *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) which held that a FERC regulated interstate pipeline had no preemption defense to a cause of action under Illinois state antitrust law.

6. Both the *Leggett* and *Gallo* cases asserted state antitrust claims against based on allegations of a broad, industry-wide scheme by numerous energy companies in the same 2000-2001 period as this case to inflate natural gas prices through fictitious natural gas transactions and false reporting of transactions to private newsletter publishers of natural gas price indices. *Leggett*, 308 S.W.3d at 848-49; *Gallo*, 503 F. 3d at 1031-32. The Nevada case does not allege an industry-wide conspiracy, but is narrowly focused on the conduct of Reliant and Enron.

Petitioner presented *Illinois* to the Nevada court, and the court's failure to address the decision is puzzling, because *Illinois* was a *parens patriae* action for enforcement of state antitrust law like this one, and the case is on all fours with respect to the preemption issue. There is a clear conflict between *Illinois* and this case that requires resolution by this Court.

Apart from these conflicts of appellate authorities, the reasoning of the Nevada Supreme Court represents an unwarranted application of the preemption reasoning of this Court's 1986 *Transcontinental* case. This case set up a burden shifting rule that examines deregulatory statutes reducing federal authority not for expression of Congressional intent to preempt, but for specific Congressional intent to transfer a regulatory power to the States. Just two years after *Transcontinental* was decided, this Court criticized and reversed an application of this "burden shifting" preemption rule. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988). *Isla Petroleum* reaffirmed the general preemption canons requiring that implied preemption be traced to positive expressions of Congressional intent in legislative texts and schemes, and the presumption *against* preemption of state laws within the traditional police powers of the States. The Nevada Supreme Court improperly relied on *Transcontinental* to disregard the complete absence of any positive expression by Congress in the NGA, NGPA or Decontrol Act to preempt the application of state or federal antitrust law.

I. THE NEVADA SUPREME COURT DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE FEDERAL COURTS OF APPEALS BECAUSE IT IGNORED THE LIMITS OF THE FERC'S STATUTORY AUTHORITY WITH RESPECT TO ANTITRUST MATTERS

The issue below concerned whether petitioners' claim that defendants' "alleged price-fixing activities [related to natural gas sales] violated" the Nevada Unfair Trade Practices Act could be heard by the courts or "is preempted by federal law." App. 2a-3a. Here the Nevada Supreme Court concluded that "field preemption"[7] of federal natural gas regulatory statutes precluded, as a matter of law, maintenance of suit for overcharges under Nevada's antitrust law. App. 19a.

1. In general, "preemption is a question of congressional intent." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). The Nevada Supreme Court examined the federal preemption issue under the standards outlined in *Nanopierce Techs. v. Depository Trust,* 123 Nev. 362, 371, 168 P.3d 73, 79-80 (2007). The court recognized that the "field preemption" doctrine requires analysis of the "entire regulatory scheme ... to determine whether … Congress intended to preclude states from also imposing requirements on that field," (App. 7a), but the court did not directly analyze the NGA, the NGPA,[8] or the Decontrol Act, the three pertinent regulatory statutes.

7. The Nevada opinion includes no review or discussion of the case under the "conflict preemption" prong of this Court's implied preemption rules.

8. The Court does quote without comment the NGPA's definition of "first sale" but does not analyze the concept. App. 10a n. 5.

The Nevada Court began its preemption analysis with a discussion of the history of federal regulation under the NGA but omitted examination of how NGA regulation or subsequent legislation intersects with antitrust law. App. 8a-14a. This is not a case where the relevant regulatory scheme is silent as to antitrust issues. *Cf. Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 270-71 (2009). Both Section 20(a) of the NGA (15 U.S.C. § 717s(a)) and NGPA § 304(e) (15 U.S.C. § 3364(e)) specifically reference the antitrust laws.[9] Section 20(a) authorizes the Commission to proceed directly in the federal courts to enjoin violations of the NGA, but requires the Commission to refer antitrust violations to the Attorney General for prosecution. Similarly, section 304(e) of the NGPA (15 U.S.C. § 3364(e)) sets up a limited defense to actions "brought for violation of the Federal antitrust laws (or any similar law of any State) ...." *Id.* (e)(1). These sections evidence the express recognition by Congress that federal and state antitrust actions are not ousted by federal natural gas regulation.

This Court has interpreted NGA section 20(a) as reflective of congressional intention to exclude antitrust matters from FERC's regulatory purview and to leave antitrust enforcement to the courts. *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962). Per *California*, "there is no 'pervasive regulatory scheme' *including the antitrust law* that has been entrusted to the Commission."

9. NGA § 20(a) states in pertinent part: "The Commission may transmit such evidence as may be available concerning such acts or practices *or concerning apparent violations of the Federal antitrust laws* to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings." 15 U.S.C. § 717s(a) (emphasis added).

Id., 369 U.S. at 485 (emphasis added). The applicable rule dealing with the overlap of the antitrust laws and the NGA was rather that "when there are two acts upon the same subject, the rule is to give effect to both if possible." *Id.; see also Credit Suisse, supra,* 551 U.S. at 271 ("courts should reconcil[e] the operation of … statutory schemes . . . rather than holding one completely ousted." (*quoting Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963))). In its decision, the *California* court specifically contrasted the power to decide antitrust issues granted to the Interstate Commerce Commission and other federal agencies with the Commission's lack of similar power. 369 U.S. at 486. Subsequently this Court extended *California* under the closely related Federal Power Act[10] to reject an electric utility's claim that its status as a regulated utility precluded antitrust liability, observing that "[a]ctivities which come under the jurisdiction of a regulatory agency may nevertheless be subject to scrutiny under the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

10. *See Fed. Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956) (certain Federal Power Act provisions "are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act").

The specific rule that emerged from the *California/ Otter Tail* cases is that antitrust liability may attach to "voluntary commercial relationships" of regulated companies that are initiated on the basis of the "business judgment" of such companies. *Otter Tail*, 410 U.S. at 374. The scope of such business judgment was very wide under the regulatory model of the NGA because the regulated companies negotiated rates and terms of service in the first instance and submitted completed contracts to the Commission for review. *See Mobile, supra,* 350 U.S. at 338, 341 (*see discussion, supra,* pp 17-19). Thus the *Otter Tail* Court concluded:

> Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.

Otter Tail, 410 U.S. at 374. As stated in *Credit Suisse, supra,* any defense to antitrust liability requires a finding of "clear repugnancy" between the antitrust laws and the regulatory scheme.

The rule of *California* and *Otter Tail* is well settled and has not been overruled or limited by this Court. *See Credit Suisse, supra,* 551 U.S. at 271 (identifying the regulatory scheme of *Otter Tail* as one that does not provide implied immunity from antitrust liability). The fact that *California* and *Otter Tail* concerned the relationship of federal antitrust law and federal regulatory statutes and not state antitrust law is immaterial. In *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992), the Illinois attorney general brought a *parens patriae* action under state antitrust law, like this one, against the Panhandle Eastern pipeline company for monopolization of the natural gas supply market in central Illinois. 935 F.2d at 1476. As in this case, the defendant in *Illinois* pleaded preemption of the Illinois state antitrust law because of "extensive federal regulation of the natural gas industry." 935 F. 2d at 1479. The court, however, rejected this claim because the preemption argument "would apply with equal force to federal antitrust law, but federal gas regulation does not immunize natural gas companies from application of the federal antitrust laws." 935 F. 2d at 1479 (*citing California, supra)*.[11] The preemption issue was not a side issue in *Illinois*, but was essential to the judgment of the Seventh Circuit, because the Attorney General's federal antitrust claim had been dismissed for lack of standing, leaving the state antitrust case as the only cause of action reviewed on its merits. 935 F.2d at 1479.

11. The Seventh Circuit did not specifically address the *Otter Tail* "voluntary conduct" liability standard, but it affirmed in all respects the district court decision, which did. The district court observed that "the mere pervasiveness of a regulatory scheme" does not immunize conduct from antitrust challenge where the conduct is "voluntarily initiated." *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.,* 730 F.Supp. 826, 934 (C.D. Ill. 1990), *aff'd sub nom. Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992).

2. The same failure of the Nevada Supreme Court to examine properly the relationship of the antitrust laws and the NGA vitiates the Nevada Supreme Court's view of the NGPA and the Decontrol Act.[12] As discussed above, section 304(e) of the NGPA (15 U.S.C. § 3364(e)) sets up a limited defense to both state and federal antitrust liability, which makes no sense if Congress intended to preempt such liability as a general matter. Additionally, it is noteworthy that Congress, when enacting the NGPA, did not remove NGA § 20(a) or otherwise revise the NGA to overturn or to modify this Court's interpretations that antitrust violations related to natural gas sales or transportation are properly brought to courts, not to FERC. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) ("The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tensions there [is] between them.'") The Nevada Court recognized that the NGPA deprived the FERC of its former rate supervisory authority, but it found that "the NGPA did not signal a retreat from comprehensive federal gas policy." App. 15a-16a. Relying on *Transcontinental, supra,* and *Leggett*, the Nevada Court ruled that the NGPA's "mere changes in approach did not contract the scope of preemption." App. 16a.

12. The Nevada Supreme Court briefly addressed the Decontrol Act in connection with its preemption analysis, App. 10a-11a, but failed to examine the statute. The important detail is that the Decontrol Act made no changes to NGPA § 304(e) or NGA § 20(a) and did nothing to overturn or modify this Court's interpretation of the statutes, or delegate to FERC authority to decide antitrust matters.

As discussed below, the Nevada Supreme Court's application of *Transcontinental's* purported burden shifting rule to require evidence of congressional intent to *contract* implied preemption is erroneous on its merits, but it is well to note that both *Transcontinental* and *Gallo*, *supra,* recognized that the NGPA was a statute that *reduced* the scope of the FERC's authority to regulate natural gas commodity prices. If the *Transcontinental* burden shifting rule *does not* apply, there can be no question that both cases support the proposition that Congressional action since 1978 reduces the potential for conflict or "repugnancy" between antitrust liability and the authority of the Commission, further restricting any basis in the language of federal statutes to support the inference of preemption. According to *Transcontinental*, "Congress clearly intended [the NGPA] to eliminate the distortive effects that NGA price controls had had on supply and demand." 474 U.S. at 424 n. 6. *Gallo's* statutory analysis focused on the NGPA's removal of "first sales" from the FERC's NGA rate supervisory jurisdiction and the absence of preemptive language in the NGPA and Decontrol Act. *Gallo* concluded that "the withdrawal of the FERC's authority to determine … rates gives rise to the … inference that normal market forces, including the tug and pull of private lawsuits, will hold sway." App. 17a-18a (*citing Gallo*, 503 F. 3d at 1046). This conclusion accords with common sense because the Commission's NGA jurisdiction was not preclusive of antitrust liability prior to passage of the NGPA and Decontrol Act, so this deregulatory legislation to contract the Commission's regulatory authority over natural gas commodity prices cannot be logically viewed as creating or increasing immunity from price fixing liability.

3. The *Illinois* case addressed events of the 1980s in the early stages of post-NGPA deregulation. The trend of congressional and FERC policy from this period up to the time of the energy crisis in the Western States was to further reduce regulation of the natural gas commodity business and allow market forces to govern natural gas pricing. *See discussion of Regulatory Framework pp.* 4-10, *supra.* The NGPA had removed a large category of natural gas purchase and sale transactions from the Commission's rate supervision, and the statutory price ceilings that replaced the former NGA rate controls were repealed by the Decontrol Act in 1989. *Id.* FERC policy had induced interstate pipeline companies to exit the commodity business and confine their operations to transportation. *See, supra*, 8-10. Order 547 granted everyone in the world that was not a pipeline or local distribution company freedom to buy and sell natural gas without any licensing, filing or regulatory supervision. *Id.* This condition of deregulation and promotion of market forces represents a maximum of "voluntary" or "discretionary" business conduct that, under settled doctrine, is subject to the antitrust laws, so under the logic of the *California/Otter Tail* line of cases, antitrust liability would be the primary, if not only, check on price fixing in the relevant market.

In sum, the Nevada Supreme Court erred in its failure to conduct a proper statutory analysis of the relationship of the antitrust laws and federal regulatory statutes covering the natural gas industry. These regulatory statutes show an explicit congressional recognition that courts continue as the proper forum for antitrust claims related to contractual arrangements in natural gas markets and that the Nevada Attorney General may properly seek to impose liability for price fixing in such markets under Nevada's antitrust law. The Nevada Supreme Court's failure to recognize the limitations of the scope of the federal regulatory scheme relative to the antitrust laws is reversible error that justifies granting this petition for writ of certiorari and, ultimately, reversing the decision of the Nevada Supreme Court.

II. THE NEVADA SUPREME COURT'S FIELD PREEMPTION CONCLUSION IS UNSUPPORTED BY AN EXPRESSION OF CONGRESSIONAL INTENT IN THE RELEVANT STATUTORY SCHEME AND IMPROPERLY REVERSES THE PRESUMPTION AGAINST PREEMPTION APPLICABLE TO ENFORCEMENT ACTIONS UNDER NEVADA ANTITRUST LAW.

The foregoing review of the cases culminating in the *Illinois* decision is sufficient to show the deficiencies of the Nevada Supreme Court's analysis of the federal statutory scheme. The *Illinois* decision is based on well-settled precedent that shows the error of the conclusion of the Nevada Court that Congress enacted "broad field preemption" under the NGA. App. 15a (*citing Leggett,* 308 S.W.3d at 866). The "field preemption" rationale of the Nevada Supreme Court and the Tennessee Supreme Court in *Leggett* is also in direct conflict with the preemption analysis of the Ninth Circuit in *Gallo* and the conclusion of *Gallo* that state antitrust law is not preempted by federal authority over the deregulated natural gas commodity market.

In addition to the conflicts with *Illinois* and *Gallo*, the Nevada Supreme Court applied an incorrect standard in its review of congressional intent with respect to legislation deregulating the natural gas industry. The test applied was "whether Congress [by the Decontrol Act] repealed or reduced the scope of the preemptive regime." *Id.* (*quoting Leggett,* 308 S.W.3d at 866). This standard is erroneous because it ignores the presumption *against* preemption applicable to state antitrust law and applies a burden shifting rule that this Court criticized and refused to apply just two years later. *Compare Transcontinental, supra, with Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.,* 485 U.S. 495 (1988). Moreover, the Nevada Supreme Court ignored the correct reasoning of the *Gallo* case showing that there is no actual conflict between the state antitrust law and federal regulatory law. The net effect is an improperly rigid elevation of a judicially constructed "field preemption" category over a proper preemption analysis grounded in congressional intent as reflected in enacted legislative texts. *See English v. General Elec. Co.*, 496 U.S. 72, 79 n. 5 (1990); *Isla Petroleum,* 485 U.S. at 501. These errors can only be corrected by this Court and strongly support the grant of this petition for writ of certiorari.

1. The Nevada Supreme Court cites *Leggett* for the proposition that, "it was well-established that Congress had enacted broad field pre-emption prior to the [Decontrol Act]." The source and scope of the "broad field preemption" that is the predicate for the Nevada decision is obscure and is, in fact, a phantom. *Leggett* states only that "Plaintiff does not contest that broad field pre-emption has been a cardinal feature of natural gas regulation for much of the previous century." 308 S.W.3d at 864. Here, the Nevada AG vigorously contested the issue of "broad field preemption" based on the *Illinois* case and the *California/Otter Tail*

line of cases restricting preemption or preclusion of antitrust liability.

The only apparent source for the preexisting "broad preemption" in *Leggett* is *Transcontinental*. In *Transcontinental* the Mississippi Oil & Gas Board ordered a FERC regulated pipeline to purchase gas from all producers in a common pool in a producing field even though the pipeline had contracts with some but not all of the producers. 485 U.S. at 411. Such "ratable take" orders to interstate pipelines had been held to be preempted in *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. 84 (1963). The Mississippi Supreme Court ruled that the NGPA undermined the *Northern Natural* rule because the NGPA deprived the FERC of its supervisory jurisdiction over wellhead prices. 485 U.S. at 415. This Court reversed and held the Mississippi order was preempted because the order would tend to raise the pipeline's purchase costs and frustrate the federal goals of a less regulated market and ensuring low prices for consumers. 485 U.S. at 422-24. Additionally the Court objected that "Mississippi cannot be permitted to foreclose … federal oversight of purchasing practices." 485 U.S. at 423 n 5.

Although *Transcontinental* certainly preempted a state regulatory order issued to a federally regulated interstate pipeline, the case is legally and factually remote from this antitrust case. *Leggett* discerned in *Northern Natural's* reference to a "comprehensive scheme" of federal regulation a "classic field preemption rationale." 308 S.W.3d at 859. However, *Northern Natural,* like *Transcontinental,* merely invalidates a state regulatory order and nowhere defines the scope of the "comprehensive scheme" of federal regulation. However, as seen above, in 1962, just a year before the 1963 *Northern Natural* case, this Court stated that "there is no 'pervasive regulatory scheme' including the antitrust law that has been entrusted to the Commission." *California, supra,* 369 U.S. at 485.

Even without reference to the inconsistency between *Northern Natural* and *California*, *Transcontinental* cannot bear the weight placed on it by the Nevada Supreme Court and *Leggett*. Quite simply, the Natural Gas Act has not been construed to have the broad "field preemption" characteristics suggested by the Nevada Supreme Court. *See generally, Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kansas*, 489 U.S. 493 (1989). The *Northwest Central* case, unlike *Northern Natural* or *Transcontinental,* explicitly examines the Natural Gas Act in terms of "field preemption." The major holding of the case is that the NGA *did not envisage federal regulation of the entire natural gas field to the limit of constitutional power*." 489 U.S. at 510 (*citing Fed. Power Comm'n v. Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 502-503 (1949))(emphasis added). The Court emphasized too that the NGA's jurisdictional language limited the reach of FERC's jurisdiction "in language certainly as sweeping as the wording of the provision declaring . . . [FERC's] role." 489 U.S. at 512.

The *Northwest Central* court also pared down substantially the "comprehensive scheme" rationale by essentially vacating in practical effect the limitation on the power of state regulators applied in *Northern Natural* and *Transcontinental. Northwest Central* explained that the error of the state regulators in *Northern Natural* and *Transcontinental* was in directing their orders to purchasers, which were in each case interstate pipeline companies. 489 U.S. at 513. The Court thus approved a Kansas pro-rationing rule that accomplished functionally a result equivalent to the prohibited ratable take rule in *Transcontinental* because the order was directed to producers, not interstate pipelines. The net effect of *Northwest Central* in relation to *Transcontinental* and similar cases is to show that the "field" covered by the "comprehensive scheme" articulated in *Transcontinental* and *Northern Natural* is primarily federal jurisdiction over interstate pipelines. This "field" is not and cannot be construed to be an unbounded displacement of the power of States to protect consumers in their states by redressing price fixing in natural gas commodity markets.

The Nevada Supreme Court opinion does not explain how a preemption case derived from purely regulatory conflicts like *Transcontinental* should be extended to general law enforcement actions by an attorney general. Petitioner pointed out below that this Court has recently distinguished conflicts of regulatory power from general law enforcement in two cases involving national banks. *Compare Cuomo v. Clearing House Ass'n, L.L.C., 129 S. Ct. 2710, 174 L. Ed. 2d 464 (2009) and Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007). Watters* preempted direct state regulation of affiliates of national banks, but two years later the Court upheld the power of the New York attorney general to conduct a broad investigation of the banks under state fair lending laws. The *Cuomo* opinion held that general law enforcement by the attorney general raised none of the concerns associated with conflicting regulatory supervision by state and federal regulators. *Id.* at 2718.

Gallo, supra, recognized in a similar vein that laws of general applicability such as the antitrust laws are not ordinarily preempted. 503 F.3d at 1046.

2. According to the Nevada Supreme Court, *Transcontinental* stands for the proposition that "the act of deregulation has the same preemptive force as regulation."[13] App. 16a-17a. Based on this putative prudential rule, the Nevada Supreme Court and the *Leggett* case held that the "field preemption" that *Leggett* purported to find in *Transcontinental* and related cases would continue despite deregulatory statutes such as the NGPA and Decontrol Act. Applying this retransfer test, the Nevada Court concluded, "We cannot conclude that this [intervention of state law] is what Congress intended through the use of purposeful deregulation." App. 19a.

This analysis reverses the ordinary presumption against preemption applicable to the operation of state antitrust laws. Antitrust law is "an area traditionally regulated by the States." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). In such cases, the Court analyzes claims of federal preemption of state laws under "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218,

13. This paraphrase is less nuanced than the original which states: "[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 preemptive force as a decision *to* regulate" (emphasis in original). *Transcontinental,* 465 U.S. at 422 (*quoting Arkansas Elec. Coop. v. Ark. Public Serv. Comm'n,* 461 U.S. 375, 384 (1983)).

230 (1947). Moreover, this Court criticized and refused to apply this putative retransfer rule just two years after *Transcontinental* was decided. *See Isla Petroleum, supra*. In *Isla Petroleum*, this Court reversed a lower court decision based on *Transcontinental* enjoining Puerto Rico's imposition of gasoline price controls after repeal of price controls at the federal level. Justice Scalia, writing for a unanimous court, rejected the lower court's view that *Transcontinental,*

> announc[ed] a new rule of burden shifting whenever the federal government terminates or reduces its regulation of a field of commerce, replacing the normal need for finding a federal intent to preempt with the need to find a federal intent to retransfer authority to the States. To the contrary, a clear and manifest purpose of pre-emption is always required.

485 U.S. at 503 (citations and internal quotations omitted). *Isla Petroleum* thus refused to apply the retransfer rule and reaffirmed the general rule that "preemption analysis requires ascertaining congressional intent… [and is] never meant … to signify congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text." 485 U.S. at 501. Although *Isla Petroleum* did not overrule *Transcontinental,* this pointed criticism and refusal to follow the rule renders the validity of the "retransfer" reasoning of the *Transcontinental* decision highly suspect and calls for a decision of this Court deciding the issue.

Ultimately, *Isla Petroleum* reaffirmed the presumption against preemption and required a "clear and manifest" statutory basis for any implied preemption decision. The reasoning of Nevada Supreme Court based on *Transcontinental* does not meet the test. No interstate pipeline is a party to the case or any relevant transaction. The parties to the conspiracy alleged were an electrical generation company purchasing fuel for its plants, and an energy trading company operating an internet-based trading platform. *See* pp. 1-4, *supra*. This price fixing case involves the type of "voluntary conduct" that has always been subject to antitrust liability, and there is no basis for a preemption decision.

3. The opinion of the Nevada Supreme Court recognized that the *Leggett* preemption analysis depended on the *Transcontinental* retransfer standard, but that *Gallo* analyzed the issue through direct examination of the language of the NGPA and Decontrol Act for positive evidence of congressional intent to preempt the antitrust case. App. 14a, 17a-18a. *Gallo* focused on the removal of "first sales" from the FERC's NGA jurisdiction and the absence of preemptive language in the NGPA and Decontrol Act. Thus, *Gallo* concluded that "the withdrawal of the FERC's authority to determine … rates gives rise to the … inference that normal market forces, including the tug and pull of private lawsuits, will hold sway. App. 18a (*citing Gallo*, 503 F.3d at 1046).

The Nevada court acknowledged that the *Gallo* analysis drew support from the presumption that laws of general applicability such as the antitrust laws are not ordinarily preempted, and that the antitrust laws are complementary of the goals of the federal regulatory statutes. App. 18a-19a. Indeed, the Nevada court did not challenge any of these aspects of *Gallo's* reasoning but only rejected it based on its interpretation of congressional intent under the highly questionable *Transcontinental* retransfer standard. However, if the *Transcontinental* retransfer rule is rejected as in *Isla Petroleum*, *Gallo's* recognition of the complete deregulation of the portion of the natural gas market consisting of "first sales" requires rejection of the preemption theory because there can be no preemptive "field" where the FERC has no regulatory jurisdiction. Moreover, the Nevada Court's rigid application of "field preemption" in the absence of actual conflict between state antitrust law and federal regulatory legislation undermines the implied preemption conclusion. *English*, *supra*, 496 U.S. at 79 n. 5. ("[F]ield preemption may be understood as a species of conflict preemption….") The Nevada Supreme Court made the wrong choice in selecting *Leggett's* preemption standard and reasoning over that of *Gallo*.

4. The Nevada Supreme Court ruled that "[s]tate antitrust law cannot coexist peacefully with the natural gas federal regulations" because it "would devastate" two purposes of the federal scheme under the NGPA and Decontrol Act: "'national uniformity and freedom from burdensome government regulation.'" App. 18a. This policy argument misses the mark. First, the regulatory scheme of the NGA is not based on uniformity. *See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). In *Mobile,* a pipeline asserted that the NGA allowed it to increase rates under a gas contract with its customer through a unilateral tariff filing. The pipeline argued that the NGA allowed a "filed rate" procedure like the unilateral tariff filing procedure covering transactions of shippers and railroads regulated by the Interstate Commerce Commission. *Id.* at 338, 345

(*citing Armour Packing Co. v. United States,* 209 U.S. 56 (1908)). This Court rejected this analogy because the regulatory scheme of the NGA "recognizes the need for private contracts of varying terms" with different rates and contract terms for different customers, whereas the Interstate Commerce Act expressly required uniform rates. *Id.* at 345.

Second, this is a price fixing case. The Nevada Supreme Court does not and cannot identify any true non-uniformity of state or federal law with regard to price fixing. Petitioner is confident that price fixing is unlawful in every state in the union, and is certainly unlawful under the Sherman Act. Indeed, Nevada's price fixing definition is a near verbatim quotation from this Court's definition in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (U.S. 1940). *Compare Socony and* Nev. Rev. Stat. Ann. § 598A.060(a)("Price fixing … consists of raising, depressing, fixing, pegging or stabilizing the price of any commodity or service … .) The Nevada Supreme Court's ruling overlooks this Court's admonition that "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail, supra,* 410 U.S. at 374. It is rather the decision of the Nevada Supreme Court that imposes non-uniformity in the national marketplace by granting participants in the natural gas markets a privilege to engage in price fixing that participants in other markets do not enjoy.

Similarly, the policy argument that antitrust liability for price fixing is a form of "regulation" is misguided. In ordinary private damage actions, the Supreme Court has been hesitant to treat claims for damages as "regulation" at all. *See generally*, *Wyeth v. Levine*, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009) (state tort damages for failure to warn due to inadequate labeling of prescription medication not preempted by authority of Food and Drug Administration over pharmaceutical labels and warnings); *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 (1984) (despite pervasive safety regulation of nuclear materials by Nuclear Regulatory Commission, punitive damages under state tort law for unsafe practices not preempted). Damage actions to protect consumers are simply different in character and purpose from administrative oversight of an industry under regulatory statutes.

CONCLUSION

For the reasons stated herein, the petition should be granted.

Respectfully submitted,

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