No. 12-980

IN THE
Supreme Court of the United States

THE STATE OF NEVADA, ET AL.,
Petitioners,

v.

RELIANT ENERGY, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

ORRIN L. HARRISON III
AKIN GUMP STRAUSS HAUER & FELD LLP
1700 Pacific Ave., Ste. 4100
Dallas, Texas 75201-4624
(214) 969-2860

Counsel for Respondent CenterPoint Energy, Inc.

JACK DICANIO
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
300 S. Grand Ave., Ste. 3400
Los Angeles, California 90071
(213) 687-5430

Counsel for Respondent Kathleen M. Zanaboni

J. GREGORY COPELAND
MARK R. ROBECK
AARON M. STREETT
Counsel of Record
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

Counsel for Respondents Reliant Energy, Inc. and Reliant Resources, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether state-law antitrust claims asserting price fixing in wholesale natural-gas transactions within FERC's exclusive jurisdiction are preempted by the Natural Gas Act, 15 U.S.C. § 717 *et seq*, particularly where FERC determined both that it had jurisdiction over the transactions at issue and that the transactions were lawful.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondents submit this corporate disclosure statement. After the underlying lawsuit was filed, Respondents Reliant Energy, Inc. and Reliant Energy Services, Inc. were a part of a series of name changes and corporate transactions. Reliant Energy, Inc. changed its name to RRI Energy, Inc. and subsequently merged with Mirant Corp. to become GenOn Energy, Inc.; 100% of its stock is now owned by NRG Energy, Inc. (NYSE:NRG). GenOn Energy, Inc. indirectly owns 100% of the stock of RRI Energy Services, Inc., which is now known as RRI Energy Services, LLC. Only T. Rowe Price owns more than 10% of the shares of NRG Energy, Inc.

Respondent CenterPoint Energy, Inc. (NYSE: CNP) has no parent corporation and there are no publicly held companies that own 10% or more of CenterPoint Energy, Inc.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners assert a split over whether "federal natural gas legislation and regulation * * * preempt[s] * * * state antitrust law" claims. Pet. 13. No such split is presented on the facts of this case. The Nevada Supreme Court correctly held that antitrust claims challenging wholesale natural gas transactions within FERC's jurisdiction are preempted by the Natural Gas Act's grant of exclusive federal jurisdiction over those transactions. No court has held that states may invade this exclusively federal domain by authorizing state-law antitrust claims that challenge the prices charged in FERC-regulated wholesale

transactions. Accordingly, the Court should deny the petition.

STATEMENT

I. BACKGROUND

A. Statutory And Regulatory Background

1. Enacted in 1938, the Natural Gas Act (NGA) grants FERC exclusive jurisdiction over, *inter alia*, "the sale in interstate commerce of natural gas for resale for ultimate public consumption" and "natural-gas companies engaged in such * * * sale." 15 U.S.C. § 717(b). For jurisdictional wholesale transactions, the NGA requires that "all rates and charges * * * shall be just and reasonable" and declares that "any such rate or charge that is not just and reasonable is hereby declared to be unlawful." *Id.* § 717c(a). Retail and intrastate transactions, by contrast, are committed to state authority. *Id.* § 717(b)-(c).

The NGA envisioned a utility-style, cost-of-service ratemaking regime for wholesale transactions within FERC's jurisdiction. Thus, the Act provides that aspiring wholesalers must obtain "a certificate of public convenience and necessity" before making such sales. *Id.* § 717f(c). And the Act requires that natural-gas companies must "file with the Commission * * * all rates and charges for any [jurisdictional sales]." *Id.* § 717c(c).

FERC's authority to examine and reset jurisdictional rates is plenary:

> "Whenever the Commission * * * shall find that any rate [or] charge * * * 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 * * * is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the

just and reasonable rate [or] charge * * * to be thereafter observed and in force, and shall fix the same by order." *Id.* § 717d(a).

2. In the 1970s and 1980s, Congress enacted two statutes removing from FERC's jurisdiction a subset of wholesale transactions known as "first sales," which are not at issue in this case. See 15 U.S.C. § 3301(21)(A)-(B) (definition of first sales). "[F]irst sales are, in essence, merely sales of natural gas that are not preceded by a sale to an interstate pipeline, intrastate pipeline, local distribution company, or retail customer." *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027, 1037 (9th Cir. 2007). "[S]ales by pipelines, local distribution companies, and their affiliates cannot be first sales unless these entities are selling gas of their own production." *Ibid.*

The Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (NGPA), removed FERC's "jurisdiction" over first sales of "high-cost" or "new" natural gas. *Id.* § 601(a)(1)(B), 92 Stat. 3409; *Transcont'l Gas Pipe Line Corp.* v. *State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 421-422 (1986). "Congress * * * did so because it wanted to leave determination of supply and first-sale price to the market." *Id.* at 422.

The Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (WDA), removed all remaining first sales from FERC's jurisdiction.[1] See 15 U.S.C. § 3431(a)(1)(A). Neither the NGPA or WDA altered FERC jurisdiction over wholesale transactions that are

[1] The WDA is not included in petitioners' appendix. In relevant part, it provides: "For purposes of section 1(b) of the Natural Gas Act [15 U.S.C. § 717(b)], 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." 15 U.S.C. § 3431(a)(1)(A).

not first sales, which has remained unchanged in the 75 years since its enactment. See 15 U.S.C. § 717(b).

3. In 1992, FERC exercised its jurisdiction over wholesale transactions by initiating its own campaign of deregulation, moving from cost-of-service ratemaking to market-based rates. FERC Orders 547 and 636 effectively suspended the rate-filing requirements for wholesale transactions by offering "blanket marketer certificates" for wholesalers. Regulations Governing Blanket Marketer Sales Certificates, 57 Fed. Reg. 57,952 (Nov. 30, 1992). The holder of such a certificate may make "jurisdictional sales for resale of natural gas * * * at negotiated rates" without the need to file its rates with FERC. 18 C.F.R. § 284.402(a). Significantly, FERC stated in Order 547 that it would exercise its wholesale jurisdiction by "monitor[ing] the operation of the market through the complaint process." 57 Fed. Reg. at 57,958.

4. With the advent of market-based wholesale rates under Orders 547 and 636, FERC no longer, as a matter of course, establishes and approves rates in advance of wholesale sales. FERC, however, continues to exercise its exclusive statutory jurisdiction over wholesale transactions and natural-gas companies engaged in such transactions, and regulates unjust rates or practices within its purview. For example, in 2003, FERC amended blanket marketer certificates to impose a comprehensive "code of conduct" on wholesalers, prohibiting a variety of anti-competitive and manipulative conduct. Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,337 (Nov. 17, 2003). FERC took this action "to ensure the integrity of the gas sales market that remains within its jurisdiction." *Ibid.*

FERC has also taken action with respect to individual wholesalers that manipulated the market to charge unjust rates. In 2003, for instance, FERC revoked the blanket marketing certificate of Enron and reimposed

ratemaking procedures for that company. *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343, 62,295, 62,307-62,308 (2003). FERC explained that these steps were "necessary to fulfill the Commission's [statutory] obligation" to "protect [against] unjust and unreasonable rates" in the wholesale market. *Id.* at 62,295. Moreover, as discussed below, FERC investigated the wholesale transactions at issue in this case and found that Reliant did not violate the NGA by charging unjust and unreasonable rates.

B. Factual Background

1. According to petitioners' complaint, respondents engaged in unlawful activity in the wholesale natural-gas market in 2000-2001. Specifically, petitioners alleged that respondents engaged in "churning" transactions with Enron over Enron's online trading platform that artificially inflated the wholesale price of gas in the Topock spot market. Pet. 3-4; Compl. ¶¶ 55, 59.

All of the alleged misconduct occurred in FERC-jurisdictional sales between Reliant and Enron for later resale. Compl. ¶ 59. None of the allegedly unlawful practices occurred in the course of "first sales" or any other sales outside of FERC's jurisdiction.

2. FERC initiated an investigation into the very same "churning" transactions challenged by respondents. See *Reliant Energy Servs., Inc.*, 105 FERC ¶ 61,008 (2003). The investigation invoked FERC's "exclusive jurisdiction * * * over trading in the wholesale gas market." *Id.* at 61,016. FERC concluded that it "ha[d] jurisdiction over [Reliant's] trades at Topock and has exercised that jurisdiction in reviewing such trades." *Ibid.* FERC further explained that Reliant's "trading at Topock on Enron Online * * * constituted trading in the wholesale gas market and was undertaken pursuant to a blanket marketing certificate issued by the Commission." *Ibid.*

FERC found (and petitioners have never disputed) that the sales at issue here "were not 'first sales.'" *Ibid.*

On the merits, FERC held that Reliant's "trading activity at Topock did not violate either the Natural Gas Act or the Commission's regulations." *Ibid.* "[W]ith respect to Reliant's trading at Topock," the Commission ordered that "*no remedy is appropriate*." *Ibid.* (emphasis added).

II. PROCEEDINGS BELOW

A. District Court Proceedings

1. Discontented with the decision of the federal agency entrusted with oversight of the wholesale market, petitioners filed suit in Nevada state court on December 30, 2004. Petititioners claimed that Reliant's alleged wholesale churning transactions at Topock constituted violations of the Nevada Unfair Trade Practices Act (UTPA). These transactions, in conjunction with a "netting" agreement between Enron and respondents, allegedly resulted in "price fixing" in the wholesale market. Pet. 22, 23, 30, 32. Petitioners claimed that these actions caused them to pay higher retail prices for gas. Compl. ¶¶ 60-63. They sought treble damages corresponding to the "excess natural gas costs arising from the illegal restraints of trade imposed by [respondents]." *Id.* ¶ 63.

2. Respondents moved to dismiss, arguing, *inter alia*, that petitioners' claims are preempted under field-preemption doctrine because FERC has exclusive jurisdiction to regulate the wholesale transactions at issue and under conflict-preemption doctrine because petitioners sought to relitigate rates authorized and expressly investigated by FERC.[2]

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[2] Respondents also argued that petitioners' claims are barred by the filed-rate doctrine; that petitioners failed to state a claim under Nevada law; and that the court lacked personal jurisdiction over certain of the respondents. The Nevada Supreme Court "conclude[d] that

3. On April 4, 2007, the district court granted respondents' motion to dismiss. The court reasoned that "the misconduct alleged in the complaint centers on misconduct in the wholesale gas market which is within FERC's exclusive jurisdiction." App. 23a, 25a. Therefore, Nevada's UTPA "is prohibited by federal law from applying to the wholesale markets at issue." App. 23a, 25a. The court dismissed the claim "as barred by federal preemption." App. 23a.

B. The Nevada Supreme Court's Decision

1. The Nevada Supreme Court affirmed in a unanimous opinion. App. 1a-20a. The court noted at the outset FERC's "determin[ation] that Reliant's sales were subject to its jurisdiction." App. 4a. The court next examined the history of FERC's exclusive jurisdiction over wholesale transactions under the NGA, quoting this Court's holding that the NGA is "a comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce." App. 9a (quoting *N. Nat. Gas Co.* v. *Kan. Comm'n*, 372 U.S. 84, 91 (1963)). The court likewise reiterated this Court's statement "that no room has been left 'either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result.'" *Ibid.* (quoting *N. Nat.*, 372 U.S. at 91 (internal quotation omitted)).

2. The court rejected petitioners' argument that "field preemption is inapplicable * * * because even though the field historically had been preempted, * * *

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the filed-rate doctrine is inapplicable in light of [its] conclusion that the field is preempted." App. 18a n.9. It determined that "[a]ll other arguments raised on appeal either lack merit or are rendered moot by this disposition." App. 20a n.10. Respondents reserve the right to assert their alternative grounds for dismissal in any future proceedings.

the field had been deregulated and was no longer subject to FERC control." App. 7a. The court reviewed Congress's removal of first sales from FERC's jurisdiction in the NGPA and WDA, and FERC's shift to market-based rates within its remaining wholesale jurisdiction, but concluded that these actions did not eliminate Congress's field preemption of wholesale rates. App. 9a-13a.

The Nevada Supreme Court found this Court's decision in *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board of Mississippi*, 474 U.S. 409 (1986), to be controlling. In *Transcontinental*, the Nevada Supreme Court explained, this Court held that even the NGPA's removal of first sales from FERC's jurisdiction did not invite states to regulate such sales. App. 10a (citing *Transcontinental*, 474 U.S. at 421). Rather, "[this] Court determined that 'a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate.'" *Ibid.* (quoting *Transcontinental*, 474 U.S. at 422).

3. The Nevada Supreme Court reasoned that, as in *Transcontinental*, FERC's "decision to deregulate [wholesale transactions] was not a decision to no longer occupy the field." App. 17a. Rather, "FERC used deregulation as a means to increase market competition. It did not use this tool as a means to open up regulation to all fifty states." *Ibid.* The court concluded that FERC's "mere changes in [regulatory] approach did not contract the scope of preemption, as FERC has continued to regulate and refine [its] pricing policy" for jurisdictional wholesale transactions. App. 16a.

Rejecting preemption, by contrast, would "lea[d] to the imposition on interstate natural gas wholesalers 50 different sets of state rules concerning anticompetitive behavior." App. 18a. The result would be "a maelstrom

of competing regulations that would hinder FERC's oversight of the natural gas market" and defeat the "uniformity" that is the hallmark of the federal scheme. App. 18a-19a. Consequently, the Nevada Supreme Court concluded that "[petitioners'] claims are barred by federal field preemption." App. 19a.

REASONS FOR DENYING THE PETITION

Congress's grant of exclusive jurisdiction to FERC over wholesale natural-gas transactions has long been recognized as a quintessential example of field preemption. *E.g.*, *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 305 (1988) ("Congress occupied the field of matters relating to wholesale sales * * * of natural gas in interstate commerce."). Even when Congress removed certain first sales from FERC's jurisdiction, the Court reaffirmed that state-law claims challenging such sales were preempted by Congress's occupation of the wholesale field and its deregulatory intent with respect to first sales. *Transcont'l*, 474 U.S. at 422.

This case is far easier than *Transcontinental*. It involves wholesale transactions that remain *within FERC's exclusive jurisdiction*. Petitioners' lengthy discourse on Congress's removal of first sales from FERC's jurisdiction in the NGPA and WDA is therefore a red herring at best and misleading at worst. No first sales are at issue here, and the federally preempted field indisputably includes the jurisdictional wholesale transactions involved in this case. Thus, there can be no serious argument that state-law claims challenging such transactions are exempt from field preemption. Nor do this Court's cases contain a latent exception to preemption for state "antitrust" claims that seek to relitigate FERC-jurisdictional transactions.

The fact that FERC changed the *method* by which it exercises its jurisdiction over wholesale transactions does

not undercut the force of this field preemption and invite state regulation in the federally regulated field. A federal agency's choice of how to regulate cannot contract the Congressionally determined scope of field preemption. What is more, FERC actually exercised its wholesale jurisdiction to examine the very transactions at issue here and determined that Reliant did not charge unreasonable rates. It is hard to imagine a more direct conflict between state litigation and federal jurisdiction than is presented in this case.

The Nevada Supreme Court correctly held that this Court's bedrock field-preemption precedents prohibit the 50 states from revisiting FERC's determinations and imposing state policy on FERC-jurisdictional transactions. No other court has held that states may regulate jurisdictional wholesale transactions concurrently with FERC, whether under antitrust law or otherwise. Thus, while there is conflict among lower courts about the scope of preemption under the Natural Gas Act that warrants this Court's attention in a future case, that conflict is not implicated in *this case.* Certiorari should be denied.

I. THERE IS NO CONFLICT OVER WHETHER THE NGA PREEMPTS ANTITRUST CLAIMS CHALLENGING WHOLESALE SALES WITHIN FERC'S JURISDICTION.

Petitioners correctly identify significant tension among lower courts regarding the scope of NGA preemption of claims arising out of the California energy crisis. No split is implicated on these facts, however, because no court disagrees with the Nevada Supreme Court's holding that antitrust claims challenging wholesale transactions *within FERC's jurisdiction* are preempted.

A. No conflict with the Ninth Circuit's decisions warrants further review in this case.

Petitioners allege that the decision below conflicts with the decision in *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007). While the Nevada Supreme Court expressed disagreement with the *Gallo* court's approach to preemption, App. 18a, no split is presented on these facts. Even *Gallo*'s mistaken preemption analysis would not allow petitioners' claims challenging transactions *within FERC's jurisdiction*.

1. *Gallo* involved claims that antitrust violations caused inflation in natural-gas price indices that were used to price natural-gas transactions. 503 F.3d at 1030-1033. The distorted index prices allegedly caused retail customers to pay higher prices in transactions pegged to the indices. *Id.* at 1030-1033, 1048-1049.

The Ninth Circuit allowed certain claims to proceed. But it did so because it concluded that the indices were *not* comprised exclusively of transactions within FERC's jurisdiction. The indices also reflected "consumer transactions" and "first sales transactions." *Id.* at 1045. Stating that those types of transactions fall "outside of FERC's jurisdiction," the court held that antitrust claims challenging those transactions are not preempted. *Ibid.*

2. The court specifically addressed whether antitrust claims challenging first sales are preempted in light of *Transcontinental.* Distinguishing the state-agency regulations that were preempted in *Transcontinental*, the Ninth Circuit decided that "Congress's removal of FERC's jurisdiction over first sales does not preempt the type of claims brought by Gallo." 503 F.3d at 1046. "Although Congress's withdrawal of first sales from FERC's jurisdiction does reflect Congress's intent to move toward a less regulated national natural gas market," the

court reasoned that "antitrust and fair competition laws complement rather than undermine such a goal."[3] *Ibid.*

Crucially, however, the Ninth Circuit contrasted first sales with wholesale transactions that remain within FERC's jurisdiction, such as those at issue here:

> "Just as Congress's direction to FERC to determine just and reasonable rates [for jurisdictional transactions] *gave rise to the inference that Congress preempted damage claims*, [Congress's] withdrawal of FERC's authority to determine [first-sales] rates gives rise to the * * * inference * * * that normal market forces, including the tug and pull of private lawsuits will hold sway." *Ibid.* (emphasis added).

Thus, it was only Congress's removal of first sales from FERC's jurisdiction that led the Ninth Circuit to allow state-law claims challenging such sales (but only such sales).

Indeed, elsewhere in its opinion, the *Gallo* court repeatedly proclaims that antitrust suits challenging FERC-jurisdictional wholesale transactions are preempted under this Court's field-preemption precedents:

> "A challenge to market-based natural gas rates established pursuant to FERC's blanket market certificate would require a court to reconsider natural gas rates that FERC had already determined to be reasonable. *Because Congress preempted the field by giving FERC exclusive jurisdiction over such*

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[3] The Ninth Circuit's belief that state law may regulate in a federal field so long as it "complement[s]" a federal "goal" cannot be reconciled with this Court's precedent. See *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000) (finding state law restricting trade with Burma preempted despite "shar[ing] the same goal" as the federal law because "the fact of a common end hardly neutralizes conflicting means").

> *rates, challenges to such rates are barred by field preemption*." *Id.* at 1041 (emphasis added).

Accord *ibid.* ("state damages claims" challenging FERC-jurisdictional rates "are barred by field preemption"). In perfect harmony with the judgment below, the Ninth Circuit declared that "[t]he market-based rate for natural gas transactions under FERC's jurisdiction are FERC-authorized rates, and cannot be the basis of a federal antitrust or state damage action." *Id.* at 1043.

3. *Gallo*, moreover, specifically reaffirmed circuit precedent holding that retail purchasers—like petitioners here—cannot bring state-law damages claims that derive from alleged antitrust violations in the FERC-jurisdictional wholesale market. *Id.* at 1043-1044. "If [a plaintiff's] damage claims are based on upstream market-based rates within FERC's jurisdiction, such claims are likewise barred even though [the plaintiff] is a retail purchaser." *Id.* at 1043. Thus, a plaintiff's consumer status does not enable him to relitigate rates within FERC's jurisdiction.

Because the instant case challenges only wholesale transactions within FERC's jurisdiction, the outcome below would have been no different under the Ninth Circuit's approach.[4]

4. For similar reasons, the Ninth Circuit's recent decision in *In re: Western States Wholesale Natural Gas Antitrust Litigation*, --- F.3d ---, 2013 WL 1449919 (9th Cir. Apr. 10, 2013), does not support review in this case, as it also would not allow petitioners' antitrust claims

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[4] *Gallo*'s holding regarding first sales does conflict with *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010), in which the unanimous Tennessee Supreme Court held that antitrust claims challenging first sales are preempted under the rationale of *Transcontinental.* But that conflict is not presented here.

challenging wholesale transactions *within FERC's jurisdiction*.

In *Western States*, the court reaffirmed that its "preemption analysis is governed by * * * the distinction between categories of sales that fall within FERC's jurisdiction ('jurisdictional sales') and the categories of sales that fall outside of FERC's jurisdiction ('non-jurisdictional sales')." 2013 WL 1449919, at *2. The plaintiffs alleged antitrust violations consisting of false reporting to price indices. Defendants—including Reliant—argued that those claims are preempted because they challenge "practice[s] * * * affecting [jurisdictional] rates," 15 U.S.C. § 717d, which fall within FERC's exclusive jurisdiction irrespective of whether the alleged false reports concerned jurisdictional or non-jurisdictional transactions. *Western States*, 2013 WL 1449919, at *11.

The Ninth Circuit, however, found that "the claims in *Gallo* were essentially the same" as those in *Western States*—allegations of false price reporting of both jurisdictional and nonjurisdictional transactions (such as "first sales" and "retail sales"). *Id.* at **6, 8. According to the Ninth Circuit, FERC lacked jurisdiction over the price-reporting practices "associated with nonjurisdictional sales." *Id.* at *9. The court consequently rejected defendants' preemption argument because it determined that, at least in part, the state antitrust claims "ar[ose] out of price manipulation associated with transactions falling outside of FERC's jurisdiction." *Id.* at *6; accord *id.* at *8.

5. As with *Gallo*, respondents would prevail even under the *Western States* approach because petitioners allege state-law antitrust violations solely with respect to wholesale transactions over which FERC has exclusive jurisdiction. The tension between the Ninth Circuit's and the Nevada Supreme Court's respective approaches to

field preemption therefore does not present a conflict on the facts of *this case*.

However, the losing parties in *Western States*—including respondent Reliant—have filed a petition to stay the Ninth Circuit's mandate pending the filing of a petition for writ of certiorari in this Court. The Ninth Circuit's decision in *Western States* reflects a misunderstanding of field preemption that allows states to supplement federal regulation with private lawsuits in the name of advancing federal goals. This approach is at odds with the decisions of this Court and conflicts with the correct approach of the Tennessee Supreme Court, various federal courts of appeals, and the Nevada Supreme Court. The forthcoming cert petition in *Western States* will present an ideal vehicle to resolve that conflict and correct the Ninth Circuit.

B. There is no conflict between the decision below and the Seventh Circuit's decision in *Illinois* v. *Panhandle Eastern.*

Petitioners mistakenly assert that the decision below conflicts with *Illinois* v. *Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991). But like the Ninth Circuit decisions discussed above, *Illinois* did not allow state-law antitrust claims that challenge wholesale transactions within FERC's jurisdiction.

1. *Illinois* involved an interstate pipeline that refused to ship gas directly from the producer to some of its customers, so that the pipeline could instead sell those customers gas it had purchased for resale. 935 F.2d at 1471-1472. The Seventh Circuit summarily rejected the pipeline's argument that plaintiff's antitrust claims challenging this conduct were "preempted by the extensive federal regulation of the natural gas industry." *Id.* at 1479-1480. The court's preemption analysis consisted of observing that the NGA does not automatically immunize

gas companies from *federal* antitrust liability and asserting that, therefore, plaintiff's *state*-law claims were not preempted. *Ibid.*

Illinois does not create a conflict with the Nevada Supreme Court's holding that antitrust claims challenging FERC-jurisdictional transactions are preempted. Unlike here, the *Illinois* plaintiff's antitrust claims did not require a court to judge the lawfulness of transactions approved by FERC as just and reasonable.

2. Whatever vitality *Illinois* retains in the interstate-pipeline context—and no court has favorably cited its preemption holding in 22 years—it certainly has not persuaded courts to allow antitrust claims challenging wholesale rates. The one court to examine *Illinois*' reasoning refused to extend it to antitrust claims challenging FERC-jurisdictional rates. See *In re Enron Corp.*, 2005 WL 3873899, at *5 (Bankr. S.D.N.Y. 2006) ("Allowing state law claims in the wholesale interstate electricity market would encroach upon the authority Congress entrusted exclusively to FERC."). Price-fixing claims—whether federal or state—simply cannot coexist with an agency's exclusive authority to set just and reasonable rates.

Indeed, *Gallo* recognizes that federal and state antitrust claims challenging jurisdictional rates are equally barred by filed-rate and preemption doctrines. 503 F.3d at 1041-1043 ("The market-based rate for natural gas transactions under FERC's jurisdiction are FERC-authorized rates, and cannot be the basis of a federal antitrust or state damage action."). This directly undercuts petitioners' theory that the NGA's commitment of federal antitrust claims to the attorney general somehow preserves all antitrust claims from preemption.

Time and again, courts have held that antitrust claims challenging wholesale transactions within FERC's juris-

diction are preempted. App. 19a; *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843, 864-872 (Tenn. 2010); *Pub. Util. Dist. No. 1 of Snohomish Cnty.* v. *Dynegy Power Mktg. Inc.*, 384 F.3d 756, 761 (9th Cir. 2004). Petitioners identify nothing to the contrary. There is no disagreement over this issue to merit further review.

II. The Decision Below Does Not Conflict With Any Decision Of This Court.

Petitioners contend that the decision below conflicts with this Court's decision in *Puerto Rico Department of Consumers Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988), and what petitioners call "the *California/Otter Tail* line of cases." Pet. 22; see *Cal.* v. *Fed. Power Comm'n*, 369 U.S. 482 (1962); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). They are mistaken.

A. There is no conflict with *Isla Petroleum*.

1. *Isla Petroleum* does not aid petititioners. See Pet. 28-31. There, the Court considered federal statutes that granted the President authority to impose gasoline price controls to the exclusion of any state price controls, but provided that this federal authority expired in 1981. *Isla Petrol.*, 485 U.S. at 497-498. The question was whether Puerto Rico could impose its own price regulation *after* federal authority expired under the terms of the statute. *Id.* at 497. The Court unanimously held that the expiration of federal statutory authority did not preempt Puerto Rico's legislation. *Id.* at 501-504.

The Court refused to rely on legislative history that purportedly reflected "a congressional intent that there be a free market in petroleum products." *Id.* at 501. Preemption, the Court explained, depends on statutory text. *Id.* at 501, 503. And in *Isla Petroleum*, "there [was] no text * * * nor any extant federal regulation that might plausibly be thought to imply exclusivity" with respect to petroleum price regulation. *Id.* at 501.

The Court contrasted the statutes under review in *Isla Petroleum* with the Natural Gas Act. The Court reiterated its holding in *Transcontinental*, observing that "the preemptive force of the NGA * * * was equalled by the preemptive force of the NGPA, because the NGPA did not alter the comprehensive nature of the scheme" to regulate wholesale transactions. *Id.* at 502. Indeed, Congress's express textual grant of jurisdiction to FERC over wholesale transactions has long dictated preemption of all state claims in the field. *E.g.*, *Schneidewind*, 485 U.S. at 305 ("Congress occupied the field of matters relating to wholesale sales * * * of natural gas in interstate commerce."). As a result, the presumption against preemption invoked by petitioners does not apply here. See, *e.g.*, *United States* v. *Locke*, 529 U.S. 89, 108 (2000) ("an assumption of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence").

2. Moreover, contrary to petitioners' argument (Pet. 29), the Court did not abandon its "retransfer" analysis in *Isla Petroleum*. Instead, the Court *reaffirmed* that approach as controlling in the wholesale natural-gas arena at issue here: "We demanded an affirmative intent to retransfer authority in *Transcontinental* because only that could have refuted the preemptive intent already manifest in the revised, but nonetheless 'comprehensive,' federal regulatory scheme." *Isla Petrol.*, 485 U.S. at 503. The Nevada Supreme Court did not err by applying *Transcontinental*'s reasoning to the precise context in which it was reaffirmed in *Isla Petroleum*.

3. Finally, *Isla Petroleum* cannot help petitioners for an even more fundamental reason. The Court allowed Puerto Rico's price controls because "Congress has withdrawn from all substantial involvement in petroleum allocation and price regulation." *Id.* at 504. It is undisputed that Congress has not withdrawn FERC's jurisdiction

over the wholesale transactions at issue here. Thus, unlike in *Isla Petroleum*, nothing suggests that Congress has repealed its grant of exclusive jurisdiction to FERC over this dispute.

B. There is no conflict with *California* and *Otter Tail*.

1. Nor do *California* and *Otter Tail* conflict with the Nevada Supreme Court's decision. Neither case addressed the preemptive effect of federal law on state law; they stand only for the proposition that the NGA and Federal Power Act (FPA) do not bar all federal antitrust claims. See *California*, 369 U.S. at 487 (the Federal Power Commission should stay a merger application when there is a pending Clayton Act challenge to the merger); *Otter Tail*, 410 U.S. at 373-376 (the FPA did not immunize utility from Sherman Act claims for refusing to deal with municipal corporations). Furthermore, in neither case was the Court faced with a damages claim that depended on reviewing transactions the federal agency had already approved. Here, petitioners bring only state-law claims seeking money damages that rest on alleged price-fixing transactions unquestionably within FERC's exclusive jurisdiction and which were indisputably reviewed by FERC.

2. Therefore, while *California* and *Otter Tail* stand for the proposition that a federal regulatory scheme does not create antitrust immunity absent express Congressional intent, this Court has long recognized that the same scheme will nonetheless preempt state laws and even bar federal claims when, as here, the nature of the action intrudes on the field of regulation Congress entrusted to the federal agency. See *Entergy La., Inc.* v. *La. Pub. Serv. Comm'n*, 539 U.S. 39, 46-47 (2003) (holding that the filed-rate doctrine, as a matter of preemption, precluded state agency from disallowing recovery of nuclear plant costs subject to FERC's approval under

FPA); *Square D Co.* v. *Niagara Frontier Bureau*, 476 U.S. 409, 421-422 (1986) (explaining distinction between antitrust immunity and the preclusive effect of a federal agency's authority to determine just and reasonable rates); *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 580-582 (1981) (explaining that breach of contract action based on an assumed higher rate that the FERC may have approved was barred under the Supremacy Clause by the filed-rate doctrine). The Nevada Supreme Court holding—state law cannot be used to redress misconduct falling within FERC's jurisdiction—is therefore unremarkable and perfectly consistent with this Court's long line of preemption jurisprudence.

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.[5] No court has held to the contrary in a

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[5] See *Simon* v. *Keyspan Corp.*, 694 F.3d 196, 206 (2d Cir. 2012) (filed-rate doctrine barred federal and state antitrust claims related to conduct in FERC-regulated electricity markets); *Gallo*, 503 F.3d at 1033-1035, 1041-1043 (preemption bars state antitrust damages claims based on FERC-jurisdictional transactions in natural gas market); *AEP Tex. N. Co.* v. *Tex. Indus. Energy Consumers*, 473 F.3d 581, 586 (5th Cir. 2006) (preemption and filed-rate doctrine barred a state regulator from setting utility rates based on an alleged violation of a FERC tariff); *Snohomish Cnty.*, 384 F.3d at 761 (preemption barred state antitrust and unfair competition claims for money damages and injunctive relief based on alleged manipulation of wholesale electricity markets); *Utilimax.com, Inc.* v. *PPL Energy Plus, LLC*, 378 F.3d 303, 306 (3rd Cir. 2004) (filed-rate doctrine barred federal and state antitrust claims based on rates charged in wholesale electricity markets); *Cal.* v. *Dynegy, Inc.*, 375 F.3d 831, 836, 849-852 (9th Cir. 2004) (preemption barred state antitrust claims for injunctive relief, money damages, and penalties based on alleged manipulation of wholesale electricity markets); *Cnty. of Stanislaus* v. *Pac. Gas & Elec. Co.*, 114 F.3d 858, 866 (9th Cir. 1997) (filed-rate doctrine barred federal and state antitrust claims against natural gas utility); *Leggett*, 308 S.W.3d at 848, 867-872 (preemption

case challenging only transactions within FERC's jurisdiction.

III. The Decision Below Is Correct.

The Nevada Supreme Court correctly held that petitioners' claims are preempted under this Court's precedents interpreting the NGA.

1. In case after case, this Court has proclaimed that "Congress occupied the field of matters relating to wholesale sales * * * of natural gas in interstate commerce." *Schneidewind*, 485 U.S. at 305; *Transcont'l*, 474 U.S. at 422-423 (referring to the "comprehensive federal regulatory scheme" governing wholesale transactions); *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 184, 185 (1983) (invalidating state law that "trespassed upon FERC's authority over wholesale sales of gas in interstate commerce" because it "represented an attempt to legislate in a field Congress has chosen to occupy"); *N. Nat.*, 372 U.S. at 91 ("Congress enacted a comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce.").

"[U]niformity of regulation" in the wholesale market was a principal "objective of the Natural Gas Act." *Schneidewind*, 485 U.S. at 310 (quoting *N. Nat.*, 372 U.S. at 91-92). Accord *Transcont'l*, 474 U.S. at 422-423 (rejecting state regulation that "disturbs the uniformity of the federal scheme"). Congress's mandate of uniformity means that no room has been left "either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." *N. Nat.*, 372 U.S. at 91.

2. The "question" in a Natural Gas Act preemption case is "whether [the state action] regulates within this

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barred state antitrust claims based on alleged manipulation of wholesale gas markets).

exclusively federal domain." *Schneidewind*, 485 U.S. at 305. Petitioners' state-law antitrust claim plainly invades FERC's exclusive jurisdiction over wholesale transactions and would impermissibly "regulate" those transactions by penalizing transactions that FERC has declared lawful.

Petitioners have never disputed that this lawsuit challenges only transactions within the heartland of FERC's jurisdiction over wholesale rates. See 15 U.S.C. § 717(b). Both lower courts held as much. App. 4a, 23a. Indeed, FERC exercised its "exclusive jurisdiction * * * over trading in the wholesale gas market" to examine these very transactions. *Reliant*, 105 FERC at 61,016. FERC concluded that it "ha[d] jurisdiction over [Reliant's] trades at Topock and has exercised its jurisdiction in reviewing such trades." *Ibid.*

This case does not involve "first sales" that Congress removed from FERC's jurisdiction in the NGPA and WDA. *Ibid.* FERC expressly held that the sales at issue here "were not first sales." *Ibid.* Even if petitioners had contested FERC's finding of exclusive jurisdiction over these transactions—and they have not—FERC's reasonable determination would be entitled to deference. See *City of Arlington* v. *FCC*, No. 11-1545, slip op. at 16-17 (U.S. May 20, 2013).

Having exercised its exclusive jurisdiction to review Reliant's transactions, FERC held that Reliant's "trading activity at Topock did not violate either the Natural Gas Act or the Commission's regulations." *Reliant*, 105 FERC at 61,016. Thus, "with respect to Reliant's trading at Topock," the Commission ordered that "*no remedy is appropriate*." *Ibid.* (emphasis added).

In bringing a Nevada antitrust claim, petitioners assert that transactions held lawful by FERC, pursuant to its exclusive jurisdiction over wholesale rates, are in fact

unlawful under Nevada law. They seek to impose a treble damages remedy, when FERC has found that no remedy is appropriate.[6] Applying Nevada's price-fixing statute to revisit FERC-jurisdictional rates invades the federal field as surely as the state statutes and regulations preempted in this Court's previous NGA decisions. *E.g.*, *Schneidewind*, 485 U.S. at 310 (invalidating Michigan statute as applied to natural-gas pipeline because it "impinges on a field that the federal regulatory scheme has occupied"). In other words, petitioners' antitrust claim "indirectly achieve[s] the same result" as "direct state regulation of the prices of interstate wholesales of natural gas," *N. Nat.*, 372 U.S. at 91, and is therefore preempted.

The Nevada Supreme Court correctly held that applying state antitrust law to FERC-jurisdictional transactions would destroy the uniformity the NGA requires. While petitioners seem to assert that state *antitrust* claims challenging FERC-jurisdictional sales are uniquely exempt from NGA preemption, they cite no court that has endorsed this proposition. This Court recently held that even state *common-law* claims are preempted when they interfere in a field with a similarly lengthy history of federal regulation. *Kurns* v. *R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1269-1270 (2012) (holding that Locomotive Inspection Act preempts state tort claims). And lower courts routinely hold antitrust claims challenging jurisdictional sales to be preempted under the NGA. See App. 19a; *Gallo*, 503 F.3d at 1041-1043; *Snohomish Cnty.*, 384 F.3d at 761; *Leggett*, 308 S.W.3d at 864-872; see also n.5, *supra* (collecting cases).

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[6] In light of these direct conflicts between FERC's action and petitioners' antitrust claim, their claim would be preempted under principles of conflict preemption, in addition to field preemption.

3. Much of the petition belabors the fact that Congress removed first sales from FERC's jurisdiction in the NGPA and the WDA. But even if those statutes permit state-law claims challenging first sales, but see *Transcont'l*, 474 U.S. at 421-422, they cannot possibly allow suits challenging sales *within FERC's remaining jurisdiction*. Removal of FERC's jurisdiction over certain sales raises no inference that Congress wished to alter the exclusive nature of FERC's remaining wholesale jurisdiction. Just the opposite: it suggests that Congress considered the question and decided to continue FERC's plenary power within its residual realm. Even the Ninth Circuit—the only court to allow antitrust claims challenging first sales—has held that plaintiffs cannot challenge wholesale rates that are within FERC's remaining wholesale jurisdiction. See pp. 12-13, *supra* (discussing *Gallo*, 503 F.3d at 1041, 1043, 1046). Because only FERC-jurisdictional transactions are at issue here, the Nevada Supreme Court properly held that petitioners' claims are preempted by the NGA's grant of exclusive jurisdiction to FERC.

4. To the extent petitioners argue that FERC's shift to market-based rates militates against preemption, they are mistaken. Cf. *Leggett*, 308 S.W.3d at 864 (noting that "FERC itself took additional steps to further deregulate the natural gas transactions within its remaining jurisdiction in hopes of developing a more competitive market"); pp. 4-5, *supra* (describing FERC's shift to market-based rates). Nothing in this Court's caselaw supports the notion that an agency's method of regulation within its exclusive jurisdiction can "un-preempt" a field that Congress has declared preempted. FERC's actions did not, and could not, eliminate its exclusive statutory authority to ensure just and reasonable rates within its wholesale jurisdiction.

In any event, FERC has continued actively regulating wholesale transactions within its exclusive jurisdiction. See *Leggett*, 308 S.W.3d at 867 ("the federal government is still an active regulator of the wholesale market in natural gas"). While FERC no longer typically approves rates in advance, it monitors the wholesale market, imposes conditions on wholesalers' blanket marketing certificates, and may revoke market-based rates if a wholesaler engages in misconduct or charges unjust rates. See pp. 4-5, *supra*. FERC has admonished that obtaining a certificate to charge market-based rates "does not entitle the certificate holder to charge rates that are unjust and unreasonable under NGA Sections 4 and 5." *Enron Power Mktg., Inc.*, 103 FERC at 62,310 n.52. FERC continues to wield its exclusive jurisdiction to oversee the wholesale market, including the transactions at issue in this very case.[7]

FERC's approach is consistent with the reality that the NGA "does not require FERC to use any particular form of regulation in its quest to ensure reasonable rates. Rather, it has wide latitude to determine the most effective way to carry out its charge from Congress." *Gallo*, 503 F.3d at 1039. See *Mobil Oil Exploration & Prod. Se. Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 224 (1991)

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[7] In light of this ongoing regulation, petitioners' statement that "there was no actual regulation of the relevant transactions and market" (Pet. 1) is perplexing, to say the least. But even if FERC totally deregulated the wholesale market in the exercise of its authority to ensure just and reasonable rates, this would not somehow repeal Congress's exclusive grant of jurisdiction to FERC over wholesale sales. Nor would Congressionally authorized deregulation invite state intrusion. See *Transcont'l*, 474 U.S. at 422 ("a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate").

("The Court has repeatedly held that the just and reasonable standard does not compel [FERC] to use any single pricing formula."). Thus, it is hardly surprising that every court to have considered the issue has rejected assertions that FERC's shift to a market-based approach invites state-law claims challenging FERC-jurisdictional rates. *E.g.*, App. 14a-19a; *Snohomish Cnty.*, 384 F.3d at 761 (holding with respect to state antitrust claims that "[t]his court has rejected [the] argument that the preemption-related doctrines at issue do not apply when market-based rates are involved"); *Pub. Util. Dist. No. 1 of Grays Harbor Cnty. Wash.* v. *IDACORP Inc.*, 379 F.3d 641, 649-651 (9th Cir. 2004) (unjust-enrichment claims challenging allegedly manipulative wholesale electricity sales preempted despite FERC's shift to market-based rates); *Leggett*, 308 S.W.3d at 866-872 (antitrust claims challenging deregulated transactions preempted in natural-gas context).

In sum, the scope of field preemption depends on *Congressional* action; it does not expand or contract based upon the regulatory methods of an agency.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ORRIN L. HARRISON III
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Ave., Ste. 4100
Dallas, Texas 75201-4624
(214) 969-2860

Counsel for Respondent CenterPoint Energy, Inc.

J. GREGORY COPELAND
MARK R. ROBECK
AARON M. STREETT
Counsel of Record
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

Counsel for Respondents Reliant Energy, Inc. and Reliant Resources, Inc.

JACK DICANIO
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM, LLP
300 S. Grand Ave., Ste. 3400
Los Angeles, California
90071
(213) 687-5430

Counsel for Respondent Kathleen M. Zanaboni

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