No. 12-980

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

REPLY BRIEF

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Petitioner, the State of Nevada, by and through its Attorney General, Catherine Cortez Masto, respectfully submits this Reply Brief in Support of its Petition for Writ of Certiorari to the Supreme Court of Nevada (hereafter the "Nevada Petition"). This Reply is made to the Brief in Opposition of Respondents Reliant Energy, Inc. and others. ("Reliant Brief").

REPLY ARGUMENTS

1. There are several key points for proper understanding of the Reliant Brief. First is Reliant's admission that a "certworthy" conflict of authorities exists between the Ninth Circuit's *Gallo* case and the Tennessee Supreme Court's *Leggett* case. The Nevada Supreme Court explicitly recognized the same conflict and elected to follow *Leggett* and reject *Gallo*. This admission arises from an adverse decision in *Learjet, Inc., et al. v. Oneok, Inc. (In re Western States Wholesale Natural Gas Litig.)*, ___ F. 3d ___, No. 11-16786 (9th Cir. April 10, 2013). The *Learjet/Western States*[1] case, like this case, arises from the energy crisis of 2000-2001 and, like this case, is based on allegations of price manipulation and sham trading activity by Reliant and other energy companies in natural gas commodity markets. Reliant is a party to the *Learjet/Western States* case, which reverses for the second time summary judgment for Reliant based on preemption.[2] This new case brings to five the number

1. Petitioner uses this unwieldy short form because of the large number of reported and unreported decisions under this multidistrict caption.

2. *See Abelman Art Glass v. AEP Energy Serv., Inc. (In re Western States Wholesale Natural Gas Antitrust Litig.)*, 2007 WL 2806723 (9th Cir., Sept. 24, 2007)(unpublished order)(reversing summary judgment based on *Gallo, infra.*).

of conflicting appellate cases on the preemption issue in natural gas cases.[3] Reliant's unqualified admission that the split of authorities that Nevada has invoked is "certworthy" should be accepted by the Court and the petition granted.

2. Despite its admission, Reliant opposes grant of the Nevada Petition. This is based on the continuous repetition in nearly every sentence of Reliant's Brief mischaracterizing Petitioners' factual allegations as a challenge to "wholesale" sales transactions "within FERC's jurisdiction." Other phrases such as "jurisdictional transactions" and the ubiquitous "exclusive jurisdiction" are also scattered through the brief. The point of this exercise is to pretend that Petitioner has somehow admitted that Reliant's price fixing activities, "churning" and "netting," are not "first sales." Reliant admits the Federal Energy Regulatory Commission ("FERC" or "Commission") has no rate authority over "first sales," an absence of jurisdiction that is fatal to its preemption theory under *Gallo* and *Learjet/Western States.* Reliant Brief at 3. Reliant's goal is thus to use "wholesale sales" to invoke the vestiges of the FERC's "sales" jurisdiction under the Natural Gas Act and pretend that all of the transactions fit this category.

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3. The cases finding preemption are: the case below, *State of Nevada v. Reliant Energy, Inc.*, ___ *Nev.* __, 289 P.3d 1186 (2012) and *Leggett v. Duke Energy Corp.*, 308 S.W. 3d 843 (Tenn. 2010). The cases rejecting preemption are *Learjet/Western States, supra; E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007); 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).

It is all completely untrue. The apparent source of this contention is that by using the term "churning" in the complaint, Nevada brings the case within the coverage of a FERC order approving a settlement agreement between Reliant and the FERC's Office of Market Oversight and Investigation (OMOI). *See Reliant Energy Services, Inc.*, 105 FERC ¶ 61,008 (2003). The contention is seriously misleading for several reasons. First, Reliant fails to inform the Court that it has previously presented to the Ninth Circuit the FERC settlement order and the theory that its "churning" transactions were not "first sales" and the Court specifically *rejected* Reliant's characterization of this order. *See Abelman Art Glass v. AEP Energy Serv., Inc. (In re Western States Wholesale Natural Gas Antitrust Litig.),* 2007 WL 2806723 (9th Cir., Sept. 24, 2007). Second, Judge Pro relied upon that FERC Order in granting the underlying summary judgment, but that judgment was reversed in the recent *Learjet/Western States* decision. *See in re Western States Wholesale Natural Gas Antitrust Litig.*, 2011 U.S. Dist. LEXIS 83062, at pp. 69-71 (D. Nev. July 18, 2011). Third, the FERC's order, on its face, declares that the FERC's approval "does not constitute *approval of, or precedent regarding, any principle or issue in these dockets.*" 105 FERC ¶ 61,008 at 61016 (emphasis added). Reliant never explains how an order that is not a binding precedent in FERC's own domain should be binding on anyone but Reliant itself. Finally, the FERC "findings" lack merit because these were apparently written by Reliant. The settlement agreement, which is attached to the FERC order, specifies the exact language of the "findings" and states that "Unless the Commission issues an Order approving this Agreement in its entirety, *including these findings*, without modification, this Agreement shall be null and void and of no effect." *Id.* at 61021-22 (emphasis

added). As the agreement and order show, Reliant paid a $25 million penalty for bona fide electricity violations, but paid nothing on the gas side, a non-payment "explained" by the Reliant drafted "findings." No inference can be drawn that the Reliant settlement transforms "first sales" into FERC regulated NGA "wholesale sales."

3. A third feature of the Reliant Brief is that it makes no response to the statutory citations and argument in the Nevada Petition that establish that Congress intended to exclude antitrust matters from the FERC's jurisdiction. Nevada Petition at 16, 20. The Brief concentrates on case law surrounding the judge made category of "field preemption." In this respect Reliant follows the Nevada Supreme Court, which stated:

> [A]ppellants' claims are barred by federal field preemption. While this conclusion fails to provide redress for our citizens, the long and entangled history of natural gas regulation in this country requires this result. Because Congress has afforded no room for the imposition of state law requirements, federal preemption bars this action.

Nevada Petition App. at 19a. While this historical approach fails on its own terms because the Nevada Court ignored pertinent cases,[4] it also reflects a serious failure to

4. The Nevada Petition points out that the Nevada and Tennessee Supreme Courts trace their "field preemption" holdings to *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. 84 (1963), but ignore *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962) which notes that "there is no pervasive regulatory scheme including the antitrust law that has been entrusted to the Commission."

follow the jurisprudential rules that require that implied preemption be traceable to positive statutory language. *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988)(implied preemption is "the giving of meaning to an enacted statutory text.").

In contrast to the historical approach of the Nevada and Tennessee Supreme Courts, the *Gallo* and *Learjet/ Western States* opinions correctly focus on statutory analysis to resolve the preemption issue. The "touchstone ... [is] expressed congressional intent." *Western States slip op.* at 23 (*citing Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Moreover, state antitrust laws are protected by a presumption against preemption that requires "a clear and manifest purpose of Congress" to preempt State law. *Id.*

By focusing on congressional intent as reflected in the relevant statutes, the *Learjet/Western States* Court easily rejected Reliant's post-*Gallo* theory to evade the "first sale" problem. This new theory avoided the "filed rate" theory of *Gallo* and instead framed a "field preemption" theory that relies on the presumed presence of small volumes of "jurisdictional" sales[5] in the commingled interstate gas stream to trigger FERC's allegedly exclusive jurisdiction over *all* of the manipulative *conduct* of natural gas traders despite the FERC's lack of authority over "non-jurisdictional" first sales. *Learjet/ Western States slip op.* at 21-22. The statutory predicate

5. The Nevada Petition uses the term "pipeline sales" for "jurisdictional" sales which are limited to resales by interstate pipeline companies or local distribution companies or their affiliates. In the absence of discovery this ratio cannot be determined, but reports filed by the interstate pipelines serving the Southern Nevada market show that pipeline sales are and insignificant element of the market. Nevada Petition at 8 n. 3.

for this argument was section 5(a) of the Natural Gas Act granting the FERC power to correct ("fix") "practices ... affecting ... rate[s]." *Id.* at 22 (*citing* 15 U.S.C. § 717d).

The *Learjet/Western States* Court rejected this argument for several reasons. As an overarching matter, the court viewed skeptically any rule that would allow a court "to preempt *impliedly* the application of state laws to the same transactions . . . that Congress *expressly* exempted from the scope of FERC's jurisdiction in section 1(b) of the Act." *Learjet/Western States slip op.* at 28 (emphasis added). Additionally, applying rules of statutory construction, the court held the term "practice" could not be construed broadly, but was confined solely to the specific context of the matters covered by section 5(a). *Id.* Additionally, the Court relied on a case showing the FERC itself refuses to use the "affecting rates" language to reach contracts outside the scope of the NGA's jurisdictional provisions. *See American Gas Assn. v. Federal Energy Reg. Commission*, 912 F.2d 1496, 1503 (D.C. Cir. 1990).

4. Perhaps the most significant element of *Learjet/ Western States* is its focus on this Court's restrictive reading of the NGA's jurisdiction in *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989). There the Court held FERC's jurisdiction under section 1(b) of the NGA does not cover natural gas matters "to the limit of constitutional power," but rather sets up a division of authority between the federal government and the States. *See Learjet/Western States* slip op. at 25. Based on these limitations, the court denied the pipeline's contention that implied "field preemption" barred a state conservation regulation that did not apply directly to the pipeline but merely "affected" its cost

structure and the final rates. This Court unanimously rejected the field preemption argument because it would "nullify" the powers of the States expressly recognized by Congress under NGA section 1(b). *Learjet/Western States* slip op. at 30.

The Nevada Petition relies on *Northwest Central's* rejection of NGA field preemption and argues that it undermines the foundational cases that support the decisions of the Nevada and Tennessee Supreme Courts. Nevada Petition at 26-27. These are *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. 84, 91 (1963) and *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474 U.S. 409, 421 (1986). *Northwest Central* directly reviews and limits the holdings of these cases. Surprisingly, the Reliant Brief is completely silent as to *Northwest Central* and makes no response to Petitioner's argument based on it. This silence is especially curious because the Reliant brief quotes the Nevada Supreme Court's statement of the scope of the putative "field preemption" rule drawn from *Northern Natural* as follows: "[N]o 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.*" Reliant Brief at 7, App. 7a. There can be no question that *Northwest Central* flatly holds the NGA is not a statute that imposes field preemption and that it disapproves the portion of the *Northern Natural* rule that allowed preemption of "state regulations" with indirect effects and confines the case to prevention of direct state regulation of interstate pipelines. 489 U.S. at 512-14; *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (prohibiting application of Michigan state financial regulations to interstate pipeline). Moreover, by

eliminating potential preemption of "state regulations" based on indirect effects, the broader domain of state laws of general application such as the Nevada Unfair Trade Practices Act is necessarily outside the scope of NGA preemption. This completely undermines the rationale of the Nevada Supreme Court's field preemption holding.

This silence with respect to *Northwest Central*, which is the leading NGA field preemption case, shows Reliant has no counter to *Northwest Central's* clear restriction of the scope of preemption under *Transcontinental* and its denial of the proposition that Congress intended field preemption in the enactment of the NGA. This obviates the necessity of any extensive reply to Reliant's arguments concerning the interplay of the *Transcontinental* and *Isla Petroleum* cases. Reliant Brief at 11, 17-19. As argued in the Nevada Petition, the logic of *Isla Petroleum,* its reversal and criticism of the burden shifting "retransfer" rule of *Transcontinental,* makes clear that *Transcontinental* lacks vitality, but it is the combination of *Isla Petroleum* and the substantive rejection of "field preemption" with respect to the NGA that makes *Transcontinental* a dead letter as a preemption case. Reliant's citation to *Schneidewind, supra,* does not change this. *Northern Natural* or *Transcontinental* it is a case where the Court disallowed a state regulation that imposed a direct compliance burden on a federally regulated interstate pipeline. It has nothing to do with consumer antitrust actions. Moreover, *Northwest Central* was decided a year after *Schneidewind,* however, so there is no basis to conclude that it limits in any way the *Northwest Central* holding.

5. The Nevada Petition argues that the Nevada Supreme Court decision improperly disregarded the holding 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). Nevada Petition at 13-14, 19. *Illinois* addressed the identical *preemption* issue that is present in this case because it involved a state attorney general's state antitrust action against a pipeline for monopolization of natural gas sales to a consumer class in the central Illinois market. 935 F.2d at 1476. *Illinois* was a fully litigated case decided under the standards of *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962) and *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). Nevada Petition at 18-19. Under this settled line of cases, the "voluntary conduct" of Commission regulated entities was subject to the antitrust laws. The scope of voluntary conduct of pipelines was particularly great because the regulatory scheme of the NGA did not demand uniformity and initial contracting arrangements of the regulated entities to the discretion of the companies. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956). In view of the fact the NGA did not create a lack of antitrust immunity under federal law, the Seventh Circuit saw no conflict justifying preemption of corresponding state antitrust laws.

Reliant's response ignores the fact that *Illinois* was decided under the authority of *California* and *Otter Tail* and inappropriately treats them in a disconnected fashion. *See* Reliant Brief at 15-17 (*Illinois)* and 19-21 (*California/ Otter Tail).* Reliant's arguments concerning *California* and *Otter Tail* are totally superficial. The major distinction is that neither involves state antitrust law. Reliant Brief at 19. This ignores the fact that *Illinois* supplies the missing

connection. The response to *Illinois* is also insubstantial. There is a snarky reference to the absence of favorable citations to Illinois' preemption holding in the years since *Illinois* was decided in 1991, but there are no unfavorable references either. The second, seemingly more serious point is the assertion, without citation, that "the Illinois plaintiff's antitrust claims did not require a court to judge the lawfulness of transactions approved by FERC." Reliant Brief at 16. This "approved by FERC" language incorporates without attribution Reliant's fictional theory of its FERC settlement, and is of no force. However, the more than one hundred page opinion of the district court as well as the Seventh Circuit opinion shows the courts did review the lawfulness of Panhandle's heavily regulated conduct and transactions and found them to be *lawful. See generally, 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).

Reliant's effort to marginalize *Illinois* notwithstanding, it must be considered not only for its rejection of preemption, but also as counterexample to Reliant's continual and erroneous portrayal of FERC jurisdiction as an either-or proposition in which the presence of FERC jurisdiction necessarily means the States are disabled from enforcing their laws. The reality of *Illinois,* in which the court tried the case and decided it on the merits despite a "complex regulatory backdrop," stands in contrast to the spectacle of Reliant's extreme advocacy for a broad preemption rule in a regulatory context of non-regulation: complete deregulation of "first sales" and a wide open market under the Order 547 blanket certificate for energy trading

companies like Reliant to operate in natural gas markets without any regulatory filing requirements. *See* Nevada Petition 8-10. Reliant's idea of preemption that gets wider as regulation shrinks defies common sense. Reliant's many expressions of shock notwithstanding, the novelty in the present era is not the possibility of *non-preemption* and concurrent jurisdiction per *Illinois*, but the expansive field preemption ruling of the Nevada Supreme Court. If the settled law reflected in *Illinois* based on *California* and *Otter Tail* has changed, the articulation of the proper standard must come from this Court.

CONCLUSION

For the reasons given in the Nevada Petition and this Reply Brief, the Court is respectfully requested to grant the Nevada Petition for Writ of Certiorari to the Supreme Court of Nevada.

Respectfully submitted,

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