

No. 14-1

IN THE
Supreme Court of the United States

AEP ENERGY SERVICES, *et al.*, PETITIONERS,

v.

HEARTLAND REGIONAL MEDICAL CENTER, *et al.*,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE WISCONSIN RESPONDENTS IN
OPPOSITION

ROBERT L. GEGIOS*
STEPHEN D. R. TAYLOR
MELINDA A. BIALZIK
RYAN M. BILLINGS
AMY IRENE WASHBURN
KOHNER, MANN & KAILAS, S.C.
4650 N. Port Washington Road
Washington Bldg., 2nd Floor
Milwaukee, WI 53212
(414) 962-5110
rgegios@kmksc.com

*Counsel for
The Wisconsin Respondents*

**Counsel of Record*

QUESTION PRESENTED

Is due process offended by Wisconsin courts exercising jurisdiction over defendants who sold millions of dollars of product in Wisconsin, and guaranteed the contracts for sale of that product, to Wisconsin business consumers, in order to further a conspiracy to manipulate prices in natural gas markets?

PARTIES TO THE PROCEEDINGS

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

1. AEP Energy Services (“AEPES”) and American Electric Power Company, Inc. (“AEP”), petitioners on review, were defendants-appellees below.¹

2. Merrick’s, Inc.; Sargento Foods Inc.; Ladish Co., Inc.; Carthage College; Briggs & Stratton Corporation; Arandell Corporation; and NewPage Wisconsin System, Inc. (“the Wisconsin Respondents”); and Heartland Regional Medical Center, Prime Tanning Corp., and Northwest Missouri State University (“the Missouri Respondents”),² respondents on review, were plaintiffs-appellants below.

3. Additional defendants below – CMS Energy Corporation; CMS Field Services; CMS Marketing Services & Trading Company; Coral Energy Resources, L.P.; Duke Energy Corporation; Duke Energy Trading and Marketing, LLC; Dynegy Marketing and Trade; DMT G.P. LLC; Dynegy Illinois, Inc.; Dynegy GP, Inc.; El Paso Merchant Energy, L.P.; El Paso Corporation; ONEOK Energy Marketing & Trading Co., L.P.; ONEOK, Inc.; Reliant Energy, Inc.; Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Energy Marketing & Trading Company; Williams Merchant Services Company, Inc.; Williams Paper Company,

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

² The Missouri Respondents are filing a separate brief in opposition to the petition.

Inc.; Xcel Energy, Inc.; Northern States Power Company; and e prime, Inc. – are respondents under this Court’s Rule 12.6.

4. Plaintiffs in additional cases in MDL 1566 not subject to review of the limited personal jurisdiction issue presented in the petition – Learjet, Inc.; Topeka Unified School District 501; Breckenridge Brewery of Colorado, LLC; BBD Acquisition Co.; Reorganized FLI, Inc.; Sinclair Oil Corporation; and Multiut Corporation – are also respondents under this Court’s Rule 12.6.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

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

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

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

Briggs & Stratton Corporation has no parent and is publicly traded on the New York Stock Exchange. No other publicly-held corporation owns 10% or more of its stock.

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

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

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

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

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STATUTES INVOLVED

U.S. Const., amend XIV, § 1, provides, in pertinent part:

...nor shall any state deprive any person of life, liberty, or property, without due process of law....

Wis. Stat. § 133.03 provides:

Unlawful contracts; conspiracies.

(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. Every person who makes any contract or engages in any combination or conspiracy in restraint of trade or commerce is guilty of a Class H felony, except that, notwithstanding the maximum fine specified in s. 939.50(3)(h), the person may be fined not more than \$100,000 if a corporation, or, if any other person, may be fined not more than \$50,000.

(2) Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce is guilty of a Class H felony, except that, notwithstanding the maximum fine specified in s. 939.50(3)(h), the person may be fined not more than \$100,000 if a corporation, or, if any other person, may be fined not more than \$50,000.

Wis. Stat. § 133.14 provides:

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

Wis. Stat. § 133.18 provides, in pertinent part:

Treble damages; statute of limitations.

(1)

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

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

...

Wis. Stat. § 801.05 provides, in pertinent part:

Personal jurisdiction, grounds for generally. A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

...

(4) LOCAL INJURY; FOREIGN ACT. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

...

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

(5) LOCAL SERVICES, GOODS OR CONTRACTS. In any action which:

...

(c) Arises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value; or

...

(e) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

INTRODUCTION

This case arises out of petitioners' sales of natural gas to Wisconsin companies that consumed the gas in Wisconsin. Between 2000 and 2002, petitioner AEPES entered into hundreds of contracts with Wisconsin businesses to sell and deliver natural gas in Wisconsin for use in Wisconsin. Petitioner AEP facilitated these sales by entering into hundreds of separate contracts guaranteeing AEPES's Wisconsin obligations. Pursuant to these contracts, Wisconsin companies paid tens of millions of dollars for natural gas delivered to, and consumed in, Wisconsin. The contracts in question violated Wisconsin law, as they were made pursuant to a conspiracy in restraint of trade.

Working in concert with other bad actors, petitioners entered into these contracts in furtherance of a wide-ranging conspiracy to manipulate natural gas prices in Wisconsin and elsewhere. Petitioners' actions contributed to natural gas prices in Wisconsin doubling and tripling at times between 2000 and 2002. By duping Wisconsin businesses into overpaying for the natural gas they purchased and consumed in Wisconsin, petitioners made millions of dollars in unlawful profits in Wisconsin during the relevant time period, and caused substantial harm to the Wisconsin economy.

Shockingly, petitioners fail to set out, or even acknowledge, these fundamental facts from which the Wisconsin Respondents' claims arise. Through material omissions and a lack of candor, petitioners attempt to manufacture conflicts that could arise only in cases grounded in different facts. By taking the Ninth Circuit's opinion out of the context of the factual record before it, petitioners attempt to recast

the decision below as a radical departure from this Court's opinions. Mischaracterizing the Ninth Circuit's analysis, petitioners construct an illusory conflict among the lower appellate courts, and ask this Court for guidance to sort out the purported confusion.

There is no confusion here. Petitioners came into Wisconsin ready, willing and able to do business here. They made millions of dollars in profits from Wisconsin businesses through many unlawful contracts made with Wisconsin companies to sell and deliver natural gas in Wisconsin for use in Wisconsin. Petitioners intentionally brought their wrongdoing to Wisconsin, targeting Wisconsin businesses with every intent to obtain overpayment from Wisconsin companies, and they profited immensely from their illegal conduct in Wisconsin.

Stripped of their rhetoric, petitioners' arguments boil down to the proposition that it is constitutionally unfair for Wisconsin courts to enforce the Wisconsin laws petitioners flagrantly violated in Wisconsin, in order to redress injury to Wisconsin businesses suffered in Wisconsin pursuant to contracts performed in Wisconsin. No court needs further guidance on the basic principles of personal jurisdiction implicated by these facts.

The petition should be denied.

STATEMENT OF THE CASE

In addition to the following, the Wisconsin Respondents incorporate by reference the recitation of facts and reasoning in the opinion below. *In re: W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716 (9th Cir. 2013) (Pet. App. 1a-66a) (“opinion below”).

Petitioners here are AEP and AEPES.³ AEPES is a shell corporation, entirely owned, operated and controlled by AEP. (D. 1249, at 5.)⁴ As with other subsidiaries in the AEP system, AEP had complete control of AEPES, including the power to shut down AEPES, merge it, or do essentially whatever AEP wanted with it. (*Id.* at 19.) AEP’s filings with the SEC show that AEP provided AEPES with the financial support necessary to support its energy marketing activities prior to the relevant time period. In 1995, AEP secured permission from the SEC to, *inter alia*, “guarantee AEPES’s debt and performance.”⁵ AEP continued to provide open account borrowing facilities to AEPES to support trading activities

³ Petitioners form one of ten defendant groups (“the AEP defendants”) in these cases, who acted together in the conspiracy to manipulate markets and natural gas prices. The personal jurisdiction issue presented for review is limited to the AEP defendants.

⁴ “D.” refers to the “Document Number” assigned to the referenced filing by the district court. “R.E.” refers to the “Record Extract” documents before the Ninth Circuit below.

⁵ *See, e.g.*, Post-Effective Amendment No. 6 to Form U-1, Securities and Exchange Commission File No. 70-8307 (*available at*: [http:// www.sec.gov/Archives/edgar/containers/fix010/4904/0000004904-95-000111.txt](http://www.sec.gov/Archives/edgar/containers/fix010/4904/0000004904-95-000111.txt), last visited 8/26/14).

during the relevant time period as part of AEP's intercompany financing program.⁶

From 2000 through 2003, AEPES was party to hundreds of natural gas supply agreements with companies in Wisconsin. (D. 1417-2; D. 1249, Ex. 1, at 181-82, Ex. 4, at 98.) Some of AEPES's agreements contained Wisconsin choice of law provisions. (D. 1249, Ex. 1, at 183.) AEPES's contracts identified the primary natural gas delivery point as Wisconsin. (D. 1249, Ex. 4, at 98-100.) AEPES made numerous sales to companies with Wisconsin addresses throughout the period from 2001 to 2003 and delivered at least 300 million cubic feet (300,000 dekatherms)⁷ of natural gas in Wisconsin in that period. (D. 1417-4; D. 1249, Ex. 4, at 34; D. 1417-3, at AEPWIS004056-4057.) Petitioners made sales to named plaintiffs and other putative class members. (R.E. 818-825.)

During this same time period, to make possible the millions of dollars of sales by AEPES to Wisconsin companies, AEP entered into separate contracts, guaranteeing AEPES's business obligations to Wisconsin companies. Opinion below, 715 F.3d at 740. These separate contracts were entered into by AEP with AEPES's customers for the purpose of financially underwriting AEPES's obligations under its sales contracts. For example, in

⁶ See, e.g., Form U-6 B-2, filed January 10, 2003 (*available at* http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=2112095-1073-2635&SessionID=pl3aFC9JmyZ0Wz7, last visited 8/26/14).

⁷ 1 dekatherm = 10 therms = 1000 cubic feet = 1,027,000 Btus of natural gas. Therefore, 300,000 dekatherms = 300,000,000 cubic feet = 308,100,000,000 Btus. See: "How to Measure Natural Gas," website of the American Gas Association (<http://www.aga.org/KC/ABOUTNATURALGAS/ADDITIONAL/Pages/HowtoMeasureNaturalGas.aspx>, last visited 8/26/14).

the event of a default in delivery by AEPES, AEP would compensate AEPES's customers. These guarantees, entered into by AEP on behalf of AEPES, were intended to, and did, "facilitate and enable AEPES's" sales of natural gas in Wisconsin, resulting in millions of dollars of natural gas being sold and delivered in Wisconsin. (R.E. 95.) Both AEP and AEPES conducted business with Wisconsin companies throughout 2000 to 2002 pursuant to these contracts.

During the relevant time period, petitioners were part of an anti-competitive conspiracy to manipulate markets throughout the country, specifically including Wisconsin, in order to inflate the price of the natural gas they sold and reap illegal profits.⁸ Petitioners' actions as part of the conspiracy to manipulate natural gas prices "were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period." (R.E. 1410-12.)⁹ Petitioners materially advanced the

⁸ The conspirators achieved their illegal ends by multiple devices, including engaging in sham and illusory trades to create a false sense of demand, price volatility and shortages of the supply of natural gas. Opinion below, 715 F.3d at 724. One way this was accomplished was by falsely reporting, to independent, third-party publications such as Gas Daily and Inside FERC, fictitious sales of natural gas that had not been made. *Id.* Another way the conspirators manipulated prices was to engage in "wash" sales (a prearranged set of transactions in which a sale of natural gas was countered by an offsetting transaction) falsely to increase the perception of demand for natural gas. *Id.* at 724 n.1.

⁹ The Wisconsin Respondents brought three putative class actions pursuant to the Wisconsin Antitrust Act, two of which are relevant to this Court's review of the instant petition for *certiorari*: *Arandell-Wisconsin*, Ninth Circuit Appeal No.: 11-

conspiracy in Wisconsin through their sales, including AEP's contractual guarantees of AEPES's sales, to businesses in Wisconsin. AEPES made millions of dollars' worth of sales into Wisconsin during the relevant time period. (R.E. 94.)

In October 2002, five AEPES traders admitted that they had provided false price reports to price reporting indices. (D. 1249, Ex. 4, at 184.) At least three AEP executives were convicted of criminal charges in connection with the conspiracy, and two received prison sentences. *See* Plea Agreements of, and Judgments Against, Michael Hoover, John Baggett, and Joseph Foley. (R.E. 914-956.)

AEP and AEPES have paid out \$81 million to resolve federal investigations arising out of their market manipulations. In January 2005, the Department of Justice announced a \$30 million payment under a deferred prosecution agreement arising out of "an ongoing federal investigation into the submission of knowingly inaccurate reports by AEPES concerning the commodities market for natural gas." *See* DOJ Release No. 05-032, "American Electric Power, Inc. To Pay \$30 Million Penalty To Resolve Criminal Allegations,"

16869; Dist. Ct. Case No.: CV-S-08-1019-PMP (PAL) (D. Nev.), and *NewPage*, Ninth Circuit Appeal No.: 11-16876; Dist. Ct. Case No.: CV-S-09-915-PMP (PAL) (D.Nev.). These two Wisconsin-based actions were consolidated into one case by the district court, after the *NewPage* action was transferred to the larger MDL matter, MDL Docket No. 1566, (which includes the Missouri-based action also on review here (*Heartland*, Ninth Circuit Appeal No.: 11-16786; Dist. Ct. Case No.: CV-S-07-987-PMP (PAL)), and a number of other cases). At the Ninth Circuit, all of the MDL cases on appeal were consolidated by the circuit court as Case No. 11-16786.

dated 1/25/04.¹⁰ According to an agreed statement of facts, “between November 2000 and July 2002, traders at three of AEPES’s four regional natural gas trading desks submitted false, misleading or knowingly inaccurate trade data to industry publications, altering the published index price of natural gas at various trading hubs.” *Id.* In addition, AEP and AEPES entered into civil settlements of related investigations with the CFTC and the FERC, agreeing to pay \$30 million to resolve allegations of attempted manipulation and false reporting and \$21 million to resolve the FERC’s investigation into preferential treatment AEPES received in natural gas storage and transportation. *Id.*

The Wisconsin Respondents, all of which are businesses operating in Wisconsin, brought the present actions on behalf of a putative class of:

...all industrial and commercial purchasers of natural gas for their own use or consumption during the Relevant Time Period [January 1, 2000 – October 31, 2002], and which gas was used or consumed by them in Wisconsin. Excluded from the Class are (a) entities that purchased natural gas for resale (to the extent of such purchase for resale); (b) entities that purchased natural gas for generation of electricity for the purpose of sale (to the extent of such purchase for generation); (c) entities that purchased natural gas from entities that sold natural gas at rates approved by the Wisconsin Public Service Commission (to the extent of

¹⁰ Available at: http://www.justice.gov/opa/pr/2005/January/05_crm_032.htm, last visited 8/26/14.

such purchases at such approved rates); (d) defendants and their predecessors, affiliates and subsidiaries; and (3) the federal government and its agencies.

(R.E. 1448-1449; R.E. 1598.) The Wisconsin Respondents brought two claims pursuant to the Wisconsin Antitrust Act. Wis. Stat. § 133.14 (R.E. 1395) (providing that a party injured by entering into a contract with another made pursuant to a conspiracy in restraint of trade shall recover full consideration); Wis. Stat. § 133.18 (R.E. 1544-1548) (providing that a party injured by entering into a contract with another made pursuant to an unlawful conspiracy shall recover treble damages). Both of these claims arise directly out of the contracts for sale and contractual guarantees that petitioners entered into within the State of Wisconsin.

Petitioners moved for dismissal on the grounds that they were not subject to personal jurisdiction in Wisconsin. (D. 894.) The district court failed to recognize the significance, under the Wisconsin Antitrust Act, of the petitioners' many sales contracts and guarantees in Wisconsin, and granted petitioners' motion. (R.E. 90-100.) The Wisconsin Respondents moved for reconsideration, based on the district court's misapplication of the Ninth Circuit's personal jurisdiction test and on evidence that petitioners did make sales to some respondents, in addition to the undisputed sales they made to other Wisconsin entities. (D. 1652.)

The district court recognized that on a motion to dismiss, factual disputes must be resolved in favor of plaintiffs. However, in its analysis, the district court disregarded the evidence of sales to the named plaintiffs (thus resolving the factual dispute in favor

of defendants), continued its failure to give any consideration to petitioners' many sales in Wisconsin in furtherance of the conspiracy, and affirmed the dismissal. (D. 1957.) The Wisconsin Respondents appealed, and the Ninth Circuit reversed based on the clear evidence that petitioners had targeted Wisconsin, through the duration of their conspiracy, to manipulate Wisconsin markets. Opinion below, 715 F.3d at 744.

The Ninth Circuit held there was “no question that the [respondents'] state antitrust claims arise out of the [petitioners'] collusive manipulation of the gas price indices,” *id.* at 742, and that “the pleadings contain allegations of ‘intentional acts’ in the form of anticompetitive behavior expressly aimed at the forum states.” *Id.* at 743. The Ninth Circuit further held that the Wisconsin Respondents’ allegations “went beyond alleging acts with a ‘mere foreseeable effect’ in the forum...[t]hey alleged intentional acts by the [petitioners] that were ‘directed at the forum state itself.’” *Id.* at 744 (quotations omitted). Finally, the Ninth Circuit found that the petitioners had made no “compelling case” that jurisdiction in Wisconsin would be unreasonable. *Id.* at 745.

Upon petitioners’ motion for a rehearing *en banc*, the Ninth Circuit stayed the request pending this Court’s decision in *Walden v. Fiore*, ___ U.S. ___, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014). (Order, filed 6/26/13.) After *Walden* was issued, the Ninth Circuit determined that the Court’s analysis in *Walden* had no bearing on the facts of this case, and denied petitioners’ motion. (Order, filed 3/31/14.) The instant petition followed.

REASONS FOR DENYING THE PETITION

The petition is remarkably devoid of facts or citation to the record. That vacuum is filled by a novel recasting of both the Ninth Circuit's opinion and established precedent. Contrary to petitioners' misrepresentations, there is overwhelming evidence of contacts by petitioners in Wisconsin and intentional targeting of Wisconsin.

There is no question that the exercise of jurisdiction over petitioners comports with existing law. No conflict between circuits is involved. No important federal question needing decision by this Court is implicated. Therefore, there is no ground for a grant of their petition for *certiorari*.

I. The Ninth Circuit Decision Does Not Conflict With Any Decision of This Court.

A. Personal jurisdiction is proper based on evidence of substantial contacts with Wisconsin and Wisconsin's long arm statute.

Wisconsin's long arm statute provides for jurisdiction in these cases, both on the basis of the contracts with Wisconsin companies for natural gas actually received by Wisconsin companies, and for the injury to Wisconsin companies arising out of petitioners' actions relating to natural gas consumed in Wisconsin. Wis. Stat. §§ 801.05(4) and (5).

This litigation relates to natural gas sold by AEPES to Wisconsin companies during the relevant time period, the price for which was artificially inflated by petitioners' conspiratorial acts. Wisconsin companies received and consumed the gas in

Wisconsin, suffering injury as a result of the inflated prices. Further, by enabling AEPES's sales through guarantees, a material component in bringing about these sales, AEP itself directly engaged in transactions that induced Wisconsin companies to purchase and consume the natural gas at artificially inflated prices, and thereby to suffer injury. Without AEP's guarantees, as a shell company, AEPES lacked the financial resources to underwrite its obligations, and therefore to succeed in securing business and in fulfilling its transactions with Wisconsin-based companies.

Both AEP and AEPES are subject to personal jurisdiction in Wisconsin pursuant to its long arm statute. Petitioners attempt to avoid jurisdiction by focusing on the fact that some of the actions undertaken in furtherance of the conspiracy took place outside of Wisconsin. This is irrelevant, as the Wisconsin Respondents' injuries and claims are based on the contracts for sale, and guarantee of sale, of natural gas in Wisconsin to Wisconsin companies. *See Pavalon v. Fishman*, 140 N.W.2d 263, 264-65 (Wis. 1966) (due process is satisfied if "the defendant has entered into some consensual agreement with the plaintiff which contemplates a substantial contact in Wisconsin").

B. Jurisdiction comports with fundamental notions of due process, in accordance with long-established principles of this Court.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has "certain

minimum contacts ... such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The Wisconsin long arm statute is intended to confer jurisdiction to the full extent allowed by due process requirements. *State ex rel. N.R.Z. v. G.L.C.*, 447 N.W.2d 533, 535 (Wis. 1989). Because the Wisconsin long arm statute is drafted in an attempt to codify the federal minimum contacts standard, it is presumed that compliance with §§ 801.05(4) and (5) also fulfills the requirements for specific personal jurisdiction under the due process clause. *Lincoln v. Seawright*, 310 N.W.2d 596, 599 (Wis. 1981). Here, there is no doubt that exercise of jurisdiction fulfills those requirements.

The Wisconsin Respondents’ claims relate directly to petitioners’ voluminous sales in Wisconsin – an undeniable relationship between petitioners, the forum, and the claims at issue – such that it is reasonable to require petitioners to defend this action in Wisconsin. *Shaffer v. Heitner*, 433 U.S. 186, 203-04, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). By virtue of their conduct in Wisconsin, petitioners should “reasonably anticipate being haled into court” in the forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). Entering into contracts and guarantees with Wisconsin companies for millions of dollars of natural gas establishes that “the [petitioners] purposefully avail[ed] [themselves] of the privilege of conducting activities with the forum state, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240 (1958).

C. The Ninth Circuit decision is consistent with *Calder*.

More than 20 years ago, in *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482, 1487, 79 L.Ed.2d 804 (1984), this Court held that intentional targeting of a forum, even in the absence of other acts by a defendant within the forum, was sufficient to support jurisdiction. Here, however, petitioners' significant contacts with Wisconsin during the relevant time period establish that jurisdiction here rests independently on acts within the forum. Thus, any review of *Calder's* application to this case is moot. Nevertheless, the Ninth Circuit correctly applied *Calder* in its analysis, consistent with the opinions of this Court.

Based on the specific details of the allegations in this case, the Ninth Circuit found ample evidence that petitioners had intentionally targeted Wisconsin as part of a conspiracy to manipulate natural gas prices in Wisconsin and then to sell natural gas in Wisconsin at those inflated prices. Jurisdiction in this case is rooted in the making and guaranteeing of natural gas sales in Wisconsin in furtherance of a conspiracy to manipulate prices. These are the very acts that led to petitioners' Wisconsin customers purchasing natural gas at artificially inflated prices, and plainly constitute overt acts in furtherance of the conspiracy. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997). Through those acts, the petitioners "purposefully invoked the benefits and protections of [Wisconsin's] laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (citations omitted). Petitioners make the untenable argument that, as in *Walden*, the Ninth Circuit's analysis turned solely on *respondents'*

relationship with the forum.¹¹ In stark contrast to *Walden*, the Ninth Circuit here premised its analysis on the overwhelming evidence of *petitioners'* intentional targeting of Wisconsin markets and businesses.¹²

There is no question that petitioners' conspiracy intentionally and purposefully targeted Wisconsin, and that jurisdiction is proper under *Calder*. The petitioners' conduct in making sales in Wisconsin, at artificially inflated prices resulting from illegal market manipulation, absolutely satisfies the due process standards set out by this Court. As the Ninth Circuit opinion below is entirely consistent with *Calder*, there is no conflict with any of the numerous opinions of this Court addressing personal jurisdiction, and, therefore, no ground for *certiorari*.

¹¹ Petitioners similarly attempt to invoke *J. McIntyre Mach., Ltd. v. Nicastro*, ___ U.S. ___, 131 S.Ct. 2780, 2787, 180 L.Ed.2d 765 (2011), to support their baseless argument that the Ninth Circuit opinion conflicts with other opinions of this Court. *J. McIntyre*, like *Walden*, involved the complete absence of any intentional targeting of the specific forum by the defendants. The defendant in *J. McIntyre*, a British corporation with no physical presence in the United States, put products into the stream of commerce, with a general intent that product be delivered to the United States, but no demonstrable intent that any product end up in the specific forum state at issue.

¹² In *Walden*, the sole argument for jurisdiction was the fact of residency of the plaintiffs in Nevada, and that, based on the defendants' knowledge of plaintiffs' residency, "[plaintiffs] suffered foreseeable harm in Nevada." *Walden*, 133 S.Ct. at 1124.

D. Petitioners put forth a meritless interpretation of *Calder*.

Citing to language in *Calder* that the defendants “knew that the brunt of the injury would be felt by respondent in the State in which she lives and works,” petitioners claim that “[t]he vast majority of courts hold that jurisdiction exists only when the forum qualifies as the focal point of the conduct, with the brunt of the harm felt there.” (Petition, at 2.) Conflating concepts of personal jurisdiction with venue, and completely disregarding the evidence of their significant contacts in this case, petitioners make the unprincipled argument that *Calder* requires plaintiffs, including the Wisconsin Respondents, to prove that the forum in which a claim is brought is the forum in which a defendant has done the most harm.

Petitioners’ suggested interpretation of *Calder* would stand the well-established minimum contacts precedent on its head. According to petitioners, courts must deny jurisdiction in a particular forum state, in the face of substantial and significant contacts, solely because a defendant did more harm elsewhere. This is a ludicrous reading of *Calder* and its progeny.

Petitioners ignore that *one hundred percent* of the harm to the Wisconsin Respondents took place *in Wisconsin*. By petitioners’ logic, Wisconsin businesses would be deprived of the protection of Wisconsin laws simply because the perpetrator had committed more egregious or voluminous bad acts in a different jurisdiction. This is nothing more than an unfortunate effort to misdirect the Court from the straightforward due process analysis here.

“[T]he Due Process Clause may not be wielded as a territorial shield to avoid interstate obligations that

have been voluntarily assumed.” *Burger King*, 471 U.S. at 473-74. This Court has previously stated that jurisdiction is not limited to the sole forum in which “the bulk of the harm” is done, so long as “the defendant has ‘certain minimum contacts...such that maintenance of the suit does not offend “traditional notions of fair play and substantial justice.’”” *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780-81, 104 S.Ct. 1473, 1481, 79 L.Ed.2d 790 (1984) (citations omitted).

When looking at *Calder* and *Keeton* together, as did the court in *Yahoo v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006), cited by the Ninth Circuit below, it is clear the “brunt of the harm” language is not meant to preclude jurisdiction in more than one forum, and that jurisdiction is supported by a “jurisdictionally sufficient” amount of harm, regardless of harm that may have been suffered in other forums. Petitioners cannot escape jurisdiction here with their twisted interpretation of *Calder*.

II. There is No Conflict Within the Circuits Presented by This Case.

A. There is no conflict regarding the application of *Calder*.

Petitioners suggest that there is disagreement between circuits over whether jurisdiction is limited to the sole forum in which a defendant has done the most harm, but, in fact, no court has held that, where a defendant has purposefully directed actions at multiple forums, that defendant is protected from being haled into court in all but the forum in which the most harm was suffered.

There is no genuine conflict between the circuits, and, therefore, no ground for *certiorari*. See Gressman, E., *et al.*, *Supreme Court Practice, Ninth Ed.*, 214 (2007) (explaining that, for *certiorari* to be granted, there “must be a real or intolerable conflict on the same matter of law or fact, not merely an inconsistency in dicta” (internal quotation omitted)).¹³

The Ninth Circuit below did not base its holding on the mere residency of respondents, but rather on deliberate and consistent sales to Wisconsin businesses and the fact that petitioners’ conspiracy, and actions in furtherance of that conspiracy, were “expressly aimed” at the State of Wisconsin.

The cases cited by petitioners to support their position involve factually distinct circumstances where there was very limited, if any, evidence of contact by the defendants within the forum state.¹⁴ Given the overwhelming facts supporting jurisdiction

¹³ The cases cited by petitioners present very different facts from the instant litigation, and have no bearing here. See, e.g., *Griffis v. Luban*, 646 N.W. 2d 527, 533 (Minn. 2002) (declining to exercise jurisdiction where the defendant had no contacts with Minnesota, and the plaintiff’s assertion of personal jurisdiction rested merely on the plaintiff’s residence in the state). Similarly, the Seventh and Eighth Circuits have found that the residency of a plaintiff, where there is neither evidence of intentional targeting nor sufficient contacts with the forum, is insufficient to establish personal jurisdiction. The Ninth Circuit’s holding presents no conflict with these opinions.

¹⁴ Petitioners cite a number of cases concerning the sufficiency of internet contacts alone for specific jurisdiction. This question is absent from this litigation. Petitioners’ remaining cases focus solely on behavior outside the forum and the absence of evidence of acts within the forum or of intentional targeting of the forum. Not only is that an issue already resolved by *Walden*, but it is irrelevant to the facts of this litigation.

in this litigation, the question would have been resolved in favor of jurisdiction in any circuit, and under any test.¹⁵

B. This is not an appropriate case to address the boundaries of personal jurisdiction based solely on behavior occurring outside the forum.

Petitioners cannot credibly deny that their contracts with and sales to Wisconsin companies were centered on Wisconsin. Nor can they credibly deny that those contracts and sales furthered their conspiracy to defraud Wisconsin companies. There is substantial evidence, cited by the Ninth Circuit, of petitioners' activities within Wisconsin, through contracts and sales, and intentional targeting of Wisconsin by the petitioners, through sales, intended to further their conspiracy to bilk Wisconsin companies through artificially inflated prices.

C. There is no conflict presented on these facts regarding the type or sufficiency of allegations supporting jurisdiction.

The record in this case includes ample evidence of specific targeting of Wisconsin by petitioners, including millions of dollars of sales of natural gas to Wisconsin. Petitioners' suggestion that the record lacks specific factual allegations to support jurisdiction is again based on the petitioners'

¹⁵ A prior conflict, inapplicable to the facts at hand here, was resolved by this Court in *Walden*. That conflict regarded whether residency of a *plaintiff* alone, with no other evidence of intentional targeting of the forum, was sufficient to support jurisdiction. *See generally Walden*, 134 S.Ct. at 1119-20.

material omission of facts in this record. The examples of conclusory allegations cited to by petitioners, such as that a plaintiff “knew its actions would intentionally cause harm to [plaintiffs] in Texas” (Petition, at 20), are a far cry from the specific allegations relied on by the Ninth Circuit, including that petitioners’ “traders were instructed by their superiors to adjust the prices and volumes of trades they had made and, in some cases to report trades that had never occurred,” the “purpose and effect” of which was to “collusively and artificially inflate the price of natural gas paid by commercial entities in Wisconsin.” Opinion below, 715 F.3d at 744.

As the Wisconsin Respondents’ complaints specifically allege, the petitioners intentionally targeted Wisconsin in conspiring with others to drive up the price of natural gas across the country and in Wisconsin, while conducting substantial sales activities in Wisconsin for natural gas at those artificial prices during the relevant time period, all with the intent to reap illegal profits from Wisconsin businesses through these sales. Petitioners’ unlawful contracts selling and guaranteeing sales of natural gas in Wisconsin were not merely *part* of the conspiracy, they were the very means by which petitioners’ profit was made, and thus the *point of* the conspiracy. Petitioners cannot credibly dispute that the millions of dollars of profits they made in Wisconsin in furtherance of their conspiracy occurred by design, not happenstance.

Thus, under any analysis, in any circuit, the Wisconsin Respondents have put forth facts with sufficient specificity that the actions of petitioners targeted Wisconsin.

D. There is no conflict presented on these facts regarding the “arising out of” requirement.

Petitioners next argue that there is a split in the circuits relating to the requirement that the litigation at issue “arise out of or relate to those activities.” *Burger King*, 471 U.S., at 471-72. Not only did the Ninth Circuit not discuss such an issue in its opinion,¹⁶ no such inconsistency is presented in this litigation, as, under any circuit’s test, the claims asserted by respondents “arise out of or relate to” the petitioners’ forum-related activities.

The “arising out of” aspect of the jurisdictional analysis focuses on the relationship amongst the defendant, the forum and the causes of action, within the particular context of each case. *Shaffer*, 433 U.S. at 203-04. The causes of action here arise under Wisconsin’s Antitrust Act. Pursuant to that Act, petitioners’ execution of contracts with Wisconsin businesses and performance under those contracts in Wisconsin, in furtherance of a conspiracy in restraint of trade, are actionable. *See, e.g.*, Wis. Stat. § 133.14.

The Wisconsin Antitrust Act allows recovery from a party injured by such contracts (*i.e.*, when a party overpays for goods or services due to price fixing). *See Meyers v. Bayer AG*, 735 N.W.2d 448, 461 (Wis. 2007). A Wisconsin plaintiff may recover its injuries resulting from an unlawful contract — made pursuant to a conspiracy in restraint of trade — that is executed and performed in Wisconsin, even if other

¹⁶ Without the “benefit of the views of the Court of Appeals,” this issue is not properly before this Court. *United States v. Sperry Corp.*, 493 U.S. 52, 66, 110 S.Ct. 387, 397, 107 L.Ed.2d 290 (1980).

acts in furtherance of the conspiracy occurred outside the forum. *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 158 (Wis. 2005).

Under the facts and causes of action here, the propriety of an exercise of jurisdiction over petitioners is straightforward. Petitioners craft their petition to obfuscate their conspiracy to manipulate Wisconsin markets while taking advantage of that manipulation through sales in Wisconsin, and the specific sales of natural gas to the putative class.

First, as stated above, a factual dispute exists regarding whether or not petitioners made sales to the named plaintiffs. In determining jurisdiction, all factual disputes should be resolved in favor of the party seeking to assert jurisdiction. A reviewing court “accepts as true any uncontroverted allegation in the complaint and resolves any conflicts between the facts contained in the parties’ evidence in the plaintiff’s favor.” *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1119 (9th Cir. 2002).

Taking as true the Wisconsin Respondents’ allegations that petitioners made sales to the named plaintiffs, that petitioners’ overall Wisconsin sales activities constituted overt acts in furtherance of an antitrust conspiracy, and that the Wisconsin Respondents’ claims arise directly out of those overt acts, there is no conceivable argument that the Wisconsin Respondents’ claims do not relate to petitioners’ activities, and, therefore, no ground for this Court to consider any jurisdictional issue on the facts of this case.

Next, as this Court has recognized, “in some cases, as with an intentional tort, the defendant might well fall within the State’s authority by reason

of his attempt to obstruct its laws.” *J. McIntyre*, 131 S.Ct. at 2787. Here, petitioners’ sales in Wisconsin in furtherance of their conspiracy to manipulate prices and markets represent an undeniable attempt to obstruct Wisconsin’s antitrust laws. Consequently, petitioners are rightly subject to jurisdiction in Wisconsin.

Finally, the Wisconsin Respondents’ complaints allege that the AEP defendants conspired with others to drive up the price of natural gas across the country and in Wisconsin. In conducting substantial sales activities in Wisconsin during the relevant time period at prices inflated pursuant to the conspiracy, and obtaining the benefits of the artificially-high prices at which those sales were made, petitioners engaged in overt acts in furtherance of the conspiracy. (R.E. 1409-1413; R.E. 1557-1561.) *See Klehr*, 521 U.S. at 190. There is an obvious nexus between the petitioners’ forum-related acts and the Wisconsin Respondents’ causes of action. The Wisconsin Respondents’ claims arise out of, and are related to, petitioners’ activities in Wisconsin. Therefore, the exercise of jurisdiction over petitioners does not offend constitutional concerns of fair play and substantial justice.¹⁷

¹⁷ Petitioners speculate that, as the contracts in question were priced on the indices they manipulated, if class members had hypothetically not entered into contracts with petitioners, and instead had entered into similar contracts with *different* entities at prices set by reference to the indices, they would have suffered the same harm. Assuming, *arguendo*, that this speculative counterfactual conditional holds water, it is irrelevant. The harm suffered here arises from contracts petitioners voluntarily entered into for the purchase and delivery of natural gas in Wisconsin at prices they knew to be artificially high, made by petitioners for the purpose of making

III. There is no important federal question implicated by this Petition.

A. Jurisdiction is clear under well-established law.

With the overwhelming volume of evidence of contacts with the State of Wisconsin – through contracts for sale and contractual guarantees with Wisconsin businesses, sales into Wisconsin, intentional violation of Wisconsin’s laws, and by fleecing Wisconsin companies for millions of dollars through manipulated, inflated prices for the natural gas sold – petitioners meet the clear requirements for the exercise of personal jurisdiction established in *International Shoe* and its progeny.

Based on the facts of this case, it cannot credibly be doubted that jurisdiction is proper and reasonable under the Due Process Clause. Petitioners should have anticipated being haled into court in Wisconsin to account for their violation of Wisconsin law.

B. This case does not present the proper vehicle for addressing any personal jurisdiction question.

Through petitioners’ startling omission of material facts, and their taking opinions and holdings out of context, petitioners have manufactured the appearance of conflicts where none exist. The actual facts alleged and in the record do

illegal profits in Wisconsin, in violation of Wisconsin law at the expense of Wisconsin businesses. Only by assuming away the wrongful and harmful conduct in which they *actually engaged in Wisconsin* can petitioners break the tie between their conduct, the forum, and this litigation.

not support any of the circumstances upon which petitioners seek to identify divergence between the circuits.

Here, the facts demonstrate that the petitioners acted extensively throughout the relevant time period in Wisconsin to target and sell to Wisconsin businesses. No creatively misplaced quotations or skewed interpretations of precedent can create an issue that needs to be addressed by this Court.

C. Petitioners' generalized arguments about personal jurisdiction present no issue that needs to be resolved by this Court.

Petitioners put forth generalized and unsupported claims that lower courts need guidance in the application of *Calder*, and that defendants need certainty as to where they may be subject to jurisdiction. Neither of these arguments has merit on the facts of this case. As shown above, the only confusion presented by petitioners as to the application of *Calder* has already been addressed by this Court in *Walden*. Contrary to petitioners' arguments, no circuit has held that *Calder* should be applied to deprive a forum of jurisdiction in the face of substantial contacts satisfying due process requirements.

It has long been settled that a defendant should anticipate being haled into court in a forum in which the defendant entered into contracts with resident businesses to sell significant volumes of its product, purposefully manipulated that forum's markets, and then exploited that forum's business consumers in violation of that forum's laws.

Petitioners' suggestion, that there is any lack of predictability as to whether their conduct might subject them to jurisdiction in Wisconsin courts for this behavior, is untenable in light of the substantial long-established precedent to the contrary. No question of due process is raised by this litigation. On the facts of this litigation, jurisdiction is entirely reasonable and predictable. There is no ground for granting *certiorari*.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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ROBERT L. GEGIOS*
STEPHEN D. R. TAYLOR
MELINDA A. BIALZIK
RYAN M. BILLINGS
AMY IRENE WASHBURN
KOHNER, MANN & KAILAS, S.C.
4650 N. Port Washington Road
Washington Bldg., 2nd Floor
Milwaukee, WI 53212
(414) 962-5110
rgegios@kmksc.com

*Counsel for
The Wisconsin Respondents*

**Counsel of Record*