No. 13-271

IN THE

Supreme Court of the United States

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS LEARJET, INC., *et al.*; HEARTLAND REGIONAL MEDICAL CENTER, *et al.*; BRECKENRIDGE BREWERY OF COLORADO, LLC, *et al.*; REORGANIZED FLI, INC.; and SINCLAIR OIL CORP.

Jeffrey L. Fisher
Brian Wolfman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jennifer Gille Bacon
Counsel of Record
William E. Quirk
Gregory M. Bentz
Anthony Bonuchi
Andrew J. Ennis
POLSINELLI PC
900 W. 48th Place
Kansas City, MO 64112
(816) 753-1000
jbacon@polsinelli.com

[Additional counsel listed on inside cover]

ADDITIONAL COUNSEL

Donald D. Barry
BARRY LAW OFFICES, LLC
DONALD D. BARRY, CHARTERED
5340 S.W. 17th Street
P.O. Box 4816
Topeka, KS 66604
(785) 273-3151
Counsel for Respondents Learjet, Inc., et al., Heartland Regional Medical Center, et al., Breckenridge Brewery of Colorado, LLC, et al., Arandell Corp., et al., Wisconsin System, Inc., et al., and Reorganized FLI, Inc.

Eric I. Unrein
FRIEDEN, UNREIN & FORBES, LLP
555 S. Kansas Avenue
Suite 303
Topeka, KS 66603
(785) 354-1100
Counsel for Respondents Learjet, Inc., et al., and Reorganized FLI, Inc.

Isaac L. Diel
SHARP MCQUEEN, P.A.
6900 College Boulevard
Suite 285
Overland Park, KS 66207
(913) 661-9931
Counsel for Respondent Reorganized FLI, Inc.

Gary D. McCallister
GARY D. MCALLISTER & ASSOCIATES, LLC
120 N. LaSalle Street
Suite 2800
Chicago, IL 60602
(312) 345-0611
Counsel for Respondents Learjet, Inc., et al. and Reorganized FLI, Inc.

Thomas J.H. Brill
LAW OFFICES OF THOMAS H. BRILL
8012 State Line Road
Suite 102
Leawood, KS 66208-3712
(913) 677-2004
Counsel for Respondent Reorganized FLI, Inc.

Melvin Goldstein
Matthew A. Corcoran
GOLDSTEIN & ASSOCIATES, PC
1757 P Street, NW
Washington, DC 20036
(202) 872-8740
Counsel for Respondent Sinclair Oil Corporation

Philip M. Ballif
DURHAM JONES & PINEGAR
111 East Broadway
Suite 900
Salt Lake City, UT 84111
(801) 415-3000
Counsel for Respondent Sinclair Oil Corporation

QUESTION PRESENTED

Whether the Natural Gas Act – as it existed before 2005 – preempts state antitrust claims arising from a conspiracy to inflate prices in transactions that the Act expressly excluded from its coverage.

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit:

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

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

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

4. Williams Merchant Services Company, Inc. was a defendant-appellee below. It was later known

as Williams Merchant Services Company LLC, but that entity was dissolved on October 2, 2013.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statements of the various respondents are grouped below according to the underlying lawsuit to which they belong.

In *Learjet*: Learjet, Inc. is wholly owned by Bombardier Corp. which is in turn wholly owned by Bombardier Inc. Bombardier Inc. is not publicly traded in the U.S., but is publicly traded on the Toronto, Canada stock exchange. Plaintiff Topeka Unified School District 501 is a state entity and a public school district in Topeka, Kansas, and is therefore not owned by any publicly-held corporation.

In the *Sinclair* cases: Plaintiff Sinclair Oil Company is a wholly-owned subsidiary of the Sinclair Companies. Neither the Sinclair Oil Company nor the Sinclair Companies are publicly traded and no publicly-held company owns more than 10% of the stock of either Sinclair Oil Company or the Sinclair Companies.

In *Breckenridge*: Breckenridge Brewery of Colorado, LLC is jointly owned by BWD Holdings, LLC and Breckenridge Brewery of Denver. No publicly-traded company owns more than 10% of the stock of Breckenridge Brewery of Denver, BWD Holdings, LLC, or Breckenridge Brewery of Colorado, LLC. Plaintiff BBD Acquisition Co. is owned by BWD Holdings, LLC. Both BBD Acquisition Co. and BWD Holdings, LLC are privately-held corporations, and no publicly-held corporation owns 10% or more of their stock.

In *Heartland*: Heartland Regional Medical Center is a private non-profit entity with Heartland Health, also a private non-profit, as its sole member.

As such, Heartland Regional Medical Center is not publicly-held by any corporation. Plaintiff Northwest Missouri State University is a state entity and a public university in Maryville, Missouri, and is therefore not owned by any publicly-held corporation. Plaintiff Prime Tanning, Corp. (currently known as Tasman Leather Group LLC) is owned by Tasman Industries, Inc. Tasman Industries, Inc. is a private corporation, and no publicly-traded corporation owns 10% or more of its stock.

In *Reorganized FLI, Inc.*: Reorganized FLI, Inc. is a non-governmental, private corporate entity. Reorganized FLI, Inc. has no parent corporation and no publicly-held corporation owns 10% or more of the shares of its stock.

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BRIEF FOR RESPONDENTS

Respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case arises from petitioners' well-documented conspiracy to inflate the price of natural gas in retail sales to high-volume consumers. Petitioners effectuated this conspiracy in part by manipulating private indices that served as reference points in contracts between them (or their intermediaries) and those consumers. Petitioners' scheme was wildly successful – in the end, too successful. Prices rose so high that they contributed to the Western Energy Crisis of 2000-2002. In the wake of the crisis, respondents – manufacturers, hospitals, educational institutions, and others who purchased gas at inflated rates through retail contracts – brought suit under state antitrust laws.

After an unsuccessful attempt to have the case dismissed under the filed rate doctrine, petitioners have turned to a theory of field preemption under the Natural Gas Act ("NGA" or "the Act"). The NGA gives the Federal Energy Regulatory Commission (FERC) exclusive authority to regulate wholesale transactions; it thus preempts state regulation aimed at FERC's direct concern, the wholesale price of natural gas. At the same time, the NGA reserves to the states the power to regulate retail transactions.

In light of the limited reach of the NGA, this Court has never held that the NGA preempts any state law that, as here, is being applied to retail transactions. Nor has this Court ever held that the NGA preempts any state-law cause of action that, as here, is grounded in a traditional law of general applicability, as opposed to being directed specifically at gas companies. Petitioners nevertheless argue that the NGA preempts respondents' claims because in the course of their conspiracy, petitioners elected to use the indices they had manipulated to set prices not only for retail sales but also for some of their own wholesale transactions.

The question here is whether this Court should expand the preemptive force of the NGA to allow gas companies to insulate themselves in this manner from traditional state-law liability. It should not.

STATEMENT OF THE CASE

A. Factual and Legal Background

1. As it originally came into being, the natural gas industry involved three separate segments. *See generally E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1036 (9th Cir. 2007). First, producers extracted and gathered gas and sold it to pipelines for interstate transportation. Second, the pipelines transported the gas and sold it to local distribution companies. Third, distribution companies resold the gas to consumers. *See, e.g.*, *Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 502-03 (1942). Each segment was subject only to state regulation and common law. *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 514 (1947).

In the early twentieth century, however, this Court held that the Commerce Clause precluded the states from regulating the second step of the process. *See, e.g.*, *Missouri v. Kan. Natural Gas Co.*, 265 U.S. 298, 307 (1924). These decisions created a regulatory "gap" where states controlled both the initial production and local distribution of natural gas but lacked authority over the middle step – namely, "wholesale rates of gas . . . moving in interstate commerce." *Interstate Natural Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 689 (1947).

Congress enacted the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, to fill this gap. *Interstate Natural Gas Co.*, 331 U.S. at 690. The NGA's core jurisdictional provision is Section 1(b). That provision gives the federal government the authority to regulate the interstate transportation of natural gas, as well as sales for resale (also known as wholesale, or "jurisdictional," transactions). 15 U.S.C. § 717(b); *accord Panhandle*, 332 U.S. at 516. After the NGA was passed, the Federal Power Commission (FERC's predecessor) used this new power to set rates for wholesale transactions. *Ark. La. Gas Co. v. Hall,* 453 U.S. 571, 577 (1981). And to ensure that the federal government's authority to set reasonable rates for wholesale transactions would be effective, Congress also enacted NGA Section 5. That provision allows FERC to determine whether a jurisdictional seller's "practice" directly affecting wholesale rates is unjust or unreasonable, and, if so, to prescribe the reasonable practice "to be thereafter observed and in force." 15 U.S.C § 717d(a).[1]

[1] The text of Section 5(a) allows FERC to exercise jurisdiction over unjust or unreasonable "practices . . . affecting" wholesale rates. 15 U.S.C § 717d(a). But FERC and the D.C. Circuit have construed the provision, in light of its placement and purpose in the overall statutory scheme, as conferring authority only over practices "directly" affecting wholesale rates. *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1506 (D.C. Cir. 1990).

Nothing in these provisions or any other in the NGA was intended to take power away from the states. "On the contrary," the Act's purpose was "to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions." *Panhandle*, 332 U.S. at 517. In other words, Congress designed the NGA to "complement and in no manner usurp State regulatory authority." *Interstate Natural Gas Co.*, 331 U.S. at 690 (citation omitted); *accord Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 291-92 (1997).

To ensure that "its intent [in this respect] could not be mistaken," *Panhandle*, 332 U.S. at 516, Congress wrote the federal-state dichotomy it envisioned directly into the text of Section 1(b). Not only does that provision grant the federal government authority over wholesale transactions, it also expressly provides that "[t]he provisions of this chapter . . . shall not apply to *any other transportation or sale* of natural gas." 15 U.S.C. § 717(b) (emphasis added). Thus, as before the NGA's enactment, the states retain authority over all "direct sales for consumptive use," *Panhandle*, 332 U.S. at 517 – that is, retail sales.

For decades after the NGA's enactment, gas consumers made the vast majority of their purchases from local utilities. FERC set the rates at which utilities purchased the gas from pipelines, and state

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Both petitioners and the Solicitor General accept that construction here.

utility commissions ensured that utilities did not overcharge when selling the gas to consumers.

2. In the 1970's and 1980's, Congress deregulated much of the natural gas market. *See* Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3409 (codified in part at 15 U.S.C. § 3301 *et seq.*) (eliminating price ceilings for certain categories of natural gas sales and removing FERC's authority over "first sales"); Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (accelerating this process); *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 50 Fed. Reg. 42,408 (Oct. 18, 1985) (effectuating market-based pricing system); *Pipeline Service Obligations and Revisions to Regulations*, 59 F.E.R.C. 61,030 (Apr. 8, 1992) (requiring pipelines to unbundle sales and transportation charges).

This deregulation allowed consumers of natural gas to buy directly from gas producers (or their marketing firms), paying only transportation fees to pipelines and utilities. *See Gen. Motors*, 519 U.S. at 284. Although buying directly was impractical for many residential consumers, most large industrial, commercial, and nonprofit users began buying their own gas in this manner. *Id.* at 283-84. By 2000, nearly 70% all of gas consumed in the United States was purchased through these "direct retail" sales. Pls.' Opp. To Mot. For Summ. J. Ex. 1 at 14, ECF No. 1903-1 (Feb. 1, 2010).

The numerous buyers in the newly formed direct retail market needed some way of discerning fair market prices when negotiating with petitioners and others among the small set of gas sellers. The buyers turned to small private publications such as *Inside*

FERC and *Gas Daily*. J.A. 124. In the 1980's, these publications had begun collecting reports from gas traders about the volume and prices at which natural gas was being sold at various trading points ("hubs") around the country. *Id.* 124-25. No federal law or regulation required gas sellers to provide this information to the publications, and the publications lacked any way of verifying the accuracy of the reports. Instead, traders at natural gas companies informally provided information on the honor system: they gathered data simply by "passing around a form," "using a spreadsheet on a shared drive," or taking "an 'oral survey' to get a sense of where the market was trading." *Id.* 170-71. The traders then passed along this "sense of the market" to the publications, which used it to calculate and publish average prices for each hub on a daily or monthly basis. *Id.* 124-25.

By the mid-1990's, most retail gas sellers were using the indices to set contract prices. A typical contract price provision, for example, read: *Inside FERC* Southern Star Central + $0.31 MMBtu. *See Policy Statement on Natural Gas & Electric Price Indices*, 104 F.E.R.C. 61,121, 61,404 (July 24, 2003).

3. Retail customers' heavy reliance on the indices to negotiate prices for natural gas, combined with the private publications' inability to verify the accuracy of reports that affected the indices, created an opportunity for gas sellers to work together to overcharge these customers. *See E. & J. Gallo Winery*, 503 F.3d at 1031-32. If sellers reported artificially high prices to the indices – either by fabricating sales or engaging in "wash trades" with one another at artificially inflated prices – the indices

would publish higher average prices for gas.[2] J.A. 88. Direct retail customers, in turn, unknowingly would accept those averages as reflective of true market prices and pay them under their contracts keyed to the indices.

No gas company could effectuate this scheme on its own. That is, no company sold gas in high enough volumes that its individual reports to the indices would significantly move the numbers. *See Regulations Governing Blanket Marketer Sales Certificates*, 57 Fed. Reg. 57,952, 57,957-58 (Dec. 8, 1992) (explaining no single company had "market power"). And besides, the indices used formulas designed to exclude outliers before figuring average prices, so high price reports from only a single seller would not have moved the indices. J.A. 125. Hence, the only way to inflate prices in retail transactions by way of index manipulation was for the companies to coordinate their efforts.

Gas sellers seized this opportunity and began manipulating the indices to increase retail prices for gas. In 2003, FERC completed an investigation of index manipulation that took place from 2000 to 2002. *See Final Report on Price Manipulation in Western Markets*, Docket No. PA02-2-000 (F.E.R.C.

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[2] "Wash trades" are defined as "pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk, and no net change in beneficial ownership." *Amendments to Blanket Sales Certificate*, 105 F.E.R.C. 61,217, ¶ 38, ¶ 53 (Nov. 17, 2003). For example, a trade for $10,000 of gas from company A to B combined with an offsetting trade for $10,000 of the same gas from B to A would be a "wash trade."

Mar. 2003) ("*Final Report*") (partially reproduced at J.A. 84-239). Specifically identifying five of the petitioners, the Report found that market participants "provided false reports of natural gas prices and trade volumes to industry publications." J.A. 88. This practice reached "epidemic" proportions. *Id.* One petitioner, for instance, acknowledged that it fabricated 99% of its reports during this timeframe. *Id.* 141-42.

Not only was false reporting rampant in the industry, J.A. 88, but companies conspired with one another to manipulate the indices, *id.* 229. A trader employed by one petitioner, for example, collaborated with another trader to report a false trade, saying, "hey, do you want to fax me . . . exactly what you guys are going to write down so it's more believable . . . I'll just write the exact opposite." *Id.* 303 (internal quotation marks omitted). Thus, while petitioners portray this case as though it involved nothing more than individualized fraud, petitioners in reality colluded in a variety of ways to raise retail gas prices. They even colluded – perhaps to cover their tracks, perhaps to reinforce the reputation of the indices – to peg some wholesale contracts with each other to the indices, *see id.* 632, 640-41, 643-45, even though they knew full well that the indices did not represent true market prices, *see id.* 105 (noting that while six petitioners paid "$48.8 million less" for gas in wholesale transactions in California during the conspiracy "than they would have paid if they had purchased the gas at the index price," they sometimes purchased gas at index prices).

The effects of petitioners' conspiracy were dramatic and "unprecedented." J.A. 85-86. FERC found that "spot gas prices" within the relevant time period "rose to extraordinary levels" and identified "efforts to manipulate price indices" as a factor contributing to this increase. *Id.* 86. Retail natural gas prices in Wisconsin, for instance, "more than doubled." *Id.* 312. Reorganized Farmland Industries (FLI) experienced such enormous price increases in 2001 that it was no longer able to produce and sell fertilizer at a profit. Farmland's Resp. in Opp. to Mot. to Compel Produc. 7, ECF. No. 1831 (filed under seal pursuant to ECF No. 1849) (Nov. 2, 2009) (referencing deposition testimony of Rich Schuck).

4. The NGA does not give FERC any power to impose liability on sellers who overcharge for gas in retail transactions. Accordingly, FERC has not sought – nor could it seek – to require petitioners to compensate respondents for the harm they suffered as a result of this conspiracy.

In 2003, after the misconduct leading to the crisis was unearthed, FERC issued a Code of Conduct forbidding sellers from misreporting wholesale prices to the indices. *Amendments to Blanket Sales Certificates*, 68 Fed. Reg. 66,323, 66,323-37 (Nov. 26, 2003). But even then, FERC explained that it lacked the authority to regulate reporting practices with respect to direct sales for consumptive use, such that "a portion of the market [would] not be subject to these regulations." *Id.* at 66,325-26.

In the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (commonly known as the "EPAct"), Congress enlarged FERC's authority to forbid gas companies from using any "manipulative or deceptive device" "directly or indirectly . . . in connection with" any jurisdictional sale of natural gas. 15 U.S.C. § 717c-1. According to FERC, this 2005 statute enlarged its authority to regulate "*non*-jurisdictional entities' manipulative reporting about, and wash-trade practices purporting to involve, non-jurisdictional sales when they are used to manipulate wholesale gas rates." U.S. Br. 32 n.7.

B. Procedural History

1. Respondents are manufacturers, hospitals, educational institutions, an agricultural cooperative, and other entities that made direct retail purchases of natural gas from 2000 through 2002. *See, e.g.*, J.A. 321-22, 360. They filed lawsuits in state and federal courts, alleging that petitioners' conspiracy to manipulate the retail prices of natural gas violated state antitrust law. *Id.* 240-584.[3] Petitioners removed the state cases to federal court, and all of the cases were later consolidated into multidistrict litigation in the District of Nevada.

Petitioners first sought dismissal on the basis of the filed rate doctrine. Pet. App. 20a-21a. Because FERC had issued them "blanket marketing certificates" during the time period at issue, thereby allowing them to charge market-based rates, petitioners argued that the indices were in effect FERC-approved rates. This argument hit a dead end, however, when the Ninth Circuit held in *Gallo* and two other cases from this multidistrict litigation that "the filed rate doctrine does not bar state or

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[3] One respondent, Sinclair Oil Corporation, alleges not only state antitrust claims, but also a variety of other state and federal claims. Petitioners do not advance any distinct arguments regarding these latter claims.

federal antitrust claims arising out of manipulation of the price indices because the challenged price indices were compiled using transactions outside of FERC's jurisdiction as well as transactions within FERC's jurisdiction." *Id.* 21a (citing *Gallo*, 503 F.3d at 1048); *see also Texas-Ohio Energy, Inc. v. AEP Energy Servs.,* 243 Fed. Appx. 328 (9th Cir. 2007); *Abelman Art Glass v. AEP Energy Servs.,* 248 Fed. App'x 821 (9th Cir. 2007). "Misreported rates and rates reported for fictitious transactions are not FERC-approved rates." *Gallo*, 503 F.3d at 1045.

The *Gallo* decision and its counterparts limited petitioners to pressing their back-up argument that the NGA – as it existed before the EPAct of 2005 – impliedly preempts respondents' claims. After the district court denied their motion to dismiss, petitioners filed a motion for summary judgment based on this argument. The district court denied this motion as well. J.A. 37-62. Petitioners then moved for reconsideration. Eighteen months later, the district court granted the motion and announced its intention to revisit petitioners' implied preemption argument. Pet. App. 124a-136a.

Seeking to protect themselves against any adverse ruling on reconsideration regarding their state-law claims, several respondents quickly moved to amend their complaints to add federal antitrust claims. Pet. App. 40a-41a. The proposed federal claims sought to challenge the exact same conduct as their state antitrust claims. Without finding that petitioners would be prejudiced in any way by such an amendment, the district court denied these motions. *Id.* 41a; *see also* Order on Pls.' Mot. to

Modify Scheduling Order, ECF No. 1958 (Oct. 10, 2010).

After letting almost another whole year pass, the district court reversed its earlier position and held that the NGA occupies a field that categorically displaces state law with respect to any practice that directly affects wholesale rates. Pet. App. 115a. That is so, in the court's view, regardless of whether the practice at issue – as here – also falls within the power that Section 1(b) reserves to the states to regulate retail transactions or involves matters over which states otherwise have traditional regulatory authority. *See id.* 133a-34a. Applying this "directly affects" preemption test, the district court concluded that petitioners' "manipulation of the indices directly affect[ed] jurisdictional rates" because petitioners had elected to use indices to set prices not only for retail transactions involving direct consumers such as respondents but also for at least some wholesale transactions. *Id.* 112a.

2. The Ninth Circuit reversed in a unanimous opinion by Judge Bea. Relying on this Court's decision in *Northwest Central Pipeline Corp. v. State Corp. Commission*, 489 U.S. 493 (1989), the court of appeals began by noting that the authority that NGA Sections 1(b) and 5(a) grant the federal government to regulate practices affecting wholesale rates cannot "nullify[] the jurisdictional provisions of Section 1(b), which reserve to the states regulatory authority" over retail sales. Pet. App. 30a-32a; *see also id.* 24a. Because respondents seek compensation for anticompetitive practices falling within that reservation to the states of regulatory authority, the

court of appeals then reasoned, the NGA cannot displace their state-law claims. *Id.*

Even if it had agreed with the district court that the NGA preempts all state-law claims arising from practices that directly affected wholesale rates, the court of appeals indicated that it still would not have held respondents' claims preempted. Drawing on *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1503, 1506 (D.C. Cir. 1990), in which the D.C. Circuit held that FERC lacks authority to regulate under NGA Section 5(a) unless the practice at issue "directly govern[s] the rate in a jurisdictional sale," the Ninth Circuit stressed that any preemptive force arising from FERC's Section 5(a) jurisdiction could not stretch "broadly." Pet. App. 31a. In the court of appeals' view, construing the NGA to preempt state authority over index "reporting practices associated with nonjurisdictional sales" would go too far. *Id.* 32a.

Having held that respondents could proceed on their state antitrust claims, the court of appeals ruled that the district court had not abused its discretion in denying leave to add federal antitrust claims. Pet. App. 42a-43a.

3. This Court granted certiorari to review the court of appeals' preemption holding. 134 S. Ct. 2899 (2014).

SUMMARY OF ARGUMENT

The Natural Gas Act – as it existed before 2005 – does not preempt respondents' state antitrust claims.

I. Petitioners and the Solicitor General advance a theory constructed of selectively cropped case quotations and wishful thinking. According to them, the NGA field preempts a state-law claim whenever it concerns a practice that "directly affect[s] jurisdictional rates" and thus falls within FERC's Section 5(a) authority. Petr. Br. 2, 19; *see also* U.S. Br. 13. But this Court has never adopted any such rule. Rather, an unfiltered review of NGA case law makes clear that the NGA field preempts state law only when two things are present: (A) a state "cross[es] the dividing line so carefully drawn by Congress in NGA § 1(b)" that separates retail from wholesale transactions, *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514 (1989); and (B) state law is "directed at" the natural gas industry, such that it is capable of "affect[ing] the ability of FERC to regulate comprehensively . . . the transportation and sale of natural gas," *Schenidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308-10 (1988).

Neither of those conditions is present here. First, respondents seek to apply state law only in the context of retail transactions, which are firmly on the states' side of the NGA Section 1(b) dividing line. Even if respondents' claims also somehow implicate some practice falling within FERC's Section 5(a) authority, respondents' suits may proceed because petitioners do not (and could not) show that respondents' state antitrust theories conflict with any FERC rule or regulation.

Second, respondents' state antitrust theories are grounded in "traditional" state law, *Schneidewind*, 485 U.S. at 308 n.11, that is incapable of impeding FERC's ability to regulate. The NGA does not displace federal antitrust law, and respondents' state-law theories challenge nothing more than conduct that federal antitrust law also forbids.

II. Even if this Court were inclined to vastly expand the NGA's field preemptive force by barring any state-law claim that implicated a "practice" that directly affected wholesale rates, it would still have to affirm. The conduct at issue here – colluding to inflate prices in retail transactions – does not directly affect wholesale rates because no rule or regulation requires sellers to price wholesale transactions the same way they price retail transactions.

And even if the relevant practice here were defined more narrowly as index reporting alone, that practice would still not have fallen within FERC's Section 5(a) authority. Much of the reporting at issue here involved non-jurisdictional sales, which, by definition, fell beyond FERC's pre-2005 authority. Furthermore, the only reason *any* index reporting influenced wholesale prices was that petitioners themselves voluntarily elected to use the indices – knowing full well they did not represent true market prices – as price points not only for retail but also for certain wholesale transactions. This kind of intervening, conspiratorial act precludes finding any "direct effect" that could trigger NGA preemption. Otherwise, petitioners' theory would allow natural gas sellers to insulate themselves from virtually any state law simply by pegging wholesale prices to that law.

ARGUMENT

I. The NGA Does Not Preempt Respondents' Claims Because The Claims Involve Matters That The NGA Reserves To The States.

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). And where, as here, a party asserts that field preemption exists in a particular regulatory sphere, the question is whether Congress "legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989).

The text of the NGA, as well as this Court's precedent describing Congress's intent in passing it, demonstrate that the NGA leaves the states substantial room to supplement federal law. In particular, Section 1(b) of the Act expressly denies FERC the authority to regulate "the production or gathering of natural gas" or "any . . . transportation or sale of natural gas" besides wholesale transactions. 15 U.S.C § 717(b). Those non-wholesale matters are "reserved to the states." *Nw. Cent.*, 489 U.S. at 507*; see generally Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 517 (1947). Further, this Court has made clear that Congress did not intend the NGA to displace "traditional" modes of state regulation – for example, "blue sky" securities laws and labor laws – that apply generally to all companies doing business in the state and are not "directed at" the gas industry.

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 308 & n.11 (1988).

Both of these forms of reserved state power are present in this case. Respondents' claims fall within Section 1(b)'s reservation of state authority because they arise from retail transactions. In addition, respondents' claims are grounded in traditional state antitrust law, as opposed to state regulation directed specifically at the natural gas industry.

A. Respondents' Claims Fall Within NGA Section 1(b)'s Express Reservation Of State Authority Over Retail Transactions.

The language and structure of the NGA, as well as this Court's precedent, demonstrate that when state-law claims arise from matters that Section 1(b) reserves to the states, the claims necessarily fall outside of any preemptive field. Contrary to petitioners' argument, this is so even if the state-law claims implicate practices that also directly affect wholesale rates. In that circumstance, state law must give way only to the extent that it conflicts with the NGA; the NGA otherwise allows state law to coexist with FERC rules and regulations.

1. This Court's decision in *Northwest Central* establishes that when state-law claims regulate matters that Section 1(b) of the Act reserves to the states, the claims necessarily fall outside of any preemptive field. In *Northwest Central*, a Kansas law provided that certain gas producers would lose the right to extract gas from wells connected to a common source if they failed to extract that gas before various deadlines. 489 U.S. at 497. This was "precisely the sort [of law] that Congress intended by

§ 1(b) to leave within a State's authority"; it fell within "the States' retention of their traditional powers to regulate rates of production, conserve resources, and protect correlative rights." *Id.* at 512, 514. Thus, "[t]o avoid encroachment on the powers Congress intended to reserve to the States," this Court unanimously held that the NGA did not field preempt the Kansas law. *Id.* at 512.

2. Petitioners and the Solicitor General advance a far broader conception of the NGA's preemptive field. According to them, the NGA nullifies forbids state-law claims arising from retail transactions whenever they implicate a practice FERC has authority to regulate under Section 5(a) because the practice "directly affect[s] jurisdictional rates." Petr. Br. 19; *accord* U.S. Br. 14. In service of this theory, petitioners and the Solicitor General characterize *Northwest Central*'s holding as turning on a finding that FERC lacked regulatory authority over the specific practice at issue because the effect of the practice on wholesale rates was "too remote." Petr. Br. 36; *see also* U.S. Br. 30.

This reading of *Northwest Central* cannot withstand scrutiny. Where a state-law claim concerns a matter that Section 1(b) reserves to states but also implicates a practice that Section 5(a) may authorize FERC to regulate, *Northwest Central* explains that applying conflict preemption – not invariably ousting state law altogether – is the solution. And none of the other authority that petitioners summon in support of their argument indicates otherwise.

a. *Northwest Central* turned on whether the state law at issue was regulating a matter "reserve[d] to the States," not on whether FERC had authority under Section 5(a) to regulate the some aspect of the what the state was regulating. 489 U.S. at 512. The challenged state regulation there was designed to incentivize pipelines to purchase gas from underused wells, *id.* at 505, thereby having "some impact on the purchasing decisions and hence costs of interstate pipelines," *id.* at 516. This Court, therefore, repeatedly acknowledged that the state regulation was expected to "have some effect on interstate rates." *Id.* at 513; *see also id.* at 515 (law would have "some effect on the practices or costs of interstate pipelines subject to federal regulation"); *id.* at 517 (state law "may affect pipelines' costs"). That is, the Kansas law regulated not only matters within the states' reserved powers but also seemingly implicated a practice "within FERC's exclusive authority under the NGA." *Id.* at 506-07; *see also id.* at 515 n.12 (noting that "each agency" – that is, both the state and FERC – had authority "within its assigned sphere").

This Court, however, never felt any need to pinpoint the degree to which the state regulation would "impact on matters within federal control." *Id.* at 516. Even assuming that FERC had authority over some aspect of what the state was regulating, this overlap of regulatory interests could not trigger field preemption: "To find field pre-emption of Kansas' regulation merely because [wholesale rates] might be affected would be largely to nullify that part of NGA § 1(b)" that reserves power to the states. *Id.* at 514. Instead, to "prevent diminution of the role that Congress reserved to the States while at the same time preserving the federal role," the framework that applies in situations of overlapping authority is "conflict-pre-emption analysis." *Id.* at 515. "Only by applying conflict-pre-emption analysis," this Court explained, "can we be assured that *both* state and federal regulatory schemes may operate with some degree of harmony." *Id.* at 515 n.12 (emphasis in original).

b. Other NGA precedent – much of it referenced in *Northwest Central* – confirms that the NGA does not automatically preempt state law whenever it applies to a practice that has a direct effect on wholesale rates. Time and again, this Court has stressed that the NGA "was drawn with meticulous regard for the continued exercise of state power, *not to handicap or dilute it in any way.*" *Panhandle E. Pipe Line Co. v. Pub. Servs. Comm'n*, 332 U.S. 507, 517-18 (1947) (emphasis added); *see also Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690 (1947) (NGA was "drawn as to complement *and in no manner usurp* State regulatory authority") (emphasis added) (citation omitted); *Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 506-08 (1942) (same). And before the NGA was enacted, states had the power to regulate direct sales for consumptive use. *See, e.g.*, *Panhandle*, 332 U.S. at 517 n.12. Accordingly, that a state law governing retail sales might also implicate FERC's post-NGA authority to regulate a practice directly affecting wholesale rates cannot mean that FERC's authority "swallow[s]" the state Section 1(b) power over retail sales. *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 508 (1949). The authority that Section 1(b) reserves to the states over such sales must persist – so long as no conflict exists – regardless of a practice's effect on wholesale rates.

Northwest Central's repeated citations to *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), reinforce the point. *See Nw. Cent.*, 489 U.S. at 512, 515 n.12. *Louisiana Public Service Commission* arose under the Communications Act, which, like the NGA, assigns exclusive authority to the federal government over interstate activities but reserves power to the states over local matters. 476 U.S. at 369-70; *see* 47 U.S.C. §§ 152, 220. In particular, the case concerned accounting matters that the Communications Act reserved to the states but that also "significantly affect[ed], among other things, the rates that customers pay for [interstate] service." *La. Pub. Serv. Comm'n*, 476 U.S. at 364; *see also id.* at 373 (describing "severe impact" that practice at issue would have "on the interstate communications network"). The state law at issue thus implicated a practice "conceivably within the jurisdiction of both federal and state authorities." *Id.* at 360.

Much like petitioners and the Solicitor General do here, the FCC argued that the effect of the accounting practices on interstate service conferred "exclusive regulatory power . . . on the FCC, thus raising a claim that Congress ha[d] manifested a clear intent to displace state law." *Id.* at 369. But in light of the "express jurisdictional limitations on [federal] power" in the statute and the "*dual* regulatory system" that Congress created, this Court held that a state law falling within this reservation of state authority could not be field preempted. *Id.* at 370 (emphasis in original).

So too with respect to the NGA. Indeed, no other method of dealing with jurisdictional overlaps with respect to gas regulation would make sense. Imagine that a gas company entered into contracts to sell gas in wholesale transactions at prices keyed to "the price at which the seller sold gas the week before in retail transactions." Under petitioners' theory that the NGA preempts state claims concerning any reference points that appear in contracts for wholesale gas transactions, states would lose the ability to regulate retail rates, even in a manner wholly consistent with federal law. The absurdity of such an outcome – and its stark incompatibility with congressional intent – reveals that petitioners' theory cannot be right.

c. Petitioners and the Solicitor General nevertheless insist that other cases establish that "the preemption analysis [under the NGA] does *not* change when a state purports to regulate matters within state authority." Petr. Br. 23 (emphasis added); *see also* U.S. Br. 30. In support of this proposition, they cite *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), along with four other cases: *Northern Natural Gas Company v. State Corporation Commission*, 372 U.S. 84 (1963); *Transcontinental Gas Pipe Line Corporation v. State Oil & Gas Board (Transco II)*, 474 U.S. 409 (1986); *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 621 (1972); and *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988). Petr. Br. 23-28; *see also* U.S. Br. 17 (relying on *Schneidewind*, *Northern Natural*, and *Transco II*). These cases, petitioners and the Solicitor General maintain, collectively establish that "state authority" under Section 1(b) must give way whenever a state-law claim arises from a practice that directly affects wholesale rates. U.S. Br. 14; *see also* Petr. Br. 23.

That is not how the Solicitor General interpreted *Northern Natural*, *Transco II*, and *Schneidewind* in its briefs in *Northwest Central.* In those filings, the Government made no mention of any "direct effect" test for preemption. Instead, the Government explained that "the 'field occupation' sort of preemption [wa]s not applicable" in *Northwest Central* because "the Kansas order at issue here (unlike the state regulations at issue in *Northern Natural*, *Transco* [*II*], and *Schneidewind*) by its terms regulates producers, and gas production, not pipelines and their activities." U.S. Cert. Br. at 12-13, *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493 (1989) (No. 86-1856); *see also* U.S. Br. at 12, *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493 (1989) (No. 86-1856) ("[T]he state orders in *Northern Natural* and *Transco [II]* . . . were preempted because they involved state regulation of interstate pipelines," whereas "[t]he Kansas order at issue [in *Northwest Central* was] an exercise of" the authority that "[t]he NGA specifically reserves to the states.").

This Court agreed. It explained that "[i]n *Northern Natural* and *Transco* [*II*], States had crossed the dividing line so carefully drawn by Congress in NGA § 1(b) . . . , trespassing on federal territory." *Nw. Cent.*, 489 U.S. at 514. Likewise, in *Schneidewind* the state law "could not plausibly be said to [have] operate[d] in the field expressly reserved by the NGA to the States." *Nw. Cent.*, 489 U.S. at 513 n.10. By contrast, "Kansas ha[d] regulated" in *Northwest Central* "firmly on the States' side of that dividing line." *Id.* at 514. Consequently, *Northwest Central* distinguished *Northern Natural*, *Transco II*, and *Schneidewind* on the ground that none of those cases involved a state law operating in "the field expressly reserved by the NGA to the States." *Id.* at 513-14. *Northwest Central* did not distinguish those cases on the basis that the effect on wholesale rates of the various practices at issue in those cases was more "direct."

The Court in *Northwest Central* did not feel the need to discuss *Louisiana Power* and *Mississippi Power*, the other two cases on which petitioners rely, but they are easily distinguishable as well.

In *Louisiana Power*, the practice at issue (interstate transportation of gas) fell "within [FERC's] jurisdiction under the opening sentence of § 1(b)" and outside of "the proviso's exemption for direct sales." 406 U.S. at 638. The case, therefore, has nothing to say about the situation in which states are acting within their reserved sphere of authority.

In *Mississippi Power*, a state did attempt to exercise "its undoubted jurisdiction over retail sales." 487 U.S. at 372. But this Court did not invalidate the state regulation under field preemption principles. Instead, this Court held – consistent with *Northwest Central*'s framework for dealing with overlaps in jurisdiction – that the state law could not be enforced because it "conflict[ed] with" federal authority. *Id.* at 377. "States," this Court explained, "may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair." *Id.* at 371.

Petitioners ignore the conflict-preemption reasoning in *Mississippi Power*, fixating instead on Justice Scalia's statement, concurring in the judgment, that "[i]t is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." 487 U.S. at 377. But this statement should not be wrenched out of context. The state regulation in *Mississippi Power* allowed the state to consider for itself the "prudency" of the same power allocations that FERC had already determined to be just and fair. *Id.* at 375. Thus, the state law, by its nature, was incapable of being consistent with federal law. Reassessing FERC's determinations necessarily "interfere[d] with federal authority over the same activity." *Id.* at 377 (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 318-319 (1981); *see also id.* at 380 (Scalia, J., concurring in the judgment).

3. NGA Section 1(b) authorizes the states to regulate "direct sales for consumptive use." *Panhandle*, 332 U.S. at 517. And there is no dispute that all of the respondents' claims arise out of direct sales for consumptive use. The Ninth Circuit thus took it as a given – and petitioners do not dispute – that respondents' claims implicate "the jurisdictional provisions of Section 1(b), which reserve to the states regulatory authority over nonjurisdictional sales." Pet. App. 31a-32a.

The Solicitor General, however, resists this straightforward analysis. According to the Solicitor General, respondents' claims fall outside of the states' Section 1(b) authority because rather than arising from "retail sales themselves," the claims arise from manipulative practices that "affect[ed] the price for *subsequent* retail sales." U.S. Br. 27.

The Solicitor General's hairsplitting misconceives respondents' claims. Respondents are not pursuing fraud claims that would punish petitioners' deception of the index publishers.

Rather, they are bringing *antitrust* claims that seek to hold petitioners liable for colluding to inflate prices for retail gas. Hence, respondents' claims obviously concern retail sales themselves and thus implicate the states' Section 1(b) authority to regulate retail sales.

Nothing in *Louisiana Power* – the only case the Solicitor General cites in support of its argument – undercuts this reasoning. In stating that Section 1(b) withholds from FERC only "rate-setting authority with respect to direct sales," *Louisiana Power* held simply that Section 1(b) does not reserve to the states power to regulate the interstate "transportation," as opposed to retail sales, of gas. 406 U.S. at 637-38. It said nothing about whether Section 1(b) authorizes the states to regulate the methods by which retail prices are established. The only case that speaks to *that* issue is *Panhandle*, which accepted that Section 1(b)'s proviso reserves states the authority not only to set retail rates themselves but also to regulate the "rules and regulations" and "service" involved in sellers' retail transactions. 332 U.S. at 509; *see also Northwest Central*, 489 U.S. at 511 (states' Section 1(b) power over production extended beyond the "drilling and spacing of wells" to "prevent[ing] waste and protect[ing] correlative rights" of producers) (internal quotation marks and citation omitted). There is no doubt, therefore, that prohibiting sellers from colluding to inflate retail prices falls within the states' Section 1(b) authority.[4]

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[4] Citing *Transco II*, the Solicitor General also suggests that the Ninth Circuit erred insofar as it suggested categorically that

4. Because respondents' claims involve matters over which Section 1(b) preserves state authority, they can be preempted only if they fail "conflict-preemption analysis." *Nw. Cent.*, 489 U.S. at 516. Yet petitioners do not argue that respondents' claims conflict with federal law. The most they contend is that a "potential for conflict" exists. Petr. Br. 32. But when conflict preemption applies, "the existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of [a] state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); *accord PLIVA Inc. v. Mensing*, 131 S. Ct. 2567, 2587 (2011). Accordingly, the court of appeals' decision should be affirmed.

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all "first sales" fall within the states' Section 1(b) reservation of power. U.S. Br. 26. It is true that *wholesale* transactions statutorily defined as "first sales" fall outside of the states' Section 1(b) authority. *See Transco II*, 474 U.S. at 422. But the only "first sales" at issue in this case are direct sales for consumptive use from "wellheads" and "sellers in Canada and Mexico." Pet. App. 32a. Petitioners have never distinguished in their preemption theory between those kinds of first sales and other direct sales for consumptive use. Instead, petitioners have correctly treated all of the sales at issue as "retail transactions." Pet. Br. i; *see also Panhandle*, 332 U.S. at 516 & n.12 (noting that Section 1(b) reserves power to the states "when and if [a] first sale" from another jurisdiction is "necessarily the last sale because consummated by consumption") (quotation marks and citations omitted).

B. Respondents' Claims Are Grounded In Traditional Antitrust Statutes That In No Way Undermine FERC's Ability To Regulate.

Respondents' claims also fall within authority the NGA leaves to the states because – as the only federal court of appeals to consider the issue has held – the NGA does not displace the states' traditional authority to prohibit anticompetitive conduct that federal antitrust law also forbids. *See Illinois v. Panhandle E. Pipeline Co.*, 935 F.2d 1469, 1479-80 (7th Cir. 1991).

1. The NGA field preempts state law only where that law is "directed at . . . things over which FERC has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988). In other words, the NGA preempts state law only when that law "affect[s] the ability of [FERC] to regulate comprehensively" with respect to interstate transportation or wholesale rates. *Id.* at 310 (quoting *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963)).

That being so, this Court made clear in *Schneidewind* that the NGA does not preempt "traditional" state regulation that neither is "directed at" the gas industry nor threatens to affect FERC's ability to regulate comprehensively and effectively. *Id.* at 308 & n.11. This Court offered as an example a state "'blue sky' law that governs the registration and sale of securities sold within [a] State." *Id.* "[S]uch traditional 'securities regulation'" is not preempted by the NGA because it "is not FERC's direct concern." *Id.* So too with respect to various other forms of generalized state regulation, such as laws "protect[ing] investors from fraudulent or deceptive issuances" of securities, *id.* at 310 n.13, and labor and employment laws. Such state laws might occasionally cover practices that directly affect wholesale prices of natural gas, but the NGA need not displace them unless they threaten to impede FERC's ability to do its job.

The same type of analysis applies to other statutes that operate like the NGA. In cases involving other statutes that occupy certain fields, this Court has repeatedly held that such statutes do not preempt traditional state-law claims absent some adverse effect on the federal scheme. *See, e.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002). In *Silkwood*, for example, the Court considered whether the Atomic Energy Act, which "occupie[s] the entire field of nuclear safety concerns," preempted certain "traditional principles of state tort law." 464 U.S. at 249, 255. The defendants argued that state law had to be preempted because it could require power plants to "conform to state standards" with respect to practices that the federal government also regulated. *Id.* at 255-56. This Court rejected the argument, holding that traditional state tort law applied "with full force" insofar as it would not "frustrate the objectives of the federal law." *Id.*

Petitioners respond that *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), shows that a federal statute that occupies a field can displace even traditional state-law claims. Petr. Br. 23. This is no doubt true. But it is a question of congressional intent. When a federal statute's coverage is designed to be "categorical[ly]" exclusive, even traditional state law must give way when it is "directed to the same subject" as the federal law. *Kurns*, 132 S. Ct. at 1268-69 (quoting *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605, 612 (1926)). Thus, in *Kurns*, this Court distinguished *Silkwood* and held that the Locomotive Inspection Act (LIA) preempted state-law tort claims because the LIA was designed to "occup[y] the entire field of regulating locomotive equipment" and the state law was aimed at the same thing. *Id.* at 1267-70 (quoting *Napier*, 272 U.S. at 611-12).

The situation here resembles *Silkwood*, not *Kurns*. This Court has never held that the NGA preempts not only certain state regulation directed at the gas industry but also traditional state-law claims whenever a plaintiff seeks to apply such law to a practice that had a direct effect on wholesale rates. And for good reason: The purpose of Section 5(a)'s grant of authority over practices directly affecting wholesale rates is to ensure that FERC has the "tools" it needs to effectively regulate wholesale rates under Section 1(b). *Schneidewind*, 485 U.S. at 301. Thus, if a traditional state law that applies to a certain "practice" covered by Section 5(a) does not directly affect FERC's ability to do that job, there is no reason for the NGA to preempt it. *See id.* at 308 & n.11.

2. Just like the state blue sky law that *Schneidewind* explained would not be displaced by the NGA, state antitrust claims fall outside the Act's field-preemptive reach. Antitrust law "is an area traditionally regulated by the States." *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *see also id.*

(describing the "long history of state common-law and statutory remedies against monopolies and unfair business practices"). Indeed, this Court "has consistently held that nothing in the federal antitrust laws *or any other body of federal law* indicates that Congress intended to displace state antitrust law." Herbert Hovenkamp, *Federal Antitrust Policy* § 20.8 (4th ed. 2011) (emphasis added).

This is especially so with respect to the NGA. Congress did not intend in the NGA "to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). This Court, accordingly, has squarely held that the NGA does not displace federal antitrust law. *Id.* at 374; *accord California v. FPC*, 369 U.S. 482, 490 (1962). And both petitioners and the Solicitor General have conceded that respondents could have proceeded with federal antitrust claims respecting the conduct at issue here. *See* Petr. Br. 32; Dfts. Joint Reply in Supp. of Renewed Mot. and Mot. for Summ. J. 13, ECF No. 1910 (Feb. 26, 2010); U.S. Br. 24.[5]

Given that the NGA would permit respondents to bring federal antitrust claims respecting the conduct

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[5] After conceding this point without qualification at the certiorari stage, *see* U.S. Cert. Br. 17-18, the Solicitor General now suggests that the filed rate doctrine, if applicable, might sometimes preclude a federal antitrust claim. U.S. Br. 24. But the lower courts have held that the filed rate doctrine does not apply in this case, Pet. App. 21a, and petitioners do not challenge that holding. Nor do petitioners ask this Court to overrule the holdings in *Otter Tail* and *California v. FPC* that the NGA does not displace federal antitrust law.

at issue, there is no reason why the NGA should preempt state antitrust law insofar as "state antitrust law only mirrors federal antitrust law." *Illinois*, 935 F.2d at 1479. To the contrary, the "primary aim" of the NGA is "to protect consumers against exploitation at the hands of natural gas companies." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *accord Cities Serv. Gas. Co. v. FPC*, 176 F.2d 548, 552 (10th Cir. 1949). It would thus be "an exceedingly incongruous result if a statute so motivated" were construed "to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption." *Panhandle*, 332 U.S. at 519; *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 450 (2005) (using similar reasoning to divine congressional intent and reject preemption argument).

Put in the parlance of *Schneidewind*: state antitrust claims cannot possibly "affect[] the ability of [FERC] to regulate comprehensively . . . the transportation and sale of natural gas" when they require nothing more than what federal antitrust law already requires, *Schneidewind*, 485 U.S. at 310 (quoting *N. Natural*, 372 U.S. at 91-92) (alterations in original), and the NGA does not displace federal antitrust law.

3. That leaves petitioners' two-part argument that applying state antitrust law in this particular case would create a "possibility of collision between state and federal regulation." Petr. Br. 29. No such possibility exists.

Petitioners first suggest that NGA Section 5(a) gives FERC the authority to regulate index reporting practices – a power petitioners assert is manifested in FERC's 2003 Code of Conduct – and that respondents' lawsuits could theoretically result in liability for conduct that the Code of Conduct allows. Petr. Br. 30-32. But FERC's Section 5(a) power is prospective only, permitting it to prescribe rules "to be thereafter observed and in force." 15 U.S.C § 717d(a); *see also Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) ("By its terms, [Section 5(a)'s counterpart in the FPA] only comes into play when the Commission has had a hearing and finds that a 'rate, charge, or classification' employed by a regulated utility in its jurisdictional transactions is 'unjust, unreasonable, unduly discriminatory or preferential.'"). The Code of Conduct, therefore, does not apply to petitioners' actions at issue here.

In any event, petitioners never point to any specific conduct that the 2003 Code of Conduct allows for which respondents seek to impose liability. Nor could they. Respondents have made clear (*see, e.g.*, Learjet BIO 15), and petitioners do not dispute, that respondents seek nothing more than to hold petitioners liable under state law for conduct that federal antitrust law also prohibits. *See generally United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("[A] combination formed for the purpose and with the effect of raising . . . the price of a commodity . . . is illegal per se."). This case thus stands in stark contrast to *Schneidewind*, where the Court concluded that an "imminent possibility of collision" existed because FERC had the power to institute equity requirements inconsistent with those in the state law at issue. 485 U.S. at 310. Here, FERC is powerless to condone the conduct that respondents challenge.

And even if respondents' claims could somehow forbid index reporting practices that FERC had the power to allow, FERC would still not be hampered in its ability to regulate wholesale rate-setting. All FERC would have to do if it disagreed with the states would be to require that indices reflecting wholesale prices be created and used separately from indices creating retail prices. *See* U.S. Br. 28 n.6 (noting feasibility of this measure); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 (1986) (noting that the FCC could take similar action in order to preserve exclusive power over interstate component of a certain practice).

No doubt aware of these realities, petitioners retreat to asserting that a possibility of collision exists because three of the states involved here – Kansas, Colorado, and Wisconsin – allow courts to calculate damages for antitrust violations differently than "their federal counterparts." Petr. Br 32. In particular, petitioners complain that whereas federal law provides a treble-damages remedy for antitrust violations, *see* 15 U.S.C. § 15(a), these three states would allow plaintiffs to recover the full price they paid for gas at inflated prices. *Id.* This appears to be an argument that the federal antitrust statutes, rather than the NGA, preempt respondents' claims – and thus is outside the question presented.

At any rate, the argument lacks merit. It is unclear whether treble damages or full consideration will yield a larger recovery here; it depends on whether petitioners inflated prices by more than one-third over a fair market rate. But even if a full-consideration remedy is more favorable, this Court has consistently held that state antitrust claims "are not preempted solely because they impose liability over and above that authorized by federal law." *ARC Am.*, 490 U.S. at 105; *see also Illinois*, 935 F.2d at 1480 (applying this rule in context of antitrust claims concerning natural gas purchases). This is because in the antitrust realm, as elsewhere, a stronger state-law remedy for conduct that both federal and state law forbid does not require any change in primary conduct. Instead, it simply gives defendants "an additional cause to comply" with those substantive mandates. *Bates*, 544 U.S. at 448 (2005) (citing *Medtronic v. Lohr*, 518 U.S. 470, 513 (1996) (O'Connor, J. concurring in part and dissenting in part)); *accord Medtronic*, 518 U.S. at 495 (state law providing for money damages does not conflict with federal law forbidding same conduct but not providing damages remedy); *Silkwood*, 464 U.S. at 257 (punitive damages allowed under state law but not available under federal law did "not conflict with [the federal remedial] scheme").[6]

[6] Even if respondents' claims were somehow preempted insofar as they afforded more generous remedies than federal antitrust law, the solution simply would be to bar respondents from invoking full consideration remedies and to require them instead to proceed under the state-law provisions that they have alternatively invoked that require treble damages. *See* J.A. 244 (citing Wis. Stat. § 133.18); J.A. 367-69 (citing Kan. Stat. Ann. § 50-161); Colo. Rev. Stat. § 6-4-114.

II. Petitioners' Argument That The NGA Field Preempts Respondents' Claims Because The Claims Concern A "Practice" That Had A Direct Effect On Wholesale Rates Fails Even On Its Own Terms.

Even if petitioners were correct that the NGA preempts any state claim concerning a "practice" that falls within Section 5(a) – that is, any practice by a jurisdictional seller that directly affects wholesale rates – the NGA would still not preempt respondents' claims. Respondents do not challenge, as petitioners would have it, mere "index manipulation." Petr. Br. 19. Instead, the only thing state law is regulating in these antitrust lawsuits, properly conceptualized, is conspiring to inflate prices in retail transactions. Such conspiratorial actions have no direct effect on wholesale rates. And even if the practice at issue were simply index reporting, that practice still would not have fallen under FERC's Section 5(a) authority.[7]

[7] Contrary to petitioners' assertion (Petr. Br. 40), respondents have not waived their argument that there is no direct effect here. They have pressed this alternative argument at every step of the case. In the district court, respondents argued that "[a]t most, defendants' false reporting 'directly affected' published *price indices*, not jurisdictional rates." Pls.' Opp'n to Defs.' Mot. for Summ. J. 23, ECF No. 1900 (Feb. 1, 2010). They then urged the Ninth Circuit to follow the reasoning in *Am. Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), in which the D.C. Circuit held that FERC has authority over matters "directly govern[ing] the rate in a jurisdictional sale," but not matters affecting jurisdictional rates only "indirectly." *Id.* at 1506-07; *see* Learjet C.A. Opening Br. 36. When petitioners responded (as they do again here, *see* Petr. Br. 36 n.5), that *American Gas* does not apply because the

A. The Practice Of Conspiring To Use The Indices To Set Prices In Retail Transactions Does Not Directly Affect Wholesale Rates.

Antitrust law does not prohibit fraud or deceit. Rather, antitrust law – as is relevant here – forbids conspiracies to influence prices. *See* Kan. Stat. Ann. § 50-112; Colo. Rev. Stat. § 6-4-104; Mo. Rev. Stat. § 416.031; 79 Okla. Stat. § 203; Wis. Stat. § 133.03; Wyo. Stat. Ann. § 40-4-101. Thus, while the various complaints in this case highlight different factual aspects of petitioners' conspiracy – sometimes focusing on the manipulation of the indices, *see, e.g.*, J.A. 412-13, and sometimes focusing on the eventual sales, *see, e.g.*, *id.* 312-13 – the specific means petitioners used to restrain trade are immaterial.

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contracts there affected jurisdictional rates only "indirectly," Defs.' C.A. Br. 39, respondents replied that "[t]he 'effect' in the present case and the 'effect' in *American Gas* are similarly attenuated, and thus the 'effect' here should similarly be beyond [Section 5(a)]'s reach." Learjet C.A. Reply Br. 7 (internal quotation marks and citation omitted). Finally, respondents renewed this argument during the certiorari stage, *see* Learjet BIO 19-20, thereby preserving their ability, pursuant to this Court's Rule 15.2, to make it now.

Given that petitioners and their *amici* have briefed the question whether the practice at issue has a direct effect on wholesale rates (*see* Petr. Br. 41-43; Amicus Br. of Noble Ams. Energy Solutions 9-13), there is no reason, if this Court finds the question relevant to the proper disposition here, to refrain from addressing the issue. But at the very least, this Court should follow the Solicitor General's advice and allow this issue, if necessary, to "be resolved by the court of appeals on remand." U.S. Br. 20 n.4.

Insofar as respondents allege that petitioners violated state antitrust law, respondents claim simply that petitioners colluded to inflate prices in retail transactions, thus causing respondents to "pa[y] higher prices" than they should have. Petr. Br. 11.

This practice of conspiring to inflate prices in retail transactions does not have a direct effect on wholesale rates. That is because nothing in federal law or any wholesale contract petitioners have introduced in evidence (or of which respondents are otherwise aware) requires sellers to price wholesale transactions the same way they price retail transactions.

Put another way, private lawsuits seeking damages based on state law are a form of "regulation" insofar as they "govern[] conduct and control[] policy" going forward. *Kurns v. R.R. Friction Prods., Corp.*, 132 S. Ct. 1261, 1269 (2012) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). Yet if respondents prevail here on the ground that state law forbids conspiring to increase prices in retail transactions, that ruling would not govern any conduct with any effect on wholesale rates. State antitrust law will not prevent gas sellers, if they wish, from reporting false prices to the indices or executing wash trades. Nor will it prevent sellers from pegging wholesale prices to the indices. The only effect of the state-law judgment respondents seek would be to prevent sellers from conspiring to use artificially inflated prices in retail transactions. That holding would have no effect whatsoever on wholesale rates.

B. Even If The "Practice" At Issue Was Really Petitioners' Index Reporting, This Practice Did Not Fall Within FERC's Section 5(a) Authority.

Even if petitioners were correct that the relevant "practice" at issue in this case was somehow index reporting itself, that conduct did not fall within FERC's Section 5(a) authority. This is so because (1) many of the reports at issue concerned sales (or supposed sales) outside of FERC's jurisdiction; and (2) any effect that other reports to the indices had on wholesale rates stemmed only from petitioners' intervening choice to reference index prices in their own wholesale contracts.

1. The NGA authorizes FERC to regulate certain practices of gas companies when such companies are "engaged in" wholesale transactions. 15 U.S.C. § 717(b); *see also id.* § 717a (defining a "[n]atural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale"). But the NGA's grant of federal power does "not apply to any other transportation or sale of natural gas." *Id.* § 717(b). Accordingly, while petitioners call themselves "jurisdictional sellers," *e.g.*, Petr. Br. 11, gas companies that "engage in both jurisdictional and non-jurisdictional sales" cannot be categorically termed "jurisdictional sellers" or "non-jurisdictional sellers." Pet. App. 128a. They are the former when involved in jurisdictional transactions and the latter when involved in non-jurisdictional transactions. Put another way, although Section 5(a) gives FERC the authority to regulate certain practices of gas companies when acting as "jurisdictional sellers," it

could not have given FERC any power during the time period at issue here to regulate the same companies when making (or claiming to make) non-jurisdictional sales.

FERC itself has repeatedly recognized this limitation on its jurisdiction. When instituting the program of blanket marketing certificates, FERC stressed "that an individual company can be engaged in both jurisdictional and nonjurisdictional activities," and FERC acknowledged that it was not claiming authority over "the non-jurisdictional aspects of these marketers' business." Regulations Governing Blanket Marketer Sales Certificates, 57 Fed. Reg. 57,952, 57,957 (Dec. 8, 1992); *accord* J.A. 58-59 (initial district court decision). FERC's regulations also explained that each certificate issued under the program was "of limited jurisdiction which [would] not subject the certificate holder to any other regulation under the Natural Gas Act . . . other than [the provisions concerning 'sales for resale']." Blanket Marketing Certificates, 18 C.F.R. § 284.402(a); *see also* Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323, 66,325-26 (Nov. 26, 2003) (acknowledging that "a portion of the market [would] not be subject to these regulations"). Thus, according to FERC's own words and regulations, FERC lacked any jurisdiction over gas companies during the period at issue to the extent they reported supposed prices and volumes for *non-jurisdictional transactions* to the indices.[8]

[8] The Solicitor General states that FERC issued the Code of Conduct "without limiting [its] prohibitions to contexts

A substantial portion of the reports petitioners made to the indices during the time period at issue involved direct retail or other (real or fictitious) sales "outside of FERC's jurisdiction." *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1035 (9th Cir. 2007); *see also id.* at 1048; J.A. 58-59.[9] Consequently, as the district court initially seemed to recognize (J.A. 55-59), insofar as those reports inflated the indices, respondents' claims arising from those reports cannot be preempted. State law in this context is being wielded to do nothing more than what the Solicitor General says is permissible (*see* U.S. Br. 28 n.6): namely, to hold petitioners liable for misreporting of *non-jurisdictional* sales in order to raise prices in later *retail* sales.

As the district court also initially seemed to recognize (*see* J.A. 51-55), the EPAct of 2005 confirms

involving jurisdictional sales," U.S. Br. 34-35, but, as shown in the text, any suggestion that the Code reaches beyond reports of jurisdictional sales deviates from FERC's own words at the time. In any event, the plain text of NGA Section 1(b) forbade FERC from asserting authority over reports of non-jurisdictional transactions.

[9] While we know that about 70% of gas consumed during the time period at issue was purchased in direct retail transactions, *see supra* at 5, the record as it currently exists does not reveal precisely what percentage of petitioners' false and misleading reporting *input* involved non-jurisdictional, as opposed to wholesale, transactions. It suffices here to note that "[f]ederal preemption is an affirmative defense upon which the defendants bear the burden of proof," *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007) (quoting *Fifth Third Bank v. CSX Corp.*, 415 F.3d 741, 745 (7th Cr. 2005)), and petitioners have never shown (nor could they) that all of their reporting involved jurisdictional sales.

that FERC's authority during the time period at issue was limited to reports of jurisdictional sales. According to FERC, this new statute enlarged its authority to regulate "*non*-jurisdictional entities' manipulative reporting about, and wash-trade practices purporting to involve, non-jurisdictional sales when they are used to manipulate wholesale gas rates." U.S. Br. 32 n.7; U.S. Cert. Br. 21-22 (noting this "significant change[] in the regulatory environment"). If FERC had had such authority in 2000-02, Congress would not have needed to enact this statute. *See* Pet. App. 37a-38a; J.A. 55.

The district court, of course, later backed away from its initial analysis. In doing so, it accepted petitioners' argument on reconsideration that "because *any* alleged false price reports [during 2000-2002] were reported to a common index, *all* false reporting affected the jurisdictional rate, regardless of whether the false report itself was linked to a jurisdictional or non-jurisdictional transaction." Pet. App. 129a (emphasis added).

But this reasoning eviscerates the NGA's pre-2005 distinction between jurisdictional and non-jurisdictional sellers. If Section 5(a) were triggered whenever a gas company made a report to an index that was then later used to set a price in a later wholesale transaction, then Section 5(a) would have given FERC authority over all of petitioners' reports regardless of whether they concerned jurisdictional or non-jurisdictional transactions, but also over reports from companies reporting solely non-jurisdictional transactions. After all, the latter reports would have influenced wholesale prices in exactly the same way as petitioners' reports concerning non-jurisdictional transactions. Yet even FERC has consistently conceded it lacked any authority before 2005 over companies reporting solely "non-jurisdictional transaction[s]." J.A. 53. By the same token, FERC lacked authority over petitioners' reporting practices to the extent they transmitted information concerning non-jurisdictional transactions.

2. To the extent that the index reporting at issue here conveyed information regarding wholesale transactions, the effect this practice had on wholesale rates was still not "direct" – at least in a world in which the inquiry concerning when an effect is "direct" must control not only FERC's regulatory authority under Section 5(a) but also field preemption analysis under the NGA.

a. Because this Court has never held that NGA Section 5(a) preempts a state-law claim whenever the claim implicates a practice that had a direct effect on wholesale rates, no case from this Court sets forth any definition of what would constitute such a "direct effect." Respondents, therefore, turn to other sources of authority for guidance.

The term "direct," when used in legal parlance, means "immediate; proximate" or "without any intervening medium, agency or influence; unconditional." *Black's Law Dictionary* 459 (6th ed. 1990). Accordingly, cases from this Court involving statutes other than the NGA hold that an effect is not direct if an independent, intervening decision maker determines whether the pertinent consequence takes place. For example, when assessing the effect of a foreign practice under the Foreign Sovereign Immunity Act, 28 U.S.C. § 1602 *et seq.*, the Court has explained that a "direct effect" exists only where the effect "follows as an immediate consequence" of the practice. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (internal quotation marks and citation omitted). Similarly, in determining the meaning of the phrase "directly affect" in the context of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1), the Court held that the leasing of lands for potential oil and gas development did not "directly affect" the nearby coastal zone where "further administrative approval" was required before full exploration or development impacting the coastal zone could begin. *Sec'y of the Interior v. California*, 464 U.S. 312, 321 (1984).[10]

Requiring an effect to be unconditional in order to be direct would be consistent with the outcomes in *Schneidewind* and other cases that petitioners maintain establish that FERC always has exclusive authority over any practice with a "direct effect" on wholesale rates. In each of these cases, the state regulation at issue affected wholesale rates inescapably through the laws of economics. *See, e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988) (company capitalization level directly affected the rates it could reasonably charge); *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 92 (1963) (acknowledging the "intricate relationship" between the costs of purchasing gas from various sources and

[10] Petitioners reference a couple of other cases involving whether state laws have a "significant impact" on matters subject to state control. Petr. Br. 37 n.6. But a "significant impact" is not the same thing as a "direct effect." The word "direct" connotes immediate causation in a way that the word "significant" does not.

the rates it would eventually charge buyers for that gas); *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 372-73 (1988) (recognizing that a company's ability to recover "reasonable operating expense costs," which would have otherwise been trapped and unrecoverable as a result of state regulation, directly affected the price it could charge for gas). In none of these cases did the question whether the practice state law was regulating would affect wholesale rates depend entirely on an intervening decision maker.

b. Petitioners argue that manipulating the indices through false or misleading reporting directly affected wholesale rates because "jurisdictional sellers [during the time period at issue] entered into contracts for wholesale transactions that adopted the index rate as the sales price for gas." Petr. Br. 42. This reality establishes at most only an indirect effect.

As petitioners explain, "prices [in the natural gas market] are set by market participants, such as Petitioners and their contracting partners, rather than FERC" or any other binding authority. Petr. Br. 43. That being so, the question whether index manipulation affected wholesale prices during the time period at issue depended entirely on the sellers' voluntary decision making. If they elected to peg wholesale prices to the indices, then manipulating the indices would affect those prices. But if sellers chose not to peg wholesale prices to the indices (or if FERC, as it unquestionably had the power to do, had forbidden them from doing so), then manipulating the indices would have had no effect on wholesale prices.

This kind of wholly contingent situation hardly left wholesale prices dependent on index reporting practices "without any intervening medium, agency or influence." *Black's Law*, *supra*, at 459. In other words, wholesale rates did not fluctuate "as an immediate consequence," *Weltover*, 504 U.S. at 618, of index manipulation. Rather, the question whether wholesale rates were affected by index manipulation depended completely on the sellers' own choices.

Holding that petitioners' index manipulation had a "direct effect" on wholesale rates – and thus that petitioners are immune from state-law liability – would be especially misguided in light of the antitrust allegations here. As proof of their assertion that "jurisdictional sellers entered into contracts for wholesale transactions that adopted the index rate as the sales price for gas," petitioners cite three sets of contracts – all voluntarily entered into *by petitioners themselves*. Petr. Br. 42. What is more, the counterparty in nearly all of these transactions was also a petitioner in this suit, suggesting that many of these transactions were wash trades.[11] Surely

[11] Petitioners reference a transaction in September 2001 through which "[p]etitioner Duke Energy Trading and Marketing sold 55,000 MMBtu of index-priced wholesale natural gas per day." Petr. Br. 42. This statement, however, omits the fact that the counterparty to this transaction was Reliant Energy, also a petitioner in this suit, and that in the same month Reliant sold the exact same quantity of gas back to Duke Energy. J.A. 641. In addition, nearly 11 million of the 14.5 million MMBtu of wholesale natural gas sold by CMS Marketing Services, Pet. Br. 42, was sold to Dynegy, El Paso, Oneok, and Reliant (all petitioners in this suit), and the remainder was sold to Enron (now defunct) and PanCanadian

petitioners cannot avoid state antitrust liability for a conspiracy designed to inflate retail prices because they further colluded to use the same indices – knowing full well that those indices did not represent true market prices – as price points in select wholesale transactions, even as they continued to use true market prices for other wholesale transactions. *See* J.A. 148-49.

It gets worse. Petitioners' theory also would allow natural gas companies in the future to exempt themselves from virtually any area of state law. If all that mattered to the NGA's field preemptive effect was whether sellers chose to peg prices for wholesale transactions to some outside reference point, then gas companies could render, say, a state's labor or tax laws inapplicable to them simply by pegging

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(known after a 2002 merger as EnCana Corporation, which was named in this litigation as a co-conspirator and was the defendant in the *Gallo* litigation, *see* 715 F.3d at 1030). J.A. 632.

The other transactions not cited by petitioners but included in the record tell the same story. Nine of the ten counterparties submitted by petitioners E-Prime and five of the six submitted by AEP are either named defendants or named co-conspirators, and the remaining counterparty in each case is an affiliate of a named co-conspirator. J.A. 643-44 (tables referred to in this declaration are omitted from the J.A. but were submitted as Exhibit 50 in support of Defs.' Joint Mot. for Summ. J., ECF No. 1882-35 (Dec. 16, 2009)). Eight of the ten counterparties submitted by RRI are either named defendants, named co-conspirators, or affiliates of named co-conspirators. Finally, the counterparties in nine of the fourteen counterparties submitted by Coral fall into one of those same three categories, J.A. 643, and the remainder includes Cook Inlet Energy Supply, an entity FERC found to have engaged in wash trades, J.A. 225.

wholesale prices in their contract to the local minimum wage or tax rate. The idea of drafting contracts to reference such laws may, at first blush, seem fanciful. But if a company could exempt itself from state tax law by agreeing in a contract that the price of gas would be increased if a state raised its taxes, it is hard to think of a reason why a company would not seriously consider doing so.

3. Holding that manipulative reporting practices do not directly affect wholesale rates would be perfectly consistent with FERC's conclusion in the 2003 Code of Conduct that it had the power to prohibit jurisdictional sellers from engaging in such reporting practices. As the Solicitor General notes, Section 7 of the NGA "authorized FERC to attach to [blanket marketing] certificates for jurisdictional sellers 'reasonable terms and conditions as the public convenience and necessity may require.'" U.S. Br. 33 (quoting 15 U.S.C. § 717f(e)). That provision amply supported FERC's actions, and, indeed, FERC cited only Section 7 as its authority for issuing the 2003 Code. *See* 68 Fed. Reg. at 66,323.

To be sure, when denying a petition for rehearing respecting the Code of Conduct, FERC referenced not only Section 7 but also Section 5. *See Order Denying Rehearing of Blanket Sales Certificates Order*, 107 F.E.R.C. 61,174, 61,690 (May 19, 2004). But FERC never determined when issuing this amendment to its blanket marketing certificates that manipulative index reporting had a "direct effect" on wholesale rates. Absent such a determination, FERC cannot be taken to have applied its expertise to conclude that any such effect existed here. *See, e.g.*, *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660

(D.C. Cir. 2011) (courts may defer to an agency's interpretation of a statute "only if the agency has offered a reasoned explanation for why it chose that interpretation"). And the question whether FERC has authority under Section 5 to regulate index reporting practices is now moot in any event. In the EPAct of 2005, Congress enlarged FERC's authority to forbid gas companies from using any manipulative or deceptive device "directly or indirectly . . . in connection with" any jurisdictional sale of natural gas. 15 U.S.C. § 717c-1. That statute gives FERC, on a prospective basis, all of the authority that it is fighting for here.

Finally, no matter what the scope of FERC's Section 5(a) authority in 2000-02 might have been, it is worth noting that the Solicitor General does not seek any claim to *Chevron* deference on the ultimate issue in this case: whether the NGA field preempts all state claims concerning practices that directly affect wholesale prices. Nor could the Solicitor General make any such claim. FERC has never taken a regulatory position on that issue. And *Chevron* should not apply in a preemption case "if an agency does not speak to the question of pre-emption." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985).

* * *

In the end, the Government has nothing to fear from an affirmance here. FERC presumably had the authority to take all of the actions it took in the wake of the index manipulation scandal, and FERC has a full set of tools going forward to police similar conduct. The only issue here is preemption. And because the NGA reserves to the states the authority to regulate retail transactions and to apply their traditional antitrust law to gas companies, there is no preemption. Any other outcome would distort a statute meant to fill a regulatory gap into one that usurps rather than complements long-standing state authority. Congress would never have imagined, much less condoned, such a result.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Jeffrey L. Fisher
Brian Wolfman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jennifer Gille Bacon
Counsel of Record
William E. Quirk
Gregory M. Bentz
Anthony Bonuchi
Andrew J. Ennis
POLSINELLI PC
900 W. 48th Place
Kansas City, MO 64112
(816) 753-1000
jbacon@polsinelli.com

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