No. 13-271

IN THE

Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., et al.,
Petitioners,

v.

LEARJET INC. et al.,
Respondents.

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

BRIEF OF ELECTRIC POWER SUPPLY ASSOCIATION, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, NATURAL GAS SUPPLY ASSOCIATION, AND WESTERN POWER TRADING FORUM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Electric Power Supply Association ("EPSA") is a national trade association that represents the competitive power industry and is incorporated under the laws of the District of Columbia. EPSA's members include sixteen companies, along with numerous supporting members, and state and regional partners that represent the competitive power industry in their respective regions. The competitive (non-utility) generation sector as a whole represents forty percent of the installed electric generating capacity in the United States. As providers and marketers of wholesale power supply, EPSA members have significant financial investments in electric generation and electricity marketing operations across the country. Although the decision below construed the Natural Gas Act ("Natural Gas Act" or "NGA"), 15 U.S.C. §§ 717 *et seq.*, and though the two statutes are distinguishable in certain relevant respects, precedents construing the NGA often are invoked in interpreting the similar provisions of the Federal Power Act ("Federal Power Act" or "FPA"), 16 U.S.C. §§ 791a *et seq.*, which governs interstate markets for electricity. *See, e.g.*, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981). EPSA's members compete in the wholesale electricity markets and would be affected by any extension of

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[1] *Amici* provided respondents with timely notice of their intent to file this brief. All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

the Ninth Circuit's decision to electricity matters. EPSA's organizational purpose is, among other things, to promote a favorable market environment for the competitive electric industry; to support the development of state and federal legislative and regulatory policies that encourage the development and implementation of competitive wholesale markets for electricity; and to improve the public's awareness of the competitive electric industry. In furtherance of this mission, EPSA has participated as an *amicus* in a number of cases before this Court. *See, e.g., Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010); *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527 (2008).

The Interstate Natural Gas Association of America ("INGAA") is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA represents virtually all of the interstate natural gas transportation pipeline companies operating in the United States, as well as comparable companies in Canada and Mexico. Its members transport the vast majority of the nation's natural gas through a network of 200,000 miles of pipelines and also operate many interstate natural gas storage facilities. INGAA's members only transport gas; they do not sell it. INGAA's members are regulated by the Federal Energy Regulatory Commission under the Natural Gas Act. INGAA and its individual members have a substantial interest in contract stability, rate certainty, continued investment in energy infrastructure, and in ensuring predictable, rational, and fair law and policy affecting natural gas transportation. To advance those interests INGAA regularly participates as an *amicus* in cases concerning the proper regulation of the industry. *See, e.g.*, *Morgan Stanley*, 554 U.S. 527.

The Natural Gas Supply Association ("NGSA") is a trade association that represents integrated and independent companies that produce and market domestic natural gas. Established in 1965, NGSA encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers. Members of NGSA account for approximately thirty percent of the domestic natural gas production and are shippers on interstate pipelines. NGSA has previously participated as an *amicus* in cases before this Court. *See, e.g.*, *Morgan Stanley*, 554 U.S. 527.

The Western Power Trading Forum ("WPTF") is a California non-profit, public benefit corporation. It boasts a broad-based membership of energy service providers, scheduling coordinators, generators, power marketers, financial institutions, energy consultants, and public utilities, dedicated to enhancing competition in Western electric markets while maintaining the region's current high level of system reliability. WPTF supports development of competitive markets throughout the West and the establishment of uniform rules to facilitate transactions among market participants. To that end, WPTF has participated in important cases where federal courts' decisions have threatened to disrupt the orderly functioning of the electricity markets. *See, e.g., NRG Power Mktg.,* 558 U.S. 165; *Morgan Stanley*, 554 U.S. 527.[2]

SUMMARY OF ARGUMENT

The success of our economy depends in no small part on a vibrant, efficient interstate energy market. For the past three-quarters of a century, our nation has fostered the effective production and distribution of energy through a system of shared regulatory authority between the states and the federal government. That system depends on maintenance of clear, predictable, and sensible lines dividing what subjects are left to the states and what subjects fall within the exclusive jurisdiction of the federal agency Congress charged with regulating interstate transportation and wholesale sales of natural gas and electricity.

The Ninth Circuit's decision in this case has thrown the traditional division into disarray. It has long been understood that under the Federal Power Act and the Natural Gas Act, the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction to regulate the interstate transportation of natural gas and electric transmission as well as the wholesale sales for resale of natural gas and electricity (so-called "jurisdictional sales"). By contrast, states retain jurisdiction over, among other

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[2] This brief represents the position of EPSA, INGAA, NGSA and WPTF as organizations, but not necessarily the views of any particular member with respect to any issue.

things, retail sales.[3] In this case, the Ninth Circuit confronted a practice (alleged manipulation of natural gas price indices) that is "associated with" both jurisdictional and non-jurisdictional sales. The Ninth Circuit held that federal law did not preempt state antitrust claims based on the alleged manipulation of the indices because the indices were associated with non-jurisdictional sales (such as retail sales).

That holding turns established federal preemption doctrine on its head and threatens to substantially disrupt the wholesale energy industry. The industry has long understood that if a practice falls within federal jurisdiction, that jurisdiction is exclusive; there is no need to survey the law of all the states (including often vague antitrust and consumer protection statutes) to determine the standard with which the industry must comply. But the principle applied in this case opens the door to massive litigation against transporters and sellers of wholesale gas and electricity whenever the plaintiffs' bar is able to hypothesize some plausible association between the challenged conduct and retail prices *even when* the conduct would otherwise obviously fall within FERC's jurisdiction. For example, an end user might sue a natural gas pipeline for taking part

[3] "Jurisdictional sales" refers to transactions falling within FERC's jurisdiction, including, for example, interstate sales of gas for resale. *See* Pet. App. 16a. "Non-jurisdictional sales" refers to transactions falling outside of FERC's jurisdiction, such as retail sales and "first sales." *Id.* 17a.

of its pipeline off line for repairs in response to a natural disaster, as authorized by the pipeline's FERC-approved tariff, on the theory that the action illegally increased retail prices.

This result is untenable. Congress established a national expert energy regulator precisely to avoid the confusion, inefficiency, and unfairness that arise when interstate commerce is subject to separate (and potentially conflicting) regulation by each of the forty-eight states plus the District of Columbia that buy and sell natural gas and electricity in interstate commerce.[4] Unless and until reversed by this Court, the decision in this case will engender uncertainty in the energy industry that will interfere with long-term planning, encourage litigation, and increase energy costs at a time when our economy can least afford it.

ARGUMENT

I. The Ninth Circuit's Decision Threatens The Careful Division Of Jurisdiction Congress Established For The Natural Gas And Electric Power Industries.

A well-functioning energy industry is vital to the national economy. The United States has an abundant, diverse supply of natural gas that can be developed prudently and economically as well as a well-developed natural gas transportation infrastructure that provides consumers with access to

[4] There are no sales of natural gas or electricity in interstate commerce in Alaska or Hawaii.

that supply.[5] The enormous increase in proven and probable reserves in North America has provided tangible benefits to consumers in the form of lower home heating and electricity bills, revitalized the United States industrial market, and accelerated the power generation industry's move to natural gas. Natural gas production companies in the United States employed 600,000 people, generating $180 billion in labor income for American workers in 2012 alone. The development of shale gas is projected to add 1.4 million more jobs domestically by 2035.[6]

To take advantage of this abundant resource, the United States and Canada will require investments in natural gas gathering, processing, storage, and pipeline infrastructure in excess of $205 billion over the next twenty-five years. This will include 1400 miles per year of interstate pipelines.[7]

The success of our national energy markets depends in significant part on the maintenance of a sensible, predictable, and stable regulatory regime.

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[5] *See* Energy Information Administration, *Annual Energy Outlook 2012 Early Release Overview*, *available at* http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2012).pdf.

[6] *See* IHS Global Insight, *America's New Energy Future: The Unconventional Oil and Gas Revolution and the US Economy*, *available at* http://www.ngsa.org/download/analysis_studies/Americas_New_Energy_Future_State_Highlights_Dec2012.pdf.

[7] *See* The INGAA Foundation Inc., *North American Natural Gas Midstream Infrastructure Through 2035: A Secure Energy Future*, June 28, 2011, *available at* http://www.ingaa.org/File.aspx?id=14911.

The Ninth Circuit's decision in this case, however, threatens to disrupt well-functioning interstate wholesale energy markets by sowing confusion and uncertainty regarding the proper division of state and federal authority over an increasingly important sector of the nation's economy. The petition therefore should be granted.

A. Congress Has Long Retained Exclusive Federal Authority Over Interstate Energy Transactions.

Because natural gas basins and electric generation are situated unevenly throughout the country, often far from consumption areas, the interstate sale and movement of natural gas and electricity across state lines have long been the norm in most parts of the nation. Over the decades, the natural gas and electric power industries have invested billions of dollars to develop the infrastructure needed to efficiently produce, transport, and distribute energy to every corner of the country, often providing energy that is cheaper and cleaner than is locally available.

In the early decades of the last century, Congress recognized that the inherently interstate nature of the national markets for electricity and natural gas required uniform, federal regulation. *See, e.g.*, 15 U.S.C. § 717(a) (finding that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest"); 16 U.S.C. § 824(a) (same with respect to electricity). Congress intended the federal government to retain jurisdiction over the interstate transportation of natural gas and wholesale sales of natural gas and electricity even in those instances in which FERC does not have complete jurisdiction over all commodity sales.

Accordingly, in the Federal Power Act and the Natural Gas Act, Congress invested the Federal Power Commission (FERC's predecessor) with exclusive authority to regulate the interstate transportation and wholesale sales of electricity and natural gas.[8] This Court has long recognized that state regulation of practices falling within FERC's jurisdiction "disturb[s] the uniformity of the federal scheme" Congress intended, by forcing energy companies "to comply with varied state regulations" rather than the single regulatory regime established by an expert federal commission. *Transcon. Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 423 (1986). For that reason, it is "common ground that if

[8] To be sure, there are important and relevant distinctions between FERC's jurisdiction over, and its regulation of, rates for wholesale sales (*i.e.*, sales for resale) under the FPA and the NGA. In the case of sales for resale of natural gas, Congress has decontrolled rates for so-called "first sales," *see* 15 U.S.C. § 3431(b)(1)(A), and FERC has, by regulation, pre-authorized non-"first sales" at "negotiated rates," *see* 18 C.F.R. §§ 284.402(a), 284.284(a). In contrast, wholesale sales of electricity in interstate commerce remain subject to comprehensive and seller-specific rate regulation by FERC under the FPA. *See, e.g.,* 18 C.F.R. §§ 35.36-35.42. Nonetheless, because the FPA and NGA share common language that has long been read "interchangeably," *see, e.g.*, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); Pet. App. 33a n.12, there is a significant risk that the Ninth Circuit's decision in this case will be cited as precedent for suits against electricity suppliers as well as members of the natural gas industry.

FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring in the judgment); *see, also, e.g.*, *id*. at 377 ("[A] state agency's effort to regulate" interstate electricity transportation or wholesale sales "must fall when they conflict with or interfere with federal authority over the same activity."); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988) ("Congress has occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.").

B. The Ninth Circuit's Decision In This Case Departs From Settled Preemption Principles And Threatens To Sow Confusion And Uncertainty In The Energy Industry.

Despite this Court's prior decisions, the Ninth Circuit held in this case that states may regulate conduct otherwise falling within FERC's exclusive jurisdiction, so long as the practice *also* is "associated with" a subject falling within state jurisdiction, such as a practice that has an effect on both wholesale and retail prices. Pet. App. 36a. That conception of preemption threatens to unravel the careful division of regulatory authority Congress intended and to generate great uncertainty in the natural gas and electric power industries.

1. Petitioners are natural gas marketing companies that buy and sell natural gas in the wholesale market, and also sell gas directly at retail to industrial and commercial consumers for their own use. Rates in both wholesale and retail transactions

often are set with reference to "index prices" published by trade publications based on survey responses from various market participants.[9] Pet. App. 13a-14a. Respondents, industrial and commercial retail purchasers of natural gas, brought state law antitrust claims alleging that petitioners unlawfully manipulated the index prices by providing false information in the surveys used to compile the indexes and by engaging in "wash sales" that artificially affected market prices. *Id*. 12a & n.1. This alleged unlawful conduct would have directly affected transaction prices in both the FERC-jurisdictional wholesale market and the retail market to the extent transactions in those markets were priced with reference to a manipulated published index price. Or, in the Ninth Circuit's parlance, the alleged misconduct could be considered "associated with" both the jurisdictional and non-jurisdictional sales. *Id*. 24a.

The Ninth Circuit thus viewed the case as presenting the question whether "Section 5(a) of the NGA . . . preempt[s] state antitrust claims arising out of price manipulation associated with transactions falling outside of FERC's jurisdiction." *Id*. 24a. Applying a presumption against preemption, the court adopted a "narrow reading" of the NGA's preemptive effect. *Id*. 23a-24a. It held that "the NGA does not preempt state antitrust challenges to rates and practices associated with . . . non-

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[9] The indices reflect a single price that does not distinguish between wholesale and retail sales; there is not, for example, a separate index for wholesale prices and another for retail prices.

jurisdictional sales," even if those practices *also* are associated with, and affect, jurisdictional rates. *Id*. 36a. To allow FERC exclusive jurisdiction over practices affecting both wholesale and retail sales, the court believed, would amount to excluding state jurisdiction over "the same transactions (first sales and retail sales) that Congress expressly exempted from the scope of FERC's jurisdiction." *Id*. 28a.

Under this standard, there was no preemption in this case because the alleged manipulation was associated with both jurisdictional and non-jurisdictional sales. *Id*. 24a.

2. As petitioners have shown, there is no basis in this Court's precedents for the Ninth Circuit's conclusion that a practice otherwise falling within federal jurisdiction may nonetheless be subject to state regulation and litigation so long as it also affects retail prices or other non-jurisdictional sales. The fact that FERC has not been given jurisdiction over *all* sales of natural gas does not diminish the NGA's preemptive effect on state regulation of *practices* that *do* fall within the federal government's jurisdiction. *See, e.g.*, *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 865-67 (Tenn. 2010).

The Ninth Circuit's contrary holding has thrown into doubt longstanding understandings about what industry practices are subject to exclusive federal jurisdiction and when the industry must look to state law to decide how to conduct its business. After the Ninth Circuit's ruling, the plaintiffs' bar need only hypothesize some plausible connection between a practice ordinarily falling within FERC's jurisdiction and retail prices in order to justify bringing suit for potentially billions of dollars on state-law grounds before a lay jury in any state in the Union. Because of the close connection between wholesale and retail prices, *many* practices falling within federal jurisdiction over wholesale sales *also* affect retail prices, just as they would in any industry. For example, if an interstate pipeline announced pursuant to its FERC-approved tariff that it needed to reduce pipeline capacity in response to a natural disaster, and thus could not satisfy all of its contractual commitments to deliver gas to its customers, an industrial end user might argue that its cost of purchasing natural gas at retail was greater than it should have been due to the pipeline's actions of reducing its transportation capacity. Similarly, if FERC authorized a pipeline to increase its tariff rates due to an accounting modification, for example, an industrial end user might argue that it paid too much at retail for the cost of gas due to the pipeline's rate increase at wholesale.

Allowing state litigation over practices properly falling within federal jurisdiction undermines the foundation of the national regulatory regime by subjecting energy companies to the multiple, potentially conflicting demands of forty-eight different state masters and the District of Columbia. Because it may be difficult, if not impossible, to conduct business differently in different states, the practical effect of overlapping state and federal authority may well result in companies having to comply with the most restrictive of the various state rules. As a result, FERC's expert judgment as to practices that it has deemed permissible or even advantageous for the economy may be effectively forbidden by a handful of more parochial state regulatory interests. And even when companies are not subject to directly conflicting commands, discerning and complying with multiple regulatory regimes substantially increases the cost, and decreases the efficiency, of the national energy markets. Moreover, the problem is exacerbated when the state rule effectively is implemented through litigation before lay juries, under often-vague state antitrust or consumer protection statutes, rather than by expert agencies through a deliberate administrative process.

Just the uncertainty that the Ninth Circuit's decision creates over the proper division of regulatory authority between states and the federal government is harmful. Even if questions of federal preemption are eventually resolved correctly — either by subsequent decisions of the lower courts or by this Court — delay in bringing clarity to the law subjects the industry to uncertainty that can interfere with long-term planning, discourages needed capital investment, increases operating costs, and degrades the overall efficiency of the energy system. Only the intervention of this Court, and the re-establishment of settled preemption principles, can restore the clarity and proper division of regulatory authority this important segment of the national economy requires.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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