

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

**BRIEF OF INTERSTATE NATURAL GAS ASSOC.
OF AM., NATURAL GAS SUPPLY ASSOC., AND
INDEPENDENT PETROLEUM ASSOC. OF AM., AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

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. 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 Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008).

¹ 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. A blanket consent letter on behalf of all the parties is on file with this Court.

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.

Since 1929, the Independent Petroleum Association of America (IPAA) has served as a voice for the exploration and production segment of America's oil and natural gas industry, and advocates its members' views before the U.S. Congress, the Administration, and federal agencies. Today, IPAA represents more than ten thousand independent oil and natural gas producers and service companies across the United States. Independent producers develop ninety-five percent of the nation's oil and natural gas wells, produce fifty-four percent of domestic oil and produce eighty-five percent of domestic natural gas. The average independent has been in business for twenty-six years and employs twelve full-time and three part-time employees. IPAA's members are the face of small business in the

oil and natural gas industry and support more than two million direct jobs in the United States.²

SUMMARY OF ARGUMENT

The natural gas industry is in the midst of a massive build-out of infrastructure required to take advantage of North America's increasingly abundant supply of domestic energy resources. To permit advantageous use of cleaner burning natural gas – including as a replacement for retiring coal-fired electric generation facilities – the industry will need to spend hundreds of billions of dollars in the next two decades expanding what is, in large part, an inherently interstate system. These expensive, long-term investments require a transparent and stable regulatory environment in which companies easily can discern their legal obligations and the proper regulatory authority for any given activity. The Ninth Circuit's preemption analysis in this case deprives the industry of that needed clarity and certainty.

Until now, knowing whether a particular activity was subject to state or federal control was a relatively straightforward matter. Section 1(b) of the Natural Gas Act (NGA) establishes exclusive federal jurisdiction over interstate transportation of natural gas and the sale in interstate commerce of natural gas for resale (*i.e.*, wholesale sales), as well as over the natural gas companies engaged in those

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

activities. 15 U.S.C. § 717(b). Section 5 of the Act further authorizes Federal Energy Regulatory Commission (FERC) oversight of “any rule, regulation, practice, or contract affecting” the rate charged for such sales or transportation. *Id.* § 717d(a). Under this Court’s decisions, no state could exercise jurisdiction over any matter falling within that authority. On the other hand, as Section 1(b)’s proviso expressly provides, anything *not* falling within federal jurisdiction – such as retail sales – was left to the states. *Id.* § 717(b).

Although the Ninth Circuit’s decision is not a model of clarity, it seemingly held that there is an exception to this general rule: even if a practice (like the market manipulation alleged in this case) would otherwise fall within federal jurisdiction under Section 5, states may nonetheless permit private state-law suits against companies for engaging in that conduct so long as the practice is also “associated with” retail prices or other aspects of the natural gas industry left to state control by the Section 1(b) proviso. On that view, even if FERC approved a particular practice, industry participants could be sued in state court on the theory that the practice has a retail effect and violates local law. As this case illustrates, such litigation can be enormously disruptive, putting claims for hundreds of millions of dollars in the hands of local lay juries who may lack the expertise or national outlook required to ensure a properly functioning interstate energy market. The prospect of such litigation necessarily increases the risk (and, therefore, the cost) of the investments required to maintain and expand our natural gas infrastructure. Those costs are ultimately passed on

to consumers and business, with radiating effects throughout the economy.

This is not the scheme Congress intended. The Ninth Circuit over-read Section 1(b)'s proviso, failing to recognize that while Section 5 generally gives FERC authority over practices that "affect" jurisdictional sales, there is no parallel provision giving states jurisdiction over practices that affect, or are otherwise associated with, non-jurisdictional sales. That asymmetry makes perfect sense: because there are any number of practices that have both wholesale and retail effects, giving both states and FERC "affecting" jurisdiction would lead to the inevitable overlapping authority and potential for conflict seen in this case.

The natural gas industry cannot perform its important role if it is forced to discern and comply with the commands for dozens of different masters, all claiming the power to regulate the same practice. Because the Ninth Circuit's analysis permits that untenable result, its judgment should not stand.

ARGUMENT**I. The Natural Gas Act Imposes An Important And Sensible Division Of Power Between The Federal Government And The States.**

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 robust natural gas transportation infrastructure that provides consumers with access to that supply.³ The enormous increase in proven and probable reserves in North America has generated 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 cleaner burning natural gas. At the same time, natural gas activity in the United States contributed more than 900,000 jobs to the economy, and generated more than \$64 billion in labor income for American workers, in 2012

³ See Energy Info. Admin., *Annual Energy Outlook 2012 Early Release Overview*, available at [http://www.eia.gov/forecasts/aeo/er/pdf/0383er\(2012\).pdf](http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2012).pdf).

alone.⁴ The development of shale gas is projected to add 1.4 million more jobs domestically by 2030.⁵

The success of our national energy markets depends in significant part on the maintenance of a sensible, predictable, and stable regulatory regime. The rule seemingly adopted by the Ninth Circuit below is neither sensible nor predictable and would sow uncertainty in the energy industry at a time when confidence and stability are most needed.

A. The Energy Industry Needs Predictability And Clear Lines Of Authority.

By its nature, much of the natural gas industry is extensively interstate. Because natural gas supply basins are broadly situated throughout the country, often far from consumption areas, the interstate sale and movement of natural gas across state lines has long been the norm in most parts of the nation. Over the decades, the natural gas industry has invested trillions of dollars to develop the infrastructure needed to efficiently produce, transport, and

⁴ See IHS, Inc., *America's New Energy Future: The Unconventional Oil and Gas Revolution and the US Economy, Volume 1: National Economic Contributions* 25, 32 (Oct. 2012), available at http://marcelluscoalition.org/wp-content/uploads/2012/10/IHS_Americas-New-Energy-Future.pdf (hereinafter "New Energy Future").

⁵ See Consumer Energy Alliance, *North America's New Energy Future* 16 (2012), available at http://consumerenergyalliance.org/wp/wp-content/uploads/2012/09/CEA-Report-North-Americas-New-Energy-Future_Full_FINAL_LowRes.pdf.

distribute energy to every corner of the country, often providing energy that is cheaper and cleaner than is locally available.

Due to increased energy demands, coupled with increased domestic supplies of natural gas resources, the natural gas industry is in the midst of a massive expansion of production and transportation capacity. Since 2000 alone, the oil and natural gas industry invested over \$2.7 trillion dollars in U.S. capital projects to meet the growing demand for oil and natural gas.⁶ That investment has already borne fruit: since 2007, domestic natural gas production has increased nearly twenty-five percent.⁷ The government projects that domestic natural gas production will continue to grow for decades to come, increasing by more than fifty percent by 2040.⁸

As a consequence, even while demand for natural gas continues to grow,⁹ imports have fallen to their

⁶ See Energy Tomorrow, Capital Spending for U.S. Projects, <http://www.energytomorrow.org/economy/capital-spending-for-us-projects> (hereinafter “Energy Tomorrow”).

⁷ See Energy Info. Admin., U.S. Natural Gas Gross Withdrawals (Aug. 29, 2014), <http://www.eia.gov/dnav/ng/hist/n9010us2a.htm> (showing 24.6 million cubic feet withdrawn in 2007, compared to 30.1 million cubic feet in 2013).

⁸ See Energy Info. Admin., *Annual Energy Outlook 2014 With Projections to 2040* A-27 (April 2014), available at [http://www.eia.gov/forecasts/aeo/pdf/0383\(2014\).pdf](http://www.eia.gov/forecasts/aeo/pdf/0383(2014).pdf) (hereinafter “Energy Outlook 2014”).

⁹ Energy Info. Admin., U.S. Natural Gas Total Consumption (Aug. 29, 2014), <http://www.eia.gov/dnav/ng/hist/n9140us2a.htm>.

lowest levels in more than fifteen years.¹⁰ At the same time, the increased production of natural gas has allowed electric utilities to retire many coal-fired generators, replacing them with cleaner burning natural gas generation.¹¹ That trend is expected to continue, with natural gas accounting for forty-two percent of the projected increase in electricity generation between now and 2040.¹²

To take advantage of the increased availability of this North American resource, the energy industry must undertake further immense capital projects to increase the system's capacity at every stage of production and transportation. A recent INGAA Foundation report projected that the United States and Canada will need to invest \$313 billion in the next twenty-two years on natural gas midstream assets, including new mainlines, natural gas storage fields, lateral lines to/from storage, power plants and processing facilities, LNG export facilities, and related equipment.¹³ This amounts to more than \$14 billion per year through 2035. Another \$5.1 trillion

¹⁰ See Energy Info. Admin., U.S. Natural Gas Imports (Aug. 29, 2014), <http://www.eia.gov/dnav/ng/hist/n9100us2a.htm>.

¹¹ See Energy Outlook 2014, *supra* note 8, at MT-26.

¹² *Id.*

¹³ See INGAA Found., Inc., *North American Midstream Infrastructure Through 2035: Capitalizing on Our Energy Abundance* 14, 28 (March 18, 2014), available at <http://www.ingaa.org/Foundation/Foundation-Reports/2035Report.aspx>.

in expenditures related to unconventional oil and gas development will also be required.¹⁴

These massive projects are necessarily long-term investments that require substantial advanced planning. The energy industry is “characterized by long lead times [and] huge capital requirements,” with “very real investment risks.”¹⁵ Obtaining regulatory approval for, and then building, new facilities can take several years and often much more, and can cost billions. Once completed, these facilities cannot feasibly be moved if they prove unprofitable. And given their great expense, such projects pay for themselves only after many years of operation.

Accordingly, for the energy industry, “[p]lanning and investment cannot be turned on and off like a spigot, without entailing huge, potentially non-recoverable costs and delaying urgently needed projects.”¹⁶ Because “the industry must plan and operate under these long lead times, it is hypersensitive to minimizing risk over the course of its investments.”¹⁷

A very material source of risk in the sector arises from regulatory uncertainty. In particular, investors must be assured that the investments they make today will not be rendered unprofitable, or significantly riskier, tomorrow by changes in the

¹⁴ See *New Energy Future*, *supra* note 4, at 7.

¹⁵ See *Energy Tomorrow*, *supra* note 6.

¹⁶ *Id.*

¹⁷ *Id.*

basic rules of the game or their inconsistent application. It is therefore critical that the industry know who its regulators are, and the scope of the regulators' authority. It is likewise imperative that the industry avoid the potential for conflicting legal obligations that arises when the same practices are subject to regulation by multiple jurisdictions.

B. Congress Intended A Clear, Bright-Line Division Of State And Federal Authority Over The Natural Gas Industry.

Congress enacted the Natural Gas Act, 15 U.S.C. §§ 717-717w, to provide the necessary uniformity and predictability through national regulation of the interstate aspects of natural gas transportation and sales. *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”). Specifically, the Act removed from state regulation interstate transportation and wholesale sales of natural gas, substituting in its place a federal regulatory regime.

As most relevant here, Section 1(b) of the Natural Gas Act extends federal jurisdiction over interstate transportation of natural gas and the sale in interstate commerce of natural gas for resale, as well as over the natural gas companies engaged in those activities. 15 U.S.C. § 717(b). Section 5 of the Act further authorizes Federal Energy Regulatory Commissions (FERC) oversight over “any rule, regulation, practice, or contract affecting” the rate

charged for such sales or transportation. *Id.* § 717d(a).¹⁸

In our federal system, what is not reserved to the federal government is left for the states. As a consequence, and as expressly set forth in Section 1(b), states retain authority over “any *other* transportation or sale of natural gas” – such as intrastate sales and transportation, and retail sales – as well as the “facilities used for such distribution” and the “production or gathering of natural gas.” 15 U.S.C. § 717(b) (emphasis added).

When it comes to natural gas, “[t]here can be no divided authority over interstate commerce.” *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 377 (1988) (citation and internal quotation marks omitted). Thus, where federal jurisdiction applies, it is exclusive. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988); *Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 423 (1986). As a consequence, it is “common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.” *Miss. Power & Light Co.*, 487 U.S. at 377 (Scalia, J., concurring in the judgment); *see also id.* at 377 (majority opinion) (“[A] state agency’s efforts to

¹⁸ In describing the scope of federal preemption, this brief refers to “federal jurisdiction” rather than “FERC jurisdiction” because there are some areas Congress has reserved for exclusive federal regulation but has withheld from FERC plenary jurisdiction, for example, leaving the rates for “first sales” to be regulated by market forces. *See Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 421-25 (1986).

regulate” interstate electricity transportation or wholesale sales “must fall when they conflict with or interfere with federal authority over the same activity.”) (citation and internal quotation marks omitted).

To be sure, Congress did not intend the federal government to occupy the entire field in which the natural gas industry operates. As noted, states retain jurisdiction over gas production, intrastate transportation, and retail sales. In addition, Congress has deprived FERC of authority over some natural gas sales otherwise falling within exclusive federal jurisdiction, such as “first sales.” *See Transcon. Gas Pipe Line Corp.*, 474 U.S. at 412; *Pet. App.* 25a & n.10. But 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 regulations of practices that do fall within the federal government’s jurisdiction. *See Transcon. Gas Pipe Line Corp.*, 474 U.S. at 422 (explaining that FERC’s inability to “regulate directly the prices” for first sales, “has little to do with whether state regulations that affect a pipeline’s costs and purchasing patterns impermissibly intrude upon federal concerns”).

Providing exclusive federal jurisdiction over the interstate aspects of the industry thus creates a nationally uniform regulatory regime for a national enterprise, thereby avoiding the confusion, cost, and potential for conflict that would arise if each state could regulate a portion of the inter-related systems or attempt to frustrate the interstate transportation and sale of natural gas for resale by doing indirectly what it could not do directly. *See, e.g., id.* at 423; *N.*

Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 91-92 (1963).

II. The Ninth Circuit's Preemption Analysis Contravenes Established Understandings Of The Role Of The State And Federal Governments In The Natural Gas Industry.

The specific result in this case is less important to amici than the rules governing the preemption analysis. On that score, the basis of the Ninth Circuit's decision is not entirely clear. The court of appeals acknowledged that under Section 5, FERC generally has jurisdiction over practices of natural gas companies that affect jurisdictional rates. *See* Pet. App. 24a. At the same time, the court did not question that the index manipulation alleged in this case directly affected jurisdictional rates (it did not, for example, hold that FERC lacked jurisdiction because the connection between the alleged manipulation and jurisdictional rates was too attenuated). Instead, the court held that the plaintiffs' claims were not preempted because they arose from "price manipulation associated with transactions falling outside of FERC's jurisdiction." *Id.*; *see also id.* 31a-32a.

The court never explains what it means by "associated with transactions" falling outside of FERC jurisdiction. It may have meant that the indices reflected some nonjurisdictional sales. Or it may have meant that the indices were used to set prices for nonjurisdictional sales, such as retail sales. Or both. But whatever it meant, the court did not deny that the alleged manipulation was "associated with" *jurisdictional* transactions in the exact same

sense – *i.e.*, the indices reflected, and affected, jurisdictional sales as well. *See* Pet. App. 14a (court of appeals’ description of indices); Pet. App. 112a (district court finding that indices “are the method by which jurisdictional rates are set and embody jurisdictional rates”).

The Ninth Circuit nonetheless held that respondents’ claims were not preempted, reasoning that construing FERC’s exclusive jurisdiction to extend to “price manipulation associated with nonjurisdictional sales would risk nullifying the jurisdictional provisions of Section 1(b), which reserve to the states regulatory authority over nonjurisdictional sales.” Pet. App. 31a-32a. The decision thus seems to hold that the proviso in Section 1(b) reserves to the states authority to regulate any conduct “associated with” nonjurisdictional transactions, even if the conduct would also affect jurisdictional prices sufficient to trigger FERC jurisdiction under Section 5. That interpretation threatens to unravel the careful delineation between state and federal of authority in the NGA.

A. Permitting State Jurisdiction Based On The Retail Effects Of Conduct Otherwise Falling Within Federal Jurisdiction Is Contrary To The Text And Structure Of The NGA.

To the extent the Ninth Circuit believed that the NGA gives the states exclusive jurisdiction over any practice that is “associated with” nonjurisdictional sales, even if the practice is also “associated with”

jurisdictional sales, its analysis turns the statute on its head.

1. Although the Ninth Circuit’s interpretation is premised on a supposed reading of the reservation of state authority in Section 1(b), the text of the provision gives it no support. Section 1(b)’s proviso reserves to the states authority over certain practices based on their *nature*, not their *effects*. That is, states retain jurisdiction over the “transportation” or “sale” of natural gas not subject to federal authority, including “local distribution” of natural gas, as well as the “production” and “gathering” of natural gas. So the question the Ninth Circuit should have asked is whether the practices at issue *constitute* a retail sale of natural gas, not whether the practice was “associated with” retail sales.

Congress provided FERC authority over certain practices that “affect” jurisdictional rates in Section 5. But, critically, there is no parallel provision reserving states similar jurisdiction over practices that affect nonjurisdictional rates. Nor can the Section 1(b) provision be read impliedly to provide states such broad authority. To the contrary, this Court has held that “[e]xceptions to the primary grant of jurisdiction in section (1(b)) are to be strictly construed,” precluding an expansive interpretation of Section 1(b)’s proviso. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 679 (1954) (alterations in original).

Thus, in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court rejected the claim that the Section 1(b) proviso gave states jurisdiction to regulate a pipeline’s curtailment of retail deliveries in times of shortage, despite the

curtailment's obvious effect on direct retail sales (*i.e.*, the curtailment precluded some retail sales from taking place). *See id.* at 637-38. The Court explained that the "proviso of § 1(b) withheld from [FERC's predecessor] only rate-setting authority with respect to direct sales," and did not serve to limit the federal agency's otherwise undisputed authority to regulate transportation of gas from interstate pipelines. *Id.*

Similarly in this case, the Section 1(b) proviso cannot be read impliedly to reserve to the states powers that are otherwise assigned to the federal government. The asymmetry between federal jurisdiction (which includes power over practices that "affect" jurisdictional rates) and the jurisdiction reserved to the states in Section 1(b) (which omits any parallel "affecting" power), is essential to the statutory scheme. Construing Section 1(b) to give states jurisdiction over any practice that affects non-jurisdictional rates, even if the practice also directly affects jurisdictional rates, would create inevitable conflict within the statute and could subject companies to precisely the hodge-podge of regulation Congress intended to spare them.

As this case illustrates, a particular practice may well be "associated with" or affect both jurisdictional and non-jurisdictional rates and practices. For example, a regulated company may wish to issue new securities that will affect its cost structure and, thereby, its rates. *See Schneidewind*, 485 U.S. at 307. If the company makes both jurisdictional and non-jurisdictional sales, the securities issuance could well affect both. In another example, an interstate pipeline may find that it needs to reduce pipeline capacity temporarily (perhaps due to damage from a

natural disaster or equipment outages) and therefore cannot satisfy all of its contractual commitments to deliver gas to its customers. *Cf. La. Power & Light Co.*, 406 U.S. at 624-28 (case in which natural gas shortages led to curtailment of deliveries). The drop in deliveries could affect both wholesale and retail prices.

On the Ninth Circuit's apparent reading, Section 1(b) gives states the exclusive right to regulate such practices on the basis of their retail effect, while Section 5 gives FERC that same exclusive jurisdiction given their effect on jurisdictional sales. Instead of deciding which provision should trump the other, it is far more sensible to read Section 1(b) according to its plain terms, which do not include the broader power of exclusive jurisdiction over every practice "associated with" retail and other non-jurisdictional transactions.¹⁹

¹⁹ Of course, Section 5's "affecting" jurisdiction is not unlimited either. FERC may not exercise authority over practices (say, state minimum wage laws) whose effect on jurisdictional rates is unduly attenuated. Nor does Section 5 provide FERC a means to exercise authority that has been expressly withheld from it – for example, the power to set prices for "first sales" or the direct regulation of natural gas production. *See* 15 U.S.C. §§ 717(b), 3431(a)(1)(A), (b)(1)(A); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514 (1989). But the Ninth Circuit did not find that the index manipulation alleged in this case was itself a non-jurisdictional retail sale; it based jurisdiction on the belief that the manipulation was "associated with" retail sales. Pet. App. 24a, 31a-32a. As noted, that power is not reserved to the states by Section 1(b).

B. Allowing States Jurisdiction Over Practices “Associated With” Both Retail And Wholesale Sales Would Contravene The Purposes Of The NGA’s Establishment Of A Uniform Federal Regulatory Regime.

The Ninth Circuit’s apparent holding likewise undermines the basic purposes of NGA preemption.

This Court has repeatedly recognized that “uniformity of regulation . . . was an objective of the Natural Gas Act.” *N. Natural Gas Co.*, 372 U.S. at 91-92; *see also, e.g., Transcon. Gas Pipe Line Corp.*, 474 U.S. at 423 (NGA preemption avoids disruption to “the uniformity of the federal scheme” by avoiding the prospect that “interstate pipelines will be forced to comply with varied state regulations of their purchasing practices”). But allowing states exclusive jurisdiction over practices “associated with” retail rates would subject companies to exactly the diversity of potentially conflicting state legal obligations the NGA was intended to eliminate.

Many of the practices that affect both jurisdictional and non-jurisdictional rates have effects in multiple states, giving rise to the prospect that the same conduct would be subject to regulation (and litigation) under the laws of many jurisdictions. This case is an example: the indices at issue are used nationwide and, as a result, their alleged manipulation led to “a series of class action lawsuits . . . filed around the country,” Pet. App. 19a, alleging violation of various state antitrust laws, *see id.* at 19a-21a.

The Ninth Circuit's apparent rule could thus subject the same conduct to potentially conflicting regulation by up to 48 different states and the District of Columbia.²⁰ It is difficult to overstate the practical problems that would arise if that were the law. To start, just determining what those legal obligations are would be burdensome. Companies would first have to discern whether a practice has a sufficient "association" with non-jurisdictional prices to invoke Section 1(b)'s proviso and, therefore, render the practice subject to state regulation. (In this case, for example, even the Ninth Circuit was unable to explain clearly the sense in which the alleged index manipulation was "associated with" non-jurisdictional sales). And even if it were clear that state law governed, determining what that law required could be difficult. As this case illustrates, often the relevant law would arise from broadly written antitrust or consumer statutes. Pet. App. 20a-21a. *See, e.g., Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (case brought against energy producers under California's Unfair Competition Code, which prohibits "any unlawful, unfair, or fraudulent business act or practice," Cal. Bus. & Prof. Code § 172000).

As this case also illustrates, enforcement of those disparate state laws could be left to the individual judgments of local lay jurors. Even assuming that lay juries are likely to be able to understand the

²⁰ There are no sales of natural gas in interstate commerce in Alaska or Hawaii.

complex matters surrounding many natural gas industry practices, there is every reason to fear that local juries will give greater weight than Congress intended to local interests at the expense of the broader national needs for an effective energy market. *Cf. Louisiana Power & Light Co.*, 406 U.S. at 633 (noting that even expert state regulators can be expected “to regulate in the State, not the national interest”).

At the same time, it is possible that in many cases a jury will never be empanelled because of the *in terrorem* effects of lawsuits often seeking hundreds of millions (if not billions) of dollars. By their nature, the activities of energy companies tend to give rise to enormous claims, given the value of the commodities they sell and the vast numbers of individuals and companies with whom they deal. In this case, for example, the practices challenged in the lawsuit affected hundreds of millions (perhaps billions) of dollars’ worth of retail sales. *See* Cert. Pet. 24. Under the Ninth Circuit’s seeming rule, all a plaintiff’s lawyer would need to do in order to realistically threaten litigation before a lay jury in state court is hypothesize an association between an industry practice and retail prices.

Finally, given the nation’s integrated national market for the transportation and sale of energy, it may be difficult, if not impossible, to conduct business differently in different states. As a consequence, the practical effect of the Ninth Circuit’s rule may well be that companies will be forced to comply with the most restrictive of the various state rules. As a result, practices that the federal government has deemed permissible or even

advantageous for the national economy may be effectively forbidden by a handful of more parochial state regulatory interests.

This kind of legal and financial uncertainty badly interferes with the broad-scale, long-term investments in infrastructure that are needed to promote a healthy national energy system. Uncertainty regarding legal obligations and potential liability increases risk, which both deters needed investment and increases the cost of securing capital, costs that are ultimately passed on to consumers and the broader economy.

C. To The Extent The Ninth Circuit Meant To Authorize Simultaneous Federal Regulation And State Suit Over The Same Practice, That Holding Is Wrong And Even More Destabilizing.

Finally, it seems possible that the Ninth Circuit intended *concurrent* state and federal jurisdiction over practices that affect both jurisdictional and non-jurisdictional sales. That is, although the court of appeals permitted state lawsuits over the alleged market manipulation, it seemingly left open whether FERC had jurisdiction to prohibit (or otherwise regulate) the same conduct. Thus, the court discussed in some detail whether, “[e]ven if FERC did have the statutory authority” to regulate index manipulation associated with retail sales, it had exercised that authority in 2003. Pet. App. 38a. But if the Ninth Circuit had believed that Section 1(b) gave *exclusive* jurisdiction over index manipulation to the states, it would have made no difference whether FERC had, or had not, previously attempted to

regulate that conduct. Perhaps, then, the court of appeals intended to allow FERC the power to regulate index manipulation due to its effects on wholesale prices, while permitting state suits for injuries arising from retail sales.

But that outcome would be even worse. In addition to giving rise to all the problems just discussed, it would also create the possibility that some conduct could be subject to conflicting state and federal law. For example, if FERC authorized a pipeline to increase its tariff rates due to an accounting modification, an industrial end user might bring suit in state court, arguing that it paid too much at retail for the cost of gas due to the pipeline's rate increase at wholesale. Yet this Court has repeatedly held that Congress intended to preclude states from second-guessing federal regulatory decisions, directly or indirectly. *See, e.g., Miss. Power & Light Co.*, 487 U.S. at 375; *Schneidewind*, 485 U.S. at 306-09.

It is no answer that in this case, or any other, state and federal regulations may be substantively consistent. Jurisdiction under the NGA "was not intended to vary from state to state, depending upon the degree of state regulation and of state opposition to federal control." *Phillips Petroleum Co.*, 347 U.S. at 681. Where federal law has occupied the field, states may not exercise any authority over the subject matter, including by subjecting companies to suit in state courts for state-defined remedies (which, as petitioners note, may vary dramatically from what federal law deems appropriate, *see* Petr. Br. 32). *See Schneidewind*, 485 U.S. at 305 ("Congress occupied the field of matters relating to wholesale sales and

transportation of natural gas in interstate commerce.”); *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (“Where Congress occupies an entire field . . . even complementary state regulation is impermissible” because “[f]ield preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.”). To hold otherwise would subject companies to much of the risk and uncertainty of broader state jurisdiction, including the cost of litigating in state court whether the state law rules the plaintiffs seek to enforce (or the remedies they seek) are truly consistent with federal law.

CONCLUSION

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

Respectfully submitted,

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