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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Natural Gas Act preempt state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by end users who purchased gas in retail transactions?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual and business civil liberties, a limited, accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this Court in cases involving preemption issues, to point out the economic inefficiencies that often result when multiple layers of government seek to regulate the same activity. *See, e.g.*, *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005); *Buckman Co. v. Plaintiffs'*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; blanket letters of consent have been lodged with the Clerk.

Legal Comm., 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). WLF also participates in important preemption cases where liability under state tort laws threatens the predictability and uniformity provided by federal regulatory schemes. *See, e.g., Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Bruesewitz v. Wyeth*, 131 S. Ct. 1068 (2011).

WLF is particularly concerned that individual freedom and the American economy both suffer when state law, including state antitrust law, imposes upon an entire industry an unnecessary layer of regulation that frustrates the objectives or operation of specific regulatory regimes, such as (in this case) the Natural Gas Act (NGA) and the Federal Energy Regulatory Commission (FERC). In this case, the rule adopted by the Ninth Circuit exposes natural gas companies to massive state regulation—in the form of state antitrust liability—for conduct that is the exclusive province of a comprehensive federal regulatory regime.

WLF is also concerned that the Ninth Circuit's approach to preemption under the NGA would result in a windfall for enterprising plaintiffs' attorneys, who can circumvent FERC's comprehensive regulatory scheme by simply identifying some practice of interstate gas companies that impacts gas prices, locating a plaintiff who purchased natural gas at retail in a state with generous antitrust damages provisions, then filing suit seeking damages under state consumer protection laws. WLF firmly believes that FERC, not the plaintiffs' bar, should be deciding how interstate natural gas practices are regulated.

STATEMENT OF THE CASE

In 1938, Congress enacted the NGA, which gives the federal government exclusive authority to regulate the wholesale natural gas market, including the practices of natural gas companies affecting wholesale gas rates. *See* 15 U.S.C. § 717 *et seq*. Under §1(b) of the NGA, the FERC enjoys exclusive jurisdiction over (1) the "transportation of natural gas in interstate commerce," (2) most sales of natural gas at wholesale, and (3) "natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b).

The NGA also authorizes FERC to ensure that rates for jurisdictional sales are "just and reasonable." 15 U.S.C. § 717c. To accomplish this aim, § 5 of the NGA empowers FERC to regulate natural gas sellers with respect to "any rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a).

Petitioners are natural gas companies governed by the NGA and FERC's comprehensive regulatory scheme. Respondents, several commercial and industrial end users of natural gas, sued Petitioners in various states under state antitrust law. Pet. App. 67a. Respondents' complaints alleged that Petitioners had engaged in a practice of improperly inflating index rates[2] for natural gas,

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[2] Index rates are published rate compilations, as reported by industry publications, which buyers and sellers use to price natural gas in the wholesale and retail markets.

which allegedly caused Respondents to pay higher retail rates. *Id*. at 14a-15a. The Panel on Multidistrict Litigation consolidated the suits in the District of Nevada. *Id*. at 12a.

Because the evidence was undisputed that Petitioners' alleged practices would necessarily increase wholesale gas prices as well as retail prices, Petitioners moved for summary judgment on the grounds that Respondents' state-law claims were preempted by the NGA. Pet. App. 110a-111a. In other words, Petitioners argued that Respondents' state law claims sought to regulate a "practice . . . affecting" wholesale gas rates under 15 U.S.C. § 717(d)a. *See id*. at 111a.

The district court agreed. Granting summary judgment in favor of Petitioners, the court found that any index manipulation by Petitioners would have unquestionably affected jurisdictional wholesale gas rates. Pet. App. 110a-111a. As a result, the practices challenged by Respondents under state law were subject to FERC's authority over jurisdictional sellers, and thus the state law claims were preempted. *Id.* at 75a. As the district court explained, "[b]ecause FERC's jurisdiction is exclusive where it exists, any state law claims based on any such practices [*i.e*., those affecting wholesale gas rates] are preempted." *Id.*

On appeal, the Ninth Circuit reversed. Pet. App. 25a. Relying on its earlier opinion in *E. & J. Gallo Winery v. EnCana Corp*., 503 F.3d 1027, 1037 (9th Cir. 2007), a decision based almost entirely on the filed-rate doctrine, the appeals court rejected the district court's holding that the NGA provides for

exclusive federal jurisdiction over any practice by a FERC-jurisdictional seller that affects jurisdictional rates. Pet. App. 25a-28a. The panel concluded that federal preemption turns not on whether the lawsuit would have the effect of regulating in the federal field, but rather on the specific kind of transaction (retail or wholesale) by which plaintiffs sustained their alleged injuries. *Id.* According to the appeals court, because Respondents allegedly suffered harm in retail transactions, and the NGA does not regulate retail sales, no preemption exists. *Id.* Under the Ninth Circuit's view, then, state antitrust law trumps FERC's plenary authority any time a practice affecting wholesale rates also happens to affect retail rates.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding simply cannot be squared with this Court's longstanding preemption precedents under the NGA. Since Congress enacted the NGA in 1938, the Court has consistently recognized that Congress intended the NGA to unify regulation in the natural gas wholesale market and to squarely place authority over that market with FERC. At the same time, the Court has taken a dim view of those approaches, such as the one adopted below, that would allow states to disturb the uniformity of the federal scheme that Congress put in place. In drawing the line between state regulations that impair FERC's authority and those that do not, the Court has emphasized that state regulation is preempted if it is "directed at . . .things over which [the NGA] has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

The decision below ignores this well-settled view. Under the Ninth Circuit's approach, Respondents' claims are not preempted because they invoke only the state courts' supervision of state *retail* transactions, which are outside of FERC's jurisdiction, as opposed to wholesale transactions. But § 5 of the NGA exclusively reserves to FERC the power to regulate natural gas sellers with respect to "any rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a). The fact that a given practice may affect retail rates *as well as* wholesale rates is of no consequence. As this Court's prior holdings make clear, the relevant question is whether Respondents' state-court actions are "directed at" conduct in the field that the NGA occupies.

If plaintiffs are allowed to manipulate state-law duties as a backdoor way to regulate practices that affect wholesale rates for natural gas, this Court's field-preemption precedents will be rendered a dead letter. By permitting private plaintiffs to second-guess FERC under the guise of state-law civil suits, the decision below permits juries to reach judgments that differ from FERC's as to how best to regulate natural gas companies' conduct affecting wholesale rates. And given the outsized antitrust damages available in some of the states involved here, the tail of state-law regulation would wag the dog of federal regulation under FERC. That outcome is hardly consistent with the Supremacy Clause. If federal regulatory agencies are to perform the important expert functions assigned to them by Congress, they must have the ability to decide, free

from hindrances imposed by state law, how best to regulate jurisdictional conduct within their given field of expertise.

The Ninth Circuit's preemption analysis turns not so much on any underlying legal principle, but rather on the ability of the ever-creative plaintiffs' bar to identify a wholesale-market practice in the natural gas field that may also plausibly be said to affect prices in the state's retail market. Because the success of that endeavor hinges primarily on the semantics of how broadly the issue is framed, a creative plaintiffs' lawyer will easily be able to make the argument and find a suitable retail plaintiff in a wide range of cases. But a single plaintiffs' lawyer should not be permitted to trump FERC's expertise to decide whether nationwide practices affecting the wholesale market are permissible. Unless reversed by this Court, the Ninth Circuit's decision thus threatens to disrupt the uniform federal regime envisaged by Congress by allowing attorneys motivated by large jury awards rather than regulatory aims to create potentially 50 different (often conflicting) state regulatory regimes binding the natural gas industry.

Finally, contrary to the view of the Ninth Circuit, permitting state antitrust lawsuits to go forward will not "complement" federal efforts to ensure fair competition. Rather, Respondents' state-law suits threaten to create a wildly inconsistent patchwork quilt of state-by-state regulation of the natural gas market. Such a 50-state mishmash of antitrust regimes cannot possibly be harmonized with Congress's goal of achieving a uniform federal standard for the natural gas wholesale market. For

that reason, this Court has routinely found such state laws preempted even if the state law in question purports to enforce exactly the same standards for exactly the same reasons.

ARGUMENT

I. THE NINTH CIRCUIT'S PREEMPTION ANALYSIS CONFLICTS WITH THIS COURT'S OWN PRECEDENTS

The question of whether a state law or rule is preempted by federal law turns on the intent of Congress, which is the "ultimate touchstone." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). The intent of Congress can be determined if it is "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* (quoting *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977).

When Congress enacted the NGA 75 years ago, it explicitly recognized the importance of uniform federal regulation of the natural gas industry. Because "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest," § 1(a) of the NGA provides that uniform regulation of such businesses "is necessary in the public interest." 15 U.S.C. § 717(a). Informed by that clear statement of Congressional policy, this Court has consistently identified uniformity as the central purpose of the NGA, holding that the NGA unifies regulation in the natural gas wholesale market and squarely places authority over that market with FERC. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S.

591, 609-610 (1944) (stating that the "basic purpose" of the NGA was to "occupy the field" as to the "fixing of 'just and reasonable' rates").

At the same time, this Court has scrutinized those approaches that would allow the states to "disturb[] the uniformity of the federal scheme," in light of concerns that such state regulation might "seriously impair [FERC's] authority to regulate" jurisdictional sellers who would then "be forced to comply with varied state regulations of their . . . practices." *Transcon. Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 420-23 (1986). In distinguishing state regulations that impair FERC's authority to regulate the field from those that do not, the Court has consistently held that a state regulation is preempted, regardless of its purported subject area, if it is "directed at . . . things over which [the NGA] has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

In *Schneidewind*, for example, the Court found that the NGA preempted a Michigan statute that required companies transporting natural gas in-state to obtain state approval before issuing securities. Although nothing in the NGA expressly authorizes FERC to regulate the issuance of securities, the Court nevertheless found that Michigan's law "amount[ed] to regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." *Id.* at 304. In so holding, the Court looked to the Michigan law's purpose, which was to prevent natural gas companies from raising equity levels above a certain point so as to ensure that the companies "will charge

only what Michigan considers to be a 'reasonable rate.'" *Id.* at 308. The Court held that such an approach constituted a "regulation of rates" under the NGA and was thus preempted.

Likewise, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 360 n.6 (1988), the Court determined that an agreement among four power companies to allocate power from a nuclear power plant constituted a "contract affecting the wholesale rates . . . of those companies." Consequently, the Court held that Mississippi could not regulate that contract even under the state's undisputed power to regulate retail rates. *Id.* at 374. As the Court explained, "States may not regulate in areas where FERC has properly exercised its jurisdiction to . . . insure that agreements affecting wholesale rates are reasonable." *Id.* As a result, the Court found the state law preempted even though Mississippi was purporting to exercise its power to regulate the *retail* market. *Id.*

The Ninth Circuit's holding simply cannot be reconciled with these precedents. Under the appeals court's approach, Respondents' state law claims are not preempted because they invoke only the state's supervision of *retail* transactions, which are outside of FERC's jurisdiction, as opposed to wholesale transactions. But that misguided approach asks the wrong question. As this Court's prior holdings make clear, the relevant question is whether Respondents' state-law actions are "directed at" conduct in the field that the NGA occupies. The answer to that question is yes—Respondents' suits obviously seek to punish Petitioners' alleged price-reporting and index-manipulation practices (which affect wholesale

rates for natural gas as much as they affect retail rates).

Yet § 5 of the NGA exclusively reserves to FERC the power to regulate natural gas sellers with respect to "any rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a). Under this Court's own NGA-preemption jurisprudence, then, Respondents' claims are preempted. *See Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963) (holding that the NGA "leaves no room either for direct state regulation" in the field "or for state regulations which would indirectly achieve the same result"). Just as *Northern Natural Gas* held that indirect state regulation may not conflict with the NGA, so too state antitrust laws administered by courts may not conflict with the NGA. If instead, as the Ninth Circuit insists, plaintiffs are allowed to manipulate state-law duties as a backdoor way to regulate practices that affect wholesale rates for natural gas, this Court's field preemption precedents will be rendered a dead letter.

II. THE NINTH CIRCUIT'S RULE WOULD DISRUPT A UNIFORM INTERSTATE REGULATORY SCHEME AND SERVE AS AN UNNECESSARY DRAG ON FREE ENTERPRISE

By permitting private plaintiffs to second guess FERC under the guise of state-law civil suits, the decision below permits juries to reach judgments that differ from FERC's as to how to regulate the conduct of natural gas companies that affect wholesale rates. But if federal regulatory agencies

are to perform the important expert functions assigned to them by Congress, they must have the ability to decide, free from hindrances imposed by state law, how best to regulate jurisdictional conduct in their given field of expertise. At the same time, allowing juries to award damages under potentially conflicting state laws would interfere with Congress's delicate balance of statutory objectives and adoption of a uniform federal regulatory scheme, including enforcement via federal antitrust law.

Under the Ninth Circuit's rule, whether a state is permitted (under the Supremacy Clause) to regulate any given wholesale-market practice in the natural gas field hinges on whether that practice can also plausibly be said to affect prices in the state's retail market. Because this approach turns primarily on the semantics of how broadly the issue is framed, a creative plaintiffs' lawyer will easily be able to make the argument and find a suitable retail plaintiff in a wide range of cases. In other words, the Ninth Circuit's preemption analysis turns not on any underlying legal principle, but merely on the amply demonstrated ability of the plaintiffs' bar to identify a suitable party plaintiff.

Natural gas is a fungible commodity widely distributed through a variety of distribution channels, and the interstate markets for natural gas are closely interrelated. It only takes a modicum of imagination to argue that virtually *anything* that happens in the wholesale market, or any other area of the natural gas market regulated by FERC, ultimately affects retail, end-use buyers. Plaintiffs' attorneys will have no trouble finding an economist who, for a fee, will gladly testify that the alleged

industry practice in question—whether it be an accounting practice, shipping practice, or (as here) a price-reporting practice—impacts wholesale and retail rates alike.

As here, a ready supply of potential plaintiffs will not prove difficult to find. Many large end-users of natural gas—including the Respondents in this case—purchase their gas directly from the interstate market, so as to eliminate the costs that accompany a middleman distributor. *See* Am. Petroleum Inst., *Understanding Natural Gas Markets* 19 (2006) ("[M]any industrial customers have the option to purchase natural gas from a marketer or producer instead of from the distribution company."). Once an entrepreneurial plaintiffs' attorney is successful in signing up direct retail purchasers (such as Respondents) as clients, suddenly a state-law claim that would have been preempted for a wholesale purchaser becomes *not* preempted under the Ninth Circuit's rule.

Armed with a suitable plaintiff and a plausible argument for affecting retail rates, the plaintiffs' bar will be able to use the Ninth Circuit's rule to wrest regulatory control away from FERC on matters as technical as how a natural gas wholesaler accounts for depreciation, how it allocates costs of capital expenditures, or how it hedges against financial risk. If a plaintiff can argue that any of these practices affect retail rates, even by merely affecting a natural gas company's cost structure, then the Ninth Circuit's rule will pave the way for the plaintiff to avoid preemption and impose state-law duties on a federally regulated industry. That cannot possibly be the result that Congress intended,

which is why this Court forestalled that possibility with its prescient earlier holdings in *Schneidewind*, *Mississippi Power*, and *Northern Natural Gas*.

Such technical regulatory issues are squarely within FERC's ambit, and only FERC has the required expertise and broad view of the market to regulate natural gas wholesalers intelligently and consistently. But if the Ninth Circuit's approach to preemption is allowed to stand, juries in state courts throughout the country will be empowered to decide whether any given practice—no matter how technical—is inappropriate and subject to liability.

For example, a business transaction that FERC rightly understands to be a bona fide financial hedge—the sort of hedge that American companies engage in every day for perfectly legitimate financial reasons—could now be deemed "manipulative" by a jury applying one of 50 different states' laws, resulting in massive liability for the natural gas company. Even worse, many of these suits are brought as class actions, where only a fraction-of-a-cent impact on each unit of natural gas sold can quickly add up to hundreds of millions of dollars in the hands of a sufficiently motivated plaintiffs' attorney and his experts.

Amicus WLF believes strongly that companies should not be put in a position where they cannot dependably rely on FERC's guidance about what they may and may not do. Nor should a single plaintiffs' lawyer be permitted to trump FERC by deciding whether nationwide practices affecting the wholesale market—practices routinely engaged in by all or most of the natural gas industry—are

permissible. Such uncertainty is the antithesis of the rule of law. Unless reversed by this Court, the Ninth Circuit's decision will disrupt FERC's uniform regime by allowing attorneys motivated by large jury awards to create their own new binding rules for the natural gas industry.

In any event, the Ninth Circuit's highly idiosyncratic approach to field preemption is unnecessary to combat truly anticompetitive practices. This Court has long recognized that the NGA does not displace *federal* antitrust suits challenging the allegedly anticompetitive practices of natural gas companies. *See, e.g., California v. FPC*, 369 U.S. 482 (1962). WLF believes that Respondents' state-law claims are chiefly motivated by a desire to take advantage of certain states' more liberal antitrust damages provisions, *see* Pet. 27-28, and to avoid the unifying force of this Court's antitrust doctrines, by taking refuge in often less well-developed and more plaintiff-friendly state court antitrust jurisprudence. While such state laws may garner much higher jury awards, and thus higher fees for plaintiffs' attorneys, Congress has already determined that such laws are unnecessary to ensure a competitive market for interstate natural gas.

The natural gas industry has proven to be an economic boon throughout much of the country. Unless reversed, the holding below will create vast uncertainty in the marketplace, potentially deterring industry stakeholders from investing hundreds of millions, if not billions, of dollars into the natural gas market, producing an unnecessary drag on the free-market economy. To arrest the harmful

nationwide implications of the Ninth Circuit's opinion, WLF respectfully urges this Court to reverse the misguided holding below.

III. DUAL STATE AND FEDERAL REGULATION OF THE NATURAL GAS WHOLESALE MARKET IS NOT "COMPLEMENTARY"

Equally misguided is the Ninth Circuit's suggestion that state antitrust laws can somehow avoid federal preemption because they merely "complement Congress's intent to move to a less regulated market" by "support[ing] fair competition." Pet. App. 27a. As this Court has repeatedly held, complementarity is no defense against field preemption: "When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to do." *United States v. Locke*, 529 U.S. 89, 115 (2000) (quoting *Charleston & W. Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915)).

The Court has routinely found such "complementary" state laws to be preempted even if the state law in question purports to enforce exactly the same standards, for exactly the same reasons. *See, e.g., Arizona v. United States,* 312 S. Ct. 2492, 2502 (2012) ("Where Congress occupies an entire field . . . even complementary state regulation is impermissible."); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235 (1947) ("[I]f a licensed warehouseman complied with each requirement, he did all that he need do. He could not be required by

a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act."). Simply put, a separate system of state regulation over the natural gas wholesale market is not "complementary," despite sharing the goals of the NGA, because it conflicts with and disrupts a clear federal policy of uniformity. In any event, none of the generally applicable antitrust state laws at issue here are expressly aimed at natural gas, so it strains credulity for the Ninth Circuit to suggest that they were enacted with an eye toward complementing the NGA.

The Ninth Circuit's flawed analysis also ignores the messy potpourri of state regulation as it is actually practiced across the nation. Suffice it to say, the 50 states are hardly unanimous in their views as to what practices should count as "anticompetitive." What one State may deem as deceptive, another State may view as a perfectly legitimate business transaction. Indeed, "[t]here is much disagreement as to the meaning of a 'competitive' market, and, therefore, when antitrust law should intervene." *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 869 (Tenn. 2010). To suggest, as the Ninth Circuit does, that potentially 50 different state antitrust regimes regulating the natural gas market would somehow "complement" the uniform federal scheme ignores that reality.

Rather than complement the uniformity provided by the NGA, Respondents' state-law suits threaten to create a wildly inconsistent patchwork quilt of state-by-state regulation of the natural gas market. In many instances, state antitrust laws are

more generous than their federal counterpart in compensating victims of purportedly anticompetitive conduct. And the remedies available under state law for antitrust violations differ not only from the federal remedy provided by the Clayton Act, but from one state to another. Colorado, for example, permits antitrust plaintiffs to recover the full price paid for a good as damages. *See* Colo. Rev. Stat. § 50-115 (2011). That is a far greater recovery than a direct purchaser can obtain under federal law, which limits recovery to only treble the amount the defendant allegedly overcharged for the product. *See Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 203 (1990)(stating that damages under the Clayton Act are limited to treble the amount the direct purchaser was overcharged, plus costs and attorney fees).[3] Still other states, such as Minnesota, permit such treble recovery even for indirect purchasers. *See* Minn. Stat. § 325D.57. The Ninth Circuit's holding thus displaces the NGA's uniform federal standard with a cacophony of state-law rights and remedies.

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[3] A finding of preemption will not necessarily deprive aggrieved purchasers of any remedy whatsoever. They are perfectly free to bring federal antitrust claims under the Clayton Act, albeit not for the windfall recovery amounts being sought here under state law. Such purchasers may also have resort to FERC administrative proceedings to petition for a refund. In 2005, for example, FERC facilitated over $6.3 billion in settlements arising from claims of market manipulation during the California electricity crisis. *See* Federal Energy Regulatory Commission, *The Commission's Response to the California Electricity Crisis and Timeline of Distribution of Funds*, Dec. 27, 2005, *available at* www.ferc.gov/legal/staff-reports/comm-response.pdf.

The Ninth Circuit's rule also engenders considerable uncertainty throughout the natural gas industry because it is impossible to predict in advance precisely when and how retail rates may be affected by practices that fall within FERC's jurisdiction. For practical, economic reasons, many natural gas companies will simply not be able to individually tailor their practices on a state-by-state basis. In such cases, those companies will be forced to conform all of their practices to the antitrust laws of the most restrictive state within which they conduct business. But such a result would ultimately make the states, not FERC, the final arbiter of practices that affect wholesale and retail natural gas rates. Again, that is clearly not what Congress intended.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court reverse the holding of the Ninth Circuit.

Respectfully submitted,

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