No. 11-16786

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

LEARJET, INC., et al.,
Plaintiffs-Appellants,

v.

ONEOK, INC., et al.,
Defendants-Appellees

(and related cases)

Appeal from the United States District Court for the District of Nevada, MDL Docket No. 1566

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S PREEMPTION HOLDING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute ("AAI") is an independent non-profit educational, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of more than 115 prominent antitrust lawyers, law professors, economists, and business leaders.[1] *See* http://www.antitrustinstitute.org. AAI frequently appears as *amicus curiae* in cases raising important antitrust issues, including, for example, in *Shames v. Cal. Travel & Tourism Comm'n,* 626 F.3d 1079 (9th Cir. 2010), in which it supported the position adopted by this Court on rehearing, and in *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.,* 555 U.S. 438 (2009), in which it participated in oral argument before the Supreme Court. AAI is particularly concerned that the decision below, if upheld, will unnecessarily impair the enforcement of state antitrust laws in the natural gas and electric power industries, laws which are an essential component of antitrust enforcement and help ensure competitive markets in deregulating industries.

[1] The AAI's Board of Directors alone has approved the filing of this brief. The individual views of members of the Advisory Board may differ from AAI's positions.

FED. R. APP. P. 29(c)(5) STATEMENT

No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity – other than the AAI or its counsel – has contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). Accordingly, state antitrust laws are not preempted unless it "was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also* Herbert Hovenkamp, *Federal Antitrust Policy* § 20.8, at 815 (4th ed. 2011) ("The Supreme 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.").

The district court ignored the strong presumption against preemption of antitrust laws by relying a simplistic and erroneous assumption that if the Federal Regulatory Energy Commission (FERC) has nominal jurisdiction over certain conduct, state antitrust claims related to that conduct must be

preempted. Such an assumption ignores the explicit role given to state regulation of natural gas under the Natural Gas Act; it contradicts the rule that laws of general applicability, like the antitrust laws, are not preempted without some showing of actual conflict with federal law; and it fails to appreciate that federal regulation and competition law (state and federal) are generally complementary. Indeed, as this Court observed in its prior opinion in this litigation, "state and federal antitrust and fair competition laws complement rather than undermine" [Congress's goal of deregulating the natural gas market] because they support fair competition." *E & J Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1046 (9th Cir. 2007).

ARGUMENT

PLAINTIFFS' STATE ANTITRUST CLAIMS ARE NOT "FIELD'' PREEMPTED EVEN IF FERC HAD JURISDICTION OVER DEFENDANTS' MISCONDUCT

The district court held that because, in its view, FERC *could* regulate defendants' manipulative conduct under section 5 of the Natural Gas Act,[2]

[2] Section 5(a) of the Natural Gas Act provides:

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, *or that any* rule, regulation, *practice*, or contract *affecting such rate, charge, or classification* is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and

States are barred from applying their antitrust laws (and implicitly any other state law of general applicability enacted under the states' historic police powers) to such misconduct, even if the laws are entirely consistent with FERC regulation.[3] The court's "field" preemption argument is flawed for a number of reasons, even assuming *arguendo* that FERC had the authority to regulate defendants' market manipulation prior to the enactment of section 315 of the Energy Policy Act of 2005, 15 U.S.C. § 717c-1.

The first problem with the district court's argument is that it ignores the express role that States are given under the Natural Gas Act to regulate, among other things, retail or direct sales to consumers by natural gas sellers who are under FERC's jurisdiction in other transactions. *See* 15 U.S.C. § 717(b); *Panhandle E. Pipeline Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507 (1947). This means that a state regulation of direct sales is not preempted merely because it affects sales for resale ("jurisdictional sales"); rather, it could be preempted only if it actually conflicts with federal

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reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . . .

15 U.S.C. § 717d(a) (emphasis added).

[3] The court held: "Given the preemptive force of FERC's jurisdiction where it exists, to the extent FERC has jurisdiction over a jurisdictional seller's practices that affect jurisdictional rates [under § 717d], that jurisdiction is exclusive and preempts state law on the subject." Order Re: Doc. #1248 at 8 (Nov. 2, 2009).

regulation. *See Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kentucky*, 489 U.S. 493 (1989) (holding that field preemption analysis did not apply to state regulation governing the timing of production of natural gas, even though it was expected to affect cost structures and wholesale rates of interstate pipelines, because state regulation of "production or gathering of natural gas" was preserved in § 1(b) of Natural Gas Act). Likewise, a practice that may affect rates over which the Commission has jurisdiction under 15 U.S.C. § 717d may also affect rates over which *States* have jurisdiction (e.g., for direct sales), but deciding whether a specific state regulation of such a practice is preempted cannot be resolved by reference to the maxim that where FERC has jurisdiction, that jurisdiction is exclusive; this ignores the "dual regulation Congress had in mind." *Panhandle*, 332 U.S. at 521.

The second problem with the district court's analysis is that, even if FERC occupies a field of regulation, "every state statute that has some indirect effect on rates and facilities of natural gas companies is not pre-empted." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988) (citing *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-756

(1985)).[4] Rather, as this Court said in *Gallo*, "[w]e ordinarily do not deem Congress to preempt laws of general applicability." 503 F.3d at 1046. 2007).[5] This is consistent with the presumption that in "'all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (ellipses in original); *see*

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[4] *Metropolitan Life* held that exclusive federal regulation of collective bargaining did not preempt state minimum labor standards of general applicability. 471 U.S. at 753-56. Similarly, while *Schneidewind* held that a state statute enacted specifically to regulate the issuance of securities of natural gas companies was preempted, it suggested that a state blue-sky law of general applicability would not be. *See Schneidewind,* 485 U.S. at 308 n.11; *see id.* at 310 n.13 (noting that the regulation of the issuance of securities of natural gas companies was not a field that the states had traditionally occupied).

[5] *See, e.g., De Buono v. NYSA-ILA Med. and Clinical Serv. Fund*, 520 U.S. 806, 815 (1997) (state laws of general applicability that impose some burdens on the administration of ERISA plans are not preempted by ERISA); *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 107 (1992) ("state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike would generally not be pre-empted"); *see also United States v. Arizona*, 641 F.3d 339, 356 (9th Cir. 2011) (observing that recent Supreme Court cases finding state laws not preempted involved state laws whose "'generality le[ft] them outside the category of requirements that [the federal statute] envisioned'" (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 502 (1996))) (brackets in original).

also Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 292 (1995) (Thomas, J., joined by Scalia, J., dissenting) ("To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather we must be 'absolutely certain' that Congress intended such displacement before we give preemptive effect to a federal statute." (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991))).

Accordingly, even if FERC has "exclusive" jurisdiction over wholesale rates or practices that directly affect such rates – including the market manipulation at issue here – such jurisdiction does not preempt the application of state antitrust laws to such conduct any more than it would preempt state laws against fraud, theft, or trespass, absent some showing of actual conflict. *See Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1479 (7th Cir. 1991) (state antitrust claim not preempted by Natural Gas Act); *Stand Energy Corp. v. Columbia Gas Transmission Corp.*, 373 F. Supp. 2d 631, 638-40 (S.D. W. Va. 2005) (same); *see also California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962) ("there is no pervasive regulatory scheme including the antitrust laws that has been entrusted to the Commission" under the Natural Gas Act) (internal quote marks omitted);

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (Federal Power Act did not bar application of consistent federal antitrust law).[6]

This Court has recognized the principle that state laws that only indirectly affect FERC's "exclusive" jurisdiction over interstate wholesale electric power rates are not necessarily preempted, but held that the principle was not applicable when the State of California sought to assert unfair competition claims "*directly* to enforce federal tariff obligations." *California ex rel. Lockyer v. Dynegy, Inc.*, 387 F.3d 966, 968 (9th Cir. 2004) (amending 375 F.3d 831, 850 n.17 (9th Cir. 1994)) (emphasis in original). No tariff obligations are at issue in this case. *Cf. In re W. States Wholesale Natural Gas Antitrust Litig.*, 346 F. Supp. 2d 1123, 1133, 1141 (D. Nev. 2004) (holding in related cases that California antitrust law was not preempted by the Natural Gas Act because the purpose of California act was "peripheral to the central purpose of the NGA," and distinguishing *Dynegy*).

In sum, whatever the scope of FERC's authority to address the market manipulation alleged in the complaints, nothing in the Natural Gas Act suggests that Congress intended to exclude long-standing state antitrust laws

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[6] Defendants apparently concede that FERC's "exclusive" jurisdiction does not bar federal antitrust claims, yet if there is no conflict between the Sherman Act and the Natural Gas Act, then "[w]hen state antitrust law only mirrors federal antitrust law, there is no reason to conclude that Congress intended to preempt the state law." *Illinois ex rel. Burris*, 935 F.2d at 1479.

prohibiting price fixing in the natural gas industry, particularly when such laws do not conflict with, but rather complement, FERC's authority.

CONCLUSION

The district court's preemption orders should be reversed and the matter remanded for further proceedings.

Respectfully submitted,

/s_____
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December 5, 2011

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 1989 words, excluding the parts of the brief exempted by the rule. It complies with the type face requirements as it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style.

/s Richard M. Brunell

Dec. 5, 2011

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on Dec. 5, 2011.

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