

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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BRIAN HUNTER,

*Plaintiff-Appellant, and*

COMMODITY FUTURES TRADING COMMISSION,

*Intervenor,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**AMICUS BRIEF OF FUTURES INDUSTRY ASSOCIATION, MANAGED  
FUNDS ASSOCIATION, CME GROUP, INC. AND NATIONAL  
FUTURES ASSOCIATION IN SUPPORT OF APPELLANT AND  
INTERVENOR**

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**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

**(A) Parties and Amici**

The parties who appeared in the District Court below and who appear in this Court are:

Brian Hunter, Plaintiff-Appellant  
Federal Energy Regulatory Commission, Defendant-Appellee

No intervenors or amici participated in the District Court proceedings.

The U.S. Commodity Futures Trading Commission was granted leave to intervene in this appeal. *See* Order Granting CFTC Mot. for Leave to Intervene (Oct. 15, 2008).

The “Futures Group” is comprised of four corporate entities the identity, interest and ownership status of which are described in the accompanying Corporate Disclosure Statement section of this brief pursuant to Circuit Rule 26.1

**(B) Rulings Under Review**

The ruling under review is that of the Honorable Richard J. Leon of the United States District Court for the District of Columbia on July 31, 2008 denying Appellant’s motion for a declaratory judgment and granting Appellee’s motion to dismiss in the case captioned *Brian Hunter v. Federal Energy Regulatory*

*Commission*, No. 07-1307 (RJL). A891. That decision has been published as *Hunter v. FERC*, 569 F. Supp. 2d 12 (2008).

**(C) Related Cases**

This case has not been before this Court. Related cases are *Amaranth Advisors LLC, et al v. Federal Energy Regulatory Commission*, No. 07-1491, now pending in this Court, and *CFTC v. Amaranth Advisors, LLC*, No. 1:07-cv-06682-DC, pending in the United States District Court for the Southern District of New York. The Futures Group has filed as an amicus curiae in both cases.

## **DISCLOSURE REQUIRED BY CIRCUIT RULE 26.1:**

Futures Industry Association, Inc. (“FIA”), Managed Funds Association (“MFA”), National Futures Association (“NFA”), and CME Group, Inc (“CME Group”) (collectively the “Futures Group”), state as follows:

FIA is a not for profit corporation organized and operated pursuant to the laws of the State of New York and having its principal place of business at 2001 Pennsylvania Avenue, N.W., Washington, DC 20006. FIA is a national trade association. Its regular membership consists of 35 of the Nation’s largest futures brokerage firms and its associate membership consists of approximately 150 firms involved in virtually all other segments of the industry.

MFA is a not for profit corporation organized and operated pursuant to the laws of the State of Illinois and having its principal place of business at 2025 M Street, N.W., Washington, DC 20036. MFA is the national trade association for the alternative investment industry. MFA members include professionals in hedge funds, funds of funds and managed futures funds.

CME Group is a for-profit, public company incorporated in Delaware with its principal place of business at 20 South Wacker Drive, Chicago, Illinois 60606-7499. There are no public companies that own 10% or more of its stock. CME Group was formed by the merger of Chicago Mercantile Exchange Holdings Inc. and CBOT Holdings Inc. in 2007, and subsequently merged with NYMEX

Holdings, Inc. in 2008. The CME Group is the parent of four U.S. futures exchanges -- the Chicago Mercantile Exchange Inc. ("CME"), the Board of Trade of the City of Chicago Inc. ("CBOT"), the New York Mercantile Exchange Inc. ("NYMEX") and Commodity Exchange Inc. ("COMEX").

NFA is a not-for-profit corporation organized and operated pursuant to the laws of the State of Delaware and having its principal place of business at 300 S. Riverside Plaza, #1800 Chicago, IL 60606-6615. NFA is a registered futures association under 7 U.S.C. § 21 and a limited-purpose national securities association under Section 15A(k) of the Securities Exchange Act of 1934. 15 U.S.C. § 78o-3(k). As the industry-wide self-regulatory organization for the U.S. futures industry, NFA is first and foremost a regulatory body devoted to customer protection. NFA regulates the activities of over 3,700 Member firms that include futures commission merchants, introducing brokers, commodity pool operators and commodity trading advisors. NFA also regulates the activities of approximately 55,000 registered account executives who work for those Members.

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## **IDENTITY OF AMICUS CURIAE**

Pursuant to United States Court of Appeals for the District of Columbia Circuit Rule 29, Futures Industry Association, Inc. ("FIA"), Managed Funds Association ("MFA"), CME Group, Inc ("CME Group"), and National Futures Association ("NFA") (collectively, the "Futures Group") are filing this brief, amicus curiae, in support of appellant Brian Hunter's ("Hunter") request that this Court find the Federal Energy Regulatory Commission lacks jurisdiction to assert jurisdiction over alleged price manipulation arising out of natural gas futures trading. The Futures Group has filed an accompanying and unopposed motion for leave to file this brief amicus curiae.

FIA and MFA are national trade associations and are the primary representatives of the interests of futures brokerage firms and major futures market participants, subject to regulation by the Commodity Futures Trading Commission ("CFTC"). CME Group owns and operates four CFTC-licensed futures exchanges which trade commodities ranging from interest rates and currencies to agricultural products, metals and energy. CME Group's exchanges conduct market surveillance and other self-regulatory operations under CFTC oversight. NFA is the industry-wide self-regulatory body which is also registered with the CFTC and focuses its efforts on customer protection.

The futures industry is a major engine of our nation's financial markets and economy: more than \$5 trillion worth of futures contracts and options are traded daily on futures exchanges in the United States. The Futures Group represents the bulk of that trading activity and thus has a substantial interest in preserving the integrity of the vital, statutory principle at stake here: U.S. futures trading should be subject to a single set of federal regulatory standards grounded in the Commodity Exchange Act ("CEA") as administered by the CFTC.

### **INTRODUCTION**

Much like our national pastime of baseball, U.S. futures trading is governed by a set of complex rules. Without the clarity of such rules and the mechanisms by which they are enforced, futures markets cannot function properly. Congress understood this and created the CFTC to decide which futures trading activities are lawful and which are not. The question presented is whether another federal agency, the Federal Energy Regulatory Commission ("FERC"), is also authorized to umpire the natural gas futures trading field while it is umpiring a game on another field. Under the CEA's grant of "exclusive jurisdiction" to the CFTC, the answer is that Congress authorized only the CFTC to rule on futures trading. FERC has no jurisdiction in this case.

## ISSUE PRESENTED

Whether the statutory grant of “exclusive jurisdiction” to the CFTC “with respect to ... transactions involving” futures contracts traded on CFTC-licensed futures exchanges (7 U.S.C. § 2(a)(1)(A)) precludes FERC from asserting jurisdiction over a futures market participant for manipulating natural gas futures prices exclusively through transactions involving natural gas futures contracts traded on a CFTC-licensed futures exchange?

## FACTS

The pertinent facts are simple and undisputed.

### A. FERC's Asserted Jurisdiction and the District Court Decision.

FERC alleges that Hunter, in his capacity as the “head natural gas trader” for his then employer the hedge fund FERC describes as “Amaranth Entities,” manipulated natural gas futures prices on three days by engaging in transactions involving natural gas futures traded on a CFTC-licensed exchange, the New York Mercantile Exchange Inc. (“NYMEX”). FERC Order to Show Cause. (A375-A378, A389-A390). FERC’s administrative complaint contends that Hunter’s futures trading violated FERC regulations found at 18 C.F.R. § 1c.1, and adopted pursuant to Section 315 of the Energy Policy Act of 2005, 15 U.S.C. § 717c-1, because the futures price manipulation affected the price for wholesale natural gas transactions that are within FERC’s jurisdiction. FERC Order to Show Cause. (A377-A378).

Hunter filed a civil action against FERC on jurisdictional grounds seeking a declaratory judgment and injunctive relief. A14-A28. Among other claims, Hunter alleged the CFTC has exclusive jurisdiction over trading in natural gas futures contracts. A16. The district court dismissed Hunter’s case on July 30, 2008, without expressly reaching the CFTC jurisdiction issue. A881-A890. Yet the court found “it is clear that FERC interprets the EPAct to permit it to bring

anti-manipulation proceedings against those entities, including individuals, that *affect* its jurisdictional markets.” A889, italics in original.

FERC’s jurisdictional interpretation is the subject of this appeal.<sup>1</sup>

**B. CFTC Allegations and Complaint.**

The CFTC also brought suit against Hunter for attempted manipulation of the price of natural gas futures traded on NYMEX on two of the same three days FERC alleged. Unlike FERC, the CFTC did not charge Hunter with an actual manipulation of the price of natural gas futures. The CFTC is nevertheless seeking significant fines and injunctive relief from Hunter. *See* Complaint, *CFTC v. Amaranth Advisors, LLC*, No 1:07-cv-06682-DC. (A47-A67). The CFTC’s case is now pending.

**C. The Commodity Exchange Act’s Regulatory Structure.**

The CEA “has been aptly characterized as ‘a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.’” *Merrill Lynch v. Curran*, 456 U.S. 353, 355-56 (1982). The CEA is comprehensive both in the trading it covers and the regulation it entails. All U.S. futures trading in all goods and articles (except onions), including sources of energy, like natural gas, 7 U.S.C. § 1a(4), is subject to the CEA’s regulatory apparatus. That apparatus

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<sup>1</sup> The Futures Group expresses no view on whether FERC would have statutory jurisdiction to reach futures trading under the Energy Policy Act if it were not precluded by the CEA’s exclusive jurisdiction provision. Our position is that the CEA forecloses FERC’s assertion of jurisdiction assuming it otherwise would have such jurisdiction.

- mandates futures trading on CFTC-licensed exchanges (7 U.S.C. § 6(a))
- sets limits on speculative positions to prevent price manipulation (7 U.S.C. § 6a)
- prohibits fraud and deceit (7 U.S.C. §§ 6b, 6o) and other trading practices like wash and fictitious sales (7 U.S.C. § 6c)
- imposes minimum financial rules on regulated intermediaries (7 U.S.C. § 6d)
- requires registration of regulated intermediaries (brokers and advisors), as well as recordkeeping and reporting (7 U.S.C. §§ 6d, 6e, 6f, 6g, 6i and 6m)
- licenses self-regulatory organizations to self-police trading and prevent manipulation (7 U.S.C. §§ 7, 23)
- authorizes CFTC emergency actions to prevent manipulations or other major market disturbances (7 U.S.C. § 12a(9)); and
- makes it unlawful civilly and criminally for any person to manipulate or attempt to manipulate the price of a futures contract or its underlying commodity. (7 U.S.C. §§ 9, 13b and 13(a)(2)).

The CEA has been amended many times. In 2000, for example, Congress enacted substantial amendments, including a revision and modernization of the CEA's underlying congressional findings and purposes to make explicit that the "transactions subject to this Act are ... affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating price information through trading in liquid, fair and financially secure trading facilities." 7 U.S.C. § 5(a). Further, Congress identified the CEA's "purpose" to be "serv[ing] the public interests ... through a system of effective

self-regulation ... under the oversight of the [CFTC]" which would, among other things, "deter and prevent price manipulation or any other disruptions to market integrity...." 7 U.S.C. § 5(b).

**D. Congress Grants Exclusive Jurisdiction to the CFTC.**

In 1974, Congress considered legislation to overhaul the regulation of futures trading in the U.S. under the CEA. At that time,

- Congress recognized "the futures markets play a significant role in the economic well being of our country." H.R. Rep. No. 93-975, at 60 (1974).
- Congress wanted to strengthen futures regulation, by creating a comprehensive regulatory structure for the esoteric futures trading complex. H.R. Rep. No. 93-975, at 1 (1974); S. Rep. No. 93-1131, at 19 (1974).
- Congress wanted to create an independent agency for futures markets, which were then regulated by a branch of the Department of Agriculture under the CEA. S. Rep. No. 93-1131, at 19 (1974); H.R. Rep. No. 93-975, at 70-72 (1974).
- Congress wanted the new agency to be an expert in futures regulation, which it acknowledged "requires highly specialized skills;" H.R. Rep. No. 93-975, at 71 (1974), *see also* S. Rep. No. 1131, at 22 (1974 ("persons of demonstrated knowledge in futures trading").
- Congress wanted the new agency to be a neutral arbiter of futures prices, without the conflict of interest (i.e., the lack of any inclination to seek higher or lower prices) that other agencies, like the Department of Agriculture, would have, H.R. Rep. No. 93-975, at 60 (1974). As one Committee put it, "The proper regulatory function of an agency which regulates futures trading is to assure the market is free of manipulation and other practices which prevent the market from being a true reflection of supply and demand." S. Rep. No. 93-1131, at 21 (1974.)

- Congress appreciated that, as futures trading and regulation expanded to new commodities, other agencies could try to regulate or otherwise exercise jurisdiction over futures markets. S. Rep. No. 93-1131, at 23 (1974.)
- Congress knew that futures and options trading had been subjected to the vagaries of state blue sky laws and SEC enforcement actions prior to 1974. (H R. Rep. No. 93-975, at 48, 120 Cong. Rec. 34737 (1974) (statement of H. Comm. Chairman Poage), 120 Cong. Rec. 34997 (1974) (Statement of Sen. Comm. Chairman Talmadge).

Against this backdrop, Congress passed the Commodity Futures Trading Commission Act of 1974, which strengthened the regulatory regime under the CEA and created the CFTC. As the Supreme Court recognized, “Along with an increase in powers, the [CFTC] was given exclusive jurisdiction over commodity futures trading.” *Merrill Lynch*, 456 U.S. at 386. The CEA’s three-sentence exclusive jurisdiction provision has been amended modestly on occasion since 1974, and now reads in its entirety:

“The [CFTC] shall have exclusive jurisdiction, except to the extent otherwise provided in subparagraphs (C) and (D) of this paragraph and subsections (c) through (i) of this section, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an ‘option’, ‘privilege’, ‘indemnity’, ‘bid’, ‘offer’, ‘put’, ‘call’, ‘advance guaranty’, or ‘decline guaranty’), and transactions involving contracts of sale of a commodity for future delivery (including significant price discovery contracts), traded or executed on a contract market designated or derivatives transaction execution facility registered pursuant to section 7 or 7a of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission

pursuant to section 23 of this title. Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on the courts of the United States or any state.”

7 U.S.C. § 2(a)(1)(A) as amended by Pub. L. No. 110-246, 122 Stat. 2201 (June 18, 2008) (adding “significant price discovery contracts” to CFTC exclusive jurisdiction). When enacted in 1974, this provision was intended “to separate the functions of the [CFTC] from those of the Securities and Exchange Commission *and other regulatory agencies.*” *Merrill Lynch*, 456 U.S. at 386 (emphasis added). In other words, through § 2(a)(1)(A) Congress sought “to consolidate federal regulation of commodity futures trading in the [CFTC].” *Merrill Lynch*, 456 U.S. at 387.

The 1974 Conference Committee on the CFTC Act explained that “the Commission’s jurisdiction over futures contract markets ...is exclusive ... and the Commission’s jurisdiction, where applicable, supersedes State as well as Federal agencies.” H.R. Rep. No. 93-1383, at 35 (1974) (Conf. Rep.). “Under the exclusive grant of jurisdiction to the Commission, the authority of the Commodity Exchange Act (and regulations issued by the Commission) would preempt the field

insofar as futures regulation is concerned.” *Id.* As further described by the Senate Committee Chairman: “In establishing this Commission, it is the Committee’s intent to give it exclusive jurisdiction over those areas delineated in the act. This will assure that the affected entities -- exchanges, traders, customers, et cetera -- will not be subject to conflicting agency rulings.” 120 Cong. Rec. 30459 (1974) (Sen. Comm. Chairman Talmadge). *See also* 120 Cong. Rec. 34736 (1974) (H. Comm. Chairman Poage) (the provision was adopted “in an attempt to avoid unnecessary, overlapping and duplicative regulation.”)

#### SUMMARY OF ARGUMENT

On its face, the CEA’s “exclusive jurisdiction” provision withholds from FERC any jurisdiction to prosecute Hunter for manipulating the price of natural gas futures. Because Hunter’s alleged misconduct was “with respect to ... transactions involving” futures contracts traded on NYMEX, it falls squarely “within the congressional grant of ‘exclusive jurisdiction’ to the CFTC in § 2(a)(1)(A).”

FERC has made two arguments to defeat this provision’s plain meaning. If adopted, either FERC interpretation of the CEA would eviscerate the CFTC’s exclusive jurisdiction and its underlying public policy goals.

First, FERC claims futures “manipulation ... is not within the CFTC’s exclusive jurisdiction” because futures trades that result in a manipulation are not

“transactions involving” futures contracts within the meaning of § 2(a)(1)(A). (A485). This crabbed misreading of the CFTC’s exclusive jurisdiction is incompatible with the statute’s text, structure, history and purposes.

Businesses and market participants worldwide rely on the integrity of the prices that U.S. futures markets discover and disseminate. The CEA’s regulatory structure makes sure those futures prices reflect accurately the forces of supply and demand, in other words, are not distorted by manipulation. The CEA’s exclusive jurisdiction provision is an integral part of that structure, endowing the CFTC, as an expert, price neutral regulator, with “exclusive jurisdiction” to decide whether any, or all “transactions involving” futures constitute price manipulation. Congress did not intend to have other agencies, including FERC, second-guess those CFTC judgments by questioning whether futures prices were the subject of manipulation. That interference would lead to market uncertainty and harm the very public interests Congress found are served by futures trading and would be promoted by the CFTC’s exclusive jurisdiction.

FERC also asserts that, even if CFTC has exclusive jurisdiction over futures price manipulation generally, FERC’s manipulation jurisdiction is “saved” by the second sentence in § 2(a)(1)(A). (A487-A489.) Contrary to FERC’s view, every court has found that the plain meaning of the second sentence confirms that other agencies may share powers with the CFTC “over activities that lie outside the

scope of [the first sentence in] § 2(a)(1)(A),” but not activities that lie **inside** the grant of CFTC exclusive jurisdiction. *F.T.C. v. Ken Roberts Co.*, 276 F.3d 583, 591 (D.C. Cir. 2001) (emphasis added).

FERC’s assault on the CEA’s exclusive jurisdiction provision is not limited to natural gas futures trading. If FERC is allowed to prosecute futures manipulation, U.S. futures trading will become subject to multiple regulators and crushing regulatory costs. The SEC would regulate futures on securities indexes and interest-rate securities; the Department of the Treasury would regulate futures on Treasury Securities and foreign currency; the Department of Energy and the Federal Trade Commission would regulate crude oil futures trading; the Environmental Protection Agency would regulate emissions credit futures trading; and the Department of Agriculture would regulate agricultural futures trading. This is exactly the result -- balkanized, duplicative and conflicting regulation -- that Congress designed the CEA’s broadly-worded exclusive jurisdiction provision to avoid. That result would also undermine the public interests Congress designed futures regulation to serve.

FERC’s construction of § 2(a)(1)(A) and its asserted jurisdiction over Hunter’s futures trading should therefore be rejected.

## ARGUMENT

### I. CFTC EXCLUSIVE JURISDICTION BARS FERC FROM PROSECUTING ALLEGED FUTURES PRICE MANIPULATION.

FERC “indisputably recognizes that the CFTC has exclusive jurisdiction over transactions involving contracts of sale of a commodity for future delivery, i.e., futures transactions.” (A483). That concession should be the end of any case, including this one, brought by any agency other than the CFTC which alleges that the respondent engaged in misconduct solely by entering into “transactions involving” futures contracts. But FERC attempts to side-step that logic by this statutory gyration: “[t]he fact that the CFTC has exclusive jurisdiction over these activities does not mean that it has exclusive jurisdiction over fraudulent or deceptive practices associated with those transactions ....” *Id.*

Respectfully, FERC is wrong. To return to our baseball analogy, if the CFTC’s “exclusive jurisdiction” over futures transactions does not mean it is the exclusive umpire of whether futures trading is “fair” or “foul,” then the words “exclusive jurisdiction” mean very little. Congress did not go to great lengths to grant and preserve CFTC exclusive jurisdiction because it wanted other agencies to step in front of the CFTC to call the play or to create a system where the CFTC called it “fair,” while other agencies called it “foul.”

**A. CFTC Exclusive Jurisdiction Covers All Transactions Involving Futures.**

The first sentence of § 2(a)(1)(A) broadly grants the CFTC “exclusive jurisdiction with respect to accounts, agreements ... and transactions involving” futures contracts “traded or executed” on CFTC-licensed exchanges, called designated contract markets. By focusing on the forms and means for trading (accounts, agreements and transactions), as well as the actual trading of futures contracts, Congress made clear that the CFTC’s exclusive jurisdiction covered those whose futures trading practices might constitute price manipulation. Congress also chose the elastic phrase “transactions involving” to make certain that CFTC exclusive jurisdiction would cover all forms of trading activity or practices that might run afoul of the CEA’s requirements. Hunter’s alleged misconduct fits within that logical and natural statutory construction, which should be controlling here. “[O]ur analysis begins with ‘the language of the statute’. And where the statutory language provides a clear answer, it ends there as well.” *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 at 438, 119 S.Ct. 755 (1999). (internal citations omitted).

If the statutory language is not clear enough (and it is), the legislative history of the CEA’s exclusive jurisdiction provision should remove all doubt. That history establishes Congress’ intent that CFTC jurisdiction over futures trading, where applicable, would supersede that of other agencies. H.R. Rep. No. 93-1383,

at 35 (1974) (Conf. Rep.). Congress wanted to make certain that the CFTC “would preempt the field insofar as futures regulation is concerned” (*id.*) by bringing “the futures markets ‘under a uniform set of regulations.’” *Roberts*, 276 F.3d at 591 quoting *Am. Agric. Movement Inc. v. Board of Trade of City of Chicago*, 977 F.3d 1147, 1155-57 (7th Cir. 1992). None of those purposes could be achieved if futures market participants and futures exchanges are subjected to duplicative or conflicting agency rulings in the critical area of price manipulation.

Congress is well aware of the importance of futures prices for national and international commerce. 7 U.S.C. § 5(a). Market participants, of course, rely constantly on those prices for vital trading decisions. But businesses and financial institutions also rely on those prices to make crucial decisions for their enterprises. Congress has therefore made it a fundamental purpose of the CEA “to deter and prevent price manipulation or other disruptions to market integrity.” 7 U.S.C. § 5(b). To that end, the CFTC oversees extensive market surveillance by the licensed futures exchanges, including CME, CBOT, NYMEX and COMEX, designed to promote market integrity and deter manipulation. 7 U.S.C. §§ 7(d)(4), (5) and (6). The CFTC itself conducts market surveillance through its large trader reporting system and may exercise extraordinary emergency powers if it believes an actual or threatened manipulation exists. 7 U.S.C. §§ 6i, 12a(9). Last, the CFTC has vast enforcement powers to proceed administratively or in court to

punish those who manipulate or attempt to manipulate a futures price. 7 U.S.C. §§ 9, 13a-1, 13b and 13a(2).

Against this statutory focus on market manipulation, FERC contends the first sentence in § 2(a)(1)(A) contains an implicit exception from CFTC exclusive jurisdiction for transactions involving futures that result in price manipulation. (A483-A487). FERC has not explained why Congress would have wanted to establish an expert agency with exclusive jurisdiction, put it in charge of an anti-price manipulation regulatory arsenal and then “outsource” regulatory judgments over futures price manipulation to other agencies. Nor can FERC cite any statutory evidence to support its view.

The text of the first sentence in the CEA’s exclusive jurisdiction provision actually refutes FERC’s claim. When Congress intended to limit the broad grant of CFTC exclusive jurisdiction, it **expressly** “otherwise provided” such a limitation and **expressly** mandated that the CFTC’s exclusive jurisdiction was to be recognized “except” for those limitations. The statute provides, right after the words “the Commission shall have exclusive jurisdiction,” the key phrase: “except to the extent otherwise provided in subparagraphs (C) and (D) of this paragraph and subsections (c) through (i) of this section,” § 2(a)(1)(A). Thus, Congress mandated that “except to the extent otherwise provided” in different provisions of

FERC claims that since 1974 Congress has painstakingly created these explicit exemptions to CFTC exclusive jurisdiction, while implicitly intending to carve out from exclusive jurisdiction large swaths of futures trading activities that other agencies might claim to be unlawful. But in both subparagraphs (C) and (D), Congress enacted an explicit exemption from exclusive jurisdiction for the SEC. Congress has never enacted a comparable exemption for FERC. In circumstances where Congress has enacted an explicit exemption for one agency, but not other agencies, courts should not read into the statute an exemption for those agencies. *See e.g., United States v. Vonn*, 535 U.S. 55, 65 (2002). (“expressing one item of [an] associated group...excludes another left unmentioned.”)<sup>3</sup>

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(Footnote continued)

if it was permissible to equate for interpretive purposes an exemption from jurisdiction with a grant of exclusive jurisdiction, the breadth of the grant of exclusive jurisdiction in contrast to the exemptions is evident in the differing structures of the provisions. Nothing in the exemption cases is to the contrary. *See CFTC v. Bradley*, 408 F. Supp. 2d 1214, 1219 (N.D. Okla. 2005) (“the exemptions are, by their terms, limited to contracts, agreements, or transactions”); *CFTC v. Johnson*, 408 F. Supp. 2d 259, 272 (S.D. Tex. 2005) (“The trader-defendants’ reporting activities do not fall within the express meaning of a contract, transaction or agreement.”); *CFTC v. Atha*, 420 F. Supp. 2d 1373, 1379 (N.D. Ga. 2006) (“The reporting activities alleged by Plaintiff are not a ‘contract, agreement or transaction.’”) and *CFTC v. Reed*, 481 F. Supp. 2d 1190, 1198 (D. Colo. 2007) (“By their terms, the exemptions are limited to contracts, agreements, or transactions.”); *U.S. v. Valencia*, No. Crim. A. H-03-024, 2003 WL 23675402 at \* 2 (S.D. Tex. Nov. 13, 2003) (“This case is not about actual trades...”).

<sup>3</sup> Even as recently as this year, Congress reaffirmed the CFTC’s exclusive jurisdiction by expanding it to include “significant price discovery contracts,” which are new statutorily recognized instruments that are analogous to energy futures contracts. *See* Pub. L. No. 110-246, 122 Stat. 1651, 2201 (June 18, 2008).

**B. Section 412 Of The CFTC Act Of 1974 Establishes That Congress Intended CFTC Exclusive Jurisdiction To Include All Deceptive And Manipulative Transactions Involving Futures.**

FERC's misreading of the first sentence in § 2(a)(1)(A) is likewise foreclosed by another statutory provision: Section 412 of the CFTC Act of 1974. In 1974, Congress knew that other state and federal agencies, most notably the SEC, had been conducting investigations and enforcement actions involving commodity transactions. *See* H. R. Rep. No. 93-975, at 48, 120 Cong. Rec. 34737 (1974) (statement of H. Comm. Chairman Poage), 120 Cong. Rec. 34997 (1974) (statement of Sen. Comm. Chairman Talmadge). And, Congress wanted the CFTC's exclusive jurisdiction to apply prospectively once enacted, without curtailing any pre-exclusive jurisdiction enforcement activity by other agencies. For that reason, Congress enacted Section 412 of the CFTC Act which stated: "pending proceedings under existing law shall not be abated by reason of any provision of this Act but shall be disposed of pursuant to the applicable provisions of the Commodity Exchange Act, as amended, in effect prior to the effective date of this Act." Pub. L. No. 93-463, 88 Stat. 1414 (October 23, 1974). The CFTC Act's effective date was 180 days after October 23, 1974. 88 Stat. 1415-16.

Section 412 illuminates FERC's misreading of the first sentence in § 2(a)(1)(A). If manipulative or deceptive transactions involving futures could have been subject to other agencies' enforcement powers **after** the enactment of

the CEA's exclusive jurisdiction provision, as FERC argues (A483-A487), Congress would not have needed to specify that enforcement actions of other agencies initiated **before** the 1974 enactment could continue unabated. Congress understood, however, that once CFTC exclusive jurisdiction took effect on April 21, 1975, no other agency could bring charges involving commodity futures and options activities, including manipulation and deception. By enacting Section 412, Congress signaled that all agencies were free to continue enforcement activities undertaken pre-1975, but not thereafter.

The Tenth Circuit's decision in *Securities and Exchange Commission v. American Commodity Exchange, Inc.*, 546 F.2d 1361, 1367-1369 (10th Cir. 1976) makes this very point. The defendant in that case claimed the SEC lacked jurisdiction to bring an enforcement action for fraud relating to commodity options arising before the CFTC Act and the CEA's new exclusive jurisdiction provision took effect. The Tenth Circuit reviewed the 1974 legislation and concluded that once the CEA's exclusive jurisdiction provision went into effect, the CFTC's jurisdiction "over commodity transactions, including the fraudulent schemes such as that at bar, is exclusive." 546 F.2d at 1367. If that exclusive jurisdiction stopped an SEC prosecution begun before the CFTC Act was effective, however, the court observed "we [would] have a no man's land." To resolve that dilemma, the court quoted the language and purpose of Section 412 (546 F.2d at 1368) and

concluded this “best evidence” demonstrated that the SEC “retained jurisdiction to bring the suit.” 546 F.2d at 1368, 1369.<sup>4</sup>

Section 412 illustrates Congress’ intent that even “deceptive transactions” would be subject to the CFTC’s exclusive jurisdiction. Congress’ enactment of Section 412 contemporaneously with the CEA’s new exclusive jurisdiction provision is compelling statutory evidence that FERC’s attempts to limit the reach of CFTC exclusive jurisdiction should be rejected.

C. **Roberts and Other Appellate Decisions Uniformly Support CFTC Exclusive Jurisdiction Over Actual Transactions Involving Futures.**

In *F.T.C. vs. Ken Roberts Co.*, 276 F.3d 583 (D.C. Cir. 2001), this Court held that the FTC was entitled to enforce investigatory subpoenas against a company that was marketing “how to trade futures” materials in an allegedly fraudulent manner. The Roberts Company resisted those subpoenas on the grounds that its activities were “transactions involving” futures and therefore covered by the CEA’s exclusive jurisdiction provision. This Court did not find those arguments “compelling enough to overcome [its] longstanding chariness

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<sup>4</sup> The Tenth Circuit refused to follow a district court opinion with an even more expansive view of CFTC exclusive jurisdiction. In that case, the court granted dismissal of a pre-exclusive jurisdiction SEC fraud prosecution on the ground that the fraudulent commodity options transactions were subject to the CFTC’s exclusive jurisdiction. *SEC vs. Univest*, 405 F. Supp. 1029 (N.D. Ill. 1976). That decision was later reversed on appeal to the Seventh Circuit, which, without issuing an opinion, allowed the SEC’s case to proceed, just as the Tenth Circuit did in the *American Commodity Exchange* decision.

about entertaining jurisdictional challenges to administrative subpoenas.” 276 F.3d at 592. But *Roberts* does analyze the scope of “transactions involving” under CFTC exclusive jurisdiction and contradicts FERC’s jurisdictional claim.

In *Roberts*, this Court distinguished the marketing of educational materials relating to futures trading from actual futures trading. Although extending the CFTC’s exclusive jurisdiction to educational materials was deemed “far-fetched” because no actual “transactions involving” futures might result, this Court found that “a set of actions closely linked to the actual trading of commodities” fit within the phrase “transactions involving” in § 2(a)(1)(A). 276 F.3d at 589-591. In the subpoena enforcement context, then, *Roberts* rests on a distinction between conduct that might never lead to futures trading and conduct involved in actual futures trading because only the latter was certain to be subject to the CFTC’s exclusive jurisdiction. Because FERC alleges that Hunter’s actual natural gas futures trading resulted in futures price manipulation, FERC’s complaint falls well within the borders of CFTC exclusive jurisdiction as articulated in *Roberts*.

*Roberts* is consistent with twin opinions from the Seventh Circuit affirming the expansive nature of CFTC exclusive jurisdiction, cases which FERC either ignores or misconstrues: *Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137 (7th Cir. 1982), *vacated as moot*, 459 U.S. 1026, (1982) (“*GNMA Options*”) and *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537 (7th Cir. 1989) (“*IPs*”). Each

case demonstrates the sweep of CFTC exclusive jurisdiction and the weakness of the FERC's jurisdictional claim.

In both cases, the SEC had approved a new product for trading on a securities exchange under the federal securities laws. In both cases, a futures exchange and the CFTC challenged the SEC's approval, claiming that the CEA's exclusive jurisdiction provision ousted the SEC of jurisdiction and nullified its approval. In both cases, the CFTC was found to have exclusive jurisdiction over the SEC-approved product. In *GNMA Options*, the Seventh Circuit ruled that options on exempt government securities that were themselves the subject of futures trading were subject to exclusive CFTC jurisdiction. In *IPs*, the Seventh Circuit found that a new stock index instrument (the index participation or "IP") was both a futures contract and a security. Because of the CEA's exclusive jurisdiction provision, the Seventh Circuit ruled the CFTC had full authority to approve trading in and regulate IPs and the SEC therefore had none.<sup>5</sup>

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<sup>5</sup> FERC's fails to distinguish both *GNMA Options* and *IPs*. Neither case involved whether the SEC could oversee "contract markets" like CME, CBOT, NYMEX or COMEX. (A487). Nor did *IPs* "expressly" reserve whether the SEC could "apply its anti-fraud rules to commodity options transactions." (Id.). The *IPs* decision held that the SEC had no jurisdiction over "agreements or transactions involving futures" even when those instruments were themselves securities. 883 F.2d at 549-550 (if instruments are both securities and futures, the SEC's jurisdiction shrinks "because of the exclusivity clauses in the CEA"). And, the 2000 CEA amendments FERC cites actually disprove its claim that Congress "affirmed the SEC's jurisdiction over fraud claims involving futures." (A487). In 2000, Congress did create a new category of instruments called a "security futures product" and did grant the SEC special shared regulatory authority over that product. But that just means when Congress wants to create a limited exception to CFTC exclusive jurisdiction over futures it knows it must do so expressly.

Both Seventh Circuit decisions were grounded in the unambiguous language in § 2(a)(1)(A) and its legislative purposes. Both decisions firmly support the view that when Congress decreed that the CFTC shall have “exclusive jurisdiction” over transactions involving futures contracts, Congress meant what the statute said.

**II. THE SECOND SENTENCE IN § 2(A)(1)(A) DOES NOT PRESERVE ANY FUTURES JURISDICTION FOR FERC.**

The second sentence in § 2(a)(1)(A) has been invoked by the SEC and others for almost three decades in an unsuccessful effort to circumvent the first sentence’s grant of exclusive jurisdiction to the CFTC. Now FERC is trying to do the same. (A487-A489). This Court in *Roberts*, as well as the Seventh Circuit in *GNMA Options* and *IPs*, have blocked those efforts because the express limitation that introduces the second sentence -- “except as herein above provided”-- reaffirms that futures and options trading, which is subject to the first sentence’s grant of exclusive jurisdiction, is off-limits to other regulatory bodies.

This Court has explained well the meaning of the second sentence: “the inclusion of the so-called ‘regulatory savings clauses’ ... makes clear that other agencies, such as the FTC, retain their jurisdiction of all matters beyond the confines of “accounts, agreements and transactions involving contracts of sale of a commodity for future delivery.” *Roberts*, 276 F.3d at 591. As applicable here, if Hunter’s alleged trading conduct was “beyond the confines” of the CFTC’s exclusive jurisdiction, FERC would be free to pursue its case. But futures

manipulation is within, not beyond, the scope of CFTC exclusive jurisdiction as provided in the first, or “above,” sentence in § 2(a)(1)(A).

The Seventh Circuit has agreed with this interpretation of the second sentence. In *GNMA Options*, it held: “‘Except as hereinabove provided’ refers only to above-mentioned proviso clauses of which there is but one in Section 2(a)(1), the exclusive jurisdiction clause.” *GNMA Options*, 677 F.2d at 1145. The Seventh Circuit therefore rejected the SEC’s claimed jurisdiction over options on GNMA securities: the SEC was “divested by the CFTC exclusive jurisdiction clause” because those options “involve” futures contracts on GNMA securities, which are both commodities and securities. 667 F.2d at 1146-47. In *IPs*, the Seventh Circuit reminded the SEC that its “jurisdiction continues ‘except as hereinabove provided,’ what is ‘provided’ immediately above in section 2 is that ‘the [CFTC] shall have exclusive jurisdiction ... with respect to ... transactions involving [futures contracts].’ If *IPs* are futures contracts, then the CFTC has exclusive jurisdiction, the “except” clause applies and the remainder of the language on which the SEC now relies has no force.” 883 F.2d at 550.

*IPs* also resolves what happens when two agencies claim jurisdiction, a court finds both agencies have jurisdiction, one agency is the CFTC and its jurisdiction is “exclusive.” As the Seventh Circuit held: “if an instrument is both a security and a futures contract, then the CFTC’s jurisdiction is exclusive.” 883 F.2d at 544.

Applying the *IPs* principle in the FERC vs. CFTC context, if a hypothetical transaction could be found to be both a “wholesale sale of natural gas” within FERC jurisdiction and a natural gas futures transaction, the same result must follow: “the CFTC’s jurisdiction is exclusive.” 883 F.2d at 544. The logic supporting CFTC exclusive jurisdiction is stronger where, as here, Hunter is not alleged to have even engaged in any physical natural gas transactions within FERC jurisdiction. As the Seventh Circuit confirmed, the CEA’s exclusive jurisdiction provision could have “no other possible meaning.” 883 F.2d at 544.

### **III. THE CEA’S EXCLUSIVE JURISDICTION PROVISION PROMOTES IMPORTANT PUBLIC POLICIES THAT FERC’S JURISDICTION WOULD DISSERVE.**

Congress has found that U.S. futures trading “is affected with a national public interest by providing a means for managing and assuming price risks, discovering prices or disseminating pricing information.” 7 U.S.C. § 5(a). Those public interests are threatened by FERC’s legal position in this case. Congress designed exclusive jurisdiction to prevent uncertain and conflicting legal standards, as well as regulatory duplication, from interfering with the smooth functioning of U.S. futures markets in order to allow those markets to serve the public interests in hedging and price discovery.

FERC itself has read this same history and once explained that Congress intended the CEA’s exclusive jurisdiction provision “to give a single expert

agency" -- the CFTC -- "the responsibility for developing a coherent regulatory program for the commodities industry and to prevent the costs and confusion associated with multiple regulators." *New York Mercantile Exchange*, No. EL 95-81-000, 74 FERC ¶61311 (1996). Yet FERC's recent attempts to prosecute futures price manipulation will lead to just the sort of "costs and confusion" it previously acknowledged Congress sought to prevent.

One source of such costs and confusion is the divergent legal standards CFTC and FERC apply. The CEA has a well-known, time-tested legal standard for futures price manipulation -- intentional creation of an artificial price. By contrast, FERC's proceeding has been brought under a different standard for futures price manipulation, one modeled after SEC Rule 10b-5. Congress long ago realized, however, that securities law concepts should not be exported to futures regulation, concluding that it was "erroneous" to view futures and securities regulation as "twins." H.R. Rep. No. 93-975, at 71 (1974). Thus, a futures manipulation standard grounded in securities regulation is far from the result Congress envisioned in 1974.

FERC's manipulation standard would be problematic even if it were not securities law-based because it would still result at best in legal uncertainty and at worst in outright conflict, the very ills for which the CEA's exclusive jurisdiction provision was to be the antidote. Uncertainty alone may cause reputable market

participants to find other markets or methods by which to manage natural gas price risks. But if FERC's manipulation standard would punish unintentional, yet reckless, conduct, the impact on futures trading could be devastating.

In futures markets, even the most innocent futures trader or commonplace trading strategies may have a price impact, depending upon market liquidity and other circumstances. Logically, that would be even more true when market participants take larger futures positions, as many businesses do, to hedge, for example, the risk of a future change in natural gas prices. If FERC applies an unintentional price manipulation standard to this futures trading (including a "reckless disregard" standard), legitimate traders engaging in common trading practices may eschew U.S. futures markets for fear of becoming ensnared in an after-the-fact dragnet by FERC, which lacks the CFTC's experience and expertise in futures markets and trading. In sum, FERC's enforcement of a new futures market manipulation standard could discourage participation in futures markets and trigger a loss in market liquidity and related hedging opportunities, contrary to the national public interest. 7 U.S.C. § 5(a).

The problems for self-regulating exchanges are just as profound. For example, like all CFTC-licensed exchanges, NYMEX is required by the CEA to conduct constant market surveillance to prevent price manipulation of its natural gas futures markets. 7 U.S.C. § 7(d)(4). NYMEX is expected to discharge its

statutory duty to prevent manipulation under the legal standard defined in the CEA. Yet with FERC's jurisdiction looming, should NYMEX and other exchanges also attempt to apply the FERC anti-manipulation standard? The CFTC would say "no," because the CFTC's jurisdiction is exclusive and it is NYMEX's exclusive regulator. FERC's legal position, however, casts doubt on the CFTC's position.

FERC might answer that NYMEX is supposed to enforce one set of anti-manipulation rules under the CEA, while FERC waits in the wings with admittedly very different standards. It is hard to think of a more confused or uncertain law enforcement scenario than where one set of "cops on the beat" (NYMEX and CFTC) are enforcing one set of traffic laws at the "Futures Square Intersection," while another officer (FERC) enforces a different, yet unknown, set of traffic laws at the same intersection. Any reasonable driver would avoid that intersection.

Not only would that result be unfortunate (or worse) as a matter of policy, it would also be contrary to Congress' intent. Congress enacted the CEA's exclusive jurisdiction provision to allow those, like the Futures Group, who compete in this specialized and complex area of commerce to conduct their legitimate and important financial market operations with the certainty that they must meet one set of legal standards, established by one regulatory body with experience and expertise in futures trading and markets. Overturning FERC's failure to respect

and accept the CFTC's exclusive jurisdiction in this case is essential to serve that public interest.

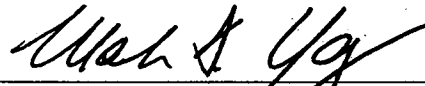
### CONCLUSION

For these reasons, this Court should conclude that FERC has no jurisdiction over Hunter's futures trading activities because the CFTC's jurisdiction is exclusive.

Respectfully submitted,

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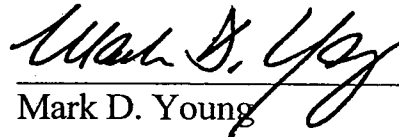
CME Group, Inc.

National Futures Association

Dated: October 31, 2008

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure And Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 6,845 words as determined by the word-counting feature of Microsoft Word 2000.

  
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Mark D. Young

## CERTIFICATE OF SERVICE

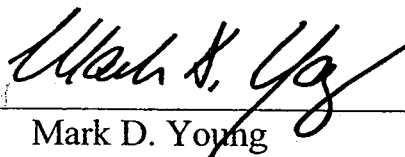
I hereby certify, in compliance with Federal Rule of Appellate Procedure 25 and United States Court of Appeals for the D.C. Circuit Rule 25, that copies of this Amicus Brief Of Futures Industry Association, Managed Funds Association, CME Group, Inc. and National Futures Association In Support Of Appellant and Intervenor was served by U.S. Mail and electronically upon the counsel listed below.

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