

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ONEOK, INC., ET AL., :

4            Petitioners                                 :

5 v. : No. 13-271

6 LEARJET, INC., ET AL. :

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8 Washington, D.C.

9 Monday, January 12, 2015

10

11           The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States  
13   at 11:04 a.m.

14      APPEARANCES:

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16 of Petitioners.

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24 Kan.; on behalf of Kansas, et al., as amici curiae,  
25 Supporting Respondents.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 THE COURT: We will hear argument next this  
4 morning in Case 13-271, Oneok versus LearJet.

5 Mr. Katyal.

6 ORAL ARGUMENT OF NEAL K. KATYAL,

7 ON BEHALF OF PETITIONERS

8 MR. KATYAL: Thank you, Mr. Chief Justice,  
9 and may it please the Court:

10 The complaints in this case claim, as the  
11 LearJet 1 says, quote, Defendant's conspiracy directly  
12 affected prices for natural gas. The mechanism for that  
13 conspiracy, they say, was false reporting to two common  
14 indices, Gas Daily and Inside FERC.

15 These publications take in jurisdictional  
16 and non-jurisdictional sales data, and push out sales  
17 information for the entire market for both  
18 jurisdictional and non-jurisdictional sales alike.  
19 That's the fundamental reason why these complaints are  
20 field preempted. The NGA, which is found in our blue  
21 brief at Page 1A, gives states control over three  
22 things, over the transportation or sale of  
23 non-jurisdictional gas, as well as to it's production or  
24 gathering.

25 JUSTICE SOTOMAYOR: Mr. Katyal, not since

1 the new regulations, but at the -- at the time of these  
2 transactions, 2000 and 2001, could FERC have punished  
3 these retail sellers for the consumers?

4 MR. KATYAL: They couldn't punish, Justice  
5 Sotomayor, retail sellers as retail -- true retailer  
6 sellers. Here, these complaints are not directed at  
7 retail sellers. They are directed at jurisdictional  
8 sellers. All ten of the defendants in this case, as the  
9 District Court found at Petition Appendix pages 85 to  
10 98A, are jurisdictional sellers.

11 And, yes, FERC could regulate them, and,  
12 indeed, did regulate them in the code of conduct, not  
13 just for their jurisdictional sales --

14 JUSTICE SOTOMAYOR: But that code of conduct  
15 came after this -- these transactions.

16 MR. KATYAL: It did. It came in 2003.  
17 That's correct.

18 JUSTICE SOTOMAYOR: All right. So -- so  
19 let's start with at the beginning. Could the consumers  
20 have come and complained to FERC?

21 MR. KATYAL: Absolutely. The consumers can  
22 come and complain to FERC and, indeed --

23 JUSTICE SOTOMAYOR: Retail consumers.

24 MR. KATYAL: Sure, retailers -- you know,  
25 if -- if there is manipulation that is directly

1 affecting, as it is here, both simultaneously the  
2 wholesale and retail market. The remedy for states or  
3 retailers is to complain to FERC and ask them to  
4 regulate.

5 But what can't happen is what happened here,  
6 which is the state coming in, and through these state  
7 causes of action, and directly regulating practices that  
8 are common to both the retail and wholesale markets.  
9 That's the crucial feature of this case.

10 JUSTICE BREYER: That is the crucial  
11 feature, and as I'm a little bit out of date on this.  
12 But as I think and understand the briefs, let's take  
13 El Paso as an example of a jurisdictional seller. It's  
14 a pipeline. It gathers gas from the field, or it used  
15 to, and then they resell it both to retail companies who  
16 give it to your house and are regulated by states, and  
17 sometimes directly to a company, a manufacturer, or a  
18 hospital, for example.

19 Is that right so far?

20 MR. KATYAL: Yes.

21 JUSTICE BREYER: I take it here we are only  
22 focusing on the thing I mentioned last, the direct  
23 sales.

24 MR. KATYAL: Well, Your Honor, I think  
25 that's the way that they're trying to claim their

1 complaints are written. That's actually not how the  
2 complaints are written, as I just read to --

3 JUSTICE BREYER: Well, I looked through the  
4 complaints, I looked through their briefs, I looked  
5 through your briefs. I tried to figure this out, and  
6 the best I can do is say whether they say it accurately  
7 or not, that's what they want to talk about.

8 MR. KATYAL: That's what they want to talk  
9 to.

10 JUSTICE BREYER: Okay. Let's talk about  
11 what they want to talk about.

12 Now, we have El Paso going in northern  
13 Arizona to a manufacturer, and it says, I am going to  
14 sell you a thousand cubic feet of natural gas at \$48 a  
15 thousand cubic feet.

16 You say, oh, my God, that's very high. I'm  
17 imagining very high price. I have no choice. I have to  
18 take it. But that, to me, is a very unreasonable price.

19 Is there anyone I can complain to?

20 MR. KATYAL: So and I may not understand the  
21 hypothetical. If it's purely about the --

22 JUSTICE BREYER: The hypothetical is that  
23 the jurisdictional seller in a direct sale sells the gas  
24 at a price that is unreasonably high.

25 MR. KATYAL: Exactly.

1 JUSTICE BREYER: Is there anyone that the  
2 buyer can complain to?

3 MR. KATYAL: There -- there is in that  
4 circumstance, Your Honor, because in that circumstance,  
5 if the reason the rate is high is not a common practice,  
6 that affects both markets simultaneously --

7 JUSTICE BREYER: The reason that  
8 it's high -- I'll tell you that it's -- why it's high.  
9 It's high because the owner of El Paso has worked out he  
10 can make more money that way. That is the only reason.

11 MR. KATYAL: And -- and, Your Honor --

12 JUSTICE BREYER: And I want to know if the  
13 customer that used to be able to complain to somebody,  
14 but can they complain now?

15 MR. KATYAL: Yes, Your Honor.

16 JUSTICE BREYER: Who?

17 MR. KATYAL: So they can complain, in your  
18 hypothetical, to the state itself why --

19 JUSTICE BREYER: But not to FERC?

20 MR. KATYAL: Well, if it's retail sales, they  
21 can't complain to FERC.

22 JUSTICE BREYER: I'm saying what it is. It  
23 was a direct sale of gas gathered by the pipeline,  
24 transported from the field, and sold by the pipeline to  
25 a manufacturer.

1 MR. KATYAL: Right. So in that  
2 circumstance, it sound -- if they are selling it not for  
3 resale but selling it for their own use --

4 JUSTICE BREYER: Correct.

5 MR. KATYAL: -- that's a retail sale --

6 JUSTICE BREYER: That is their point. They  
7 say there is no FERC regulating this. In fact, most  
8 places, there is no state regulating this. We think the  
9 this, i.e. the \$48 per MCF is set as a result of  
10 activity that is unlawful under our state antitrust law  
11 and, therefore, we would like to sue.

12 MR. KATYAL: That -- that is incorrect,  
13 Justice Breyer --

14 JUSTICE BREYER: All right.

15 MR. KATYAL: -- because the this is  
16 different in your hypothetical and in this case. In  
17 your hypothetical, it is true retail rate regulation.  
18 1(b) gives that power directly to the states, and  
19 crucial to our theory is the idea that if this is either  
20 transportation or production or regulation of the sale  
21 of the rate, which Louisiana Power is what -- says  
22 that's what that proviso is, the states can undoubtedly  
23 regulate that.

24 Here's the difference in this --

25 JUSTICE BREYER: Your point, I take it, is



1     that the this happens to be the reason that the price is  
2     higher; is not because the owner of El Paso said, ha,  
3     ha, ha, let's make a lot of money. But, rather, the  
4     owner of El Paso, in addition to that, said that the way  
5     to make the extra money is to go out and manipulate  
6     the -- the journals, the little gas journal, by lying to  
7     them, and that happens to be the same way that they  
8     would also get wholesale prices higher.

9           MR. KATYAL:           But, Justice Breyer, that is  
10    precisely the difference. That is what this Court has  
11    said time and again. For example, in Northern Natural  
12    it said, look, the -- you know, the -- the particular  
13    means chosen by the state is the crucial thing for  
14    preemption analysis. The means that my friends on the  
15    other side are seeking to regulate is a common practice  
16    to both markets --

17           JUSTICE BREYER:        Okay. I got my answer.

18           JUSTICE KAGAN:        So let's assume --

19           JUSTICE BREYER:        I won't interrupt you  
20    further.

21           JUSTICE KAGAN:        Let's assume that that's  
22    true, Mr. Katyal, that they are trying to regulate a  
23    means that's a common practice to both markets. And  
24    let's assume that because of that, FERC clearly does  
25    have authority to regulate in this area.

1           The question is whether FERC's authority  
2   should be exclusive or whether it could be concurrent,  
3   not field preemption. Right?

4           MR. KATYAL:           Right.

5           JUSTICE KAGAN:        There would still be a kind  
6   of rule of the road, even when field preemption runs  
7   out, conflict preemption takes over, and it might be  
8   that if the state regulation interfered with the goals  
9   and objectives of the federal regulation, the federal  
10  regulation would trump.

11          But I don't really see a reason in this kind  
12  of case why you would exclude the state entirely, even  
13  if nothing the state was doing was conflicting with  
14  federal regulation or federal policy.

15          MR. KATYAL:           But, Justice Kagan, you asked a  
16  similar question in *Kerns*, and I think the answer in  
17  *Kerns* is the same as the answer it is here. Indeed,  
18  it's stronger here, which is that this is a field in  
19  which this Court has said time and again is field  
20  preempted. When FERC acts in this area, it does provide  
21  exclusive jurisdiction --

22          JUSTICE KAGAN:        Well, then what's the --

23          JUSTICE GINSBURG:      It's not exclusive --

24          JUSTICE KAGAN:        -- this area is the  
25  question.

1 MR. KATYAL: Yes.

2 JUSTICE KAGAN: I mean, yes, there is some  
3 field preemption, but why should the field preemption  
4 carry into a sphere where the practice being regulated  
5 is commonly affected, both wholesales sales, which are  
6 clearly in the bailiwick of the federal government, and  
7 retail sales which are just as clearly in the bailiwick  
8 of the state?

9 MR. KATYAL: Well, precisely what this Court  
10 said in Mississippi Power, page 374, quote, "We have  
11 long rejected the sort of case-by-case analysis of the  
12 impact of the state regulation upon the national  
13 interest and power regulation cases."

14 Congress has drawn a bright line between  
15 state and federal authority in the setting of wholesale  
16 rates and in the regulation of agreements that affect  
17 wholesale rates. States may not regulate in areas  
18 where FERC has properly exercised its jurisdiction --

19 JUSTICE GINSBURG: But you agree that  
20 FERC does not have the exclusive authority because you  
21 have conceded that a federal antitrust claim would be  
22 okay. So FERC is not the sole regulator. There's room  
23 for federal antitrust claims.

24 MR. KATYAL: Justice Ginsburg, we absolutely  
25 agree that federal antitrust actions are available and

1 would have been the remedy for any problems in this case  
2 except for the litigation forfeiture by the other side.  
3 We don't think that that somehow makes FERC -- ousts  
4 FERC from being the exclusive regulator. I think time  
5 and again this Court has said there is a big difference  
6 between displacement of federal statutes which have to  
7 do with canons against implied repeal and the field  
8 preemption analysis.

9 Indeed, in *Connell v. Plumbers*, this Court  
10 said with respect to antitrust claims specifically,  
11 preemption of federal -- of state statutes would be --  
12 would be the ruling of this Court, but not federal.  
13 Why? Because federal statutes can be harmonized one to  
14 another by federal courts, but states don't have quite  
15 that same experience. That's what *Connell v. Plumbers*  
16 says.

17 JUSTICE GINSBURG: Well, suppose the state  
18 law -- and I think this is true of many states -- just  
19 mirrors the federal antitrust law, it's the same. It's  
20 the same substantive regulation.

21 MR. KATYAL: We -- we disagree with that for  
22 any number of reasons our brief points out. But even if  
23 it were the same, I think two things would follow. One  
24 is, then there would be no need for the state lawsuits  
25 anyway because you already have a federal remedy, and

1 the state --

2 JUSTICE KENNEDY: Well, may -- and I'm  
3 interested in a hypothetical. Let's assume that someone  
4 sues just under state law. The state law is exactly the  
5 same as the Sherman Act, and that's Justice Ginsburg's  
6 question, and I would be interested in it.

7 MR. KATYAL: And I think that is  
8 complementary authority, which, Justice Kennedy, your  
9 opinion in Arizona vs. United States decried. Once  
10 we're in the field, once Congress has said to a federal  
11 agency, as it is here, FERC is regulating the very  
12 practice that they are seeking to regulate three  
13 different ways, then you can't tolerate states in the  
14 area. Why? Because states will have all sort --

15 JUSTICE KENNEDY: Well, on -- on that point,  
16 let me -- this is a point that Justice Kagan was getting  
17 at, too. Let's assume that you do not prevail on  
18 conflict preemption. We say that the field has been  
19 preempted but does not include the practices here. Do  
20 you have any argument that there is conflict preemption  
21 on the facts of this case?

22 MR. KATYAL: We do. It would be something  
23 that would be sorted out on remand, but --

24 JUSTICE KENNEDY: What is it?

25 MR. KATYAL: It is that FERC is regulating

1 in this area, specifically, and, indeed, is encouraging  
2 the practice of index -- of index reporting. And if you  
3 have states coming in, then they will play -- then  
4 natural gas companies would play to the lowest common  
5 denominator and won't be able to report.

6 The FERC report goes through any number of  
7 examples of how things that look like wash trades, like  
8 paragraphs 55 and 56, practices such as sleeving, may be  
9 regulated by the states because they --

10 JUSTICE SOTOMAYOR: What would be left of  
11 the states' power to regulate prices if -- if the retail  
12 price controls the wholesale price? That's what it  
13 sounds like this industry has created. Is there  
14 anything left to the states' ability --

15 MR. KATYAL: Absolutely.

16 JUSTICE SOTOMAYOR: -- because retail prices  
17 will always influence the wholesale price?

18 MR. KATYAL: Absolutely, Your Honor, almost  
19 everything. So my answer to Justice Breyer was states  
20 have the power in 1(b) to regulate retail rates  
21 themselves, rate regulation, and as well they have the  
22 ability to regulate other things in which FERC can't  
23 isolate a practice that directly affects jurisdictional  
24 rates. So my friend's hypotheticals about wage and hour  
25 laws, or as you said, Justice Sotomayor --

1 JUSTICE SOTOMAYOR: So basically  
2 jurisdictional -- non-jurisdictional sellers can do  
3 anything they want in terms of the -- of the consumer,  
4 and consumers will always pay the cost of that.

5 MR. KATYAL: No, not at all, Your Honor.

6 JUSTICE SOTOMAYOR: Because they have no one  
7 they can recover from.

8 MR. KATYAL: No, not at all. If it's a  
9 non-jurisdictional seller, Your Honor, states have full  
10 power in the area.

11 Here is our test for preemption. It's very  
12 simple. It says two things. It's a who and a what to us.  
13 The who is, is the state regulating jurisdictional  
14 sellers. Here the complaints are they're directed at  
15 ten jurisdictional sellers.

16 JUSTICE SOTOMAYOR: But they are both. There  
17 are jurisdictional sellers, and then there are  
18 non-jurisdictional sellers. You're trying to  
19 characterize them as one. But they're -

20 MR. KATYAL: Your Honor, but the way the Act  
21 works is once you are a jurisdictional seller, you  
22 continue to be a jurisdictional seller; and that's why  
23 FERC is regulating these ten entities with respect to  
24 even their retail reporting. That's what the code of  
25 conduct does. Why? Because that's the way the Gas Act

1 works. You don't take your hat off as a jurisdictional  
2 seller down the road if you are engaged in retail sales.

3 So that's why that language from Mississippi  
4 Power I read to you is so important, because that was a  
5 case in which the State was regulating retail. They  
6 were trying to regulate retail rates.

7 And what this Court said is, no, it doesn't  
8 matter, that -- you know, you can characterize it as hat  
9 or not. It doesn't matter. That's a practice that  
10 simultaneously and directly affects both rates.  
11 Therefore, FERC has exclusive jurisdiction in the area.

12 Now, all these hypotheticals about wage hour  
13 laws and so on are solved by the fact that 5(a) is very  
14 limited. It only gives power to FERC over practices  
15 that directly affect the rates. The agency is coming  
16 before you saying, this is a legitimate interpretation  
17 of our authority. Indeed, it's the way they've  
18 interpreted their authority over time; and that's  
19 entitled to the highest form of deference, Chevron  
20 deference.

21 JUSTICE KAGAN: Mr. Katyal, suppose the  
22 following hypothetical: Suppose there is a company and  
23 it has ten customers and five of the customers are  
24 wholesalers and five of the customers are retailers, so  
25 it is a jurisdictional seller. And it says to the



1     retailers, We're going to charge you whatever we charge  
2     to the wholesalers plus 20 percent. That's what it says  
3     to the retailers. And then it lies to the retailers  
4     about the price that it's charged the wholesalers. All  
5     right?

6             Do the States have power to regulate that,  
7     that fraudulent communication to the retailers about  
8     what they're charging the wholesalers?

9             MR. KATYAL:             I think if the State is -- if  
10    it's truly about the rates, Louisiana Power says that  
11    they can regulate true rate regulation. What they can't  
12    do is regulate practices that directly affect the rates.

13            So FERC may have something to say -- and,  
14    indeed, I would expect would have something to say about  
15    that, and 5(a) says the remedy in a circumstance of  
16    divided authority in which -- excuse me, divided in  
17    which both markets are affected, the remedy is -- the  
18    first line of 5(a) says States should complain to FERC.

19            Here you have got Federal antitrust  
20    remedies --

21            JUSTICE KAGAN:           Just to make sure I  
22    understand, you are essentially saying my hypothetical  
23    is like this case and the States would be divested of  
24    authority because -- even though the company is having  
25    this direct interaction with the retailers because it's

1     pegged to wholesale rates?

2             MR. KATYAL:             No, no, I may not  
3     understand the -- but if it's one indivisible practice  
4     as it is here, a common practice of index manipulation,  
5     that is something only FERC would have authority over,  
6     not the States.

7             If I could reserve.

8             CHIEF JUSTICE ROBERTS:             Thank you, counsel.  
9     Mr. Yang.

10            ORAL ARGUMENT OF ANTHONY A. YANG,  
11            ON BEHALF OF UNITED STATES,  
12            AS AMICUS CURIAE, SUPPORTING PETITIONERS

13            MR. YANG:             Mr. Chief Justice, and may it  
14     please the Court:

15            This case concerns FERC's jurisdiction to  
16     regulate a practice of a jurisdictional seller that  
17     directly affects the wholesale price for natural gas.

18            Now, Justice Kagan, your example -- I think  
19     there might have been some confusion in the interchange.  
20     Your example is a practice that would directly affect  
21     the retail rate, not a jurisdictional rate. And in that  
22     context, that would lie within the rate-setting  
23     authority of the State.

24            But here we have something that is quite  
25     different. We have juris- -- indices for which the

1 indices are based on both jurisdictional and retail  
2 trades. Then those indices are used by common practice  
3 in the industry, and not just by these Petitioners, to  
4 set wholesale rates and retail rates. That's done in  
5 advance.

6 Particularly when we're talking about longer  
7 term contracts, the market participants end up often  
8 pegging their sale price based on the floating price  
9 that is reported in these indices. And where you have  
10 both, the input is going into the index, wholesale and  
11 retail, and the outputs that are both wholesale and  
12 retail. And FERC has jurisdiction over the entities;  
13 that is, the jurisdictional entities that are actually  
14 playing in both fields.

15 FERC, in our view, has authority to regulate  
16 under Section 5 and Section 1 the practices of those  
17 jurisdictional sellers that directly affect the  
18 wholesale rate; that is, the rate over which FERC has  
19 exclusive jurisdiction.

20 JUSTICE KAGAN: But you are saying,  
21 Mr. Yang, that even if the regulation is directed toward  
22 a retail transaction, if it directly affects the  
23 wholesale rate, you have field preemption over that?

24 MR. YANG: These have -- I'm not exactly  
25 sure what your hypothetical is getting at.

1 JUSTICE KAGAN: Does the -- the State is  
2 regulating a transaction with the retailer, and you are  
3 saying because that transaction has these direct effects  
4 on the wholesale market and wholesale prices, that that  
5 gives you field preemption, that that falls within the  
6 category of things which the State is simply not allowed  
7 to do irrespective of whether there is any conflict with  
8 Federal law or policy.

9 MR. YANG: I don't think I actually agree  
10 with that characterization of our opinion -- position.

11 JUSTICE KAGAN: Okay. So tell me what it  
12 is.

13 MR. YANG: So if the State were limited  
14 simply to regulating the retail rate, just because a  
15 retail rate might have some impact --

16 JUSTICE KAGAN: No, no, no. They are  
17 regulating a transaction with a retailer. It's not a  
18 price thing. They are regulating a transaction in the  
19 way that they are in this case.

20 I mean, all these false sales, some of them  
21 are coming out of wholesale sales, and some of them are  
22 coming out of retail sales. And the States here are  
23 regulating transactions that involve --

24 MR. YANG: Actually, I think we disagree  
25 with that premise. I think there may even be further

1 disagreement, but let me just deal with the premise  
2 first.

3 What we're talking about are practices that  
4 postdate the transaction. So when we're dealing with  
5 the false reporting of a sale, that is after the sale  
6 has been completed. And that false reporting --

7 JUSTICE KAGAN: Well, I thought a lot of  
8 these were false sales themselves.

9 MR. YANG: Well, there's two things. Like  
10 there's wash trades as well. So with respect to the  
11 false reporting, that can be either with a real trade  
12 that they are, after the fact, reporting it to be  
13 something that it wasn't or --

14 JUSTICE KAGAN: And some of those real  
15 trades are real trades with retailers.

16 MR. YANG: That's true, but the trade itself  
17 is completed, and so the market manipulation deals with  
18 future things that might be affected by the index.

19 Now, the index, of course, affects retail  
20 rates that use the index just as it affects wholesale  
21 rates that -- that use the index. But, in our view,  
22 where you have got this partial merge -- and this is a  
23 very unusual aspect of this case. Where you have a  
24 partial merging of the wholesale and retail rates -- the  
25 retail markets here, Congress would have intended,

1 through Section 5(a), which grants FERC authority to  
2 regulate practices directly affecting wholesale rates so  
3 it's not just limited to the rates itself for the  
4 wholesale sales --

5 JUSTICE GINSBURG: Can FERC give a remedy to  
6 the consumers who are involved with the Plaintiffs in  
7 this case?

8 MR. YANG: The answer is no and yes, and  
9 it's a little complicated. First, as we note in our  
10 brief, there is a remedy in Federal antitrust law, which  
11 would be outside of FERC. We also think that there may  
12 well be contract-based remedies outside that would be  
13 available. But with respect to --

14 JUSTICE GINSBURG: But FERC at this time.

15 MR. YANG: With respect to FERC regulation,  
16 FERC has authority to grant disgorgement as has been  
17 held by the courts under Section 16, and complaints are  
18 brought often by States and municipalities and others on  
19 behalf of retail customers.

20 The western energy crisis is an example.  
21 There are a number of complaints brought to FERC which  
22 FERC adjudicated. They have resulted in settlements.  
23 Those settlements with the jurisdictional sellers have  
24 involved payments to retail parties. There's an open  
25 question, and I think it might be very hard outside the

1 settlement context to determine if FERC would have  
2 direct authority to order that. But at least in the  
3 context of adjudicating disputes brought by States  
4 against jurisdictional sellers involving wholesale  
5 trades, there can be sometimes a pass-through.

6 That said, we're not relying on the  
7 availability of a FERC remedy for retailers here. We  
8 think there is an adequate remedy at Federal  
9 antitrust and that's particularly true --

10 JUSTICE GINSBURG: Can you explain -- can  
11 you explain something? The government recommended that  
12 we deny cert in this case, and the government's reason  
13 was the case lacked prospective importance.

14 So what is the situation today with the  
15 Energy Policy Act?

16 MR. YANG: Well, the reason why it lacks --  
17 it lacked, in our view, prospective importance is  
18 because whatever the question was about FERC's authority  
19 before 2005, Congress expanded that authority in the  
20 EPA. Congress granted FERC not only jurisdiction over  
21 jurisdictional entities, which I -- which is an  
22 important limitation to our position here, pre-2005, it  
23 granted authority over entity -- any entities. So going  
24 forward, you know, that's a separate question on how far  
25 the EPA Act of 2005 goes.

1           But with respect to the questions here, we  
2   think that would be controlled by the EPA Act and not by  
3   the authority that existed prior to 2005.

4           That said, prior to 2005, our view is FERC  
5   did have authority to regulate the jurisdictional  
6   sellers with respect to these practices that directly  
7   affect wholesale rates over FERC -- which FERC has  
8   exclusive authority. And this Court in, for instance,  
9   both *Schneidewind* and recognized this as -- the Court  
10   recognizes as well in *Northwest Central*, it said that  
11   the exclusive authority of FERC extends not just be --  
12   not beyond just the sales, but the practices that are  
13   affecting the sales. And this --

14           JUSTICE KAGAN:           Can I ask Justice Kennedy's  
15   question again to you, Mr. Yang, which is if -- if this  
16   were a conflict preemption regime, is there a conflict?

17           MR. YANG:           We haven't analyzed this under a  
18   conflict preemption regime, and so it would kind of  
19   depend on an analysis of what the state law prohibitions  
20   were vis-à-vis the federal prohibitions. We think that  
21   if you were to adopt only a conflict preemption type of  
22   a -- a regime, then you would have to at least have the  
23   state's accept a FERC determination of the lawfulness of  
24   these types of practices and then take that as a given  
25   in determining whether there is further conflict.



1 JUSTICE KAGAN: Sure, that seems right. But  
2 I mean, is there anything that FERC has said now about  
3 these practices that would suggest a conflict with this  
4 state regulation?

5 MR. YANG: It's -- we have not analyzed it,  
6 and it's difficult for us at this point in the  
7 litigation where there seems to be flux in the  
8 characterization of what the state laws claims are and  
9 there's not been adjudication of what the state law  
10 requires for us to determine whether there is conflict  
11 preemption. That's -- it's not a position that -- an  
12 issue that we feel that we have a dog in the fight in.

13 So that said, you know, the question of  
14 field preemption versus conflict preemption always -- as  
15 you noted before, you always have conflict preemption.  
16 This Court, however, has repeatedly determined that the  
17 Natural Gas Act -- in the Natural Gas Act, Congress  
18 intended field preemption to apply because Congress  
19 wanted to have national uniformity --

20 JUSTICE KAGAN: Well, it intended field  
21 preemption to apply as to wholesalers. It didn't intend  
22 field preemption to apply as to a retailers.

23 MR. YANG: No, actually I think the Court  
24 has recognized in Northwest Central, for instance -- we  
25 cite this in our brief -- that the regulation over the

1   wholesales extends that power, extends beyond just the  
2   wholesales themselves. And in Section 5(a), which  
3   the Court cited both in Schneidewind and then recognized  
4   I think in Northwest Central, Section 5(a) extends that  
5   power.

6           This is an extension that Congress did not  
7   have any -- an analog with respect to the states. It  
8   goes beyond the sales itself to practices affecting the  
9   sales. And we have here the effective merging of a  
10   state and federal market where, in our view, the states  
11   could, if they wished to, carve off their own markets  
12   for regulation. They have not done so.

13           But where you have that merging and both the  
14   practices that are going into the index with respect to  
15   manipulation are both whole -- related the wholesale and  
16   retail matters, and then you are coming out and you are  
17   directly affecting wholesale and retail rates, Congress  
18   would have expected the field preemption that is a  
19   single federal standard regulated by FERC to govern the  
20   practices in that context. It's --

21           CHIEF JUSTICE ROBERTS:           How -- how is -- how  
22   is the state supposed to separate out the jurisdictional  
23   and non-jurisdictional regulation?

24           MR. YANG:           If I -- if I might briefly  
25   answer.

1 CHIEF JUSTICE ROBERTS: You may.

2 MR. YANG: The state could require that all  
3 retail sales be based on an index that is exclusively  
4 retail-based. So, for instance, FERC did something  
5 analogous with respect to unbundled sales of natural gas  
6 by pipelines. It required that the contracts be based  
7 only on those indices that meet certain FERC standards.  
8 The state could do something analogous.

9 CHIEF JUSTICE ROBERTS: All right. Thank  
10 you.

11 MR. YANG: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Fisher.

13 ORAL ARGUMENT OF JEFFREY FISHER,  
14 ON BEHALF OF THE RESPONDENTS

15 MR. FISHER: Thank you, Mr. Chief Justice,  
16 and may it please the Court:

17 This is an anti-trust case, and the  
18 plaintiffs claims here are very simple. It's that they  
19 paid too much in retail transactions for natural gas  
20 because the defendants conspired to fix prices. And  
21 this is important for two reasons, each of which  
22 independently saves the claims from preemption.

23 First, because the state regulation here is  
24 retail -- is regulation of retail prices, it falls  
25 squarely within Section 1(b) reservation of power in the

1 Natural Gas Act. And, secondly, the claims necessarily  
2 fall outside any field FERC could possibly regulate  
3 because, as my opponents have conceded, FERC has no  
4 power over antitrust -- it falls outside the agency's  
5 power under Otter Tail and California v. FPC.

6 JUSTICE SCALIA: No, I'm not sure. It may  
7 be an exaggeration to say it -- it falls squarely within  
8 the exception given to the states. This is not a state  
9 regulation of prices. It's -- it's state regulation of  
10 a practice that affects state prices, retail prices, but  
11 also affects wholesale prices. It's a little different.

12 MR. FISHER: Well, Justice Scalia, let me  
13 say two things about that that are very important.  
14 First, the statutory word is "sales." What Section 1(b)  
15 reserves to the states is the power to regulate retail,  
16 quote, sales. And in that regulatory power, this Court  
17 has twice spoken directly to what that means, first in  
18 the 1947 Panhandle case and second in the 1997 General  
19 Motors v. Tracy case. And in both those cases,  
20 the Court made very clear that the state's power to  
21 regulate sales goes far beyond setting a price  
22 themselves. It's regulating the terms of service, the  
23 terms of --

24 JUSTICE BREYER: All that is true, but it  
25 might depend on how. That is, the way I'm thinking

1 about this which is out of date but perhaps analogous.  
2 We have El Paso, it picks up gas in the Permian Basin.  
3 It ships it up to Ohio. It sells it to a retail  
4 distributor in Toledo. Classic. FERC regulates the  
5 sale for resale, and the local regulator regulates the  
6 price to the distributor.

7 Now, there is what used to be a further  
8 bizarre and unusual occurrence which is now common. On  
9 the way, El Paso sells directly to a manufacturer. And  
10 that seems to be at the heart of your case.

11 MR. FISHER: Right.

12 JUSTICE BREYER: Right. So now I'm thinking  
13 we're back to cost of service ratemaking. Suppose under  
14 cost of service ratemaking, you have FERC which said  
15 El Paso is charging too much money for sales for resales  
16 because it doesn't do its depreciation properly. Okay.  
17 You'd better load them.

18 Now, suppose a state via antitrust or any  
19 other way said the reason that the sales that are direct  
20 to the manufacturer are unlawful under state law is  
21 because it doesn't do its depreciation properly, and  
22 suppose that the depreciation the state is talking about  
23 is identical to the depreciation that FERC is talking  
24 about.

25 I would say absolute preemption. And if I'm

1 right about that, in this case, we don't have  
2 depreciation rules, but we have price setting by  
3 consulting Joe's Gas Journal. And here, what the state  
4 is saying is the consultation with Joe's Gas Journal  
5 that the state wishes to make unlawful is identical to  
6 the consultation with Joe's Gas Journal that FERC wants  
7 to make unlawful and upon which rests FERC's wholesale  
8 price determination. Okay? Just like the depreciation.  
9 And if the one is field preempted, so is the other.

10 Now that's the analogy I've been going  
11 through in my mind, just waiting to ask you, because I  
12 would be very interested in your response.

13 MR. FISHER: So that's the best version of  
14 the other sides argument, but it's not this case. You  
15 just described Mississippi Power, Justice Breyer, where  
16 the state wanted to second-guess what FERC had done.  
17 Here, the state has no second-guessing. FERC has said  
18 this is terrible what happened, as do the states.

19 JUSTICE BREYER: But that is conflict  
20 preemption --

21 MR. FISHER: Right. So let --

22 JUSTICE BREYER: -- not field preemption.

23 MR. FISHER: That's exactly right. And so  
24 it's critical, but let me explain why we're in conflict  
25 preemption, and I turn back to Justice Scalia's question

1 about Section 1(b). This Court has addressed in the  
2 most recent Natural Gas Act case what happens when you  
3 have a unitary practice that has effects on both the  
4 wholesale and retail market.

5 Entire part 2(b) of Northwest Central is  
6 about that very problem. I want to read you what  
7 the Court said in that case, and this at Footnote 12  
8 where it summarizes the holding of the case. They said,  
9 "In the present case, it is argued" --

10 JUSTICE SOTOMAYOR: Can you give me a page  
11 number?

12 MR. FISHER: Pardon me.

13 JUSTICE SOTOMAYOR: Page number you're --

14 MR. FISHER: This is on page 517 of  
15 Northwest Central. It's Footnote 12.

16 In this case, the Court says, "In the  
17 present case, it is argued that each agency acts within  
18 its assigned sphere, and the Court has observed there is  
19 no provision in the statute itself to resolve such  
20 jurisdictional tensions."

21 And here is the solution, "Only by applying  
22 conflict preemption analysis can we be assured that both  
23 state and federal regulatory schemes may operate with  
24 some degree of harmony."

25 And I would tell you there is no other

1 outcome that could possibly square with the statute. If  
2 you look at the statute, and this is in the first page  
3 of both the blue brief appendix and the grey brief  
4 appendix. Section 1(b) says, and I'm quoting from the  
5 beginning, The provisions of this chapter shall apply,  
6 and then it goes on to say to wholesale transactions and  
7 the like. And then towards the end, it says, but shall  
8 not apply to any other transaction or sale of natural  
9 gas.

10 JUSTICE BREYER: Yes, yes, but wait.  
11 Suppose, in our classical system years ago, that El Paso  
12 Gas gets a price set for resale at FERC equal to three  
13 dollars a thousand cubic feet, and then the Ohio  
14 regulator, in regulating the price of the distribution  
15 company, forces it down for the reason that it thinks  
16 that three dollars for the wholesale part is too high.

17 Not close. They couldn't do that?

18 MR. FISHER: That's right.

19 JUSTICE BREYER: So it depends on their  
20 reason for thinking that the price or the sale -- they  
21 can't regulate the sale any way they want. They can't  
22 regulate it in a way that would interfere with and  
23 probably is, or is field-preempted by, FERC's authority  
24 to set wholesale rates.

25 MR. FISHER: Those are two very different



1 points, Justice Breyer. We wholeheartedly agree the  
2 State could not regulate retail sales in a way that  
3 conflicted with FERC's authority. But we disagree, and  
4 this is the holding of Northwest Central, and it's the  
5 only reading of the Act that gives meaning to the  
6 provision that says that States maintain authority, and  
7 it says no provision of this chapter, which would have  
8 to include Section 5(a), can apply to retail  
9 transactions.

10 and so the only way to harmonize those is to give -- is  
11 to give meaning to both and to apply conflict  
12 preemption. That's the square holding of Northwest  
13 Central.

14 And in Mississippi Power -- I just want to  
15 stress this -- in Mississippi Power, the problem was the  
16 State was -- the whole point of the, quote, "prudency  
17 review" in that case was to second-guess the power  
18 allocation that FERC had made. So, as the Court itself  
19 said, that conflicted with FERC's authority.

20 So once you understand that, the only --

21 JUSTICE KAGAN: So as I understand your  
22 argument, Mr. Fisher, you are rejecting the Ninth  
23 Circuit's analysis. Because the Ninth Circuit -- it's a  
24 little bit confusing, but I read the Ninth Circuit to  
25 say that FERC just had no authority over these

1 transactions.

2 MR. FISHER: The Ninth Circuit didn't  
3 explicitly say, but I think the reading of the Ninth  
4 Circuit opinion, proceeding from the premise that my  
5 friends are proceeding today, which is Section 5(a) is  
6 coterminous with field preemption. The Ninth Circuit, I  
7 think, held what you say it held, which is probably why  
8 the solicitor general was concerned with that case. It  
9 holds that FERC doesn't have power.

10 We don't have to fight FERC's power here.  
11 If Section 5(a) gives the FERC power over this practice  
12 because it affects wholesale rates, so be it. But what  
13 Northwest Central says and what the statute says is that  
14 you can't oust the States. So all you're left with--

15 JUSTICE BREYER: So you can't -- let me  
16 think of a better -- the -- the State, it faces a three  
17 dollar cost of goods sold to the wholesale pipeline, to  
18 El Paso, plus an additional claimed dollar in expenses,  
19 including reasonable profit. They're asked for \$4 at  
20 the -- in your house. The State says, no, we're not  
21 going to give you \$4, and the reason is that the \$3 is  
22 too high.

23 Now, you say that conflicts with FERC. No,  
24 it doesn't. FERC made a mistake. They will be  
25 delighted when they see that we've gone into the

1 depreciation rules more thoroughly than their own rules  
2 and they should have said 2.50 instead of 3. And when  
3 they read our opinion, they're going to jump for joy.  
4 To prevent that, we have field preemption, not conflict  
5 preemption.

6 MR. FISHER: No, Justice Breyer, we're not  
7 second-guessing anything. We are not even asking to  
8 second-guess anything FERC has ever held.

9 First of all, FERC didn't even have  
10 regulatory power over these practices at the time they  
11 have heard.

12 JUSTICE BREYER: That's a different  
13 argument.

14 MR. FISHER: Now, my friends have described  
15 themselves as jurisdictional sellers, but what the  
16 statute says is you're a jurisdictional seller or not  
17 depending on what kind of sales you are, quote, "engaged  
18 in." So when you are selling jurisdictional, you are a  
19 jurisdictional seller, but when you are making retail  
20 sales, you are a retail seller. And we're not asking to  
21 second-guess anything FERC has said. FERC, to the  
22 contrary, came in with this 2003 code of conduct and  
23 said, absolutely not, you cannot do these kinds of false  
24 reporting in wash sales.

25 So all you're left with, once you understand

1     that it's conflict preemption, if I could turn back to  
2     Justice Scalia's question, is whether you fall under the  
3     Section 1(b) reservation of power. And I've explained  
4     to you that Panhandle and General Motors v. Tracy  
5     clearly show that we do.

6             The only thing that our opponents cite in  
7     response, which is a brand-new argument, never made in  
8     the District Court, never made in the Ninth Circuit,  
9     never even made in the cert papers, is they cite  
10    Louisiana Power for the supposed proposition that all  
11    states have this regulatory ability over rate setting,  
12    but that's not the holding of Louisiana Power.

13            JUSTICE SOTOMAYOR:            Could you go back to one  
14    point? I'm sorry to interrupt you. But the indices at  
15    question, they report both retail prices and wholesale  
16    prices?

17            MR. FISHER:            Theoretically, yes. Of course,  
18    in this case, Justice Sotomayor, also completely false  
19    transactions.

20            JUSTICE SOTOMAYOR:            No, no, no. I know  
21    that. But so the -- so Old Paso -- El Paso company was  
22    reporting fake consumer prices -- this is your  
23    allegation, I know -- fake consumer prices and fake  
24    wholesale prices?

25            MR. FISHER:            Well, the reality is they were

1 simply reporting fake prices. I don't think --

2 JUSTICE SOTOMAYOR: Yeah -- no, no, no.

3 MR. FISHER: Now, it shows whether or not  
4 they were supposed wholesale transactions or supposed  
5 retail transactions. But the important point is how  
6 they're used on the other side.

7 JUSTICE SOTOMAYOR: I'm not sure how the  
8 indices -- the indices set both prices; is that what  
9 you're saying?

10 MR. FISHER: Well, the indices don't set any  
11 prices. They simply --

12 JUSTICE SOTOMAYOR: No, no, no. But the  
13 industry sets the same price for both?

14 MR. FISHER: That's right. And certainly  
15 the industry commonly uses the indices to set retail  
16 prices. They also voluntarily, wholly voluntarily, at  
17 least sometimes, use the indices at the -- time question  
18 here -- to set wholesale prices.

19 JUSTICE SOTOMAYOR: Are they the same, those  
20 two prices?

21 MR. FISHER: No, not necessarily. Because  
22 you use the -- you use the index prices as a peg, but then  
23 you can add and subtract to that depending on what kind  
24 of sale and the volume and the like. But even the act  
25 of using it as a peg, Justice Sotomayor, is an important

1 insight, because it is wholly voluntary that they even  
2 use it for wholesale transactions.

3 And so if they are right, then as soon as a  
4 given practice affects wholesale rates, and it's their  
5 completely voluntary decision to make that so, you would  
6 be giving them a get-out-of-jail-free card if you turn  
7 Section 5A into a field preemption statute. Because  
8 whatever practice they're engaged in with retail sales,  
9 all they have to do is do it a couple of times in a  
10 wholesale transaction and then be out from under state  
11 jurisdiction. And my friend tried to explain --

12 CHIEF JUSTICE ROBERTS: You could say the  
13 same for setting prices of anything at all. I mean,  
14 that's kind of the idea, is that if it affects -- if the  
15 price is affecting sales, then it is preemptive. The  
16 fact that they may engage in certain practices that  
17 affect sales is not a bad thing in the abstract.

18 I mean, you -- the case is proceeding on the  
19 ground that you are dealing with a practice that is, you  
20 know, offensive in both contexts. But the state and  
21 FERC may have different views on that. So the fact that  
22 the jurisdictional sellers engage in a practice that  
23 affects wholesale rates is not -- shouldn't be regarded  
24 as problematic.

25 MR. FISHER: No, it shouldn't, if all you

1 are doing is asking whether FERC has authority to  
2 regulate it under Section 5A.

3 What we're saying is, if you transform  
4 Section 5A into a field preemption statute, you would  
5 have the difficulty of giving the defendants themselves,  
6 or any malefactors themselves in the market, complete  
7 control over how they write their own contracts. They  
8 could even peg their contracts to retail prices  
9 directly, as -- Justice Kagan, I think that's what you  
10 were getting at -- even to taxes.

11 JUSTICE SOTOMAYOR: Mr. Fisher, there is a  
12 field.

13 MR. FISHER: Yes.

14 JUSTICE SOTOMAYOR: Define the field. How  
15 would you define what the field is?

16 MR. FISHER: The field is what the Court  
17 said in *Schneidewind*, which is the field is practices  
18 relating to wholesale transactions. So all state  
19 regulation that is directed at that field is preempted.  
20 Now, as I've explained, it is field preempted if the  
21 state cannot bring themselves under the Section 1(b)  
22 proviso. However, we can bring ourselves under the  
23 Section 1(b) reservation of power. Then you end up with  
24 a simultaneous regulatory system where conflict  
25 preemption is the solution.

1           But if I could turn to the second argument  
2   in our case, is that the words "directed at" are very  
3   important, because that's the words the Court used in  
4   Schneidewind, which my opponents say is their best case.  
5   All state regulation directed at FERC's field of  
6   wholesale transactions is field preemption.

7           For two reasons, our anti-trust claims are  
8   not directed at FERC's field. First, they are generally  
9   applicable state anti-trust cases -- claims, that is.  
10   The Court has never used the Natural Gas Act, in all of  
11   its history, to preempt in a field preemption manner a  
12   generally applicable state law. And the reason is  
13   simple: Because it's not, as the Court put it in  
14   Schneidewind, aimed at the natural gas industry. So  
15   FERC protects -- I'm sorry, the Natural Gas Act protects  
16   that turf, but it doesn't protect the state to protect  
17   companies against generally applicable laws. That is  
18   what the Court said in footnote 11 of Schneidewind, and  
19   that has to be right. As the American Antitrust  
20   Institute points out in its amicus brief, what if the  
21   way the scheme was perpetrated was simply by bribing the  
22   publishers of the indices? Certainly they wouldn't  
23   claim that it would be field preempted, but that would  
24   be -- or they shouldn't be able to, but that would be  
25   the conclusion of their argument; now even more so, even



1 if you weren't inclined to accept that all generally  
2 applicable state laws survive. And it would be fully  
3 consistent with the Court's cases to say so, because  
4 they only two cases they cite are Louisiana Power and  
5 Arkansas Louisiana, both of which are conflict  
6 preemption cases. But even if you wanted to make a  
7 narrower holding, you could simply limit it to antitrust  
8 law. Justice Kennedy, you asked, I think, about the  
9 relationship between our antitrust claims and Federal  
10 antitrust law, and it's very important. We've said time  
11 and again, and they have never disputed, the substance  
12 of our claims is exactly what would be prohibited under  
13 the Federal antitrust laws.

14 So under this Court's holdings in Ottertail  
15 and California v. FPC, it falls -- and I will use this  
16 Court's own words in California v. FPC. There is no  
17 pervasive regulatory scheme, including the antitrust  
18 laws, that has been entrusted to the commission. So  
19 FERC has no power over antitrust violations. It's the  
20 exact opposite of Kurns, which they say is their --  
21 another one of their best cases. Even Kurns --

22 JUSTICE KENNEDY: It's -- it's not this  
23 case. You don't have to argue it, but just so that I  
24 understand -- if this conduct, these transactions, had  
25 occurred after the FPC code of conduct, would the case

1 be substantially different, in your view?

2 MR. FISHER: No. No, it would be the same.

3 JUSTICE KENNEDY: And is that because you  
4 rely on a conflict preemption theory?

5 MR. FISHER: That's the proper way to go  
6 about this, and nothing in the code of conduct conflicts  
7 with anything that we're asking for. And remember, what  
8 Ottertail and California v. FPC hold is that FERC would  
9 lack the power to condone these actions. It's not just  
10 that they didn't; it's that they would lack the power.

11 So this is why the -- the contrast I wanted  
12 to draw with Kurns. In Kurns, they -- this Court said,  
13 in a very, very broad field preemption holding, it said  
14 that what Congress had done there is give everything to  
15 the agency. The agency had full power to decide any  
16 locomotive practice that would be regulated, and so  
17 therefore the States couldn't tread on the field that  
18 Congress had given to the agency.

19 Here, Congress hasn't given antitrust  
20 regulation to FERC. It's a very odd claim to come in  
21 here and say the Natural Gas Act field preempts a claim  
22 that the agency has zero power over. But that is the  
23 claim they are making today. And not only do they have  
24 zero power over it; they have zero power to give any  
25 remedy to our -- to our cause. These --

1 JUSTICE SCALIA: They have power over the  
2 transactions that you are complaining about, the  
3 transactions that are the subject of the suit.

4 MR. FISHER: No, they do not have any power  
5 over the retail transactions. And even when -- even  
6 when the code of conduct was enacted, Justice Scalia --  
7 and I want to correct something that was said earlier --

8 JUSTICE SCALIA: But -- but wait --

9 MR. FISHER: -- FERC said it did not have  
10 authority over retail transactions.

11 JUSTICE SCALIA: The gravamen of your  
12 complaint is the fiddling with the reporting.

13 MR. FISHER: Yes.

14 JUSTICE SCALIA: That is the antitrust  
15 violation, that conspiracy to report false amounts and  
16 to make false sales.

17 There is no doubt that the Natural Gas Act  
18 places that within the control of the commission. They  
19 -- it does have the power to regulate those transactions  
20 and to punish violations of those transactions.

21 MR. FISHER: You are using the word  
22 "transactions." I just want to be clear. Do you mean  
23 the reporting?

24 JUSTICE SCALIA: Oh, I'm sorry. The  
25 reporting. The -- the essence of the conspiracy that

1 you are complaining about in the antitrust case, the  
2 actions that you are complaining about in the antitrust  
3 case, are actions that come within the jurisdiction of  
4 the commission.

5 MR. FISHER: So two things, Justice Scalia.  
6 One is, to the extent that is so, that only puts you  
7 into conflict preemption. That's the holding of  
8 Northwest Central, because the indices as we are  
9 complaining about them were used exclusively in retail  
10 transactions.

11 JUSTICE BREYER: Well, actually, Louisiana.  
12 It's the same point, but in addition, you just said you  
13 agreed that they had field preemption over the setting  
14 of wholesale rates; that is, sales for resale.

15 MR. FISHER: Yes.

16 JUSTICE BREYER: And they're saying that  
17 it's the reporting to Joe in his magazine, the false  
18 reporting to Joe in his magazine.

19 JUSTICE SCALIA: Right.

20 JUSTICE BREYER: That is what we use to set  
21 the wholesale rate, the reporting of Joe to his  
22 magazine. And so what they're suing about is the very  
23 single fact that we use to set the wholesale rate, and  
24 therefore, it falls within our wholesale jurisdiction.  
25 That's their argument. And you say the -- that's their

1 argument, not yours.

2 MR. FISHER: It's just not factually  
3 accurate, because if we win this case, they can pick up  
4 the phone tomorrow and lie to indices all they want and  
5 State antitrust law would not prohibit it. It's only  
6 prohibited if it's used as a mean to fix prices. And  
7 that's what we're complaining about, is price-fixing,  
8 not the mere reporting.

9 THE COURT: Thank you, counsel.

10 Mr. McAllister.

11 ORAL ARGUMENT OF STEPHEN R. McALLISTER,  
12 FOR KANSAS, ET AL., AS AMICI CURIAE,  
13 SUPPORTING RESPONDENTS

14 MR. McALLISTER: Mr. Chief Justice, and may  
15 it please the Court:

16 The States have two strong and primary  
17 interests in this case. First, the States have long  
18 been leaders in the development and enforcement of  
19 antitrust law. Many of the State antitrust laws  
20 predated the Sherman Act, and they certainly predated  
21 the Natural Gas Act.

22 Over the past century, State attorneys  
23 general have invoked State antitrust laws on a number of  
24 occasions to challenge anticompetitive practices in the  
25 natural gas industry. The States urge the Court not to

1     adopt an interpretation of the NGA that will foreclose  
2     the attorney generals from that traditional State role.

3             The second interest the States have is an  
4     interest in maintaining the longstanding historical  
5     division of authority between the Federal and the State  
6     governments in this area. It's important to understand  
7     the history. If you want to talk about the original  
8     intent of the NGA, the only reason the Federal  
9     government got involved was because there were decisions  
10    of this Court that said there was certain territory the  
11    States could not reach, in particular interstate  
12    transportation and wholesale transactions. So the  
13    States urge the Federal government to fill that gap so  
14    that consumers and others wouldn't be taken advantage of  
15    by the companies, just as they have been in this case.

16            The Federal government, the Congress,  
17    adopted 1(b) as a very clear, and unusual in some ways,  
18    if you will, division of authority provision, and it  
19    says quite clearly that the Federal government gets  
20    power over transportation and wholesale sales, but the  
21    rest of it is reserved to the States, as it always was  
22    the States' prerogative.

23            CHIEF JUSTICE ROBERTS:           No, no, not just the  
24    sales, but the practices affecting the wholesale, which  
25    is kind of the key to their argument.

1           MR. McALLISTER:           Mr. Chief Justice, 5(a) as  
2   is being argued here, in the State's view, is a massive  
3   expansion of anything Congress ever intended in the  
4   Natural Gas Act. 1(b) is the division of authority.  
5   And if you go back to the Court's earliest Natural Gas  
6   Act decisions, the 1940s, the Panhandle cases -- there  
7   are a series of them, even into the early 1960s -- you  
8   can find numerous quotes where the Court says the  
9   subsequent sections -- 4, 5, 6, 7, 10, you name it --  
10   they help FERC implement the authority we've given, but  
11   they are not intended to expand the scope of section  
12   1(b). They are not intended to diminish what is  
13   reserved to the States. And that is exactly what the  
14   United States and the -- and the defendants here are  
15   arguing for.

16           The States have no problem with FERC having  
17   authority to address manipulation in the wholesale  
18   market. We are absolutely comfortable with that. But  
19   what we do have a problem with is saying we can't use  
20   more than century-old traditional antitrust laws that  
21   are not targeting the natural gas industry to protect  
22   consumers and businesses in our States that are paying  
23   way too much at retail because of a price-fixing  
24   conspiracy.

25           The defendants go so far as to suggest there

1     may be some uncertainty about what is a competitive  
2     market. Well, there is no uncertainty about this one.  
3     Under any legal regime, under any economic theory,  
4     price-fixing conspiracy is per se unlawful. And the  
5     States are not interfering with FERC here. FERC was  
6     never asked to bless the conspiracy. FERC would not  
7     have blessed the conspiracy, could not have blessed the  
8     conspiracy. And we agree fully with my colleague Mr.  
9     Fisher and the plaintiffs that the analysis should be  
10    conflict preemption here, not field preemption.  
11    Conflict preemption will more than adequately protect  
12    any and all Federal interests at stake.

13           And the cases that have come up prior to  
14    this can be certainly explained as conflict preemption.  
15    Northwest Central, in some ways the Court's most recent  
16    statement on this issue, a Kansas case involving  
17    production, I believe gives you the blueprint, if you  
18    will, for deciding this case. The argument in Northwest  
19    Central was the production requirements Kansas was  
20    imposing had an effect on wholesale prices, and they  
21    probably did.

22           But the Court said that doesn't mean they  
23    are field-preempted. The Court said the field of  
24    production is reserved to the States. Here the field of  
25    retail sales is reserved to the States. The Court went



1 on to say, well, does the Kansas regulation conflict  
2 with Federal goals and purposes, concluded that it did  
3 not.

4 We're absolutely comfortable with that sort  
5 of analysis here. We're not targeting States under  
6 antitrust laws, would not be necessarily wholesale  
7 sales. But what we are particularly interested in is  
8 protecting, consumers both large and small from  
9 anti-competitive price-fixing conspiracies. And I would  
10 just reiterate that I don't think you can fully  
11 appreciate -- you can look at -- I guess I will put it  
12 this way. You can look at four things perhaps in  
13 deciding the scope of section one 1.b. certainly start  
14 with the text; and to the States, the text is very clear  
15 about the division of authority.

16 But importantly it's a statute that one may  
17 not fully understand without looking at the history that  
18 led up to it. The Federal government was supposed to be  
19 the gap filler, acting only where the States couldn't,  
20 not taking over everything and pushing the States to the  
21 side.

22 Thirdly, the structure of the statute is  
23 such that 1(b) is the provision. It says the -- the  
24 provisions of this chapter shall apply to these things  
25 and shall not apply to these things. So it only makes

1 sense that 4, 5, 6, 7, everything that comes after, is  
2 not intended to alter the scope of Section 1(b).

3 And then, again, going back to numerous  
4 decisions of this Court, particularly the decisions  
5 closer in time to the enactment of the NGA, is quite  
6 clear that that was how the Court originally understood  
7 the scope of Section 1(b).

8 So the States would respectfully ask that  
9 the Court affirm the Ninth Circuit's decision. To  
10 Justice Kagan's but we're not necessarily arguing  
11 that FERC shouldn't have the authority to reach the  
12 practices that effected wholesale rates. That -- that,  
13 we're fine with. But what we do not think is that the  
14 retail sales here are field preempted. They should be  
15 subject to conflict-preemption principles at most.

16 Unless there are questions --

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 MR. MCALLISTER: Thank you very much.

19 CHIEF JUSTICE ROBERTS: Mr. Katyal, you have  
20 four minutes left.

21 REBUTTAL ARGUMENT OF NEAL K. KATYAL,

22 ON BEHALF OF PETITIONERS

23 MR. KATYAL: My friend says the field is,  
24 quote, practices relating to wholesale transactions. We  
25 agree.

1           That means the only question is whether  
2   1(b) -- these lawsuits fall within 1(b). They don't,  
3   and here's why: Imagine these lawsuits went forward,  
4   for example, in Wisconsin and Kansas. If they won these  
5   lawsuits, the result would be a rate of zero, a full  
6   refund. That is not rate regulation. That is something  
7   else.

8           If in the other States that don't have full  
9   refunds, will be treble damages. Treble damages is not  
10   just in reasonable compensation the way that rate  
11   setting is -- rate setting is.

12          This Court, in Louisiana Power, was as clear  
13   as day that 1(b) is limited-- is limited just to the  
14   setting of rates. And, indeed, in this case, the  
15   complaints themselves illustrate why these aren't sales.  
16   After all, their own complaints don't even allege that  
17   all of the defendants sold to all of the retailers.

18          Now, my friend says, Oh, we're not  
19   second-guessing FERC with these -- with these lawsuits.  
20   No. Quite to the contrary.

21          Imagine that liability phase of the trial if  
22   it were allowed to proceed. It would be second-guessing  
23   everything FERC did. Indeed, it would look just like  
24   the FERC proceeding: What were the rates, what was the  
25   scheme of manipulation, what was done, what was carried

1 out, what would those rates been otherwise?

2 FERC has in its code of conduct a very  
3 careful and fine-tuned analysis of when index  
4 manipulation in wash sales are appropriate, when they're  
5 not --

6 JUSTICE SCALIA: Well, that's -- that's no  
7 problem, I mean, they say that. That's conflict  
8 preemption.

9 MR. KATYAL: Exactly. And the difference  
10 is, Justice Scalia, that if you allow their  
11 conflict-preemption argument, you are letting 50 States  
12 adopt their own rules with respect to this 50 different  
13 lay juries. This is something the Court has never done.

14 The best they can come up with is Louisiana  
15 Power, and Louisiana Power -- and if you look if the  
16 footnote and the text around it -- is very clear why  
17 there was no preemption in that case. It was because  
18 the regulation there was directed at producers, at  
19 non-jurisdictional entities.

20 These lawsuits are directed at  
21 jurisdictional sellers. That's what the District Court  
22 found in 15 pages of findings. They aren't contesting  
23 that.

24 So this would be the first time this Court  
25 has ever adopted a rule that says there was simultaneous

1 jurisdiction and conflict preemption in a circumstance  
2 in which you are dealing with jurisdictional sellers.  
3 It's never happened. And to do so here, I think, would  
4 be a real break from this Court's field preemption  
5 precedence.

6 My friend's argument for why you should do  
7 it is, he says, well, people will be able to pick up the  
8 phone and manipulate prices. Absolutely not. The  
9 Sherman Antitrust Act would bar every allegation in this  
10 complaint if they were proven to be true. FERC  
11 regulates in this area and is regulating right now --

12 JUSTICE GINSBURG: Your point about juries  
13 would apply to the Sherman Act as well.

14 MR. KATYAL: It does and just as I  
15 was saying before, Justice Ginsburg, Connell v. Plumbers  
16 says it's very different when we're dealing with Federal  
17 juries which can harmonize Federal statutes and States.  
18 Here, Congress has a comprehensive scheme that puts FERC  
19 in charge. This Court has never countenanced a result  
20 that says you can have divided authority over  
21 jurisdictional sellers, and that's what this is.

22 JUSTICE KAGAN: I think that goes a lot  
23 further than anything we've ever done. I mean, the  
24 jurisdictional sellers, as I understand this industry,  
25 that there are a lot of companies that sell both to

1   wholesalers and to retailers and always before, I think,  
2   we've looked at the transaction and said, Where is the  
3   transaction, is the transaction a wholesale transaction  
4   or a retail transaction? Not, oh, look. You engaged in  
5   one wholesale transaction last year, and that insulates  
6   you from everything.

7           MR. KATYAL:           Justice Kagan, you don't look  
8   at the transaction, you look at the practices. That's  
9   the word 5(a) and that's what the Agency here is saying,  
10  is that the practices here, or the common and  
11  inseparable practice of index manipulation directly  
12  affects both markets. And so, absolutely, we agree with  
13  you.

14           If there is some other circumstance in which  
15  there isn't a direct effect on the wholesale market,  
16  that's one the States have authority to do. This Court  
17  hasn't dealt with that situation; but, absolutely, we  
18  will give you that.

19           But this is a circumstance that I think now  
20  my friends on the other side are conceding is within  
21  FERC's wheelhouse. FERC is here before you saying, we  
22  have exclusive authority in this area. It should be  
23  deferred to.

24           THE COURT:           Thank you, counsel.

25           The case is submitted.

1           (Whereupon, at 12:02 p.m., the case in the  
2 above-entitled matter was submitted.)  
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