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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in case 06-1265, Klein & Co. Futures versus the Board of Trade of the City of New York.

Mr. Days.

ORAL ARGUMENT OF DREW S. DAYS III

ON BEHALF OF THE PETITIONER

MR. DAYS: Mr. Chief Justice, and may it please the Court:

A clearing futures commodity merchant, an FCM, such as Petitioner, has standing to sue contract markets and clearing organizations of contract markets under section 25(b)(1) of the Act for their bad faith failure to enforce rules that are required by the Act and by the Commodity Futures Trading Commission.

The court of appeal's contrary ruling should be reversed for three reasons, because it's contrary to the text of 25(b)(1); it ignores the essential rule of clearing FCMs, such as Petitioner, recognized by the Commodity Exchange Act, as well as long-standing industry rules and practices -- an assessment with which the expert Federal agency, the Commodity Futures Trading Commission, concurs -- and it's in cross-purposes with the goal that Congress sought to achieve in enacting an

1 express private right of action under 25(b)(1) against
2 contract markets, mainly to ensure the existence of fair
3 and orderly markets through a system of effective
4 self-regulation.

5 The plain language of the Commodity Exchange
6 Act confers statutory standing on Petitioner to bring
7 this private right of action against Respondents.
8 25(b)(1) makes no reference to buyer or seller, but
9 instead confers standing on any person who engaged -- a
10 person who engaged in any transaction on or subject to
11 the rules of a contract market or licensed board of
12 trade.

13 JUSTICE GINSBURG: Mr. Days, can I interrupt
14 you there, and ask if you would --

15 MR. DAYS: Yes, Justice Ginsburg.

16 JUSTICE GINSBURG: -- if you would define
17 the transactions -- the particular transactions on which
18 you rely -- to come within that provision, and what
19 rules of the exchange or the clearinghouse do you say
20 have been violated?

21 MR. DAYS: Justice Ginsburg, we view this as
22 several subsidiary transactions that ultimately end in
23 the consummation of the contract, but with respect to
24 the rules that we have in mind -- first of all, rule
25 6(a) talks about -- that can be found in the blue brief

1 at 1a -- that such contract is executed or consummated
2 by or through a member of such contract market. This is
3 a clearing FCM that does this. And 6(a), along with the
4 NYFE rule, that is the contract market's rule 121(f) and
5 306(i)(2), essentially indicate the following
6 arrangement: No contract can be dealt with or entered
7 into on a contract market without a guarantee from the
8 clearing FCM. The FCM becomes the buyer and seller with
9 respect to that particular contract. It assumes that
10 contract and then, after assuming that contract, has to
11 clear it immediately, indeed, within one hour. So
12 that's -- those are the rules under the statute and with
13 respect to the contract market.

14 With respect to the clearing
15 organization, rule 401(a) -- which is found at the red
16 brief at 6a -- indicates that the clearing point, the
17 clearing FCM is the party that deals with the clearing
18 organization. And at that point, there's no
19 communication, no contact -- no contract between the
20 investor and the clearing organization. The clearing
21 organization becomes the buyer and seller. In other
22 words, the contract is between a clearing FCM on one
23 side of the contract and a clearing FCM on the other
24 side of the contract. The clearing organization becomes
25 the buyer and seller, but before that happens, it's

1 clear that the clearing organization views the clearing
2 FCM as the party to the contract. It is not the
3 investor. It is not any other party.

4 The important thing also about this
5 process is that the clearing FCM is always financially
6 liable from the very beginning of this transaction, this
7 process, to the very end; that is, from the executing of
8 the contract to the consummation of the contract. For
9 the court of appeals to talk about buyer or seller and
10 treat a clearing FCM as a mere creditor or agent really
11 misses entirely the role that clearing FCMS play in this
12 process.

13 JUSTICE GINSBURG: I think you --

14 CHIEF JUSTICE ROBERTS: Mr. Days --

15 JUSTICE GINSBURG: -- you've talked about
16 the transactions, but I also asked you, what were the
17 rules that the Defendants violated, the rules of the
18 statute?

19 MR. DAYS: Well, it's -- it is clear, as
20 I indicated with respect to the rule of the contract
21 market, that the clearing FCM is required to clear that
22 particular order or contract. And, therefore, at that
23 point, the clearing requires some information about the
24 settlement price. Here the allegation is that there was
25 fraud at the point where the settlement price was set.

1 That then created a problem with the clearinghouse. And
2 at the clearing process, there was also a continuing
3 violation because at both points, the contract market
4 and the clearing organization should have been applying
5 their rules effectively and carefully, and we suggest
6 here that that was done in bad faith.

7 JUSTICE SOUTER: I think --

8 MR. DAYS: In other words, the cause of
9 action, we understand, requires that there be a showing
10 of bad faith.

11 JUSTICE SOUTER: Is -- I don't want to
12 reduce the issue down to something too simplistic, but
13 is there a rule that says, don't lie, don't commit
14 fraud?

15 MR. DAYS: Yes. In fact, the -- in order to
16 be a contract market designated by the CFTC and by the
17 statute, there has to be a commitment to avoiding price
18 manipulation and cornering the market or various other
19 things of that kind. So that's in the statute, and it's
20 also subject to the rules of the CFTC. That's a basic
21 understanding. That's a given.

22 Indeed, with respect to the whole question
23 of settlement prices and margins, the understanding of
24 those who participate in a commodity futures market is
25 that they will establish their margins with the

1 expectation that those rules will be applied fairly and
2 firmly and in good faith.

3 JUSTICE SOUTER: Am I -- am I right that we
4 really do not have to --

5 MR. DAYS: Excuse me?

6 JUSTICE SOUTER: Am I correct that we really
7 do not have to determine that issue this morning?

8 MR. DAYS: What --

9 JUSTICE SOUTER: All we have to determine is
10 whether it is possible for the Petitioner here to be
11 within the class of those with standing?

12 MR. DAYS: Absolutely.

13 JUSTICE SOUTER: Yes.

14 MR. DAYS: This is a standing case, sir.

15 CHIEF JUSTICE ROBERTS: Mr. Days, suppose
16 that the exchange has a standard sort of
17 nondiscrimination provision with respect to employment
18 practices, and it -- an employee asserts that she was
19 discriminated against in the promotion review. Would
20 she be covered by this provision?

21 MR. DAYS: No, Your Honor. I think that
22 Congress had in mind a limitation of the standing
23 position -- that is standing -- a right to those who
24 participate in the process, when it talks about a person
25 who engaged in a transaction on or subject to the rules

1 of the contract market --

2 CHIEF JUSTICE ROBERTS: Well, I suppose the
3 transaction would be her annual employment review that
4 she alleges violated the exchange rule saying the
5 exchange would not discriminate on the basis of sex.

6 MR. DAYS: I don't believe that that would
7 be a transaction on or subject to the rules of a
8 contract market. She would not or he would not be a
9 person whose transaction, that is the employment
10 contract, would be carried out on or subject to the
11 rules of the contract market.

12 JUSTICE KENNEDY: But suppose, to narrow
13 that hypothetical, that there's a rule that you can't be
14 an employee of the clearinghouse or the exchange if you
15 have a conviction for fraud, and they don't -- they're
16 negligent and careless about enforcing that rule, and
17 that fraud causes the loss. Under either your theory or
18 the Government's theory, would there be liability, and
19 is there a difference between those two theories?

20 MR. DAYS: Well, the statute itself talks
21 about the responsibilities of the contract market or the
22 clearing organization. And it describes transactions,
23 and transactions are described broadly, but not in a way
24 that would encompass the examples that you gave, Justice
25 Kennedy.

1 CHIEF JUSTICE ROBERTS: So -- so,
2 "transaction" has some substantive limitation that is
3 derived from where?

4 MR. DAYS: Well, it's derived from the
5 statute, if one looks at rule 2(i) in the statute. That
6 describes transactions in a variety of ways. It's not
7 in any of the appendices, but it can be located, I
8 believe, on page 5 of the yellow brief, where we talk
9 about that. And indeed it's an interpretation that was
10 given by the Second Circuit in the Ken Roberts case,
11 which we also cite at that page in the yellow brief.

12 JUSTICE KENNEDY: But in my hypothetical,
13 there is a transaction and actual damage -- I'm reading
14 from -- from (b)(1)(C). There's been a transaction and
15 the liabilities for damages sustained by a person who
16 engaged in the transaction or subject to the rules of
17 the market.

18 MR. DAYS: Well, Justice Kennedy, I want to
19 focus on "transaction." There's nothing that I've been
20 able to find, nothing that the CFTC has indicated in
21 this respect that would cover the hypothetical that you
22 and Chief Justice Roberts had mentioned.

23 Theoretically, yes, but I don't think that
24 -- in fact, not theoretically, yes. I would say that
25 "transaction" does not incorporate those ancillary rules

1 of an operation of a contract market.

2 CHIEF JUSTICE ROBERTS: Well, why aren't
3 these ancillary rules? When I think of a futures
4 exchange market and the transaction, I think of the
5 buyers and the sellers, you know, the longs and the
6 shorts. And this strikes me as just kind of the
7 paperwork in the back office. Why is that -- why should
8 we assume that's covered by the term "transaction"?

9 MR. DAYS: Well, it is a broad definition,
10 but it focuses on the process of the execution and
11 consummation of the contract, not matters that are
12 unrelated. I would view, as was indicated in the
13 American Agricultural Movement case, these people as
14 nonparticipants in the operation of the core function of
15 a contract market.

16 CHIEF JUSTICE ROBERTS: These people -- you
17 mean the ones in our hypotheticals?

18 MR. DAYS: That's correct.

19 JUSTICE BREYER: Can I ask you -- I'm
20 slightly -- difficult -- I'm finding it difficult to
21 follow the exact language on page 4a of the appendix, of
22 (b)(1)(C). To you, that's probably the key provision,
23 right? And that's in the blue brief. And catch me when
24 I read it wrong, if I do. As I -- as I see it, it says
25 -- and here it says "a clearing organization." That's

1 what we are interested in here, the clearing
2 organization.

3 MR. DAYS: Right.

4 JUSTICE BREYER: Now, a clearing
5 organization that doesn't enforce a bylaw properly or a
6 rule or reg properly, which is what you're saying
7 happened?

8 MR. DAYS: Yes, sir.

9 JUSTICE BREYER: The clearing organization
10 got all mixed and it all --

11 MR. DAYS: Correct.

12 JUSTICE BREYER: Now, they're liable for
13 actual damages to a person who engaged in a transaction
14 in a contract market. That's what it says. And the
15 contract market is the futures exchange.

16 MR. DAYS: Yes.

17 JUSTICE BREYER: Not the clearing
18 organization.

19 MR. DAYS: Yes.

20 JUSTICE BREYER: And they're liable to that
21 person for the actual losses that resulted from his
22 transaction in the futures exchange. It's a --
23 transaction.

24 MR. DAYS: Yes.

25 JUSTICE BREYER: So what your claim -- they

1 were caused by the failure of the clearinghouse to
2 follow its rules.

3 MR. DAYS: Yes.

4 JUSTICE BREYER: And you say just read that
5 -- we have a case where the clearing organization didn't
6 follow its rules, the -- my client engaged in a
7 transaction over the futures exchange.

8 MR. DAYS: Yes.

9 JUSTICE BREYER: And it was caused harm
10 because the clearing organization didn't follow its
11 rules. You say that's what it says.

12 MR. DAYS: Yes, sir.

13 JUSTICE BREYER: And that's what happened?

14 MR. DAYS: Correct.

15 JUSTICE BREYER: Did I understand that
16 correctly?

17 MR. DAYS: Yes. I don't know, Justice
18 Breyer, whether you're heading toward the concern that's
19 expressed by the Respondents, namely that 25(b)(1) does
20 not contain in that second part of the statute a
21 reference to a --

22 JUSTICE BREYER: Clearing organization.

23 MR. DAYS: -- clearing organization.

24 JUSTICE BREYER: I know, but then the
25 response I'm going to ask them is, so what?

1 MR. DAYS: Well, I think that is -- "so
2 what" is a proper response. I'm glad you said it rather
3 than I, that --

4 JUSTICE BREYER: I know you're going to --
5 but I --

6 MR. DAYS: We have -- we have, we think,
7 standing with respect to a transaction that occurred on
8 the contract market, even if the Respondents' argument
9 is persuasive that it didn't happen on the clearing
10 organization or subject to the rules of the clearing
11 organization.

12 JUSTICE GINSBURG: It would be an argument
13 for this case because that absence has been cured.
14 Wasn't that in the 2000 amendment that -- that they
15 changed the --

16 MR. DAYS: That's correct.

17 JUSTICE GINSBURG: -- the list to registered
18 entity, which does include clearinghouse?

19 MR. DAYS: Yes. Well --

20 CHIEF JUSTICE ROBERTS: The -- there's
21 concern on the other side, I take it, is that it's not
22 just limited to transactions on the exchange, but
23 transactions subject to the rules of a contract market.
24 And I understood you, in response to the hypothetical
25 that Justice Kennedy posed, that you indicated that

1 "transaction" has some substantive limit to it. And if
2 that's the case, which seems to me an awfully large
3 concession, then we have to figure out what the limit
4 is. And it seems to me that it could just as easily be
5 limited to the transaction between buyers and sellers of
6 futures contracts as between all these subsidiary,
7 ancillary, collateral, whatever transactions that simply
8 implement that broader transaction.

9 MR. DAYS: Well, Mr. Chief Justice, there
10 are limitations with respect to 25(b)(1). As I
11 indicated, nonparticipants in the market are not
12 explicitly covered by this. But also one has to
13 understand that there has to be a showing of bad faith.
14 And there are no punitive damages; there are actual
15 damages. And, therefore, this limits the extent to
16 which this provision could be used by someone who is not
17 within the category that I described.

18 JUSTICE BREYER: Correct me if I'm wrong,
19 but you're going to be more favorable to this than, I
20 expect, your opponent. There's nothing really
21 linguistically or otherwise wrong if you had a statute
22 that said people in the badminton court have to play
23 carefully, and if they hurt somebody on the
24 merry-go-round, they're liable. And so people in the
25 contract market have to play carefully, and if they have

1 hurt somebody over at the futures exchange, they're
2 liable.

3 But it says those people in the futures
4 exchange are people who engage in a transaction on the
5 futures exchange.

6 MR. DAYS: Yes, sir.

7 JUSTICE BREYER: And so they said, well, by
8 an odd fluke of fate, your clients didn't. It was the
9 -- rather, their client who actually went into the
10 futures exchange and bought the commodity.

11 Your point, I take it, is, well, that's
12 true, but my client did something -- he guaranteed that
13 commodity transaction in accordance with the rules of
14 the futures exchange, and that's what makes him a player
15 in the futures exchange.

16 MR. DAYS: Yes. The clearing FCM --

17 JUSTICE BREYER: Yes. That's right.

18 MR. DAYS: He --

19 JUSTICE BREYER: I'm sorry. He guaranteed
20 through the clearinghouse the payment of the contract
21 made on the futures exchange --

22 MR. DAYS: That's correct.

23 JUSTICE BREYER: -- which he didn't make,
24 but he guaranteed it.

25 MR. DAYS: Well, that's not correct.

1 JUSTICE BREYER: He made it in a sense --

2 MR. DAYS: Well, that's not correct, Justice
3 Breyer. The clearing --

4 JUSTICE BREYER: He didn't walk onto the
5 floor and make it. It was his client who walked onto
6 the floor and said whatever. Is that right?

7 MR. DAYS: Well, it's hard to know who walks
8 on what floor. I think what's clear about this industry
9 is that it's the clearing FCM who is always at the
10 center of this, the essential participant in this entire
11 process.

12 The FCMs may not know who the customer is.
13 They certainly don't know who the customer is on the
14 other side. The clearinghouse doesn't know who the
15 customer is, or the investor is. So the investor
16 actually plays a very small role, other than putting up
17 his or her money at the beginning of the process.

18 CHIEF JUSTICE ROBERTS: No. I mean, the --
19 the market is about investors. It's about buyers and
20 sellers. Now, you're -- the clearinghouse and these
21 FCMs may or may not be covered by the language of the
22 statute, but it's an awful big stretch to say they are
23 central to the market.

24 What's central to the market are the
25 investors. That's why they have these. They wouldn't

1 have this market for -- for your clients, I mean, for
2 the clearinghouse or anything else. The market is there
3 for the buyers and the sellers. That's the central
4 transaction.

5 MR. DAYS: We don't argue that investors are
6 barred from bringing suits under 25(b)(1). They would
7 be persons who engaged in transactions on or subject to
8 the rules of the contract market.

9 JUSTICE GINSBURG: Didn't Judge Friendly
10 refer to the FCM as a central player or a principal in
11 --

12 MR. DAYS: Yes. That -- that's certainly
13 been the case in Leist, where Judge Friendly wrote the
14 opinion. And also --

15 JUSTICE SCALIA: What is the transaction --

16 MR. DAYS: -- also the current --

17 JUSTICE SCALIA: What is the single
18 transaction that you think brings your client within
19 this language?

20 MR. DAYS: Well, I mentioned --

21 JUSTICE SCALIA: What is the transaction --
22 the guarantee?

23 MR. DAYS: The one -- the contract market
24 requires that the clearing FCM clear a contract with one
25 hour -- assume the contract. So the assuming of the

1 contract and the clearing required by the rules of the
2 contract market is a violation of the CEA.

3 JUSTICE SCALIA: I'm not talking about what
4 the rule is that was violated. It says, "who engaged in
5 any transaction on or subject to the rules of such
6 contract market." What is, in brief, "the transaction"
7 you're relying upon?

8 MR. DAYS: Well, Your Honor, as indicated,
9 "transaction" is the process of assuming this contract
10 and then going toward the clearing -- clearing
11 organization to clear it, and it's the clearing
12 organization, setting the settlement price, which really
13 dictates what happens on the clearing organization. So
14 it's the setting of the settlement price, which is a key
15 point.

16 JUSTICE SCALIA: A transaction does not
17 require two parties?

18 MR. DAYS: Well, there are two parties here.

19 JUSTICE SCALIA: Can you have a one-party
20 transaction?

21 MR. DAYS: There's a -- we can view this as
22 one sole transaction, as one transaction with a number
23 of subsidiary activities along the process between
24 execution and consummation, or one can view various
25 transactions that ultimately end up with the

1 consummation of the contract.

2 JUSTICE GINSBURG: Why isn't it just --

3 MR. DAYS: I don't think it makes any
4 difference one way or another.

5 JUSTICE GINSBURG: -- the guarantee, the
6 relationship between the clearing organization and the
7 clearinghouse? The clearing organization has to give a
8 guarantee and has to put up margin.

9 MR. DAYS: That's correct.

10 JUSTICE GINSBURG: So there is a transaction
11 between the clearinghouse and the clearing organization.

12 MR. DAYS: Oh, absolutely. Well, they're
13 same thing.

14 JUSTICE GINSBURG: And I thought that was --

15 MR. DAYS: You mean the clearing FCM --

16 JUSTICE GINSBURG: Yes.

17 MR. DAYS: -- and the organization.

18 CHIEF JUSTICE ROBERTS: Thank you. Mr. Days,
19 we'll give you a minute for rebuttal.

20 Mr. Stewart.

21 ORAL ARGUMENT OF MALCOLM L. STEWART,

22 ON BEHALF OF THE UNITED STATES,

23 AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONER

25 MR. STEWART: Mr. Chief Justice, and may it

1 please the Court:

2 For purposes of this case, the Court may
3 assume that the word "transaction" in section 25(b)(1)
4 is limited to the purchase and sale of futures and
5 options contracts.

6 The Court may also assume that, in order to
7 engage in such a transaction, a person must be a
8 necessary and direct participant in the transaction.
9 Even under those --

10 CHIEF JUSTICE ROBERTS: Where -- where do
11 all of those assumptions come from? I would have
12 thought the limitation of "transaction" beyond the plain
13 language would be a significant concession in this case.

14 MR. STEWART: I mean -- when I say "assume,"
15 I am saying that the Court need not decide at this point
16 how far, if at all, beyond the core transactions that
17 occur on contract markets, the statute reaches. That
18 is, with respect to the hypothetical case of an exchange
19 or a clearinghouse that has an anti-discrimination rule
20 and is alleged to have violated that rule.

21 Yes, on the one hand, you could say that in
22 literal terms, that is a transaction subject to the
23 rules of the exchange. On the other hand, I think there
24 is significant force to Respondents' contention that
25 that seems very far afield from what was the core of

1 Congress's concern. And with respect to the
2 anti-discrimination hypothetical, there would also be
3 the argument that there is a different Federal statute.

4 CHIEF JUSTICE ROBERTS: So we have to figure
5 out what was the core of Congress's concern and limit
6 "transaction" in that way?

7 MR. STEWART: I think the Court can at least
8 start from the assumption that Congress referred to
9 transactions on or subject to the rules of the contract
10 market. And none of the things that have been posited
11 in the hypotheticals, the anti-discrimination, would be
12 transactions on a contract market.

13 CHIEF JUSTICE ROBERTS: But they would be
14 subject to the rules.

15 MR. STEWART: They would be subject to the
16 rules, but our point here is that the United States and
17 the CFTC have not had occasion to decide how far, if at
18 all, beyond the core transactions on the contract market
19 the statute extends.

20 But our point is, even if we look at the
21 core of what Congress was driving at, the buying and
22 selling of futures and options contracts, the clearing
23 FCM is a proper plaintiff because it assumes direct
24 contractual liability to the clearinghouse. Even before
25 the clearing process is completed, it was defined as the

1 buyer or seller of the contracts in the NYFE rules, and
2 its participation is essential.

3 Now -- now, we have a somewhat different
4 conception of the relevant transaction than does the
5 Petitioner. In our view, when Eisler executed his
6 trades on the floor of the exchange, he set in motion a
7 process that would quickly and inevitably culminate in
8 the clearing of the trades by the clearing organization,
9 and at the end of the day, there would be an array of
10 contractual relationships.

11 Klein would have a contractual obligation to
12 the clearinghouse. The clearing FCM on the other side
13 of the trade would have its own obligation to the
14 clearinghouse. Klein would have an agreement with its
15 customer, First West, that would entail rights and
16 obligations running between them. And there would be a
17 similar set of rights and obligations on the other side
18 of the trade. And --

19 JUSTICE GINSBURG: What about the argument
20 that if we accept your view of it, allowing the FCM to
21 sue, then there could be multiple liability?

22 MR. STEWART: I think that's incorrect. I
23 think the customer would also be an appropriate
24 plaintiff, that is, the customer would have his own
25 rights and obligations arising out of the -- the

1 contract with the clearing FCM. But the fact that they
2 might both be conceivable plaintiffs wouldn't mean that
3 they could both recover in the same case.

4 Remember that the statute limits recovery to
5 actual losses. So if the customer here, Eisler and
6 First West, had paid the required additional margin to
7 Klein, and Klein had discharged its obligation to the
8 clearinghouse, Klein would still be a person who had
9 engaged in a transaction. But Klein wouldn't be able to
10 recover because he would have suffered no actual losses.

11 So it's the person who bears the actual loss
12 at the end of the day who would be the appropriate
13 plaintiff.

14 And the fact that in some cases that might
15 be the customer, and in other cases it might be the
16 clearing FCM, doesn't mean that there would be
17 duplicative recovery in a single case.

18 JUSTICE ALITO: Well, when you began by
19 saying we could begin -- we could assume certain things,
20 was it included in the things that we could assume --
21 was it the proposition that the transaction was limited
22 to a purchase or sale?

23 MR. STEWART: A purchase or sale, although
24 we would extend -- I mean, we would interpret the
25 clearing process as part of the purchase or sale. And

1 the reason we would do that is that clearing occurs
2 inevitably by operation of law, as it were. That is,
3 once Eisler executes his trades, Klein had no discretion
4 as to whether to discharge its obligation to clear the
5 trades.

6 Klein had previously entered into a
7 commitment to guarantee the trades that Eisler made.
8 And, therefore, what -- Klein's obligations to the
9 clearinghouse followed directly and inevitably from the
10 initial trade on the floor of the exchange. In his --

11 JUSTICE ALITO: Is that different from
12 saying under the exchange rule, the FCM is actually the
13 party that enters into the trade? Is that --

14 MR. STEWART: I think it is a different
15 thing, and that there are two different bases on which
16 the Court could rule in our favor, that is, rule
17 306(i)(2) of the rules of the exchange that were in
18 effect at the time of these trades specified that -- and
19 that's reproduced, I guess, at page 14a of the blue
20 brief. And it said -- the second sentence of rule
21 306(i)(2) says, every such contract when made by a
22 trading member shall be made on behalf of a clearing
23 member, who shall be the buyer or seller of said
24 contract on the terms set forth therein.

25 So one way to rule for Klein in this case is

1 to simply say, even if we focus entirely on the moment
2 at which the trade was executed, under the rules of the
3 exchange, Klein was deemed to be the buyer or seller.
4 But we are also making the different argument and in a
5 sense, we think the more important practical argument,
6 that regardless of where the contract ran during the
7 brief period before the clearing process was
8 consummated, the salient factor is that at the
9 conclusion of the clearing process, the clearinghouse
10 would look directly and only to Klein for satisfaction
11 of any obligations arising out of unsuccessful trades.

12 In a sense the clearinghouse could be
13 analogized to a department store in which only the
14 clearing members have charge accounts. And in order for
15 anyone else to make a purchase, he has to make
16 prearrangements with a charge account holder to have
17 permission to charge things to his accounts. And that's
18 essentially what was done here. In order for Eisler to
19 execute trades on the floor of the exchange, he had to
20 have the prior commitment from Klein that Eisler would
21 be allowed to charge trades to Klein's account.

22 And in that situation, we think it's
23 entirely natural to say that Klein engaged in the
24 transaction, even though Eisler was making the decisions
25 as to exactly what trades to execute.

1 JUSTICE SOUTER: Mr. Stewart --

2 JUSTICE GINSBURG: Is that why the Second
3 Circuit was wrong in saying it's just like a securities
4 broker?

5 MR. STEWART: Yes. I think the Second
6 Circuit's error was not really that it had a
7 misconception of how narrow or broad the private right
8 of action is. The Second Circuit's error was that it
9 misunderstood the role that a clearing FCM plays in the
10 process. The clearing FCM doesn't simply facilitate the
11 formation of contracts between other people. The
12 clearinghouse assumes direct contractual -- I mean, I'm
13 sorry, the clearing FCM assumes direct contractual
14 liability to the clearinghouse.

15 And that's fundamental to the operation of
16 the contract markets. That is, the point of the
17 clearinghouse is to give investors assurance that if
18 their trades are successful, they will get paid. And in
19 order for the clearinghouse to pay the winners, it has
20 to have confidence that it will be able to collect from
21 the losers.

22 And the way that it has that confidence is
23 by identifying a small number of people, clearing FCMs,
24 who have demonstrated financial wherewithal and
25 integrity, and saying, we're going to look only to you

1 to satisfy these obligations; we're not going to put
2 ourselves in the business of going after large, large
3 numbers of individual investors to ensure that losing
4 trades will be paid.

5 JUSTICE SOUTER: Mr. Stewart, may I go back
6 to the question of multiple recoveries? And by that
7 term, as I understand it, the term does not mean
8 "duplicative recoveries." And I don't understand -- and
9 this is what I want you to explain -- why there couldn't
10 be a recovery in a case analogous to this both by the
11 FCM and by the ultimate customer.

12 Let's assume that the settlement price is,
13 in fact, rigged. The FCM cannot meet the resulting
14 margin call and folds, and is in hence a situation like
15 this. And this happens quickly enough so that the
16 ultimate transaction is never consummated. So that the
17 -- the contracting party on the FCM side of the trade
18 doesn't get the benefit of what would have been a
19 favorable contract. Couldn't you have recovery in that
20 case both by the customer and the FCM?

21 MR. STEWART: I'm not sure if I -- if I
22 fully understand the hypothetical to --

23 JUSTICE SOUTER: It may be that I don't
24 understand how it works.

25 MR. STEWART: To answer a variant of it, I

1 think there could be cases in which both the customer
2 and the clearing FCM recovered something. That is, say
3 there is a loss of a million dollars that's attributable
4 to malfeasance by the exchange, and the customer comes
5 up with half of that money, \$500,000. And the clearing
6 FCM uses that to discharge half of its own obligation to
7 the clearinghouse.

8 Now, in that case, both the customer and the
9 clearing FCM might have a cause of action for \$500,000.
10 So there would be -- there could be multiple recoveries
11 in the sense that you're describing.

12 JUSTICE SOUTER: But in my hypo, the FCM is
13 claiming damages because his business folds. So the
14 damages are not limited simply to those flowing from
15 this transaction itself. The customer is claiming
16 damages for failure to consummate a contract that would
17 have been favorable to him.

18 MR. STEWART: If you assume that
19 consequential damages arising out of the loss of the
20 business --

21 JUSTICE SOUTER: Right. And I am
22 assuming --

23 MR. STEWART: -- could be part of actual
24 losses, then there would be no barrier to each party,
25 the clearing FCM and the customer, recovering what it

1 actually lost.

2 Our point is that there is no danger that
3 because the clearing FCM is -- there is no danger that
4 because the clearing FCM is liable for a million dollars
5 to the clearinghouse, and the customer is liable to the
6 clearing FCM, each for a million dollars, that they'll
7 both get a million dollars. It's only the person who
8 bears the actual loss.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Stewart.

11 Mr. Pincus.

12 ORAL ARGUMENT OF ANDREW J. PINCUS

13 ON BEHALF OF THE RESPONDENTS

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

16 I'd like to return to the language of the
17 statute, because I think it explains why the comments
18 that Mr. Stewart started with are, in fact, compelled by
19 the language of the statute. 25(a) talks about a person
20 who engages in any transaction on or subject to the
21 rules of a contract market. And I'm focusing on the "on
22 or subject to the rules."

23 If, as Petitioners claimed in their opening
24 brief, any -- the fact that a -- any transaction was
25 governed by any rule, as in the Court's discrimination

1 hypotheticals, was enough, then the "on" would be
2 superfluous. There wouldn't be a need for "on" because
3 surely a transaction on a contract market has to be
4 governed by the rules of the contract market.

5 So I think that shows why "on or subject to
6 the rules of" is a term of art. It has a special
7 meaning here. And the only kinds of transactions that
8 are either on or subject --

9 JUSTICE KENNEDY: Well, but under that
10 reading, they should have used the word "and" rather
11 than "or."

12 MR. PINCUS: No, Your Honor.

13 JUSTICE KENNEDY: Any transaction or which
14 is -- which is subject to.

15 MR. PINCUS: Well, Justice Kennedy, I think
16 what Congress was explaining there is it wasn't saying
17 any transaction subject to the rules of a contract
18 market, because that would be all of the Court's
19 hypotheticals about discrimination and everything else,
20 and the word "on" wouldn't be there. And so by using
21 "on," which -- by definition "on" has to be subsumed in
22 the rules, because if a transaction is on a contract
23 market, surely it is in some way governed by a rule.

24 So if Congress meant to cover every
25 transaction that is in any way governed by the rule, it

1 wouldn't have had to include "on."

2 So the reason -- the fact that "on" is there
3 means, as we discussed in our brief, that this is a
4 specialist transaction on or subject to the rules
5 singles out a very special category of transactions.
6 And that --

7 CHIEF JUSTICE ROBERTS: I'm sorry. I'm not
8 following you. I think Justice Kennedy's question still
9 applies. Your argument assumes that the "or" is an
10 "and." I mean, you don't need to have a transaction
11 "on" at all. It can be simply one subject to the rules.

12 MR. PINCUS: Yes. But the fact that
13 Congress put "on" in there means that it was trying to
14 capture something other --

15 CHIEF JUSTICE ROBERTS: The fact that
16 Congress put "on" in there and then followed it with
17 "or" means you don't have to worry what "on" means if
18 you're subject to the rules of the contract market.

19 MR. PINCUS: Yes, Mr. Chief Justice. But I
20 think the reason that "on" is there is that Congress was
21 signaling that it wasn't -- that the second part of the
22 clause "or subject to the rules" didn't literally mean
23 "or subject to any rule," because if it literally meant
24 that, there would have been no reason to include "on."

25 CHIEF JUSTICE ROBERTS: So this is like a

1 ejusdem generis argument? You're saying, we should
2 interpret "subject to the rules" in the same light that
3 we interpret "transaction"?

4 MR. PINCUS: No. This is an argument that
5 on or subject to the rules -- that a transaction on or
6 subject to the rules is a special kind of transaction.
7 It's a term of art in the statute, and a term of art
8 that refers to trades.

9 JUSTICE STEVENS: But even if it's a term of
10 art, do you contend that Klein has not engaged in a
11 transaction subject to the rules?

12 MR. PINCUS: Yes, we do. Your Honor, we --
13 our view is that the transaction that is referred to
14 there are the transactions that include, either at the
15 trading pit or a small category of off-pit trades that
16 are permitted by section C of the Commodities Exchange
17 Act.

18 JUSTICE STEVENS: What is the full scope of
19 the term "transaction" in your view? What does it
20 cover?

21 MR. PINCUS: It covers the trade that -- the
22 contract that occurs at the pit the moment that --
23 during open outcry --

24 JUSTICE STEVENS: Between either the buyer
25 or the seller and the clearinghouse -- not the

1 clearinghouse -- the FCM or what do you call it?

2 MR. PINCUS: Well, FCMs may or may not be
3 involved. In this case, Klein wasn't involved, because
4 Eisler was a floor -- had floor privileges and he
5 actually -- he was the person who was at the pit
6 engaging in these transactions. So our -- our view is
7 that the transaction, to start with that, either occurs
8 at the pit when an offer is made in open outcry, and
9 it's accepted. At that moment, that transaction --

10 JUSTICE STEVENS: And who are the parties to
11 the transaction?

12 MR. PINCUS: The parties to that transaction
13 are the buyer and seller, the customers, the people that
14 the --

15 JUSTICE STEVENS: And the intermediaries are
16 not party to the transaction even though they are liable
17 for the -- either the purchase price or the sale price?

18 MR. PINCUS: Yes.

19 JUSTICE STEVENS: They are not parties to a
20 transaction?

21 MR. PINCUS: They are not parties to the
22 transaction.

23 JUSTICE STEVENS: But you expose them to
24 millions of dollars in liability.

25 MR. PINCUS: At the moment, Your Honor, they

1 may not even be identified. At the moment that
2 transaction occurs --

3 JUSTICE STEVENS: But they are subject to
4 liability if the transaction doesn't -- isn't
5 consummated?

6 MR. PINCUS: Under the rules of the clearing
7 organization. Yes.

8 JUSTICE KENNEDY: But the -- the buy and the
9 sell contract will be worth nothing if it isn't cleared.

10 MR. PINCUS: Well, it could -- what the
11 clearing process does after the -- after that contract
12 is formed is to eliminate -- to provide a way to strip
13 out the credit risk that ordinarily wouldn't be there.

14 JUSTICE KENNEDY: I know. But you want --
15 you want us to say that the clearing is not part of the
16 transaction, but the clearing is necessary to make a
17 transaction go forward. Otherwise the contract is just
18 a nullity.

19 MR. PINCUS: No, Your Honor, we don't
20 believe that the contract is a nullity. And in fact,
21 if, for example, a contract was made at the pit, and for
22 some reason the -- the clearing member who was to clear
23 the transaction went bankrupt that day and didn't exist,
24 and therefore that transaction was not cleared, that
25 transaction would still be enforceable as between the

1 buyer and the seller.

2 JUSTICE BREYER: I thought they had to pick
3 it up in an hour.

4 MR. PINCUS: Well, it has to be cleared in
5 an hour to go through the clearing process.

6 JUSTICE BREYER: Fine.

7 MR. PINCUS: But it's not --

8 JUSTICE BREYER: So, therefore, any
9 transaction wouldn't happen in your hypothetical,
10 because, if I understand it correctly, the buyer and the
11 seller -- who by the way, are normally represented by
12 clearinghouses by Klein, or by brokers like Klein, but
13 in this case, apparently they weren't -- they make the
14 transaction in the pit, and then the rules of the
15 exchange say that the clearinghouse has to pick it up, a
16 clearing member, within one hour. And at that point,
17 that person -- the clearing member, the broker, I guess,
18 this Klein type person -- becomes legally responsible
19 for seeing that the money is put up.

20 Now, it doesn't require a big stretch -- in
21 fact, zero stretch -- of the word "transaction" to think
22 that word "transaction" covers that entire process.
23 From the moment -- and by the way, the whole process is
24 governed by the rules of the futures exchange. So there
25 are rules in there.

1 So, why do you -- what reason is there for
2 taking that word "transaction," cutting out about
3 two-thirds of the important event, ignoring the fact
4 that it is covered by the rules of the futures exchange,
5 and limiting it to the physical moment when somebody
6 enters the pit in an unusual case and says "I buy
7 for..." and then another person says "I sell for..."?

8 MR. PINCUS: Well, let me first point out,
9 Your Honor, it's not an unusual case. There frequently
10 may be a case even where -- either where -- even where
11 both sides are represented by floor brokers, where the
12 floor broker who is -- who is representing the party in
13 the trade is not the clearing member. That happens all
14 the time, and that's why the rules say that the clearing
15 member doesn't have to even be designated until one hour
16 after the trade. So hard to say that the clearing
17 member engages in that transaction on the floor when
18 he -- when it may not be designated.

19 The reason for the division is that Congress
20 set out a clear rule here. The transaction it referred
21 to -- it used the language that it used elsewhere, as we
22 discuss in our brief, particularly in defining the
23 functions of floor trader and floor broker.

24 JUSTICE GINSBURG: Mr. Pincus, if your view
25 were correct, it would have been so easy for Congress to

1 say "buyers and sellers" or even "trade," but it used a
2 word, "transaction," that you say has a special meaning
3 in this context, but "transaction" appears all through
4 the law. And usually it's a term that has encompassing
5 meaning, like in the Federal Rules' "any transaction or
6 occurrence," and you would say that Congress has given
7 it here this very constrained meaning.

8 MR. PINCUS: We do say that, Your Honor,
9 because -- let me address first your question about why
10 Congress couldn't use "buyer or seller." Here Congress
11 had to -- needed a construction that would link the --
12 the transaction that was being targeted with the rules
13 of the -- of the contract market, because that was going
14 to be the test here. It's all about whether or not the
15 contract market violated its rules. And so it needed a
16 construction that referred to a transaction because
17 those are the things that are governed by the rules of
18 the contract market, that might be misapplied in the
19 work -- in the way that A, B, and C talk about.

20 So it would have had to -- even if it had
21 used the phrase, you know, "purchased" or "sold" a
22 commodity for future delivery or an option on a contract
23 for future delivery, it would still have to say "on or
24 subject to the rules of a contract market" in order to
25 link back to what it was doing, which was creating a

1 cause of action for the violation of the contract
2 market's own rules with respect to a transaction that
3 was subject to those rules.

4 JUSTICE GINSBURG: Why couldn't it have just
5 said "sustained by a buyer or seller"? "Shall be liable
6 for actual damages sustained by a buyer or seller." Why
7 -- why would it need to be any more complicated than
8 that?

9 MR. PINCUS: Well, because it -- it would
10 have to talk about --

11 JUSTICE GINSBURG: When everything else is
12 the same, instead of "a person," just "buyer and
13 seller"?

14 MR. PINCUS: Well, because then in the --
15 several lines down, it talks about actual loss, and it
16 would have to say "buyers and sellers" there as well.
17 And --

18 JUSTICE GINSBURG: I don't know why.

19 MR. PINCUS: Well, because it was referring
20 back to -- it would be referring back to "buyer or
21 seller."

22 But I think the key here is for Congress,
23 given the structure of the Act, "any transaction on or
24 subject to the rules of the contract market" is -- are
25 these transactions. Those are the only transactions

1 that -- that meet that test. Those are the transactions
2 -- the very same phrase is used in defining the
3 functions of the floor broker and the floor trader who
4 execute the transactions on the floor. And so by using
5 that phrase, Congress was tying back to something that
6 it had a clear definition of. Let me --

7 JUSTICE ALITO: Where is the clear --
8 there's no clear definition. There's no definition
9 whatsoever, anywhere, of "transaction."

10 MR. PINCUS: Well, there's no definition of
11 "transaction," Your Honor, but in the definitions of
12 "floor trader" and "floor broker," the phrase "on or
13 subject to the rules of a contract market" appears again
14 in defining what they do. And so those are the people
15 who are at the pit, either executing for their own
16 account or for a customer's account the trades. And so
17 by using that very phrase in defining what they do --
18 which appears, by the way, on -- in the discussion on
19 pages 5 and 6 our brief --

20 JUSTICE STEVENS: Are they persons engaged
21 in contracts subject to the rules? Are they persons
22 engaged in transactions subject to the rules?

23 MR. PINCUS: No, Your Honor, we don't -- we
24 don't think they are, because they're acting as --

25 JUSTICE STEVENS: Who are subject to the

1 rules, in your view? It doesn't include the FCM; it
2 doesn't include the broker; it doesn't include the
3 trader.

4 MR. PINCUS: Well, certainly a floor trader
5 is, because that's someone who is trading for his own
6 account. A floor broker who's merely representing a
7 customer is just like someone who, at a house closing --
8 if you can't make the house closing, you may appoint
9 someone to close the house. They're not the person who
10 engages in the transaction; you do.

11 JUSTICE SOUTER: Neither are they the people
12 who are going to end up personally liable. And -- I
13 mean, they don't have -- they are not subject to margin
14 calls. There's something very different about this set
15 of relationships from the broker/seller relationship in
16 buying and selling a house.

17 MR. PINCUS: Well, those people also have --
18 well, the -- the floor broker is not subject to a margin
19 call. He's subject to liability for other things that
20 he may do wrong, but for his role as a floor broker,
21 he's not subject to margin responsibility.

22 JUSTICE GINSBURG: Do you recognize that the
23 Second Circuit was wrong when it said that this FCM is
24 just like a securities broker? He's just making a deal
25 for a commission. It seems to me that that -- that was

1 not proper --

2 MR. PINCUS: Well, Your Honor, if that was
3 all the Second Circuit said, I would agree with you,
4 that would be wrong. But the Second Circuit recognized
5 that the -- Klein here had a risk, a credit risk,
6 because it had backed up the credit of its customer,
7 Eisler, and that's why in the lessons learned report
8 that the CFTC --

9 JUSTICE GINSBURG: But it's not just Klein.
10 It's every FCM. That's the job of an FCM.

11 MR. PINCUS: That is the job of the clearing
12 member part of what an FCM does.

13 JUSTICE GINSBURG: So that's -- that's not
14 comparable to just a broker who executes my order for
15 shares and gets a commission for it.

16 MR. PINCUS: No, Your Honor, but as the
17 Second Circuit went on to note, the fact that there is a
18 credit risk here, that Klein is taking a risk based on
19 the credit of its customer, Eisler -- as the CFTC noted,
20 there's nothing in the rules that require clearing
21 members to only accept minimum margin, and it's the job
22 of a clearing member to -- to look into both the
23 creditworthiness of its customers and the risks of the
24 various transactions that are open --

25 JUSTICE STEVENS: Mr. Pincus --

1 MR. PINCUS: -- and demand more margin.

2 JUSTICE STEVENS: I was under the impression
3 from the briefs, and maybe I'm wrong, that you did not
4 defend the reasoning of the Second Circuit. Am I right
5 or wrong?

6 MR. PINCUS: Well, we don't -- to the extent
7 Petitioners claim that the Second Circuit based its
8 reasoning on -- on the imputation into 25(b) of the
9 limitations in 25(a), we don't agree with that.

10 JUSTICE STEVENS: Which was the principal
11 basis for its decision.

12 MR. PINCUS: But there was a second basis to
13 its decision, which talked about the fact that Klein
14 didn't engage in trading, and we agree with that basis
15 because that's -- that's what we're arguing here.

16 JUSTICE KENNEDY: Well, on that subject and
17 you -- your client obviously has an institutional
18 interest in the case, assuming you don't prevail, is the
19 Government's theory much broader and more undesirable in
20 your view than that offered in Klein's brief? I didn't
21 have an opportunity to ask Mr. Days if he accepted the
22 Government's position.

23 MR. PINCUS: Well, it -- it certainly would
24 be better if the phrase "transaction on or subject to
25 the rules of the contract market" meant "trade" and we

1 were only discussing how expansive, how elastic the
2 definition of "trade" was.

3 We would still take the position that it's
4 not elastic enough, obviously, to include clearing
5 members, but we think that, given the language that
6 Congress used and the fact that that language is used to
7 refer to -- that "on or subject to" formulation is
8 repeatedly used to refer to trades, we think it's very
9 clear that trades have to be what it is. Otherwise,
10 when the statute talks about the fact that a floor
11 broker engages in activities on or subject to the rules
12 of a contract market, it could be talking about
13 discrimination and all kinds of other activities.

14 But even with respect to the narrower
15 formulation urged by the Solicitor General, we think
16 that it is not right for several reasons. First of all,
17 the language of the statute, as I said, but there's a
18 clarity problem. If once you move beyond that contract
19 that is executed and becomes complete on the pit, how
20 far do you go? There's clearing before the contract is
21 executed on the pit -- at the pit. There may be
22 antecedent activities -- for example, someone who
23 doesn't have floor privileges has to go through an FCM.
24 There may be an introducing broker that introduces that
25 customer to the FCM. Are all of those activities --

1 which are specified in the statute, just like the
2 subsequent clearing activity is specified in the
3 statute -- are they also shoe-horned into the definition
4 of trade?

5 JUSTICE GINSBURG: Mr. Pincus --

6 MR. PINCUS: And that's where --

7 JUSTICE GINSBURG: Justice Kennedy was
8 asking you about the Government's position. One of the
9 positions -- one aspect of the government's position is
10 that -- that you would not dispute that a person who
11 engaged in a transaction subject to the rules of a
12 clearinghouse would be a proper plaintiff under the
13 current law. Well, certainly the FCM is a person
14 subject to the rules of a clearinghouse.

15 MR. PINCUS: Yes, although obviously the
16 parties haven't briefed the current law. We would take
17 the position that the current law doesn't change the
18 equation and --

19 JUSTICE GINSBURG: That's what I thought
20 your position was. So that's not an accurate --

21 MR. PINCUS: No.

22 JUSTICE GINSBURG: -- characterization.

23 MR. PINCUS: No. Our position is, again,
24 the "on or subject to" language, we believe, quite
25 clearly refers to trades, and that Congress's

1 technically correct substitution of registered entities
2 doesn't change that.

3 JUSTICE SOUTER: But you're saying that
4 because a trade is on or subject to, the only thing that
5 can be on or subject to is a trade. And it seems to me
6 that that -- that's the point at which we have
7 difficulty following your argument. Why -- what is your
8 reason, textual or otherwise, for saying that because a
9 trade is on or subject to, no other subtransaction can
10 be on or subject to?

11 MR. PINCUS: Because -- because trades are
12 the only thing that fit those two criteria. Only trades
13 are -- can be under the statute either on the contract
14 market, either because -- because they are executed at
15 the pit or so-called off-market trades as referred to in
16 section 6(c), very small categories of off-market
17 transactions --

18 JUSTICE STEVENS: But even if the --

19 MR. PINCUS: -- that are the equivalent of
20 trades, but can occur off-market.

21 JUSTICE STEVENS: But, Mr. Pincus, even if
22 you limit it to the word "trades," it does not
23 necessarily follow that the only parties to the trade
24 are the original buyer and the original seller. There
25 are two intermediates who participate in the execution

1 of the trade.

2 MR. PINCUS: I agree, Your Honor, and that's
3 the second part of our argument. Once we reach the
4 point where it's "trade," then the question is what does
5 "trade" mean? And --

6 JUSTICE STEVENS: Does it include this
7 transaction?

8 MR. PINCUS: Well, we believe that it --
9 there are -- at the pit, again, that the transaction --
10 the on transaction, the transaction that occurs on, is
11 the open outcry transaction where, in this case, Eisler
12 made an offer and some other floor trader accepted it.
13 And that was complete there. Klein had no role in that
14 transaction, and clearing members do not have a role in
15 that transaction.

16 JUSTICE STEVENS: Why do you say Klein had
17 no --

18 MR. PINCUS: They come in later.

19 JUSTICE STEVENS: Why do you say that Klein
20 had no role in it? It was an indispensable party to the
21 transaction.

22 MR. PINCUS: It was a subsequent party. It
23 had a subsequent role --

24 JUSTICE STEVENS: Before it was completed,
25 he participated. He was -- he functioned as a

1 guarantor.

2 MR. PINCUS: Well, it was not -- it need not
3 be clear, at the moment that the trade is executed at
4 the pit, who the clearing member will be. Often it
5 won't be.

6 JUSTICE STEVENS: It was cleared by the time
7 it was over.

8 MR. PINCUS: No -- well, it depends what you
9 mean by "over," Your Honor. What happens in the
10 process, if I can just lay it out for one minute, is the
11 transaction occurs at the pit. It's recorded. The
12 clearing member --

13 JUSTICE STEVENS: There's a transaction
14 between A and D, but before it can be consummated, B and
15 C have to play a role.

16 MR. PINCUS: Well, that activity is over.
17 I'll try to use neutral words. That activity at the pit
18 is over. The next -- that data, who bought, who sold,
19 and maybe the clearing members for those two parties are
20 identified. Maybe they're not. They might not be
21 identified for an hour according to the rules. So
22 something happened at the pit. It's then entered into
23 the computers, and at some subsequent point, yes, the
24 clearing members will be identified and the trade will
25 be cleared.

1 Our point is that is subsequent activity.
2 That is activity -- that's the clearing process. It's
3 important, but there is an enforceable contract before
4 the clearing event occurs. Nothing in the rules say
5 that the contract is unenforceable --

6 JUSTICE BREYER: That's true, but is there
7 any reason that the word "transaction" would have --
8 serves a purpose by being so limited?

9 MR. PINCUS: It does, Your Honor.

10 JUSTICE BREYER: Why would -- what reason
11 would Congress have wanted to do that?

12 MR. PINCUS: Well, because of -- in the
13 environment that Congress was operating just following
14 this Court's decision in Curran, the focus entirely was
15 on protecting investors.

16 JUSTICE BREYER: That's not a reason. I
17 want to know what reason -- what harm will be done if,
18 in fact, we take the word "transaction" and say the word
19 "transaction," while it's capable of the interpretation
20 you give, is also capable of an interpretation that
21 includes all the near contemporaneous events, including
22 the financing and guarantees? Like a mortgage in
23 selling a house.

24 MR. PINCUS: Because --

25 JUSTICE BREYER: And that also is

1 linguistically possible. What harm will be done --

2 MR. PINCUS: The harm that will be --

3 JUSTICE BREYER: -- if the second is chosen,
4 and not the first?

5 MR. PINCUS: The harm -- two categories of
6 harm. First, a lack of clarity. We don't know, as I
7 said, how far back are we going. The statute requires,
8 for customers that are not trade -- not exchange
9 members, they have to go to an introducing broker. They
10 have to go then to an FCM.

11 JUSTICE GINSBURG: But the only one that has
12 this relationship that's different from an ordinary
13 broker, the only one is the FCM.

14 MR. PINCUS: But that's true, Your Honor,
15 but if the Court were to adopt a rule that says we're
16 going to read "transaction" broadly, and so anyone who
17 has anything to do with any aspect of the trade, either
18 before it or afterward, is covered, all of these
19 antecedent people, just in terms of the statutory
20 language, are people who have a role.

21 JUSTICE GINSBURG: But they're not people
22 who are at risk. I mean, if there -- if it's -- a
23 broker who was just executing a trade for a commission
24 is not at risk, but this FCM is at risk, in this
25 transaction, series of transactions.

1 MR. PINCUS: But it's hard to see in the
2 language where Congress would have drawn the line. I
3 think the problem is the lack of clarity. We certainly
4 won't know, if the Court says we're going to move beyond
5 this core transaction and encompass some of the
6 ancillary activities --

7 JUSTICE BREYER: I've got that.

8 MR. PINCUS: Okay.

9 JUSTICE BREYER: I got that when you said
10 there were two. What's the second?

11 MR. PINCUS: Well, let me just add to the --
12 to the first, that there are subsequent activities.
13 There also are arrangements set up with banks that
14 automatically supply margin, that facilitate
15 transactions. And so the question will be, aren't those
16 banks, who play an important liquidity role, aren't they
17 also part of the transaction?

18 The second reason is the reason involved --

19 CHIEF JUSTICE ROBERTS: The answer would be
20 that those transactions are not subject to the rules of
21 the exchange.

22 MR. PINCUS: Well, they are, but they --

23 CHIEF JUSTICE ROBERTS: They don't care what
24 kind of arrangement the FCM might have with its bank.
25 That's up to the FCM. There's no exchange --

1 MR. PINCUS: But it has to have an
2 arrangement, and that fact is a rule of the exchange.

3 JUSTICE GINSBURG: Isn't it some --

4 MR. PINCUS: So it depends what rule.

5 Again, we're -- we're embarking --

6 JUSTICE GINSBURG: Mr. Pincus --

7 MR. PINCUS: -- on a rule where we're not
8 going to know what the answer is.

9 JUSTICE GINSBURG: The -- the agency that's
10 supposed to be the supervisor of this area, the CFTC, is
11 taking the position that the Government presented to us
12 today. Apparently, it doesn't have the concern that you
13 have just expressed about reaching people who are not
14 themselves subject to the regulation of the exchange, of
15 the clearinghouse.

16 MR. PINCUS: Well, I think it does have that
17 concern, Justice Ginsburg, which is why Mr. Stewart said
18 that the Court should sort of take this case on certain
19 assumptions because, as he recognized, the theory that
20 even the Government put forward in its brief --

21 JUSTICE GINSBURG: I thought that what he
22 was telling us was that, even if you assume that Klein
23 has that -- even if you've assumed that.

24 MR. PINCUS: Well, it's certainly their
25 position that Klein has standing, but in terms of the

1 consequences of a ruling by the Court that the statute
2 goes beyond the core activity, I think the Government's
3 suggestion sort of shows that even the Government is not
4 sure, once you embarked on that exercise, where the
5 boundary line is. And I would point out the Government
6 is not asking for deference in this case, nor could it.

7 CHIEF JUSTICE ROBERTS: I think you're still
8 on Justice Breyer, his second reason.

9 MR. PINCUS: I do, Your Honor, and the
10 second reason is involved in the Government's response
11 to Justice Souter's question about multiple recoveries.
12 If all of these various people can assert claims, then
13 there is certainly a risk, and a significant risk, that
14 all of these various people will assert different kinds
15 of monetary harm that they will claim is actual loss.

16 In this case, the principal, actual loss, as
17 we discuss in the second argument in our brief, is
18 claimed as the loss from the destruction alleged --
19 allegedly caused to the destruction of Klein's business.

20 If there was a bad-enough event on an
21 exchange, all of the people in the -- in the row from
22 the introducing broker down to the end, down to the
23 bank, could claim that because there was a foul-up in
24 the electronic reporting system and trades were
25 misreported for a week and, when they were unwound, the

1 consequences of that where lots of bankruptcies in the
2 futures industry, that all of those liabilities get
3 pegged to the contract market. As -- as the FIA --

4 JUSTICE STEVENS: Aren't there lots of
5 situations in which a very serious run harms a whole
6 bunch of people, and they all recover?

7 MR. PINCUS: There are, Justice Stevens, but
8 as the -- this is a particular kind of industry. As the
9 -- as the Futures Industry Association notes in its
10 brief, every day more than \$5 trillion worth of
11 contracts are traded on futures exchanges. There's a
12 huge amount of concentrated risk in contract markets.

13 If the contract markets are going to be made
14 liable to a vast array of people, there is a very
15 serious risk --

16 JUSTICE STEVENS: You have it in this very
17 case.

18 MR. PINCUS: -- that puts them in financial
19 jeopardy.

20 JUSTICE STEVENS: You would agree, if the
21 Klein had been trading on its own account with a risk
22 helper, it would have -- may have recovered for the --
23 for its loss to itself, right?

24 MR. PINCUS: Yes, if it had been trading for
25 its own account.

1 JUSTICE STEVENS: If it has some trades for
2 itself and some for other customers, it only can recover
3 half of those. Does that make sense?

4 MR. PINCUS: It does, because Klein is a
5 market insider. It has ways to protect itself other
6 than suing the contract market.

7 It can certainly sue its customer. It has
8 ways of protecting itself, as the CFTC report said, in
9 terms of demanding more margin, in terms of watching the
10 risk in its customer's portfolio, in terms of -- of
11 hedging its own risk. It's an insider, and it can do
12 that.

13 What Congress was concerned with here -- and
14 the reason our construction of the statute makes sense
15 -- is that it protects the outsiders, the PB investors
16 who are at the core of the concern here, without
17 imposing a broad array of liability on the contract
18 markets, who are in the middle of a huge, huge amount of
19 financial risk, which really puts them in a position of
20 shouldering risk that's intolerable.

21 JUSTICE KENNEDY: Are there instances where
22 multiple parties who are injured sue under State law, or
23 is this generally deemed preemptive, or it just doesn't
24 happen?

25 MR. PINCUS: Well, there are other options.

1 I mean, one of the things that Klein says here is that
2 this is its only option. It can go to the FTC.

3 In this case, for example, the FTC order
4 against Eisler assessed a civil penalty, but then said
5 the order could be -- for that obligation could be
6 fulfilled by paying the injured parties. Klein -- to
7 the extent Klein has an injury, the FTC -- the CFTC in a
8 similar case could do the same thing. There are State
9 law claims. There are --

10 JUSTICE SCALIA: Mr. Pincus, will you
11 satisfy me on one point? I -- I understand your
12 argument about what "transaction" means. But even if I
13 accept that argument, explain to me again why "or
14 subject to the rules of" doesn't add anything?

15 MR. PINCUS: Well, it does. It adds -- in
16 our construction "the transactions that are on" are the
17 transactions that occur on the floor. The transactions
18 that are "subject to the rules" are the ex-pit
19 transactions.

20 Once you say "or subject to the rules"
21 involves more than ex-pit trades, off-exchange trades,
22 then you're into the world of the Court's hypotheticals
23 to Mr. Days of anti-discrimination rules.

24 So it has to have a limited meaning. And,
25 by coupling it with "on," we think that Congress made

1 clear it was referring to trades.

2 JUSTICE SCALIA: Why wouldn't it have been
3 enough to just say "transactions on," if that was their
4 meaning?

5 MR. PINCUS: Then --

6 JUSTICE SCALIA: Why did -- did they --

7 MR. PINCUS: Because then you wouldn't capture
8 a category -- because then Congress would have left out
9 a category of trades. Congress meant to capture
10 investors who trade. There are two categories of
11 transactions that meet that test. Those that occur on
12 the exchange, on the -- physically on the pit, and those
13 that are, within the industry, called "off-exchange" or
14 "off-pit" transactions defined in section 6(c) of the
15 Act -- of the -- of the statute.

16 And so by -- the second phrase is meant to
17 capture those trades that may involve investors, but
18 don't occur at the pit.

19 JUSTICE SOUTER: But, I take it, your
20 ultimate, let's say, policy reason for confining it to
21 that is the -- is the policy against multiple recovery.

22 MR. PINCUS: Yes. The policy reason is the
23 risk of multiple recoveries in an area where there is a
24 huge amount of risk. The contract market is at the
25 center of things, of these \$5 trillion a day. And so

1 Congress wrote very carefully, and Congress's focus was,
2 in the wake of Curran -- and given what it said -- was
3 investors.

4 Because the -- the implied cause of action
5 that the Court recognized in Curran was all about
6 investors. The rationale --

7 JUSTICE SOUTER: Yes, but the rationale
8 given is, basically, that's probably all Congress was
9 thinking about.

10 MR. PINCUS: Yes.

11 JUSTICE SOUTER: But, as I understand your
12 position, it's something more. Congress was also
13 thinking, probably, about multiple recovery, and it
14 didn't want that. And we will impute that intent to
15 Congress because multiple recovery would be a very bad
16 thing for the industry. That's basically your argument.

17 MR. PINCUS: Yes. That is our argument.

18 JUSTICE SOUTER: Okay.

19 MR. PINCUS: Let me say a word about the
20 rules and whether the rules are relevant here. It seems
21 to us that Congress used a phrase in the statute, and
22 that it -- that that cannot be changed by a rule that
23 says -- if an exchange adopted a rule that said some
24 transaction was on or subject to the rules of it, that
25 wouldn't be enough to put it into the statutory

1 language. The test is what Congress meant. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Pincus.

4 Mr. Days, you have a minute.

5 REBUTTAL ARGUMENT OF DREW S. DAYS III
6 ON BEHALF OF THE PETITIONER

7 MR. DAYS: Your Honors, Mr. Pincus has
8 identified what he views as some temporal gap between
9 the entering into a contract and the involvement of the
10 -- the clearing FCM. That simply is not the case.

11 Klein had a prior commitment to clear
12 Eisler's trade. So even at the time that Eisler was
13 trading, that had to be done with the understanding that
14 Klein was going to back him up.

15 If one looks at the gray brief at page 21,
16 at references to the rule of NTYE -- rules of NYFE 116
17 and 118 that make this very clear. The story is, as
18 we've indicated, that throughout this process, the
19 clearing FCM is financially liable and, therefore, is on
20 the hook.

21 When Congress enacted the statute, it was
22 concerned with protecting the public and maintaining
23 credibility. We think that this cause of action, this
24 express cause of action for allowing FCMs to sue, is
25 most reliant to the objectives of Congress -- the

1 faithful execution by an FCM that deals directly with
2 these entities, the clearinghouse and the commodity
3 contract market. Thank you very much.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr. Days.
5 The case is submitted.

6 (Whereupon, at 11:06 a.m. the case in the
7 above-entitled matter was submitted.)

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