

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, ET AL., EX REL.)
TRACY SCHUTTE, ET AL.,)
 Petitioners,)
 v.) No. 21-1326
SUPERVALU INC., ET AL.,)
 Respondent.)

UNITED STATES, ET AL., EX REL.)
THOMAS PROCTOR,)
 Petitioners,)
 v.) No. 22-111
SAFEWAY, INC.,)
 Respondent.)

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15 Respondent.)
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17
18 Washington, D.C.
19 Tuesday, April 18, 2023

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21 The above-entitled matter came on for
22 oral argument before the Supreme Court of the
23 United States at 11:57 a.m.

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25

1 APPEARANCES:
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3 of the Petitioners.
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P R O C E E D I N G S

(11:57 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-1326, United States ex rel. Shutte versus SuperValu Inc., and the consolidated case.

Mr. Singh.

ORAL ARGUMENT OF TEJINDER SINGH
ON BEHALF OF THE PETITIONERS

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

The False Claims Act establishes three independent ways to prove scienter for a defendant who presented legally false claims. First, if the defendant correctly interpreted the law and then chose to break it, that's actual knowledge. Second, if the defendant didn't bother to honestly assess what the law required before improperly presenting claims or presented claims as if they were definitely true despite knowing that they might well be false, that's either deliberate ignorance or recklessness. And, third, a defendant may have adopted an interpretation of the requirement that was so unreasonable as to be objectively

1 reckless.

2 On the other hand, if the defendant
3 attempted to discern and follow the correct
4 interpretation of the law and was transparent
5 with the government about how it resolved
6 ambiguities, there's no scienter. This rule is
7 not easy for plaintiffs, but it is a fair rule
8 that follows the plain meaning of the text,
9 tracks more than a century of the common law of
10 fraud, and achieves the fundamental purpose of
11 scienter, which is to accurately separate
12 culpable mind sets from innocent ones.

13 Respondents' rule, by contrast, holds
14 that contemporaneous scienter can be negated
15 retroactively if the defendant's conduct falls
16 within a wrong but reasonable interpretation of
17 the law. It treats the defendant's subjective
18 beliefs about the lawfulness of its conduct as
19 irrelevant.

20 This would permit some of the worst
21 offenders to escape liability. Indeed,
22 Respondents would -- would allow a defendant who
23 presented false claims to admit that he wanted
24 to break the law and yet simultaneously deny
25 that he acted with scienter.

1 That outcome alone shows how extreme
2 their rule is and ought to discredit it, but the
3 problems don't stop there. Across the board,
4 Respondents would replace existing incentives
5 for companies to determine and then follow the
6 law with an incentive to plunder every ambiguity
7 for all it's worth. That flies in the face of
8 the statute's text, the common law, and common
9 sense.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Mr. Singh, the -- if
12 there was no guidance as to what "usual and
13 customary" meant, do you think that an employee
14 -- sorry -- the Respondent here would also --
15 could also be accused of having made false
16 statements? If there was no guidance whatsoever
17 as to what it meant.

18 MR. SINGH: Yes, Your Honor, I -- I do
19 think that the -- the words themselves have a
20 meaning, "usual and customary" --

21 JUSTICE THOMAS: So what -- what would
22 you say it is?

23 MR. SINGH: So I -- I think, at a very
24 minimum, if you had to find the sort of
25 irreducible core of it, it's the price you're

1 normally charging to cash customers. That's how
2 it's always been understood since it was
3 enacted. And -- to a majority of the cash
4 customers.

5 And so, if you're charging a price
6 only to a small fraction of cash customers, I
7 think calling it your usual and customary price
8 is always understood -- been understood to be a
9 false statement.

10 JUSTICE THOMAS: What if you could
11 show that in Nebraska, which is a part of this,
12 that you had -- it was read one way, but in
13 Iowa, it was read another way, and there was
14 still no guidance, or disparate ways in
15 different places?

16 MR. SINGH: Sure.

17 JUSTICE THOMAS: Could you -- would
18 you still say that you could find that these
19 statements were false or representations were
20 false?

21 MR. SINGH: Yes, Your Honor. I think
22 that falsity is generally understood in an
23 objective sense. That is, a statement either is
24 true or is false. Now it may be the case that
25 "usual and customary" is interpreted different

1 ways in different states by their Medicaid
2 programs, and so the same practice may be okay
3 in one state and not okay in another. That's a
4 possibility.

5 But what I would say is, even when you
6 have -- let's just take a slightly different
7 example. Let's say that there are different
8 courts that interpret a statute a couple
9 different ways. You know, one is right and one
10 is wrong. There's a true one and a false one.

11 The next question, which is really
12 what's before the Court, is about can -- can it
13 be knowingly false. And, there, we think the
14 answer turns on subjective beliefs.

15 But, in response to the frontline
16 question, can it be false, I don't actually
17 think that there is a dispute about that
18 question. That is, there is a right answer, and
19 if you don't get it right, that's false.

20 JUSTICE THOMAS: Well, I'm just --
21 normally, you have a baseline from which you
22 deviate, and I'm trying to establish whether or
23 not there is a baseline from which you can
24 objectively deviate before you -- or whether
25 that's necessary before you can say it's false.

1 MR. SINGH: So, if -- if everything
2 were totally indeterminate, if there was no --
3 no statute, no regulation, literally nothing --

4 JUSTICE THOMAS: No, I'm looking at
5 these words, "usual and customary."

6 MR. SINGH: Yeah. So, in this case,
7 the question of whether the Respondents' claims
8 were false is really not before the Court. In
9 the Shutte case, the district court granted
10 summary judgment to us on that question, and the
11 Respondents didn't contest that on appeal. In
12 the Safeway case, the court didn't reach it
13 because it got to scienter first.

14 But I think, as the case comes to this
15 Court, as you think about how to understand the
16 issues here, the way I would do it is I would
17 start from the premise that they presented false
18 claims. They took money they weren't supposed
19 to take. And now the question is, did they do
20 so with the sort of mental state that would
21 allow the imposition of the False Claims Act's
22 remedies? And I think that that's been the crux
23 of the debate between the parties.

24 JUSTICE THOMAS: Well, that's the only
25 reason I'm asking that, is shouldn't -- you said

1 that they took money they shouldn't take. So,
2 in order to determine that, we have to know what
3 they should have taken and they have to know
4 what they should have taken.

5 MR. SINGH: Yes. So the definition
6 adopted by the lower courts was it's the -- so
7 the definition in the regulations is the cash
8 price charged to the general public. And so --
9 so also I guess I should back up. You know, I
10 took your question to be premised on a
11 hypothetical world in which there was no
12 guidance.

13 JUSTICE THOMAS: Yes.

14 MR. SINGH: In this world, there was
15 guidance. There --

16 JUSTICE THOMAS: Well, isn't the
17 argument, though, about how much guidance you
18 need in order for there to be -- a deviation to
19 be false?

20 MR. SINGH: No, Your Honor, I don't
21 think that is the argument at all. In this
22 case, I -- I take it as a given that the claims
23 were false. They have not argued otherwise
24 either on appeal below or here. And so the
25 question is just, what did they know?

1 Now that does get to the second part
2 of the question that you just elucidated. Well,
3 what did they have to know? How could they have
4 known?

5 And what we would say is that under
6 the common law of fraud, which is incorporated
7 into the False Claims Act, it's enough if you
8 correctly believe your claims are false. That
9 is, based on the guidance that was available,
10 Respondents -- if Respondents formed a view that
11 said, okay, you know, when we start charging
12 these prices to a majority of the cash
13 customers, we've got to report them -- and we
14 have evidence in the record that that's exactly
15 what they thought -- then we've got to also pass
16 those discounts on to the government. But you
17 know what, let's not do that. Let's instead
18 charge the government more because we would take
19 a huge hit to our margins if we did the other
20 thing.

21 We think that that would count as
22 actual knowledge under the False Claims Act or,
23 at a minimum, when you know there's a real
24 substantial risk that that's how it's going to
25 be interpreted, which, again, they would have

1 known because pharmacy benefit managers,
2 Medicaid states, and others were reaching out to
3 them and saying, hey, you have to report all of
4 your discounts, how are you reacting to
5 Walmart's program? Walmart had started charging
6 \$4 for all of the generics, and it passed that
7 discount on to the government. And so,
8 naturally, these intermediaries --

9 JUSTICE KAVANAUGH: What --

10 MR. SINGH: -- for the government,
11 Medicaid agencies wanted to know. Oh, I'm
12 sorry.

13 JUSTICE KAVANAUGH: What if there's a
14 situation where "U&C charges," there are three
15 different ways you can interpret that. Let's
16 say A, B, and C, and A is clearly in the safe
17 zone, B is a little more aggressive, and C is,
18 you know, pushing the envelope, but, you know,
19 we still think it's a reasonable interpretation,
20 and we're going to go with C because our job is
21 to make money, and so we're going to go with C
22 because we think that's objectively reasonable
23 interpretation.

24 It turns out later on that's ruled
25 wrong. You're using the word "false." So

1 that's false. Why liability in a situation like
2 that, or is there liability in a situation like
3 that?

4 MR. SINGH: There well might be. And,
5 here, I just want to --

6 JUSTICE KAVANAUGH: There well might
7 be?

8 MR. SINGH: Liability, yes.

9 JUSTICE KAVANAUGH: Even -- even
10 though it's objectively reasonable that A, B,
11 and C are all objectively reasonable?

12 MR. SINGH: So let me work through why
13 I think the answer is yes.

14 In the hypothetical, I'm assuming that
15 the company has said we think A is the best
16 interpretation, but B and C are also possible,
17 and we're going to go with C.

18 JUSTICE KAVANAUGH: Yeah, which
19 happens every day in the executive branch too.
20 We'll get to that.

21 MR. SINGH: Sure. And so the
22 government -- the -- the company has chosen in
23 this instance to abide by an interpretation of
24 the law that it thinks is wrong or probably
25 wrong, right?

1 JUSTICE KAVANAUGH: Well --

2 MR. SINGH: We think that that is
3 culpable --

4 JUSTICE KAVANAUGH: -- no, no. I
5 mean, it's not the -- to be wrong or probably
6 wrong means that it's outside the scope of a
7 reasonable interpretation of the statute.

8 MR. SINGH: So there I think is where
9 perhaps the disagreement is. You know, as -- as
10 you posited before, it's false. And so maybe
11 I'll use that word. They've chosen to abide
12 by an interpretation --

13 JUSTICE KAVANAUGH: That's a loaded
14 term here, but go ahead with it.

15 MR. SINGH: Sure.

16 JUSTICE KAVANAUGH: Yeah.

17 MR. SINGH: But I think that that's
18 how this statute is meant to work. That is to
19 say, I agree with you, Your Honor, very strongly
20 that left to their own devices, companies
21 believe our job is to make money, and they will
22 do the thing that -- that will make the most
23 money. And it would be naive to expect them to
24 follow a different interpretation if there
25 weren't some incentive to do so.

1 I think Congress understood that as
2 well when it enacted the False Claims Act. The
3 False Claims Act is designed not to allow a
4 company to identify every possible reasonable
5 interpretation or every interpretation it thinks
6 it could get a judge somewhere to pick and then
7 choose the one that's most profitable.

8 The False Claims Act is designed to
9 create that economic incentive to actually
10 follow the best interpretation.

11 JUSTICE KAGAN: I -- I guess I'm --
12 I'm -- I'm a little bit surprised by your answer
13 to Justice Kavanaugh, because I thought that
14 this case comes to us on the understanding that
15 they thought that this interpretation was wrong.

16 MR. SINGH: Yes, Your Honor.

17 JUSTICE KAGAN: Not, like, possibly
18 permissible but possibly not the best one, that
19 they thought that this interpretation was wrong,
20 they knew it was wrong.

21 MR. SINGH: Yes, Your Honor, that is
22 what we've argued in this case, but --

23 JUSTICE KAGAN: Well, not what you've
24 argued.

25 MR. SINGH: -- I don't think liability

1 is limited to that circumstance.

2 JUSTICE KAGAN: I thought that that
3 was a given, and the question was what's the
4 effect of that.

5 MR. SINGH: Yes, Your Honor.

6 JUSTICE KAGAN: That that's a given
7 and then the question is, well --

8 JUSTICE KAVANAUGH: And they --

9 JUSTICE KAGAN: -- does -- does that
10 count under the statute if you can find somebody
11 else later to say, well, they knew it was wrong,
12 but, in fact, it was objectively reasonable even
13 though it was wrong. So that's what the case
14 comes to us -- that's the question, right?

15 MR. SINGH: Yes, Your Honor, that is
16 the question. And so I guess maybe I'll split
17 the world again into two sets of facts.

18 One is where contemporaneously the
19 sentences were not doing the right thing, but
20 it's possible, you know, you hire the best
21 lawyers later after he gets sued and they come
22 up with a rationalization and say, oh, but maybe
23 it could have been reasonable. You know, it's
24 -- it's arguably possible.

25 JUSTICE KAGAN: I thought that that's

1 the question before us --

2 MR. SINGH: Yeah.

3 JUSTICE KAGAN: -- at time A --

4 JUSTICE KAVANAUGH: And I'm asking
5 about a hypothetical. That's what I was trying
6 to do.

7 MR. SINGH: Yeah. But, Your Honor, I
8 would say even in the situation in which the
9 timing is different from this case --

10 JUSTICE KAVANAUGH: Right. We're at
11 the time, so let's -- I'm asking -- this is a
12 hypothetical.

13 MR. SINGH: Yeah.

14 JUSTICE KAVANAUGH: Okay. At the
15 time, you have three different interpretations
16 possible, and one's clearly safe, one's a little
17 more aggressive, and the third's really
18 aggressive, but you still think it's reasonable,
19 and you go with that third one, and it's
20 later -- they don't agree later on, so it's
21 "false."

22 And you said you're still liable even
23 in that circumstance, and I find that -- now
24 Justice Kagan correctly says that's not this
25 case. I just want the answer to the

1 hypothetical so I can figure out how to think
2 about all this.

3 MR. SINGH: Yes, Your Honor. So I
4 think there are circumstances in which that
5 could be culpable. And so, here -- you know,
6 the first one is, as I said, if the view inside
7 the company is this is probably wrong, we're
8 going to do it anyway, that is --

9 JUSTICE KAVANAUGH: Well, I doubt -- I
10 mean, probably wrong, so you're loading the
11 hypothetical, I think, for how attorneys -- this
12 is aggressive, this is pushing the envelope, but
13 we think we can defend it. It could be a
14 stretch. It's not out of the bounds.

15 MR. SINGH: Yeah. So one other factor
16 that we --

17 JUSTICE KAVANAUGH: Even though we're
18 trying to make a living.

19 MR. SINGH: -- think is relevant, just
20 to populate the hypothetical with a few more
21 facts that might be relevant, you know, the --
22 the statute also includes, for example,
23 deliberate ignorance, and that places an onus on
24 companies when it's available to seek
25 clarification.

1 And so, in many of these programs,
2 there are avenues to seek clarification to say,
3 hey, we have these three interpretations, we
4 think this one is good, tell us.

5 JUSTICE GORSUCH: Counsel, I would
6 have thought the answer to the question, if --
7 if you think there's a material risk, but you
8 think it's reasonable, that that's a
9 recklessness question and that, therefore, the
10 objective inquiry that -- that your friend on
11 the other side's arguing for might be
12 appropriate in those circumstances but that your
13 case just simply isn't that case.

14 MR. SINGH: Yes, that's true, but I
15 guess I would say I do agree that in the
16 objective sense of recklessness, a reasonable
17 interpretation can be. So I'll -- I'll -- I'll
18 go with that.

19 JUSTICE GORSUCH: I think that's --

20 MR. SINGH: That said, there, in the
21 common law fraud, recklessness is used also in a
22 slightly different way, which is you are
23 subjectively aware of a substantial risk and you
24 choose to ignore it.

25 And so I think that does cover this

1 potential hypothetical as well, which is to say,
2 when you have the three interpretations, you
3 know that one's a --

4 JUSTICE GORSUCH: It might be
5 reckless.

6 MR. SINGH: -- a little out there, you
7 may be reckless to simply pursue it, especially
8 if -- and I -- I want to point this out. As I
9 said in the introduction, it's important to ask
10 whether companies are being transparent with the
11 government in what they do. So, if you were to
12 say to the government --

13 JUSTICE GORSUCH: Counsel, just --
14 just so I -- I -- I -- I understand where --
15 where we're at, we're not asked to address those
16 circumstances. We're asked to posit that there
17 is indeed a falsity, and we're asked whether, in
18 addition to recklessness, one might proceed
19 under the statute according to its plain terms
20 to show actual knowledge or intent to deceive.

21 MR. SINGH: Yes, Your Honor, that's
22 correct.

23 JUSTICE GORSUCH: And all we're asked
24 about is the mental state here.

25 MR. SINGH: Yes, absolutely right.

1 JUSTICE GORSUCH: And -- okay.

2 MR. SINGH: And so -- and we think --

3 JUSTICE SOTOMAYOR: I've never heard
4 anybody --

5 MR. SINGH: -- that mental state can
6 be --

7 JUSTICE SOTOMAYOR: -- I've never
8 heard an attorney fighting people trying to help
9 them.

10 (Laughter.)

11 MR. SINGH: And I'm not trying to. I
12 promise.

13 JUSTICE SOTOMAYOR: This is what --
14 well, you -- you're --

15 JUSTICE GORSUCH: It happens all the
16 time here.

17 JUSTICE SOTOMAYOR: Well, it certainly
18 happens right now.

19 JUSTICE KAVANAUGH: Can I --

20 JUSTICE SOTOMAYOR: Counsel --

21 JUSTICE KAVANAUGH: Oh, go ahead.

22 JUSTICE SOTOMAYOR: -- the -- the
23 bottom-line question, I think, that we're asking
24 is, however we define reckless -- we're not
25 being asked to define reckless today. We're

1 being asked whether the intent of someone to
2 make a false statement is actionable even if
3 later they come up with a different -- an
4 objectively reasonable argument, correct?

5 MR. SINGH: Yes, Your Honor, that's
6 correct.

7 JUSTICE SOTOMAYOR: All right. So the
8 only --

9 MR. SINGH: But your -- your question
10 --

11 JUSTICE SOTOMAYOR: -- the only issue
12 then might -- may be different in terms of
13 recklessness if someone is proceeding on an
14 understanding they had at the time and it turns
15 out to be wrong. That's where recklessness
16 would come in.

17 MR. SINGH: Yes, Your Honor.

18 JUSTICE SOTOMAYOR: And how we define
19 that we can leave for later, right?

20 MR. SINGH: Yes. So objective
21 recklessness is not really before the Court.

22 JUSTICE KAVANAUGH: So we can leave
23 the hypothetical of the person who at the time
24 thought about these different options as opposed
25 to the person who only later came up with the

1 legal interpretation?

2 MR. SINGH: So I think that you --

3 JUSTICE KAVANAUGH: Because your case,
4 as Justice Kagan pointed out, is only the
5 latter.

6 MR. SINGH: Well, I -- I suspect
7 Respondents are going to disagree about that
8 characterization of the case and say that they
9 have factual --

10 JUSTICE KAVANAUGH: Well, I agree with
11 Justice Kagan. That's how the case came to us.

12 MR. SINGH: Yeah.

13 JUSTICE KAVANAUGH: And we should
14 decide the case as it came to us and leave for
15 another day, I think, the question of if at the
16 time you considered these various options.

17 MR. SINGH: Sure. So, in -- in
18 that -- in that mode of deciding the case, the
19 question before you is the straightforward one
20 of was the Seventh Circuit correct to say
21 subjective understanding and beliefs are
22 irrelevant and we think always irrelevant if the
23 interpretation can be shown reasonable after the
24 fact.

25 We think that's the easy case. No,

1 they're not, because actual knowledge is in the
2 statute because it's a false --

3 JUSTICE KAGAN: Well, that's this
4 case.

5 MR. SINGH: Yes. Yeah, and so you
6 could decide -- you could reverse, going no more
7 broadly than that.

8 JUSTICE KAGAN: Why are you arguing
9 all these hard cases?

10 (Laughter.)

11 JUSTICE KAVANAUGH: Because I -- I
12 asked him. I asked him.

13 JUSTICE KAGAN: Well, I know, but
14 your -- your case is the easy case, isn't it?
15 You need to tell us why it's different from the
16 hard cases.

17 MR. SINGH: Well, sure. And --

18 JUSTICE KAVANAUGH: He wants to win
19 the hard case here too, but you don't need to.

20 MR. SINGH: Well, that's -- that's
21 correct, Your Honor. And so I -- you're right
22 that I don't need to win the hard case. I was
23 trying to address the hypothetical on its own
24 terms. But, of course, we believe this case is
25 quite different.

1 At the time, the Respondents had ample
2 evidence in terms of guidance from the
3 government, guidance from their own attorneys,
4 industry consensus that if you are offering 80
5 percent of your sales for a certain drug at a
6 particular price, 80 percent of the cash sales
7 at a particular price, that also had to be the
8 usual and customary.

9 JUSTICE ALITO: Well, that sounds like
10 you're arguing that it wasn't a reasonable
11 interpretation. I find it easier to apply the
12 scienter requirements to facts than to law, so
13 let me give you this hypothetical.

14 The law could mean X or it could mean
15 Y, and a -- an entity that ends up being the
16 defendant in a False Claims Act case says, we
17 think there's a 49 percent chance the courts
18 will say it's X, which is good for us, and a 51
19 percent chance that they will say that it's Y,
20 which is bad for us, and, therefore, we think it
21 really means X -- I'm sorry, really means Y, the
22 unfavorable interpretation. But there's a 49
23 percent chance that the court will adopt the
24 more favorable interpretation.

25 What would -- would there be liability

1 there --

2 MR. SINGH: So --

3 JUSTICE ALITO: -- because they turn
4 out to be accurate. The court says, you know,
5 this is a tough question. We think it's 51
6 percent for Y, 49 percent for X. Therefore,
7 we're going with -- with Y.

8 MR. SINGH: Yeah. So, again, this is
9 one of these hypothetical hard cases that isn't
10 this case, but I'll -- again, I'll try to -- to
11 tilt it and see how -- how it goes.

12 JUSTICE ALITO: Well, I mean, we do
13 take these cases --

14 MR. SINGH: Yeah.

15 JUSTICE ALITO: -- to decide legal
16 questions and not just to decide the particular
17 case.

18 MR. SINGH: Yes. And so, again, I
19 believe that if the company affirmatively
20 believes we are probably wrong in our
21 interpretation and yet presents a claim with no
22 qualifications, no transparency about the
23 ambiguity, but does so in a way that the
24 government couldn't tell from the face of the
25 claim that they're following interpretation X

1 and not Y, right, then, yeah, that's either
2 actual knowledge or recklessness, we think, and
3 it could be deliberate ignorance if there are
4 avenues for clarification that they did not
5 seek.

6 We think that's certainly a possible
7 frame for liability. And let me just offer
8 you -- and I know I'm over my time, so I can
9 also come back to it.

10 CHIEF JUSTICE ROBERTS: Briefly.

11 MR. SINGH: Sure. I actually think
12 it's not harder to do this for law than for
13 facts. You could posit a situation in which the
14 facts are really, really hard to determine.
15 Let's say it was based on whether a majority of
16 your sales happened. And there was a computer
17 virus. You lost a lot of your data. But an
18 employee says internally, you know, I'm pretty
19 sure that more than half of our sales were at
20 this price. I can't be a hundred percent sure.
21 I'm pretty sure. And then you submit the claim
22 as if that weren't true.

23 Again, I think that the scienter
24 standard works the same way for facts and law.

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Counsel, when
2 you allege fraudulent or filing of false claims,
3 is that something you have to allege with
4 particularity?

5 MR. SINGH: Yes, Your Honor.

6 CHIEF JUSTICE ROBERTS: Okay.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: Does this difference
10 matter mostly for purposes of summary judgment,
11 how many cases are going to be disposed of at
12 summary judgment? Does it matter so much if the
13 case gets beyond summary judgment?

14 MR. SINGH: So I think it certainly
15 could. In this case, if you rule in our favor,
16 this case will go forward to a trial. And, to
17 be clear, I don't think we can move for summary
18 judgment and win right now. I think the
19 Respondents will put up a fight at trial. And
20 could they win? Sure.

21 And so, yeah, I do think the rule
22 matters beyond because I do think -- and this
23 goes to some degree to the question of why we
24 get into the harder hypotheticals, is because,
25 in certain cases, there's going to be questions

1 that need to be resolved. So, yeah, I do think
2 it matters beyond summary judgment.

3 JUSTICE ALITO: Well, there could be a
4 case where an interpretation of the law is
5 really objectively reasonable, very, very
6 reasonable, but there's some evidence, you know,
7 some e-mail or something to suggest that the
8 company thought it was not right. So, in that
9 case, you know, that may have to go past summary
10 judgment, right?

11 MR. SINGH: It may be. You know,
12 without understanding the factual record in more
13 detail, I -- I couldn't say, but, you know,
14 generally speaking, the existence of one e-mail
15 somewhere in the company is not necessarily
16 going to be enough to defeat summary judgment.

17 I would refer the Court back to this
18 Court's decision in *Omnicare*, gave an example of
19 a CEO who says we believe our conduct is lawful,
20 and the -- the premise was, well, you know, that
21 would be misleading if you -- you hadn't
22 consulted a lawyer, if you honestly didn't think
23 your consult was lawful.

24 On the other hand, if, you know, seven
25 lawyers told you it was lawful and one junior

1 lawyer said, oh, maybe it's not lawful, that
2 wouldn't be enough to make it misleading. So
3 it's going to be fact-intensive. But, yes,
4 there are situations where I think, at the
5 margins, this could matter.

6 The big question is, do we want to
7 adopt a legal rule, like the Seventh Circuit,
8 which would allow all of the evidence inside a
9 company to say we think we're doing the wrong
10 thing, but then a court to say, well, it doesn't
11 matter because there was an objectively
12 reasonable sanctuary that you weren't thinking
13 about at the time, that you weren't relying on,
14 but that somehow saves you.

15 And quite similar to what this Court
16 did in Halo Electronics, we think that's an
17 unreasonable application of any scienter rule.

18 JUSTICE ALITO: All right. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 Justice Kagan?

22 Justice Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: Two things. One,
25 in response to Justice Alito, he asks a

1 hypothetical, you know, we think we're going to
2 lose 51-49, and you changed that into we are
3 probably wrong. Those are two different things.

4 MR. SINGH: Oh, sure. So, yeah, if
5 you think -- we think we have the best
6 interpretation of the law. We think a court
7 should decide it this way. We think that's good
8 faith, and that's good. But, if you think we
9 think courts applying honestly all of the tools
10 of construction will reject this interpretation,
11 you think it's wrong, we -- we equate those two.

12 JUSTICE KAVANAUGH: Have you ever won
13 a case in court where you thought you had the
14 worse argument?

15 MR. SINGH: Not yet, Your Honor.

16 (Laughter.)

17 MR. SINGH: I mean, I'm -- I'm waiting
18 for the day.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 Justice Jackson?

22 JUSTICE JACKSON: Can I just give you
23 a chance to respond to your friend on the other
24 side's reliance on the Safeco Footnote Number
25 20?

1 MR. SINGH: Yeah.

2 JUSTICE JACKSON: I mean, they get
3 that standard, they say, from that case. So why
4 are they wrong about that?

5 MR. SINGH: So many reasons. To
6 begin, we -- we lay out in the briefs, I think,
7 as comprehensively as we can why Safeco is just
8 decided in an entirely different context. A
9 moment ago, I referenced the Halo Electronics
10 case, and Safeco's, in its Footnote 20, were the
11 basis for the Seagate test that was up before
12 the Court in Halo, and this Court said, no,
13 we're not going to extend the Safeco footnote to
14 this distinct context of patent damages. And
15 the precise reasoning was you could have people
16 who act in really subjective bad faith for whom
17 enhanced damages were intended to be applied,
18 and they would get away with it.

19 The same is really true in the fraud
20 context. People who are intentionally trying to
21 cheat the government, there's no realistic
22 argument for why the Safeco --

23 JUSTICE JACKSON: Is that because the
24 statute has actual knowledge in it?

25 MR. SINGH: Yeah. So --

1 JUSTICE JACKSON: Yeah.

2 MR. SINGH: -- there is, first, the
3 textual distinction of having a three-part
4 definition of knowledge and it being a fraud
5 statute. There's the fact that it draws from
6 the common law of fraud, which is Section 526 of
7 the Restatement of Torts, not Section 500, which
8 was at issue in Safe -- in Safeco. There's the
9 issue of the background principles of law that
10 require those who do business with the
11 government to determine the propriety of their
12 claims before presenting them, a principle
13 that's not necessarily the case throughout the
14 entire regulated economy where the Fair Credit
15 Reporting Act applies.

16 And then there's also just the way
17 that we read that footnote, which is that we
18 don't read it to apply in a situation where, at
19 the moment the company made its decision, it had
20 no inkling of the defense that it now seeks
21 refuge in. We read it to mean that the company
22 contemporaneously followed an interpretation
23 that was reasonable at the time, not that it
24 came up with that interpretation later.

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Stewart?

4 ORAL ARGUMENT OF MALCOLM L. STEWART
5 FOR THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING THE PETITIONERS

7 MR. STEWART: Mr. Chief Justice, and
8 may it please the Court:

9 I'd like to begin by addressing the
10 line of questions that Justice Kavanaugh posed
11 earlier about the -- the internal company
12 meetings where three possible interpretations of
13 the law were discussed.

14 And there are really two important
15 differences between the hypothetical and this
16 one. The first one is the hypothetical seemed
17 to involve a situation in which the company was
18 not attempting to have contact with the
19 government but was deciding what course of
20 action it would take and was contemplating the
21 possible litigation risks down the road if it
22 was sued.

23 And what's extremely important about
24 the False Claims Act is we're not just talking
25 about conduct; we're talking about

1 representations. In the course of submitting
2 claims, the claimant is making representations
3 either to the federal government or, in the
4 Medicaid and Medicare context, to state and
5 private intermediaries, and they are describing
6 their own practices. And in our view, the one
7 bedrock requirement is they should not say
8 things they do not believe to be true.

9 And even if they think there is a
10 reasonable argument down the road that it is
11 true, if their best judgment is the statement we
12 are making is not true, they shouldn't make it.

13 The second thing I'd say is the
14 representations we're talking about here are not
15 pure propositions of law. In -- in giving
16 figures as to their usual and customary prices,
17 they were, in essence, using a mixed term of
18 fact and law. They were -- they needed some
19 legal conception of what "usual and customary"
20 meant in order to do the calculations. But the
21 whole reason that the state agencies and the
22 pharmacy benefit manufacturers were asking for
23 this information was it was factual information
24 about the prices that they customarily charged
25 to their cash customers, and that was

1 information that the agencies and the PBMs
2 didn't have on their own. That was information
3 they needed to give to the company.

4 And if the --

5 CHIEF JUSTICE ROBERTS: Mr. --
6 Mr. Stewart, you keep saying whether the
7 statements they made and representations, and I
8 gather there will be litigation at some point
9 about what the representations were, but when
10 you say something is true or false, I assume it
11 has a legal element to that determination.

12 MR. STEWART: Yes.

13 CHIEF JUSTICE ROBERTS: It's not
14 simply this is X and it turns out I know it's Y.
15 It was this falls within a particular statutory
16 provision, applying this, and you'd say they
17 knowingly represented that mixed question to
18 have this answer, and that was wrong.

19 MR. STEWART: That's correct. Now --
20 now, if they had laid it out, if they had shown
21 their work, as it were, and they had said our
22 retail price is \$20, 80 percent of our cash
23 customers pay \$4 to this drug, but our
24 understanding of the term "usual and customary"
25 is that it refers to the retail price and,

1 therefore, we're claiming \$20, if they had done
2 all of that, there wouldn't have been anything
3 deceitful and there wouldn't have been any real
4 danger that the state agencies and the pharmacy
5 benefit manufacturers would be deceived. They'd
6 have the right facts and they could decide for
7 themselves what the correct view of the law is.

8 CHIEF JUSTICE ROBERTS: Well, but, I
9 mean, that -- I appreciate that, but, on the
10 other hand, in terms of showing their work, I
11 mean, they're dealing with the government in --
12 in a way in which the government says is going
13 to affect their -- their profits and everything,
14 and I don't know if they have to show their work
15 if it is 51-49.

16 MR. STEWART: I mean, I -- I would say
17 they should give their better view of what the
18 usual and customary price is. And if their --
19 if their understanding is probably the better
20 view is that the usual and customary price in
21 this context is the discounted price, and if
22 they understand that the state agencies and the
23 PBMs believe that to be the price, then, when
24 they say \$20 is our usual and customary price,
25 they understand this will be misconstrued --

1 CHIEF JUSTICE ROBERTS: You're
2 making -- you're making it too easy for
3 yourself. I mean, that this is probably true.

4 Let's do in the 51-49. Do they have
5 to say to you that we think it's 51-49, or can
6 they decide we're going to go with the -- with
7 the 49? Because there aren't -- it's not 51-49.
8 It's here are the arguments for one, here are
9 the arguments for the other, and then you weigh
10 the arguments. And if they come up and say,
11 well, gee, I think that's going to -- if we go
12 to the Supreme Court, it's going to be 5 to 4,
13 is the 4 unreasonable for them to rely on?

14 MR. STEWART: Again, if they were
15 laying out their work, we're not saying it would
16 be unreasonable for them to assert the more
17 aggressive view of the law having apprised the
18 counter-party of the facts.

19 But, if they are creating the obvious
20 danger that the counter-party will be misled and
21 will think the representation that \$20 is your
22 usual and customary price is a representation
23 that most cash customers pay that, then the
24 intermediary or the -- the pharmacy benefit
25 manufacturer, the state agency will have been

1 misled as to an important point of fact.

2 I mean, Mr. Singh referred to Omnicare
3 and the hypothetical statement, we believe that
4 our company's practices are lawful, and the
5 Court said, in some circumstances, that would
6 imply that you've done some investigation, but
7 the most basic thing you are conveying is that
8 is actually our subjectively held belief.

9 JUSTICE KAVANAUGH: Well --

10 MR. STEWART: And the Court in
11 Omnicare said, if you said that and you didn't
12 actually believe it was true, you would be lying
13 and you would presumably know you were lying.

14 I'm sorry.

15 JUSTICE KAVANAUGH: Mr. Stewart, your
16 -- your law/fact distinction's helpful for me.
17 Obviously, if you say it's \$20 and, in fact,
18 you're charging everyone 10, okay, false, I get
19 that.

20 But, if it's based on a legal
21 understanding, it's a little hard for me to say
22 your legal view is false. Your view of the law
23 is false.

24 Normally, we'd say your view of the
25 law is incorrect or your view of the law is so

1 incorrect as to be completely unreasonable. We
2 don't usually say your view of the law is false.

3 MR. STEWART: I -- I --

4 JUSTICE KAVANAUGH: So help me with
5 that.

6 MR. STEWART: I -- I think that's
7 right, but what we are saying was false was
8 not -- for purposes of liability is not the view
9 of the law. The thing that was false was the
10 statement "our usual and customary prices were
11 \$20" when, in fact, under a proper calculation,
12 they were \$4.

13 And -- and I think -- take -- leaving
14 aside scienter for a second, just for the
15 purposes of deciding were false claims
16 submitted, I think it's common ground on both
17 sides that if you misstate your usual and
18 customary prices and state them to be --

19 JUSTICE KAVANAUGH: Yeah, that's
20 false.

21 MR. STEWART: That's false, even if
22 the source of the error is a misunderstanding or
23 a misconception of the relevant law rather than
24 a misunderstanding of the facts.

25 JUSTICE KAVANAUGH: What was your

1 answer to the hypothetical if you at the time do
2 the three interpretations and at the time
3 conclude, but you don't disclose it at the time?
4 You go with the most aggressive one at the time,
5 but you don't disclose it and you just list 20.

6 MR. STEWART: We would say that would
7 be with actual knowledge that your --

8 JUSTICE KAVANAUGH: Really?

9 MR. STEWART: Yes, that would be with
10 actual knowledge --

11 JUSTICE KAVANAUGH: Wow.

12 MR. STEWART: -- that your claim was
13 false. And I think --

14 JUSTICE KAVANAUGH: I mean, doesn't
15 the government all the time -- this was my
16 allusion earlier -- debate what position to take
17 in national security situations or EPA
18 regulation or what have you and -- and be --
19 well, we have a couple different interpretations
20 here. This might not be the best one, but we're
21 going to go with the most aggressive one. That
22 never happens in the federal government?

23 MR. STEWART: Oh, I think it happens,
24 and I think it happens in private practice, and
25 I'm really focusing on the fact that we're not

1 just talking about what you do and whether you
2 can be held liable after the fact or penalized
3 for doing it in bad faith. We're talking about
4 things you say.

5 And the Court, for instance, last year
6 dealt with this problem in Unicolors, where it
7 was dealing with a Copyright Act provision.

8 JUSTICE KAVANAUGH: Well, the federal
9 government would say it to a court -- the
10 federal government might adopt a legal
11 interpretation for various views that some
12 people in the federal government don't think is
13 the best, but they still think it's reasonable.

14 MR. STEWART: And -- and, again, we
15 would say --

16 JUSTICE KAVANAUGH: And represent that
17 to a court. Is that fraud on the court?

18 MR. STEWART: No, it's not fraud on
19 the court because I think there is an
20 understanding that filing a legal document
21 doesn't constitute an implied representation
22 that either the client or the lawyer
23 subjectively believes that this view of the law
24 is correct.

25 JUSTICE GORSUCH: Mr. Stewart --

1 MR. STEWART: And that --

2 JUSTICE GORSUCH: -- I -- I -- I --

3 I -- I guess I'm -- I'm more confused after your
4 presentation than I was before. I -- I -- I had
5 -- I would have thought that in -- in the
6 hypotheticals Justice Kavanaugh was giving you
7 where there's some reasonable good-faith basis
8 for it that you are relying on in making a
9 presentation, that at most that would be
10 reckless and probably maybe not even reckless if
11 objectively there was enough evidence out there
12 in the law to support your claim, and -- and
13 that all -- all that's at issue before us isn't
14 that.

15 It's an allegation yet to be proven
16 that the company knew -- knew that -- that its
17 representations were not its ordinary and
18 customary price. Under its understanding of the
19 law, it knew that, that there was no good-faith
20 basis, and that that is potentially actionable
21 here. I thought that's all that was before us.

22 MR. STEWART: Well, I -- I think
23 Respondents will say that there's much more than
24 that before you because --

25 JUSTICE GORSUCH: Oh, I'm sure they

1 will.

2 (Laughter.)

3 MR. STEWART: But I -- I guess, to
4 respond more directly to your question, there
5 are lots of propositions that I understand
6 reasonable people could believe and that might
7 even be right, but I don't believe them, and if
8 somebody asks --

9 JUSTICE GORSUCH: Correct.

10 MR. STEWART: -- do you believe X and
11 I say, yes, I do, I'm lying, and I know that I'm
12 lying because I understand that my subjective
13 belief is not what I have just --

14 JUSTICE GORSUCH: Yes.

15 MR. STEWART: -- represented it to be,
16 and --

17 JUSTICE GORSUCH: And that's -- that's
18 all we have to decide in this case, is whether
19 that is actionable.

20 MR. STEWART: Well, the irony is, even
21 in the kind of -- let's make it 40-60 percent,
22 the company thinks 60 percent likelihood that
23 this is false, 40 percent that this is true, if
24 they were asked to say do you believe -- what do
25 you believe your usual and customary price is

1 and they said, we think it's the \$20, the higher
2 figure, when they thought, in fact, that the
3 better argument was it was the \$4 figure, under
4 Omnicare, they would have falsely stated their
5 belief and they would have stated it with
6 scienter, and yet they're saying we can get
7 all --

8 JUSTICE KAGAN: Well, because they
9 believed it to be \$4, correct, and they said it
10 was \$20?

11 MR. STEWART: They believed it to
12 be \$4, yes. They believed --

13 JUSTICE KAGAN: Yes. So that's the
14 question before us, I believe it to be \$4, but
15 I'm saying it's \$20.

16 MR. STEWART: Yes, but the question
17 is --

18 JUSTICE KAGAN: So I think Justice
19 Kavanaugh was suggesting that there's a harder
20 case out there, which is, I'm not sure whether
21 it's \$4 or \$20. I can kind of make arguments
22 both ways, and I'm going to press the argument
23 that is most to my advantage.

24 But I guess I'm -- I'm still having
25 the same trouble that I was having with Mr.

1 Singh. That seems to be not the case before us.
2 The case before us is, I believe it was \$4, but
3 I'm saying it was \$20.

4 MR. STEWART: I mean, just -- just to
5 clarify the way we read the Seventh Circuit's
6 opinion, and I -- I -- I don't want to be
7 accused of turning down help, but I -- I -- I --

8 (Laughter.)

9 MR. STEWART: -- I -- I -- I -- I do
10 want to make this clarification.

11 I don't understand the Seventh Circuit
12 to have said subjectively they absolutely,
13 absolutely thought that it was \$4, but they said
14 it was \$20, and then they came up with a post
15 hoc rationale down the road.

16 What I understood the Seventh Circuit
17 to say is it's been alleged that they knew at
18 the time that it was \$4 --

19 JUSTICE KAGAN: Yes, of course, it's
20 an allegation, but the allegation is that they
21 believed something different from what they told
22 the government.

23 MR. STEWART: And, again, I would say,
24 in order to believe that \$4 is the right price,
25 you don't have to think there is no conceivable

1 argument for the other prices. In the other --
2 in the circumstance --

3 JUSTICE JACKSON: But that doesn't
4 really --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Stewart. I -- I just have one very brief
7 question. You're saying that this was false.

8 When they say \$20 as opposed to \$4 and
9 you say that was false, there is a legal
10 analysis baked into those numbers, right?

11 MR. STEWART: Yes.

12 CHIEF JUSTICE ROBERTS: It's not
13 simply there is \$20 here and there's 4. It is
14 this is how I read it and that comes out to 20,
15 and you're saying they thought that was false.

16 Now do you mean -- you're simply
17 saying they didn't -- the -- the legal analysis
18 they put in was the 40 percent and not the 60
19 percent?

20 MR. STEWART: Yes. That if --

21 CHIEF JUSTICE ROBERTS: Okay.

22 MR. STEWART: Yes.

23 CHIEF JUSTICE ROBERTS: Thank you.

24 Justice Thomas?

25 Justice Alito?

1 JUSTICE ALITO: Well, I like to resist
2 the temptation to make easy cases hard, but it
3 does seem to me that the legal issue here is --
4 is harder than it has been portrayed, unless you
5 think that people have the same certainty about
6 the meaning of the law that they have about
7 facts.

8 So I -- I know as a fact that it is
9 Tuesday, but I have ideas about what the law
10 means and what it should mean and what courts
11 will interpret it to mean, but I can't hold that
12 with most of those, many of those -- I'll amend
13 that, some of those -- with the same degree of
14 certainty that you have generally about facts.
15 That's what makes this a hard case.

16 MR. STEWART: I mean, I agree it's a
17 hard case, but -- and it may be more difficult
18 for that reason to prove that the person
19 subjectively believed that he was giving the
20 wrong numbers. But I think the bedrock
21 criterion in these circumstances is, when you're
22 making representations to the government and
23 asking for money, you should say what you
24 believe to be true.

25 And if we imagine a lawyer, for

1 instance, advising a client who's -- who asks do
2 you think what I propose to do is legal, the
3 lawyer may recognize there are good arguments
4 both ways, but if the -- the lawyer actually
5 thinks the better argument is this is illegal
6 and he says, I think the better argument is that
7 it's legal, that's just knowingly making a false
8 statement.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor?

11 Justice Kagan?

12 Justice Gorsuch?

13 Justice Kavanaugh?

14 JUSTICE KAVANAUGH: I mean, I think
15 that last statement was pretty extreme, but it's
16 not this case.

17 MR. STEWART: To clarify, I'm not
18 talking about the lawyer's representation in
19 court because we do understand that when the
20 lawyer argues in court, he or she is not making
21 an implicit representation: I would adopt all
22 of these views if I were a judge.

23 When the lawyer is advising a client,
24 that is a circumstance where, even in cases of
25 indeterminacy, we would expect the lawyer to

1 provide his or her best judgment, and it
2 wouldn't -- if the lawyer failed to do that, it
3 wouldn't be a sufficient answer to say I
4 understood at the time that this was a possible
5 respectable view of the law.

6 JUSTICE KAVANAUGH: If the client
7 says, well, I realize it's not your best
8 interpretation, but if I go with the other
9 interpretation, can I win in court, and the
10 lawyer says, yeah, I think you have a good
11 chance of winning?

12 MR. STEWART: That would all be fine,
13 again, assuming that is actually the lawyer's
14 good-faith view. There are some circumstances
15 in which we expect --you know, if for some
16 reason expert testimony on a question of law
17 were admissible, we would want the witness to
18 give his or her best judgment about what the law
19 is, and if the person gave anything other than
20 that, it wouldn't be a sufficient justification
21 that there was a reasonable argument to be made.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: Just a quick
25 question about the limits of your argument. I

1 mean, to decide this case, right, I mean, if we
2 were just to say it's not a 49-51, it's a case
3 where there's no confidence, where there's a
4 belief that it's false and not even a belief at
5 the time that there was a reasonable argument
6 later, you're happy with that if we decided in
7 your favor on that basis?

8 MR. STEWART: I mean, if you decide
9 the case on that basis, I think that would lead
10 to a reversal, so it would be the right
11 disposition. To the extent the Court implied
12 that this was the only circumstance in which a
13 misstatement about a mixed question of law and
14 fact could -- could be made with scienter --

15 JUSTICE BARRETT: But I guess I'm
16 saying not bleeding into reckless disregard and
17 stuff like that. Deliberate ignorance. I mean,
18 the -- the hard cases that might come up in the
19 medium, if we classify this at one end of the
20 spectrum, you're not happy with that or you are?

21 MR. STEWART: Not -- not really
22 because --

23 (Laughter.)

24 MR. STEWART: -- I mean, in --
25 because, in other contexts, applying this vision

1 of knowledge seems extravagant. That is --

2 JUSTICE KAGAN: We wouldn't be saying
3 anything about other contexts.

4 MR. STEWART: Okay.

5 CHIEF JUSTICE ROBERTS: Thank --

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: Yeah. So I'm -- I'm
10 over here struggling as to why this is a hard
11 case. I don't understand it at all. I was with
12 Justice Kagan. I thought the Seventh Circuit
13 said, essentially, that the subjective beliefs
14 of the supermarkets were irrelevant.

15 MR. STEWART: Yes.

16 JUSTICE JACKSON: All right. And so
17 then the only question, I thought, is whether
18 the allegations that are being made about their
19 subjective beliefs matter. They're not
20 irrelevant. If we're trying to figure out what
21 the scienter is in this case, you -- you -- you,
22 the jury -- let's say I'm charging the jury --
23 you, the jury, can take into account evidence
24 concerning their actual beliefs, what they
25 subjectively believed about the \$4 or the \$20 or

1 whatever. Isn't that the question? Is the
2 Seventh Circuit wrong when it says, essentially,
3 jury, the only thing that matters in terms of
4 establishing knowledge and scienter in this case
5 is an objective view of the price, but all of
6 this evidence with respect to what they actually
7 thought, that can't be used to determine whether
8 or not they had actual knowledge?

9 MR. STEWART: If all the Court does is
10 say that was a misconception on the Seventh
11 Circuit's part, we send it back for the Seventh
12 Circuit to redo the analysis without regard to
13 that misconception, that's certainly a step in
14 the right direction.

15 JUSTICE JACKSON: But it's not the
16 step --

17 (Laughter.)

18 JUSTICE JACKSON: -- it's not the only
19 step that you want to take in this case? I
20 thought that's what we were doing. I thought
21 what we were doing was assessing whether the
22 Seventh Circuit's statement that it was -- the
23 subjective knowledge was irrelevant was wrong.

24 MR. STEWART: Obviously, we would
25 prefer -- from the standpoint of somebody who's

1 not just working on this case but who is --
2 represents the government that is litigating
3 False Claims Act cases across the board, we
4 would prefer greater clarification about what
5 the rules are in the hypothetical case where the
6 allegation is, yes, at the time you acted, you
7 considered the possibility of this
8 interpretation, you just thought it was wrong
9 and said it anyway. We would prefer to have it
10 clarified that that's actual knowledge as well.
11 But what you propose is certainly, as I say, a
12 step in the right direction.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Phillips.

16 ORAL ARGUMENT OF CARTER G. PHILLIPS

17 ON BEHALF OF THE RESPONDENTS

18 MR. PHILLIPS: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 I think I want to start by trying to
21 make this a hard case.

22 (Laughter.)

23 MR. PHILLIPS: Justice Kagan, I -- I
24 -- I don't think this is just a case about post
25 hoc lawyer rationalization. That was Halo.

1 There's no question those were the facts in
2 Halo.

3 In this case, I think you have to go
4 back to 2005, when all -- when "usual and
5 customary" had been in place for many years,
6 Walmart adopts a pricing mechanism where it
7 discounts deeply and across the board for all
8 generics, and the question is, what do the rest
9 of the pharmaceutical business do in that
10 context?

11 And it does it, Justice Thomas,
12 against the backdrop that there is no usual and
13 customary guidance. There is nothing from the
14 federal government that tells you what the right
15 answer is. And there are lots of different
16 states that take lots of different positions.
17 There's lots in the record in this case that
18 says that the interpretation adopted by my
19 clients was absolutely correct, those discounts
20 didn't count.

21 And the reason why I don't think you
22 can look at this as a post hoc justification for
23 what they did is, at the time, those -- my
24 clients, who actually matched, directly matched
25 the Walmart scheme and said, okay, \$4 flat

1 discount across the board, that's exactly what
2 they charged as a usual and customary number.

3 But, when they didn't adopt that
4 approach, when they -- when they stuck with --
5 with the individual matching programs or when
6 they adopted membership programs that had some
7 discounts and not some discounts in certain
8 circumstances, in their view, their ordinary
9 price to the customer, the person who walks in
10 the door, rings on the bell of the pharmacist,
11 and says, I want a prescription for Crestor,
12 what's the price that I have to pay for it, I
13 have my wallet here ready to pay cash, and the
14 number is \$10, and that's the number that they
15 would report as the usual -- excuse me -- and
16 customary. And they did that on the basis that
17 that is a reasonable approach, that is an
18 objectively reasonable decision and that there
19 is nothing, not even remotely, in the category
20 of definitive guidance, authoritative guidance,
21 from any agency of the federal government and
22 certainly not from any court. Indeed, all the
23 courts that have decided that issue until Garbe
24 in the Second -- in the Seventh Circuit in 2016
25 had held that this was perfectly okay.

1 And put it into context, okay? These
2 are prices that were offered and audited in one
3 instance 12,000 time over a decade. Not once
4 anybody complained about whether or not these
5 were usual and customary and an acceptable price
6 under those --

7 JUSTICE GORSUCH: Mr. Phillips, it
8 sounds to me like an excellent jury argument.
9 And --

10 MR. PHILLIPS: No, but --

11 JUSTICE GORSUCH: Just a second. And
12 maybe --

13 MR. PHILLIPS: Fair enough.

14 JUSTICE GORSUCH: -- maybe even a good
15 summary judgment argument that -- that my client
16 had no reckless disregard, deliberate
17 indifference, or knowledge of the falsity of the
18 information it was supplying the government.

19 But I think the question before us is
20 a narrow one, and that is, did the Seventh
21 Circuit err when it said that the only evidence
22 that could be admitted against your client was
23 objective proof. And I think the statute makes
24 that argument pretty hard, that knowing and
25 deliberate indifference require subjective

1 proof, proof of internal knowledge and -- and
2 actual knowledge.

3 And so that the law makes that an
4 available course to meet the case for a
5 plaintiff. Whether they can do so here I know
6 not. And you may have a very good argument.
7 But why -- why wouldn't we reverse the Seventh
8 Circuit on the narrow question presented because
9 they failed to account for the fact that the
10 statute has some mens rea attached to it?

11 MR. PHILLIPS: Well, I think the
12 Court's going to at least have to deal with
13 Safeco and the -- and the statement in Safeco
14 that it would defy history and current thinking
15 to treat a defendant who merely adopts one such
16 reasonable interpretation as a knowing and
17 reckless violator. Congress could not have
18 intended that result -- such a result for those
19 who followed an interpretation that could
20 reasonably have found support in the courts.

21 And I submit, you know, the subjective
22 evidence is not relevant. And that's all the
23 Seventh Circuit did. Now there's -- you know,
24 obviously, there's a whole discussion and a
25 debate between the majority and the dissent on

1 the issue of, you know, does that mean post hoc
2 rationalization, et cetera.

3 I don't think the Court has to decide
4 that issue in this case. I think, in this case,
5 what the Court has to recognize is that we deal
6 in a situation where there's no guidance, we
7 have an inherently ambiguous term, we used what
8 was by all accounts and is, you know, undisputed
9 before this Court an absolutely objectively
10 reasonable interpretation, so the number we gave
11 was based on an objectively reasonable
12 interpretation.

13 JUSTICE GORSUCH: And, therefore,
14 Members of the Jury, you should not infer
15 knowledge?

16 MR. PHILLIPS: No, it should never get
17 to the jury, and that's the whole point of this
18 because, if you adopt the opposite rule, Justice
19 Gorsuch, then the one -- the same position the
20 United States took in Safeco, right? You
21 guarantee that in every single case you have to
22 waive the privilege for attorney-client -- the
23 attorney-client relationship.

24 You're going to have to scrutinize
25 what happened, what was the difference, who said

1 what to who.

2 JUSTICE GORSUCH: I mean, I can easily
3 imagine a case, Mr. Phillips, in which there's
4 all kinds of internal communications, not among
5 lawyers but among businesspeople, saying, we
6 know this isn't our usual and customary price
7 under any reasonable definition, but we're going
8 to do it anyway, okay?

9 And for reasons that turn out later
10 with subsequent guidance, it might be
11 objectively reasonable, if mistaken, but they
12 knew. And that would be fraud in a normal
13 circumstance. And I don't know why it wouldn't
14 be here.

15 MR. PHILLIPS: Because that's not this
16 case. I don't have any problem --

17 JUSTICE GORSUCH: Oh, I --

18 MR. PHILLIPS: I don't, frankly, have
19 any problem with that case. But the case we --

20 JUSTICE GORSUCH: So -- so -- so you
21 think --

22 MR. PHILLIPS: In that because it goes
23 to the frame, how you frame the issue.

24 JUSTICE GORSUCH: No, I think -- I
25 think acknowledging that -- that you have no

1 problem with that suggests the Seventh Circuit
2 erred in suggesting otherwise.

3 MR. PHILLIPS: Well, because what that
4 situation is, if you -- if you have -- you're at
5 the summary judgment stage, because my -- my
6 clients and -- and the business communities'
7 interests here is can these cases end at summary
8 judgment or are we, one, insisting --

9 JUSTICE GORSUCH: Oh, I understand
10 that, but I think, if you concede that
11 knowledge, internal knowledge, can be relevant,
12 that's all we're -- that's all we would say in
13 this disposition. We would not take away any of
14 your defenses on knowledge or deliberate
15 indifference based on --

16 MR. PHILLIPS: Well, I mean, I think
17 --

18 JUSTICE GORSUCH: -- based on the
19 facts.

20 MR. PHILLIPS: -- I mean, I think it
21 could -- it goes to the objective reasonableness
22 of the ultimate determination --

23 JUSTICE GORSUCH: Sure.

24 MR. PHILLIPS: -- and, you know, of
25 the fact that everybody --

1 JUSTICE GORSUCH: It may go to
2 knowledge too.

3 MR. PHILLIPS: And if everybody thinks
4 it's wrong, it may be that that's not an
5 objectively reasonable assessment. If that's --
6 I mean, the reality is --

7 JUSTICE GORSUCH: I think Justice
8 Kagan had a question.

9 MR. PHILLIPS: All right.

10 JUSTICE KAGAN: I mean, I think my
11 question -- my question was the same as Justice
12 Gorsuch's question, which is, when you said that
13 in the hypothetical, let's call it a
14 hypothetical, where the company says we know
15 this to be wrong, but we're going to state it to
16 the government, we know our price is one thing,
17 but we're going to state another thing to the
18 government, if you say, well, yeah, you have no
19 problem with that, well, the Seventh Circuit did
20 have a problem with that.

21 The Seventh Circuit thought that as
22 long as you could find somebody later that said
23 that what you said was objectively reasonable,
24 it didn't matter that you believed it to be
25 entirely wrong.

1 MR. PHILLIPS: Except -- except that,
2 I mean, there's undeniably discussion in the
3 Seventh Circuit's opinion and a debate between
4 the majority and the dissent on what to deal --
5 what to do in connection with post hoc
6 rationalization situations.

7 That is not -- that was not the way --
8 that was not the basis for the district court's
9 rulings in this case, which come off of Safeco,
10 which are based on was the action taken
11 reasonable, objectively reasonable under the law
12 at the time it was taken, or was there some
13 evidence -- or was -- and was there evidence
14 that would lead them away from that
15 interpretation.

16 And on that understanding of what --
17 of what -- you know, that's the basis why, when
18 you're dealing with a case like this, the
19 downside of saying we're going to ignore whether
20 the actions taken were objectively reasonable,
21 we're always going to allow subjective intent,
22 guarantees, again, as the Solicitor General said
23 in Safeco, you're going to have to weigh the
24 attorney-client privilege in every single case.
25 That seems to me not something Congress would

1 have wanted.

2 Two, we should have to put it in the
3 context of -- of the scheme, right? We're
4 talking about a punitive scheme where the
5 definition of "usual and customary" is
6 completely unknowable, candidly, at least in the
7 time during this litigation. There were no
8 determinations as to what's usual and customary.
9 And --

10 JUSTICE JACKSON: Can I -- can I --

11 MR. PHILLIPS: -- and that notice
12 requires scienter to be interpreted in an
13 aggressive and -- and -- and protective way for
14 the defendants in order to avoid what would
15 otherwise be a due process problem.

16 JUSTICE JACKSON: Mr. Phillips, can I
17 read you two sentences from the Seventh
18 Circuit's opinion, and can you tell me whether
19 they are right or wrong?

20 Ultimately, the crucial point is that
21 the Court, meaning the Supreme Court, has
22 articulated a standard for acts committed
23 knowingly or with reckless disregard that
24 excludes subjective intent. In the absence of
25 textual indicia in the FCA supporting that

1 subjective intent matters here, we apply Supreme
2 Court precedent to interpret the same common law
3 terms addressed in Safeco.

4 In other words, we believe, says the
5 Seventh Circuit, that based on Supreme Court
6 precedent, subjective intent does not matter for
7 the standard for acts committed knowingly or
8 with reckless disregard.

9 Do you agree with that statement?

10 MR. PHILLIPS: Yes, I -- yes, that's
11 what Safeco says.

12 JUSTICE JACKSON: All right. So, if
13 we disagree, if we think Safeco doesn't say that
14 or Safeco doesn't apply here or subjective
15 intent can matter with respect to actual
16 knowledge in the FCA or the other definitions,
17 what result? Do you lose?

18 MR. PHILLIPS: No, because -- because
19 it still seems to me that the -- that -- I mean,
20 you can take subjective -- you can take all of
21 the employee emails into account. Those are
22 nonprivileged documents that are in the record.
23 They were in front of the district court.

24 And at the end of the day, the right
25 answer to this case is that our clients followed

1 an undeniably objectively reasonable approach in
2 what they did, that there was no guidance, that
3 the federal government steadfastly refused to
4 provide any guidance that would have assisted us
5 in how to deal with this problem.

6 And here we are 15 years after the
7 fact and being -- and being exposed to treble
8 damages, to literally thousands of individual
9 claims and circumstances where we had no notice
10 that that would happen.

11 JUSTICE JACKSON: So your standard is
12 objective intent?

13 MR. PHILLIPS: Yes, Your Honor.

14 JUSTICE JACKSON: Is the only thing
15 that is relevant to the assessment --

16 MR. PHILLIPS: Yes.

17 JUSTICE JACKSON: -- of knowledge or
18 recklessness?

19 MR. PHILLIPS: Yes.

20 JUSTICE JACKSON: All right.

21 MR. PHILLIPS: I think, in deciding
22 whether what we said was objective -- what we
23 did was objective or not, whether we didn't
24 believe it may say something about objectivity,
25 but it's not an examination into their -- into

1 their specific understanding.

2 It has to be, unless -- unless you're
3 going to make it open season on every federal
4 government contractor. And those contractors
5 have all told you the problem here. And the
6 amicus briefs couldn't be clearer. Both the
7 Chamber and the -- and the Dreeben brief tell
8 you, first of all, this is an enormously
9 expensive enterprise and that -- and that -- and
10 that when entities act in an objectively
11 reasonable fashion and without the benefit of
12 guidance from the government as to what is
13 permitted and what --

14 JUSTICE JACKSON: Objectively
15 reasonable but subjectively unreasonable in the
16 sense that they are making a statement that they
17 know to be untrue at least as alleged. You say
18 that's irrelevant.

19 MR. PHILLIPS: Well, I mean, the
20 problem with that is it, I guess, goes -- maybe
21 it's an epistemological issue -- but I think the
22 way the law normally -- I mean, the way the
23 common law normally has treated questions of law
24 is that those are not things that aren't
25 knowable.

1 I think that was one of the questions
2 that Justice Alito was alluding to, is that
3 typically you don't know that. All you're doing
4 is giving an opinion in a circumstance.

5 JUSTICE JACKSON: No, I understand.
6 But it's sort of like you're fighting the
7 hypothetical. I just want to know the sentence
8 that says, excluding subjective intent is what
9 we have to do to evaluate knowledge. You say it
10 doesn't matter, subjective intent to evaluate
11 actual knowledge for the purpose of the FCA.

12 MR. PHILLIPS: Right, because actual
13 knowledge --

14 JUSTICE JACKSON: All right. Thank
15 you.

16 MR. PHILLIPS: -- requires a
17 determination -- it has to be based on an
18 objectively reasonable assessment given the --
19 and -- and -- and based on whether or not
20 there's guidance that exists under those
21 circumstances because, if you don't take that
22 position, if you go in the opposite direction,
23 the downside is great, because this is an
24 extraordinary -- extraordinarily punitive
25 provision.

1 And the Court, you know, in Safeco
2 recognized as much. And I haven't heard the
3 other side -- my friend says that Safeco is a
4 more narrow position, but, you know, this Court
5 has pretty consistently held in dealing with the
6 False Claims Act that it's not designed simply
7 as a regulatory enforcement tool.

8 JUSTICE KAGAN: No, but -- but --

9 MR. PHILLIPS: That is exactly how
10 it's being used here.

11 JUSTICE KAGAN: -- but the statute
12 says what it says. And don't you think it's a
13 little odd to read a statute that reads like
14 this to say that subjective -- subjectivity
15 doesn't matter? I mean, has actual knowledge,
16 acts in deliberate ignorance.

17 MR. PHILLIPS: Right. With respect to
18 facts.

19 JUSTICE KAGAN: Acts in reckless
20 disregard.

21 MR. PHILLIPS: With respect to facts.

22 JUSTICE KAGAN: That -- that what you
23 think isn't -- isn't relevant?

24 MR. PHILLIPS: No, as to facts,
25 obviously, it is. As to the law --

1 JUSTICE KAGAN: So are you just saying
2 that this entire statute, we take it and throw
3 it over our shoulder with respect to anything
4 that has a legal judgment that's enmeshed in it?

5 MR. PHILLIPS: Not -- not necessarily
6 for anything that's got a legal judgment that's
7 enmeshed in it, but with the theory of the case
8 is that you made a false statement because you
9 said usual and customary is X and it could have
10 been determined to be Y, that that gives --

11 JUSTICE KAGAN: Well, again --

12 MR. PHILLIPS: - rise to a claim
13 against us, a knowing claim.

14 JUSTICE KAGAN: -- the allegation --
15 the allegation is that you knew it was X and you
16 said Y. That's the allegation. And as I
17 understood what you just said is that because
18 there's a legal judgment subsumed in what you
19 knew and what somebody later thought was
20 objectively reasonable or not, that we shouldn't
21 read this language in the same way we would
22 ordinarily read this language as being a measure
23 of subjectivity.

24 MR. PHILLIPS: I mean, that is exactly
25 the position the Court took in Safeco.

1 JUSTICE GORSUCH: Well, Safeco was a
2 reckless case, and so I -- I -- I think, you
3 know, there's an argument that, you know,
4 recklessness looks at an objective evidence, at
5 least sometimes, but that's pretty hard to
6 extend that to the mens rea we have here,
7 knowing and -- and -- and deliberate disregard.

8 MR. PHILLIPS: Well, I mean, you can
9 say it was a -- that it's a recklessness case,
10 but, I mean, the statement of the Court is as a
11 knowing -- knowing or reckless violator, you
12 would not normally think of them as a knowing or
13 reckless violator.

14 And -- and I suppose I should clarify,
15 Justice Kagan. I'm not saying that -- that --
16 that intent doesn't count ever in this
17 litigation. If you get past the objective
18 reasonableness, you know, if it's not an
19 objectively reasonable interpretation, and if
20 it's not a -- or -- and if there is
21 authoritative guidance that pushes against that
22 interpretation, then the Safeco defense is not
23 available, and obviously subjective intent will
24 count and all of those statements that say we
25 didn't really believe that will be the basis on

1 which the hammer of the False Claims Act will
2 come down on them.

3 Our point is you shouldn't get to that
4 stage if indeed all the actions taken by the
5 defendants were objectively reasonable at the
6 time that they took them and there was nothing
7 to lead them away.

8 CHIEF JUSTICE ROBERTS: I think maybe
9 Halo pushed Safeco from 51 to 49, and what is
10 your distinction of Halo?

11 MR. PHILLIPS: I mean the patent
12 statute is -- is fundamentally different, I
13 think, from this, because the patent statute
14 doesn't have a scienter requirement embedded in
15 the -- in the text of the statute.

16 Section 284 says, you know, you can
17 treble the -- the district court can in its
18 discretion can treble the damages for --
19 essentially for any reason that had been
20 construed by the Court to be narrower than that.

21 But when the Court said that -- you
22 had to take into account or, you -- you know,
23 you couldn't rely solely on objective
24 determinations, it was because there was
25 embedded in the history of the patent law bad

1 faith.

2 And, therefore, an examination of bad
3 faith was required as part of that or you
4 couldn't limit the district court's discretion
5 in deciding how to enhance the damages by
6 excluding the bad faith element.

7 JUSTICE KAGAN: I -- I mean, that
8 makes Halo sound very patent specific and maybe
9 I'm wrong about this, somebody that -- that
10 there's definitely someone on this bench that
11 knows better than I do what Halo meant in that
12 footnote.

13 But I would take that footnote to mean
14 something like we've read the Safeco footnote
15 and we kind of don't really understand it.
16 And -- and -- and -- and we're definitely going
17 to say it depends on circumstances and -- and
18 consign it to its facts.

19 MR. PHILLIPS: Well, you're -- you're
20 a hundred percent right that there is someone in
21 the courtroom who is in a better position to say
22 exactly what that footnote meant.

23 But -- but the -- but I did argue the
24 Halo case and I have some recollection of the
25 circumstances --

1 (Laughter.)

2 MR. PHILLIPS: -- you know, and the
3 facts there were quite extreme. They dealt with
4 the precise problem of post hoc rationalization
5 and was exclusively --

6 JUSTICE SOTOMAYOR: So --

7 MR. PHILLIPS: -- on that
8 understanding.

9 JUSTICE SOTOMAYOR: -- why don't we
10 distinguish Safeco by the fact that it dealt
11 with a consumer protection statute that had no
12 common law tradition but the government's
13 absolutely right that this statute is based on
14 fraud, and fraud has always looked at subjective
15 intent.

16 So why read something out that the
17 common law tradition never would have in this
18 kind of statute?

19 MR. PHILLIPS: Because what the --
20 what the statute requires is knowingly, and then
21 it has three definitions of knowingly, or actual
22 knowledge, reckless disregard, and deliberate
23 ignorance.

24 Those all have common law meanings.
25 And -- and the understanding is, is that even --

1 even fraud generally or making false statements
2 has always treated legal issues, statements with
3 regard to legal issues --

4 JUSTICE SOTOMAYOR: The problem --

5 MR. PHILLIPS: -- differently --

6 JUSTICE SOTOMAYOR: -- is Escobar.

7 MR. PHILLIPS: -- than the factual.

8 Yeah. I'm sorry?

9 JUSTICE SOTOMAYOR: The problem is
10 Escobar. Mixed legal questions with fact are a
11 different thing altogether. Every time we try
12 to tease out that issue, we fail.

13 MR. PHILLIPS: Well I don't think it
14 --

15 JUSTICE SOTOMAYOR: When it's not pure
16 legal, when it's not pure fact but it's mixed,
17 that's a harder standard to define. So why
18 don't we take it at its face value, subjective
19 intent. Subjective knowledge is important.

20 MR. PHILLIPS: Because I don't believe
21 Congress meant to permit every False -- False
22 Claims Act case in which there's a reasonable
23 difference of opinion about the appropriate --

24 JUSTICE SOTOMAYOR: Well --

25 MR. PHILLIPS: -- legal standard --

1 JUSTICE SOTOMAYOR: -- I think the
2 person --

3 MR. PHILLIPS: -- to inquire into the
4 attorney-client privilege.

5 JUSTICE SOTOMAYOR: I think the person
6 most knowledgeable about that, what Congress
7 intended, is probably Senator Grassley because I
8 suspect he's the one who initiated almost all
9 these laws and follows them so closely and he
10 disagrees with you.

11 MR. PHILLIPS: Well, I -- I would give
12 Senator Grassley the respect that a single
13 senator in the Senate deserves under these
14 circumstances. The statute says what the
15 statute says. It doesn't -- as -- as -- as we
16 concede, you know, you don't need proof of
17 specific intent. There are certainly deviations
18 from the common law.

19 The common law historically treated
20 the questions of interpreting the law
21 differently than it treated questions of fact.
22 We're here clearly on a question of the
23 interpretation of the common law.

24 And the only issue is, is it -- is it
25 fair in these circumstances, years after the

1 fact, to impose treble damages liability, large
2 civil penalties in a case where we had no notice
3 that this was a problem under these
4 circumstances --

5 JUSTICE ALITO: Mr. --

6 MR. PHILLIPS: -- and to do so on the
7 basis of statements from -- from employees
8 trying to figure out what the law means.

9 JUSTICE ALITO: Mr. Stewart said the
10 problem was you didn't show your work. Did you
11 have AN opportunity to show your work?

12 MR. PHILLIPS: Well, we -- we were
13 audited 12,000 times which means that there were
14 probably more than a few opportunities for
15 somebody to ask us and -- and -- and in fact to
16 show our work.

17 And as the record clearly shows, the
18 vast majority of the pharmacy benefit managers'
19 view of the world was these kinds of discounts
20 don't count. We don't take them into account as
21 part of the usual and customary price, and,
22 therefore, it -- it -- it is at least passing
23 strange to come in here now 10, 15 years later
24 where the party on the other side, who had a
25 financial interest, candidly, in taking the

1 other position on that issue, pretty
2 consistently and across the board said, no,
3 that's fine, we understand that. Discounts
4 don't count.

5 The General Accounting Office said the
6 price -- in -- in setting the price, discounts
7 don't count. CMS recognized discounts don't
8 count. You get all that, those statements, from
9 the federal government as to how you're supposed
10 to proceed, and no state governments involved in
11 this case who told us that Medicaid doesn't take
12 into -- you know, you can't -- if you discount,
13 you have to discount in full.

14 I mean, that could have been a
15 position. You know, if the federal government
16 wants to take that position, there's a way to do
17 it. It adopts a rule. It tells everybody what
18 the standard is, and then you're on notice, and
19 there's no question.

20 If they had said that any discount
21 then becomes the baseline for all, that's usual
22 and customary, is any baseline on any drug under
23 any circumstances, I mean, we might challenge
24 that rule as being inconsistent with the concept
25 of usual and customary or just an -- an

1 unreasonable interpretation of the law, but at
2 least if we went forward after that and ignored
3 it, we would have been put on notice.

4 Our position would be obviously not
5 be -- it would either be viewed as objectively
6 unreasonable or we had been given guidance that
7 said to us don't go in that direction.

8 So I -- in -- in response
9 specifically, Justice Alito, I think -- you
10 know, part of it, I mean we clearly had the
11 opportunity or there were opportunities for
12 information to be exchanged. The government's
13 view of the world is that we're supposed to come
14 in and identify problems.

15 And I go back to Dreven's brief which
16 says, you -- you can try till the ends of the
17 day to get the federal government to clarify for
18 you issues about which they have discretion, and
19 they will as consistently decline to do that as
20 is possible, allowing themselves a much broader
21 opportunity for enforcement discretion.

22 Remember, this is a case where the
23 government looked at this for five years, didn't
24 intervene, seemed to be -- you know, didn't take
25 any actions with respect to any of this ever,

1 and then shows up here now and says, the issue
2 is whether or not, you know, how to take this
3 into account and the court ought to review it
4 under these circumstances.

5 This is -- this is not just about this
6 case. This is a problem that the False Claims
7 Act is going to present to the entire business
8 community in ways that I think are
9 inappropriate.

10 CHIEF JUSTICE ROBERTS: Justice
11 Thomas?

12 JUSTICE THOMAS: Just so I understand
13 you, Mr. Phillips, the -- you're saying if there
14 had been a rule, and I'm just giving an example,
15 that the price is four and you charged five,
16 that that would be a false --

17 MR. PHILLIPS: That would be a false
18 claim, yes, Your Honor.

19 JUSTICE THOMAS: But you're saying
20 that no one gave you guidance on usual and
21 customary, and that you arrived at a price that
22 was above your discount price, and that that
23 cannot be false.

24 MR. PHILLIPS: Right, under -- and
25 that that -- and that that choice was, under the

1 circumstances, objectively reasonable given --
2 given the language usual and customary in the
3 way that it was generally interpreted by -- by
4 contracting -- contracting parties on the other
5 side and by state and federal agencies.

6 CHIEF JUSTICE ROBERTS: Justice Alito?
7 Justice Sotomayor?
8 Justice Kagan?
9 Justice Gorsuch?
10 Justice Kavanaugh?

11 JUSTICE KAVANAUGH: Just one question.
12 I'm not saying this is going to happen, but, if
13 you lose this case, you've talked about the
14 business community. It strikes me that it's a
15 much narrower loss if it's the post hoc theory
16 and like a full-out disaster if it's the theory,
17 the broader theory, that even if you've
18 considered it at the time and you guess wrong,
19 legally, you can be held liable for the treble
20 damages.

21 Do you agree with that in terms --
22 MR. PHILLIPS: Yeah.

23 JUSTICE KAVANAUGH: Do you understand
24 what I'm referring to --

25 MR. PHILLIPS: No, yeah, of course, of

1 course.

2 JUSTICE KAVANAUGH: -- post hoc here?

3 MR. PHILLIPS: Of course. I mean,
4 look, if -- if -- if it's a full defense under,
5 -- call it the Safeco defense, even though it
6 says modified by Safeco -- that says that, as
7 long as the parties had a reasonable, you know,
8 took a position that was reasonable under the
9 circumstances, you cannot come in and waive
10 something after the fact and -- and save you if
11 you, if you otherwise didn't have anything that
12 would, you know, that -- that -- where your
13 intent was -- was up in the air.

14 Yeah, I mean, that would obviously be
15 more important for the business community than
16 the -- well, less damaging to the business
17 community than the alternative.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 Justice Jackson?

22 Thank you, counsel.

23 Mr. Singh?

24

25

1 REBUTTAL ARGUMENT OF TEJINDER SINGH
2 ON BEHALF OF THE PETITIONERS

3 MR. SINGH: There are three things
4 that I'd like to just quickly discuss.

5 The first is, as Mr. Phillips says,
6 the statute says what it says, and it says
7 something very different from the Fair Credit
8 Reporting Act and very different from the
9 Seventh Circuit's rendition of Safeco and the
10 rule that it adopted. Terms like "objectively
11 reasonable," "authoritative guidance" appear
12 nowhere in the False Claims Act. It refers to
13 clearly subjective terms.

14 And so I think, at a minimum, a right
15 holding in this case is to say -- to apply the
16 statute as written. It includes plainly
17 subjective terms, and any rule that treats
18 subjective understandings as irrelevant is
19 plainly wrong.

20 Going forward from there, there is
21 this question that Mr. Phillips has introduced
22 about, is there a real difference between law
23 versus facts, and I think the answer is that
24 sometimes there can be, but the beauty of the
25 subjective rule is that it accounts for that.

1 You can subjectively be more or less
2 sure about facts. You can subjectively be more
3 or less sure about law. All of that is true.
4 There is no need to set an arbitrary threshold
5 of, if this particular kind of precedent was
6 available, then you can know the law but not
7 otherwise.

8 What the subjective rule asks is, look
9 at what people actually believed at the time
10 they were filing claims. Did they believe they
11 were doing the right thing or the wrong thing?
12 And that could be because of a legal reason or a
13 factual reason. It's one-size-fits-all.

14 And, again, this is nice in light of
15 the text, because the text does not distinguish
16 between questions of law and fact. It has one
17 scienter standard for every reason why a claim
18 might be false or fraudulent. And so you should
19 apply the same inquiry whether it's false or
20 fraudulent.

21 In light of that, the other side's
22 concession that the subject of standard applies
23 to facts is, I think, quite a helpful one for us
24 when it comes to figuring out what standard you
25 should apply to law. You should do the same one

1 because the statute only has one.

2 Lastly, I just want to push a little
3 bit on some of the descriptions that
4 Mr. Phillips is offering of the record in this
5 case. He says there's no guidance, there's
6 nothing, but we have cited to the contrary
7 guidance, and we have, moreover, cited all of
8 the internal communications saying that their
9 employees understood that guidance.

10 As Justice Gorsuch said, these are all
11 lovely things that he should tell a jury about
12 why they couldn't have had an idea at the time
13 that what they were doing was wrong, but they
14 are not a basis to hold, as a matter of law,
15 that the defendant's subjective intent is always
16 irrelevant if someone can identify an
17 objectively reasonable interpretation.

18 For those reasons, we would ask the
19 Court to reverse the judgments below.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 The case is submitted.

23 (Whereupon, at 1:10 p.m., the case was
24 submitted.)

25

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| <p>\$</p> <p>\$10 [1] 56:14 \$20 [15] 36:22 37:1,24 38:21 39:17 40:11 45:1,10,15,21 46:3,14 47:8,13 52:25 \$4 [15] 12:6 36:23 40:12 45:3,9,12,14,21 46:2,13,18,24 47:8 52:25 55:25</p> <hr/> <p>1</p> <p>1:10 [1] 85:23 10 [2] 39:18 77:23 11:57 [2] 1:23 4:2 12,000 [2] 57:3 77:13 15 [2] 66:6 77:23 18 [1] 1:19</p> <hr/> <p>2</p> <p>20 [4] 31:25 32:10 41:5 47:14 2005 [1] 55:4 2016 [1] 56:24 2023 [1] 1:19 21-1326 [1] 4:4 284 [1] 72:16</p> <hr/> <p>3</p> <p>34 [1] 3:8</p> <hr/> <p>4</p> <p>4 [4] 3:4 38:12,13 47:13 40 [2] 44:23 47:18 40-60 [1] 44:21 49 [5] 25:17,22 26:6 38:7 72:9 49-51 [1] 51:2</p> <hr/> <p>5</p> <p>5 [1] 38:12 500 [1] 33:7 51 [3] 25:18 26:5 72:9 51-49 [5] 31:2 37:15 38:4,5,7 526 [1] 33:6 54 [1] 3:11</p> <hr/> <p>6</p> <p>60 [2] 44:22 47:18</p> <hr/> <p>8</p> <p>80 [3] 25:4,6 36:22 83 [1] 3:14</p> <hr/> <p>A</p> <p>a.m [2] 1:23 4:2 abide [2] 13:23 14:11 above [1] 80:22 above-entitled [1] 1:21 absence [1] 64:24 absolutely [6] 20:25 46:12,13 55:19 59:9 74:13 acceptable [1] 57:5 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