

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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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.

24

25

1 APPEARANCES:

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7 Petitioners.

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9 behalf of the Respondents.

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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. Schutte 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
3 the problems don't stop there. Across the
4 board, Respondents would replace existing
5 incentives for companies to determine and then
6 follow the law with an incentive to plunder
7 every ambiguity for all it's worth. That flies
8 in the face of the statute's text, the common
9 law, and common 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 has 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 Schutte 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 you get 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,
13 but 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: We've got to --
18 we're trying to make money.

19 MR. SINGH: -- think is relevant, just
20 to populate the hypothetical with -- with a few
21 more facts that might be relevant, you know,
22 the -- 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 of fraud, recklessness is used also
22 in a 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: But I -- counsel,
14 just -- just so I -- I -- I -- I understand
15 where -- where we're at, we're not asked to
16 address those circumstances. We're asked to
17 posit that there is indeed a falsity, and we're
18 asked whether, in addition to recklessness, one
19 might proceed under the statute according to its
20 plain terms to show actual knowledge or intent
21 to deceive.

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

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

1 MR. SINGH: Yes, absolutely right.

2 JUSTICE GORSUCH: And -- okay.

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

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

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

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

11 (Laughter.)

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

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

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

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

20 JUSTICE KAVANAUGH: Can I --

21 JUSTICE SOTOMAYOR: Counsel --

22 JUSTICE KAVANAUGH: Oh, go ahead.

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

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

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

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

10 MR. SINGH: But your -- your question
11 --

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

18 MR. SINGH: Yes, Your Honor.

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

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

23 JUSTICE KAVANAUGH: So we can leave
24 the hypothetical of the person who at the time
25 thought about these different options as opposed

1 to the person who only later came up with the
2 legal interpretation?

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

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

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

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

13 MR. SINGH: Yeah.

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

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

1 We think that's the easy case. No,
2 they're not, because actual knowledge is in the
3 statute because it's a false --

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

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

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

11 (Laughter.)

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

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

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

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

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

1 quite different.

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

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

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

1 What would -- would there be liability
2 there --

3 MR. SINGH: So --

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

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

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

15 MR. SINGH: Yeah.

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

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

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

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

11 CHIEF JUSTICE ROBERTS: Briefly.

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

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

1 JUSTICE ALITO: Thank you.

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

6 MR. SINGH: Yes, Your Honor.

7 CHIEF JUSTICE ROBERTS: Okay.

8 Justice Thomas?

9 Justice Alito?

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

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

22 And so, yeah, I do think the rule
23 matters beyond because I do think -- and this
24 goes to some degree to the question of why we
25 get into the harder hypotheticals, is because,

1 in certain cases, there's going to be questions
2 that need to be resolved. So, yeah, I do think
3 it matters beyond summary judgment.

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

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

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

25 On the other hand, if, you know, seven

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

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

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

19 JUSTICE ALITO: All right. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

22 Justice Kagan?

23 Justice Gorsuch?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: Two things. One,

1 in response to Justice Alito, he asks a
2 hypothetical, you know, we think we're going to
3 lose 51-49, and you changed that into we are
4 probably wrong. Those are two different things.

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

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

16 MR. SINGH: Not yet, Your Honor.

17 (Laughter.)

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

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 Justice Jackson?

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

1 20?

2 MR. SINGH: Yeah.

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

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

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

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

1 MR. SINGH: Yeah. So --

2 JUSTICE JACKSON: Yeah.

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

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

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Stewart?

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

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

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

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

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

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

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

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

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

5 And if the --

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

13 MR. STEWART: Yes.

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

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

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

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

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

1 they understand this will be misconstrued --

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

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

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

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

1 manufacturer, the state agency will have been
2 misled as to an important point of fact.

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

10 JUSTICE KAVANAUGH: Well --

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

15 I'm sorry.

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

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

25 Normally, we'd say your view of the

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

4 MR. STEWART: I -- I --

5 JUSTICE KAVANAUGH: So help me with
6 that.

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

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

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

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

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

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

9 JUSTICE KAVANAUGH: Really?

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

12 JUSTICE KAVANAUGH: Wow.

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

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

24 MR. STEWART: Oh, I think it happens,
25 and I think it happens in private practice, and

1 I'm really focusing on the fact that we're not
2 just talking about what you do and whether you
3 can be held liable after the fact or penalized
4 for doing it in bad faith. We're talking about
5 things you say.

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

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

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

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

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

1 JUSTICE GORSUCH: Mr. Stewart --

2 MR. STEWART: And that --

3 JUSTICE GORSUCH: -- I -- I -- I --

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

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

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

1 JUSTICE GORSUCH: Oh, I'm sure they
2 will.

3 (Laughter.)

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

10 JUSTICE GORSUCH: Correct.

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

15 JUSTICE GORSUCH: Yes.

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

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

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

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

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

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

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

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

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

25 But I guess I'm -- I'm still having

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

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

9 (Laughter.)

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

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

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

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

24 MR. STEWART: And, again, I would say,
25 in order to believe that \$4 is the right price,

1 you don't have to think there is no conceivable
2 argument for the other prices. In the other --
3 in the circumstance --

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

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

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

12 MR. STEWART: Yes.

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

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

21 MR. STEWART: Yes. That if --

22 CHIEF JUSTICE ROBERTS: Okay.

23 MR. STEWART: Yes.

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 Justice Alito?

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

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

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

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

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 Justice Kagan?

13 Justice Gorsuch?

14 Justice Kavanaugh?

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

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

24 When the lawyer is advising a client,
25 that is a circumstance where, even in cases of

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

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

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: Just a quick

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

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

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

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

24 (Laughter.)

25 MR. STEWART: -- I mean, in --

1 because, in other contexts, applying this vision
2 of knowledge seems extravagant. That is --

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

5 MR. STEWART: Okay.

6 CHIEF JUSTICE ROBERTS: Thank --

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

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

16 MR. STEWART: Yes.

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

1 subjectively believed about the \$4 or the \$20 or
2 whatever. Isn't that the question? Is the
3 Seventh Circuit wrong when it says, essentially,
4 jury, the only thing that matters in terms of
5 establishing knowledge and scienter in this case
6 is an objective view of the price, but all of
7 this evidence with respect to what they actually
8 thought, that can't be used to determine whether
9 or not they had actual knowledge?

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

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

18 (Laughter.)

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

25 MR. STEWART: Obviously, we would

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Phillips.

17 ORAL ARGUMENT OF CARTER G. PHILLIPS
18 ON BEHALF OF THE RESPONDENTS

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

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

23 (Laughter.)

24 MR. PHILLIPS: Justice Kagan, I -- I
25 -- I don't think this is just a case about post

1 hoc lawyer rationalization. That was Halo.
2 There's no question those were the facts in
3 Halo.

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

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

22 And the reason why I don't think you
23 can look at this as a post hoc justification for
24 what they did is, at the time, those -- my
25 clients, who actually matched, directly matched

1 the Walmart scheme and said, okay, \$4 flat
2 discount across the board, that's exactly what
3 they charged as a usual and customary number.

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

1 had held that this was perfectly okay.

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

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

11 MR. PHILLIPS: No, but --

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

14 MR. PHILLIPS: Fair enough.

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

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

1 deliberate indifference require subjective
2 proof, proof of internal knowledge and -- and
3 actual knowledge.

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

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

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

1 debate between the majority and the dissent on
2 the issue of, you know, does that mean post hoc
3 rationalization, et cetera.

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

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

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

1 the difference, who said 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, you know --

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 --

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

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

22 JUSTICE GORSUCH: Sure.

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

25 JUSTICE GORSUCH: It may go to

1 knowledge too.

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

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

8 MR. PHILLIPS: All right.

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

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

25 MR. PHILLIPS: Except -- except that,

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

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

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

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

9 JUSTICE JACKSON: Can I -- can I --

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

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

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

1 Court precedent to interpret the same common law
2 terms addressed in Safeco."

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

8 Do you agree with that statement?

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

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

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

1 that Justice Alito was alluding to, is that
2 typically you don't know that. All you're doing
3 is giving an opinion in a circumstance.

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

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

13 JUSTICE JACKSON: All right. Thank
14 you.

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

25 And the Court, you know, in Safeco

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

7 JUSTICE KAGAN: No, but -- but --

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

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

16 MR. PHILLIPS: Right, with respect to
17 facts.

18 JUSTICE KAGAN: Acts in reckless
19 disregard.

20 MR. PHILLIPS: With respect to facts.

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

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

25 JUSTICE KAGAN: So are you just saying

1 that this entire statute, we take it and throw
2 it over our shoulder with respect to anything
3 that has a legal judgment that's enmeshed in it?

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

10 JUSTICE KAGAN: Well, again --

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

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

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

25 JUSTICE GORSUCH: Well, Safeco was a

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

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

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

1 come down on them.

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

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

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

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

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

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

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

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

17 MR. PHILLIPS: Well, you're -- you're
18 a hundred percent right that there is someone in
19 the courtroom who is in a better position to say
20 exactly what that footnote meant. But the --
21 but I did argue the Halo case, so I have some
22 recollection of the circumstances --

23 (Laughter.)

24 MR. PHILLIPS: -- you know, and the
25 facts there were quite extreme. They dealt with

1 the precise problem of post hoc rationalization
2 and was exclusively --

3 JUSTICE SOTOMAYOR: So --

4 MR. PHILLIPS: -- on that
5 understanding.

6 JUSTICE SOTOMAYOR: -- why don't we
7 distinguish Safeco by the fact that it dealt
8 with a consumer protection statute that had no
9 common law tradition, but the government's
10 absolutely right that this statute is based on
11 fraud, and fraud has always looked at subjective
12 intent. So why read something out that the
13 common law tradition never would have in this
14 kind of statute?

15 MR. PHILLIPS: Because what the --
16 what the statute requires is knowingly, and then
17 it has three definitions of knowingly, are
18 actual knowledge, reckless disregard, and
19 deliberate ignorance.

20 Those all have common law meanings.
21 And -- and the understanding is, is that even --
22 even fraud generally or making false statements
23 has always treated legal issues, statements with
24 regard to legal issues --

25 JUSTICE SOTOMAYOR: The problem --

1 MR. PHILLIPS: -- differently --

2 JUSTICE SOTOMAYOR: -- is Escobar.

3 MR. PHILLIPS: -- than the factual.

4 Yeah. I'm sorry?

5 JUSTICE SOTOMAYOR: The problem is
6 Escobar. Mixed legal questions with fact are a
7 different thing altogether. Every time we try
8 to tease out that issue, we fail.

9 MR. PHILLIPS: Well, I don't think it
10 --

11 JUSTICE SOTOMAYOR: When it's not pure
12 legal, when it's not pure fact, but it's mixed,
13 that's a harder standard to define. So why
14 don't we take it at its face value? Subjective
15 intent -- subjective knowledge is important.

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

20 JUSTICE SOTOMAYOR: Well --

21 MR. PHILLIPS: -- legal standard --

22 JUSTICE SOTOMAYOR: -- I think that
23 the person --

24 MR. PHILLIPS: -- to inquire into the
25 attorney-client privilege.

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

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

15 The common law historically treated
16 the questions of interpreting the law
17 differently than it treated questions of fact.
18 We're here clearly on a question of the
19 interpretation of the common law, and the only
20 issue is, is it -- is it fair in these
21 circumstances, years after the fact, to impose
22 treble damages liability, large civil penalties
23 in a case where we had no notice that this was a
24 problem under these circumstances --

25 JUSTICE ALITO: Well, Mr. --

1 MR. PHILLIPS: -- and to do so on the
2 basis of statements from -- from employees
3 trying to figure out what the law means.

4 JUSTICE ALITO: Mr. Stewart said the
5 problem was you didn't show your work. Did you
6 have an opportunity to show your work?

7 MR. PHILLIPS: Well, we -- we were
8 audited 12,000 times, which means that there
9 were probably more than a few opportunities for
10 somebody to ask us and -- and -- and, in fact,
11 to show our work.

12 And as the record clearly shows, the
13 vast majority of the pharmacy benefit managers'
14 view of the world was these kinds of discounts
15 don't count. We don't take them into account as
16 part of the usual and customary price, and,
17 therefore, it -- it -- it is at least passing
18 strange to come in here now 10, 15 years later,
19 where the party on the other side, who had a
20 financial interest, candidly, in taking the
21 other position on that issue, pretty
22 consistently and across the board said, no,
23 that's fine, we understand that. Discounts
24 don't count.

25 The General Accounting Office said the

1 price -- in -- in setting the price, discounts
2 don't count. CMS recognized discounts don't
3 count. You get all that, those statements, from
4 the federal government as to how you're supposed
5 to proceed, and no state governments involved in
6 this case who told us that Medicaid doesn't take
7 into -- you know, you can't -- if you discount,
8 you have to discount in full.

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

15 If they had said that any discount
16 then becomes the baseline for all, that's usual
17 and customary, is any baseline on any drug under
18 any circumstances, I mean, we might challenge
19 that rule as being inconsistent with the concept
20 of usual and customary or just an -- an
21 unreasonable interpretation of the law, but at
22 least, if we went forward after that and ignored
23 it, we would have been put on notice.

24 Our position would obviously not be --
25 it would either be viewed as objectively

1 unreasonable or we had been given guidance that
2 said to us don't go in that direction.

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

10 And I go back to Dreeben's brief,
11 which says you -- you can try until the ends of
12 the day to get the federal government to clarify
13 for you issues about which they have discretion,
14 and they will as consistently decline to do that
15 as is possible, allowing themselves a much
16 broader opportunity for enforcement discretion.

17 I mean, remember, this is a case where
18 the government looked at this for five years,
19 didn't intervene, seemed to be -- you know,
20 didn't take any actions with respect to any of
21 this ever, and then shows up here now and says,
22 the issue is whether or not, you know, how to
23 take this into account and the court ought to
24 review it under these circumstances.

25 This is -- this is not just about this

1 case. This is a problem that the False Claims
2 Act is going to present to the entire business
3 community in ways that I think are
4 inappropriate.

5 CHIEF JUSTICE ROBERTS: Justice
6 Thomas?

7 JUSTICE THOMAS: Just so I understand
8 you, Mr. Phillips, the -- you're saying, if
9 there had been a rule -- and I'm just giving an
10 example -- that the price is four and you
11 charged five, that that would be a false --

12 MR. PHILLIPS: That would be a false
13 claim, yes, Your Honor.

14 JUSTICE THOMAS: But you're saying
15 that no one gave you guidance on usual and
16 customary and that you arrived at a price that
17 was above your discount price and that that
18 cannot be false?

19 MR. PHILLIPS: Right, under -- and
20 that that -- and that that choice was, under the
21 circumstances, objectively reasonable given --
22 given the language "usual and customary" in the
23 way that it was generally interpreted by -- by
24 contractor -- contracting parties on the other
25 side and by state and federal agencies.

1 CHIEF JUSTICE ROBERTS: Justice Alito?
2 Justice Sotomayor?
3 Justice Kagan?
4 Justice Gorsuch?
5 Justice Kavanaugh?

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

16 Do you agree with that in terms --

17 MR. PHILLIPS: Yeah.

18 JUSTICE KAVANAUGH: Do you understand
19 what I'm referring to --

20 MR. PHILLIPS: No, yeah, of course, of
21 course.

22 JUSTICE KAVANAUGH: -- for post hoc
23 here?

24 MR. PHILLIPS: Of course. I mean,
25 look, if -- if -- if it is a full defense under

1 -- call it the Safeco defense, even though it
2 says modified by Safeco -- that says that as
3 long as the parties had a reasonable -- you
4 know, took a position that was reasonable under
5 the circumstances, you cannot come in and waive
6 something after the fact and -- and save you if
7 you -- if you otherwise didn't have anything
8 that would -- you know, that -- that -- where
9 your intent was -- was up in the air.

10 Yeah, I mean, that would obviously be
11 more important for the business community than
12 the -- or, well, less damaging to the business
13 community than the alternative.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 Justice Jackson?

18 Thank you, counsel.

19 Mr. Singh?

20 REBUTTAL ARGUMENT OF TEJINDER SINGH
21 ON BEHALF OF THE PETITIONERS

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

24 The first is, as Mr. Phillips says,
25 the statute says what it says, and it says

1 something very different from the Fair Credit
2 Reporting Act and very different from the
3 Seventh Circuit's rendition of Safeco and the
4 rule that it adopted. Terms like "objectively
5 reasonable," "authoritative guidance" appear
6 nowhere in the False Claims Act. It refers to
7 clearly subjective terms.

8 And so I think, at a minimum, the
9 right holding in this case is to say you should
10 apply the statute as written. It includes
11 plainly subjective terms, and any rule that
12 treats subjective understandings as irrelevant
13 is plainly wrong.

14 Going forward from there, there is
15 this question that Mr. Phillips has introduced
16 about, is there a real difference between law
17 versus facts, and I think the answer is that
18 sometimes there can be. But the beauty of the
19 subjective rule is that it accounts for that.

20 You can subjectively be more or less
21 sure about facts. You can subjectively be more
22 or less sure about law. All of that is true.
23 There is no need to set an arbitrary threshold
24 of, if this particular kind of precedent was
25 available, then you can know the law but not

1 otherwise.

2 What the subjective rule asks is, look
3 at what people actually believed at the time
4 they were filing claims. Did they believe they
5 were doing the right thing or the wrong thing?
6 And that could be because of a legal reason or a
7 factual reason. It's one-size-fits-all.

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

15 In light of that, the other side's
16 concession that the subjective standard applies
17 to facts is, I think, quite a helpful one for us
18 when it comes to figuring out what standard you
19 should apply to law. You should do the same one
20 because the statute only has one.

21 Lastly, I just want to push a little
22 bit on some of the descriptions that Mr.
23 Phillips is offering of the record in this case.
24 You know, he says there's no guidance, there's
25 nothing. But we have cited to the contrary

1 guidance, and we have, moreover, cited all of
2 the internal communications showing that their
3 employees understood that guidance.

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

12 For those reasons, we would ask the
13 Court to reverse the judgments below.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 1:10 p.m., the case was
17 submitted.)

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