

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK D. THOMPSON,)
)
) Petitioner,)
)
) v.) No. 23-1095
)
) UNITED STATES,)
)
) Respondent.)
)

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PATRICK D. THOMPSON,)

Petitioner,)

v.) No. 23-1095

UNITED STATES,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, January 14, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

CHRIS C. GAIR, ESQUIRE, Chicago, Illinois; on behalf of the Petitioner.

CAROLINE A. FLYNN, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 23-1095, Thompson versus United States.

Mr. Gair.

ORAL ARGUMENT OF CHRIS C. GAIR

ON BEHALF OF THE PETITIONER

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

Section 1014 punishes only false statements, not true but misleading ones, and we know that from the text, the context in the statutory code, and this Court's precedents.

At the outset, at its most basic, the word "false" means not true. It is, therefore, implausible to suggest that the statute that punishes false statements includes some types of true statement. "False" and "true but misleading" are different concepts. When Congress means to prohibit both, it does so explicitly using both terms, as it has in over 100 places in the United States Code. The government would put this all down to serial, thoughtless redundancy, but that violates the first principle of statutory

1 interpretation: to heed the text.

2 The courts below erroneously held that
3 Section 1014 punishes misleading statements in
4 addition to false ones. We are asking the Court to
5 correct that legal error and to remand to the
6 courts below for a determination of whether
7 Mr. Thompson's statements were false or only
8 misleading.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: How would you define
11 "false" and how would you define or distinguish --
12 and distinguish that from "misleading?"

13 MR. GAIR: A false statement is one that
14 is not true when compared to the objective facts.
15 A misleading statement is a statement that depends
16 on the reasonable hearer's understanding. The term
17 "misleading" is -- by its nature focuses on what
18 the hearer hears. The term "false" relates to an
19 objective fact about the universe.

20 JUSTICE THOMAS: Do you think there could
21 be overlap between the two?

22 MR. GAIR: There definitely are -- is
23 overlap, Your Honor. Many, many false statements
24 are misleading, and many misleading statements are
25 false. But that does not mean they're synonyms.

1 As this Court has recognized on a number of
2 occasions, including in the Macquarie case, where
3 the Court dealt with Rule 10b-5 and held that
4 10b-5's two parts, the first penalized only express
5 false statements and the second half-truths, which
6 it referred to as misleading omissions.

7 JUSTICE THOMAS: Often, we see "false"
8 and "misleading" paired, and you think of it --
9 there's a tendency to think of those two paired,
10 false and misleading or false or misleading.

11 Why wouldn't we do that here as opposed
12 to just taking a literal view of false?

13 MR. GAIR: So, when we see them in these
14 hundred-plus statutes, it's always in the
15 disjunctive, false or misleading, suggesting that
16 those are two different things. And they do have
17 different meanings because "false" is an objective
18 question. If I -- if I say the sun rises in the
19 west, that is a false statement, and it doesn't
20 matter what the perception of the listener is.

21 So I think that there is a good statutory
22 context argument, a very good statutory context
23 argument, for suggesting, when Congress says
24 "false," it means false, not misleading.
25 Otherwise, there would be a hundred statutes, from

1 the Commodities Exchange Act to the Securities
2 Exchange Act, to a number of labeling statutes,
3 down to the Peanut Statistics Act and the act that
4 penalizes false or misleading statements by an
5 officer of the Administrative Office of the U.S.
6 Court to either make false or misleading
7 statements.

8 Congress chose not to do that here.

9 JUSTICE ALITO: I take it you are not
10 arguing that the statute requires that the
11 statement be literally false when viewed in
12 isolation?

13 MR. GAIR: No. I --

14 JUSTICE ALITO: Is that correct?

15 MR. GAIR: I'm sorry, Your Honor.

16 JUSTICE ALITO: Is that correct? Is that
17 your --

18 MR. GAIR: That -- that -- that is
19 correct.

20 JUSTICE ALITO: -- that is your argument?

21 MR. GAIR: That -- that is not our
22 argument. As this Court said in Bronston, and I
23 would point the Court to Footnote 3, the context
24 that's relevant is the question that's asked, not
25 the other circumstances. But, obviously, it would

1 be absurd to try and judge a statement in isolation
2 from the question that it answers.

3 JUSTICE JACKSON: So can I just ask
4 you --

5 JUSTICE BARRETT: I -- I don't --

6 JUSTICE JACKSON: --- even --

7 JUSTICE BARRETT: Oh. Sorry.

8 JUSTICE JACKSON: -- even if we accept or
9 agree with you that the statute covers only false
10 statements, based on what you've said you believe a
11 false statement is, I guess I don't understand how
12 that helps your client in this case, because the
13 amount of money that he borrowed or that he owed, I
14 would think, is a knowable fact with one correct
15 answer and that it doesn't rely on any sort of
16 perception of the hearer or whatnot, however you've
17 defined "misleading." So why -- why would we send
18 this back for -- for the lower court to --

19 MR. GAIR: Your Honor, I'd point out at
20 the outset --

21 JUSTICE JACKSON: -- assess?

22 MR. GAIR: I'm sorry.

23 JUSTICE JACKSON: Yeah.

24 MR. GAIR: I'd point out at the outset,
25 Your Honor, that neither of the lower courts

1 applied this standard to the facts of the case, and
2 so this Court would be doing it for the first time.

3 But the statements that were made here,
4 the prosecutor explicitly told the lower court --
5 and this is Joint Appendix 144 -- what Mr. Thompson
6 said was literally true, but it was not the whole
7 truth.

8 Mr. Thompson was never asked how much did
9 you borrow and -- and did not, therefore, respond,
10 I only borrowed \$110,000.

11 JUSTICE JACKSON: My understanding was
12 that he wasn't asked anything. He was sent an
13 invoice after the bank closed, and the invoice
14 listed the various loans that he had made and the
15 amount of interest that, according to the
16 statement, he owed in total.

17 And so I don't understand why that's not
18 tantamount -- his response, his, apparently, three
19 times going back and saying, no, I owe \$110,000,
20 why is that not a false statement in that context?

21 MR. GAIR: The -- the invoice didn't have
22 the details. It said the unpaid principal balance
23 was \$269,000. So, if we take that as an implicit
24 question, do you owe \$269,000, his statement was:
25 I borrowed \$110,000; I had a promissory note for

1 \$110,000.

2 That statement, "I borrowed \$110,000 on a
3 \$110,000 promissory note," is absolutely true.
4 There were no other notes concerning the later
5 advances.

6 And what Mr. Thompson did, if you
7 consider the invoice to be an implicit question,
8 was effectively to change the terms of the question
9 from how much the principal balance was, how much
10 he owed, to what he borrowed in a particular note.
11 And that brings it squarely within the rule of
12 Bronston, where everyone knew that Mr. Bronston was
13 being asked whether he had ever had a personal
14 Swiss Bank --

15 JUSTICE JACKSON: Would we have to assess
16 at all the reasonableness of that interpretation on
17 his part?

18 In other words, it seems to me that you
19 could also interpret the invoice as asking him to
20 verify, you know: How much did you borrow? How
21 much do you owe?

22 If that's the question, then to respond
23 \$110,000 when there are other obligations
24 outstanding is false.

25 MR. GAIR: I -- I -- I don't think so

1 because the -- if the question is how much you owe,
2 that's a different issue than borrow. And
3 Mr. Thompson gave an answer that was actually true.

4 JUSTICE KAGAN: Sorry, how is it
5 different from borrow?

6 MR. GAIR: Because, obviously, what you
7 owe depends -- a -- a great deal of what you owe is
8 the interest on the loans. So Mr. Thompson, in
9 effect -- in fact, borrowed \$219,000. He got an
10 invoice saying: You owe \$269,000. And his
11 response was a true response, but --

12 JUSTICE KAGAN: Well, but either way, it
13 wasn't \$110,000.

14 MR. GAIR: That's right. And if he had
15 said in response, "I only borrowed \$110,000, and
16 not a penny more," then his statement would have
17 been false. But he didn't say that.

18 What he said was: "I borrowed \$110,000.
19 I had a promissory note for \$110,000." It's
20 misleading, and we concede that, but it is not
21 false.

22 JUSTICE BARRETT: Do you regard it --

23 JUSTICE SOTOMAYOR: I'm sorry. Go ahead.

24 JUSTICE BARRETT: Do you regard it as a
25 material omission case? I'm just trying to figure

1 out -- I mean, I -- I agree with you there's a
2 distinction between -- you know, as the Sixth
3 Circuit opinion distinguished between material
4 omissions and concealment and falsity.

5 What do you think your case falls into?
6 Is it a material omission of the other \$169,000?

7 MR. GAIR: I -- I -- I -- I think that's
8 the right way to look at it, Your Honor. It's what
9 this Court in Macquarie called a half-truth. Some
10 information has been given. Other information that
11 would be necessary to make the statement
12 completely --

13 JUSTICE BARRETT: I --

14 MR. GAIR: -- true has been left out.

15 JUSTICE BARRETT: -- I mean, I guess I
16 just see a difference between what your client said
17 and some of the hypotheticals in your brief. Like,
18 you gave the example of a borrower who tells the
19 lending institution: Well, I have a lower interest
20 rate offered someplace else but doesn't mention
21 that that requires a much bigger down payment.

22 I can see that as an omission. It's a
23 material omission insofar as you're trying to
24 represent it as a better deal that you're trying to
25 get them to match. But it's -- but it's true, the

1 assertion. I mean, it's -- it's -- you can
2 separate out the interest rate from the amount of
3 the down payment, and you look at what the
4 statement is asserting. What it's asserting about
5 the interest rate is true.

6 I guess yours is just a little -- I just
7 see your client's as different because maybe --
8 maybe it's because what he's asserting -- and I
9 think these are the questions you're getting from
10 Justices Kagan and Jackson -- sounds an awful lot
11 like: All I owe is \$110,000.

12 MR. GAIR: Well, the perception of the
13 listener could have been that. But, in fact, it
14 wasn't, as the testimony made clear that the --
15 the -- the listener actually thought that he just
16 didn't know how much he borrowed.

17 JUSTICE KAGAN: Isn't it a lot --

18 CHIEF JUSTICE ROBERTS: What --

19 JUSTICE KAGAN: -- like the --

20 CHIEF JUSTICE ROBERTS: Go ahead.

21 JUSTICE KAGAN: -- like -- like the
22 example that's given in Bronston, where you've
23 entered a store 50 times and you say: I entered
24 the store five times. And, I mean, that's true, in
25 the course of entering the store 50 times, you

1 entered it five times. But it's obviously false if
2 what the purport of the statement is, is I entered
3 it five times rather than 50 times.

4 And the same thing here. You know, I
5 owed \$110,000, rather than \$260,000.

6 MR. GAIR: I don't think so because
7 the -- the principle set forth in Bronston in that
8 footnote is that understating a number in response
9 to a specific numeric inquiry is a false statement.
10 Mr. Thompson did not understate the number in
11 response to a specific numeric inquiry about how
12 much he borrowed.

13 JUSTICE KAGAN: I guess I don't know
14 exactly where this requirement of a specific
15 inquiry comes from. I mean, there can be various
16 contextual things that go to whether a statement is
17 true or false. One of them is what did they ask
18 you.

19 But there are other ways in which -- you
20 know, if I say I made a hundred thousand dollars
21 and I'm speaking of Canadian dollars, but everybody
22 listening to me is thinking you're in the United
23 States, of course, they're thinking American
24 dollars. I mean, that's just false if I say I made
25 a hundred thousand dollars and, in fact, I made

1 \$70,000 or \$130,000, or whichever way the exchange
2 rate goes.

3 (Laughter.)

4 JUSTICE KAGAN: But, you know, so I guess
5 I don't get this, like, oh, it's got to be an
6 inquiry.

7 I mean, there was a implicit inquiry
8 here. The guy was calling to say: You got the
9 number wrong. It's just as if somebody had said:
10 Did we get the number wrong? And he said: You got
11 the number wrong, it's \$110,000, when it was, in
12 fact, \$260,000.

13 MR. GAIR: I -- I don't think so, Judge,
14 and -- or, Your Honor, because the -- the statement
15 he made was tied to the personal note. And that
16 was true also of the call with the FDIC.

17 It -- it's true that a statement that is
18 volunteered can be a false statement. So, if
19 Mr. Thompson had walked into the bank and shouted,
20 "I only borrowed \$110,000, and not a penny more,"
21 that would be a false statement. But, instead,
22 what happened is that there's this invoice about
23 what he borrowed -- what he owed, and he made a
24 statement about what he borrowed under his personal
25 note.

1 And I think that the -- the -- the -- the
2 clearest evidence of the -- that that is not a
3 false statement comes from the government's
4 concession on our motion for judgment of acquittal
5 that --

6 JUSTICE SOTOMAYOR: I -- I'm a little --
7 I'm totally confused, okay?

8 He took the statement the bank sent to
9 him -- I'm quoting him: "I have no idea. The
10 numbers you sent me shows that I have a loan for
11 \$269,000. I borrowed a hundred thousand, period."

12 So, if he borrowed 219, 215, 150, 160, it
13 wasn't the hundred thousand he said. I don't see
14 how that's literally true. That's literally false.

15 MR. GAIR: Your Honor --

16 JUSTICE SOTOMAYOR: He borrowed more than
17 he said he did.

18 MR. GAIR: Justice Sotomayor, I think
19 that by putting the period after the \$110,000,
20 we're not getting the full context of his
21 statement. He said a few more words about the
22 circumstances, and then he said, "I had a note for
23 \$110,000," so that I think that his statement --

24 JUSTICE SOTOMAYOR: So he had a note for
25 110,000 might be true, but he was asked: What did

1 you borrow? And he said: Only a hundred thousand.

2 MR. GAIR: With respect, Your Honor --

3 JUSTICE SOTOMAYOR: I -- I -- I -- I
4 don't understand how -- how -- this is, I think,
5 where Justice Barrett is confused, which is, if the
6 question is did you enter 50 times, and he says I
7 only -- I entered 10 times, it's not literally
8 true. It -- it's literally false that he entered
9 10 times.

10 MR. GAIR: I agree that the -- the
11 hypothetical is a false statement. But
12 Mr. Thompson was not asked how much he borrowed.
13 The implicit question is what the total debt was.

14 JUSTICE SOTOMAYOR: All right. So, as I
15 read the jury instruction here, the jury
16 instruction didn't use the word "misleading." It
17 said: Was his statement false?

18 MR. GAIR: Correct.

19 JUSTICE SOTOMAYOR: So the issue here now
20 is would a rational juror have concluded that this
21 was a false statement, correct?

22 MR. GAIR: That's correct, Your Honor.

23 JUSTICE SOTOMAYOR: So I -- I hate the
24 word "literally" because I don't know what it
25 means. I think that the question is: Did he make

1 a false statement? And wouldn't -- could a
2 rational jury have understood him to have made a
3 false statement in the way that I read this?

4 MR. GAIR: And that goes back to the
5 question presented in the procedural history,
6 Justice Sotomayor.

7 JUSTICE SOTOMAYOR: No, that goes back to
8 do you get a directed verdict or -- or is this an
9 issue that we leave for the jury.

10 MR. GAIR: It -- it is --

11 JUSTICE SOTOMAYOR: So do --

12 MR. GAIR: No -- no --

13 JUSTICE SOTOMAYOR: -- we vacate and
14 remand for the court below to decide that?

15 MR. GAIR: I -- I think -- I think you
16 have to vacate and remand for the court below to
17 decide it because neither of the courts below
18 reached this issue. Both believed they were bound
19 by a Seventh Circuit precedent called Freed to hold
20 that it didn't matter whether it was false or
21 misleading, the statute captured misleading
22 statements.

23 JUSTICE SOTOMAYOR: All right. Thank
24 you.

25 JUSTICE KAGAN: Well, however the

1 district court --

2 CHIEF JUSTICE ROBERTS: We're talking
3 about -- we've been talking about what your client
4 thought or knew. You know, maybe he did this or
5 that. Does that matter at all?

6 I mean, does it -- is there a -- is it a
7 different case if your client can say: I thought
8 they meant, you know, the amount of the first loan
9 and it was a hundred, or -- or if there's evidence
10 he went back and said: Well, they asked me this,
11 you know, and I know they're talking about 269, but
12 I think I might be able to fool them or something
13 if I say 110?

14 Is it the objective listener, what --
15 what -- how that person would understand it, or do
16 you go back and say, well, if he knew about it,
17 then it definitely is false, but if he had -- you
18 know, was confused, then maybe it's not false?
19 Is -- does the statement vary depending upon what
20 the defendant knew?

21 MR. GAIR: No, it doesn't, Mr. Chief
22 Justice.

23 First of all --

24 CHIEF JUSTICE ROBERTS: So just to be
25 clear then, then that means all the discussion

1 about what he thought and all that and how
2 reasonable, that -- that's beside the point.

3 MR. GAIR: It -- it's absolutely beside
4 the point. Truth and falsity, when Congress uses
5 the term "false," we -- because it often uses the
6 term "misleading," which points to the perception
7 of the listener, we know, when it says "false," it
8 means something objective. Now --

9 JUSTICE KAVANAUGH: Well, there still has
10 to be a mens rea, though, right?

11 MR. GAIR: And there is. It has to be
12 knowing --

13 JUSTICE KAVANAUGH: So it has to be false
14 and you know it's false --

15 MR. GAIR: Right. The -- the --

16 JUSTICE KAVANAUGH: -- to be convicted,
17 correct?

18 MR. GAIR: Right. The evidence of his
19 mens rea -- the mens rea actually has two parts.
20 One is that it has to be knowing, and the other, it
21 has to be for the purpose of influencing the
22 institution.

23 JUSTICE KAVANAUGH: Right.

24 MR. GAIR: And there was evidence in the
25 record from which a jury could have found the mens

1 rea, and we haven't challenged that. But the --
2 but the mens rea is a separate element. And the
3 question of falsity is not --

4 JUSTICE KAGAN: But are you saying that
5 no reasonable jury could have found this statement
6 to be false?

7 MR. GAIR: That is our argument, Your
8 Honor.

9 JUSTICE KAGAN: No reasonable jury could
10 have found the statement "I owe \$110,000" to be
11 false?

12 MR. GAIR: I -- yes, Your Honor. In the
13 context of the question, if we go to the call with
14 the FDIC, the FDIC agent said: We didn't ask a
15 question. What we did was start out by talking
16 about his personal note.

17 And Mr. Thompson, in a question -- in a
18 discussion about his personal note, said: I
19 borrowed \$110,000. That was absolutely true.

20 JUSTICE KAGAN: Yeah, but --

21 JUSTICE KAVANAUGH: The question
22 presented -- go ahead.

23 JUSTICE KAGAN: I -- I -- I -- I mean,
24 just -- because that is the important inquiry here,
25 isn't it, right? You say that the district court

1 was under the misimpression from the Seventh
2 Circuit precedent that misleading was okay. But,
3 in fact, the instructions made clear that the
4 statement needed to be false, and the jury
5 convicted on those instructions. And so, for you
6 to win in the end, it has to be that not -- no
7 reasonable jury -- I mean, that's a pretty
8 deferential standard that we give to the jury -- no
9 reasonable jury could have found this to be false.

10 MR. GAIR: That's right, Judge -- Your
11 Honor, and --

12 JUSTICE KAGAN: And if we don't think
13 that, we should just say so, I take it, because,
14 otherwise, like, what's -- what's the purpose of
15 vacating if we don't think that that's a
16 particularly hard question?

17 MR. GAIR: Well, this Court would
18 typically, for prudential reasons, not be the first
19 court to apply the -- the law to the facts, and it
20 would -- we think that the district court and the
21 court of appeals are in a better position to assess
22 that issue. They didn't do that because they made
23 a mistake about the law.

24 So I do think that a rational -- that no
25 rational jury in this context could have found

1 that. And, certainly, the district court could
2 have made that determination but didn't reach it.

3 JUSTICE KAVANAUGH: The question
4 presented was -- and this supports what you just
5 said. The question presented was just the legal
6 issue, right, not will this Court parse the
7 statements about a loan for -- you know, I don't
8 know. That's not what I thought we were granting
9 cert on. I thought we were granting cert on a -- a
10 legal question and we resolve the legal question.

11 MR. GAIR: Justice Kavanaugh, I think
12 that you're absolutely right. I mean, the
13 invitation by the -- by my friends from the
14 government here to delve into the facts is, I
15 think, not surprising given the fact -- given the
16 strength of our legal argument.

17 But -- but this Court granted cert to
18 determine whether misleading statements are -- in
19 addition to false ones, are punished by the
20 statute.

21 JUSTICE ALITO: All right. Well, tell
22 me -- tell me again what is the difference between
23 a statement that is false in context, not literally
24 false when viewed just by itself but false in
25 context, and a statement that is misleading.

1 MR. GAIR: So a statement -- let's take
2 an example of a statement that -- that might be
3 misleading.

4 If I go back and change my website and
5 say "40 years of litigation experience" and then in
6 bold caps say "Supreme Court advocate," that would
7 be, after today, a true statement. It would be
8 misleading to anybody who was thinking about
9 whether to hire me or Mr. Francisco or Mr. Waxman,
10 right?

11 But a false statement would be if I had
12 not ever argued in the United States Supreme Court.
13 So it -- it -- it -- it -- the --

14 JUSTICE ALITO: Well, that's mildly
15 misleading -- maybe, at best, it's -- I don't know
16 that that's going to mislead anybody, but, at best,
17 it's mildly misleading.

18 (Laughter.)

19 MR. GAIR: Well --

20 JUSTICE KAGAN: It is, though, the
21 humblest answer I've ever heard from the Supreme
22 Court podium.

23 (Laughter.)

24 JUSTICE KAGAN: So good show on that one.

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: Maybe not so good
2 for Mr. Francisco and Mr. Waxman.

3 (Laughter.)

4 JUSTICE ALITO: As -- as far as the
5 question presented is concerned, okay. But, I
6 mean, maybe this -- I don't know how this
7 misleading idea even got into the case. This is
8 just maybe sloppy work by the Seventh Circuit, but
9 the -- the instruction was you have to find that
10 it's false.

11 You could have argued and -- that, no, it
12 has to be literally false viewed by itself. You
13 didn't argue that. In fact, my understanding is
14 that the defense originally had asked for an
15 instruction on literal falsity and then withdrew
16 it, and then the jury found that the statement was
17 false.

18 And you're just saying no reasonable
19 juror could -- could view this as false in context?
20 That's an awfully hard argument. So what's the
21 point of remanding this to the Seventh Circuit?
22 Just as kind of a punishment for having introduced
23 this "misleading" idea into the case?

24 MR. GAIR: No, I definitely don't think
25 the Court would -- would want to do that, but this

1 is an important statute that deals with people's
2 dealings with sophisticated financial entities.
3 And it is important for the Court to give some
4 guidance on the question of whether a statement is
5 misleading or false precisely because the statute
6 is so important and so -- such broad application.

7 As the Court knows, in the Wells case,
8 this Court correctly found that there's no
9 materiality element to the statute. So this
10 statute could be used extremely broadly to punish a
11 number of types of dealings between individuals and
12 very sophisticated financial institutions --

13 JUSTICE GORSUCH: Counsel, along those
14 lines, in terms of whether a remand is worth it or
15 not, I -- I take it you don't dispute that you've
16 got a tough row to hoe with the standard and no
17 reasonable jury could have concluded. But, here,
18 we have, as you say, an incredibly sophisticated
19 questioner, the federal government no less.

20 And the question, if it is a question at
21 all, it's a statement: You owe 269. He responds:
22 I borrowed 110. The government itself says it
23 understood him to be confused about how much he
24 borrowed and how much he owed.

25 And, under those circumstances, you know,

1 we can -- we can make a judgment, or we could maybe
2 leave it to somebody else to do it in the first
3 instance. Them's our choices. Is that about it?

4 MR. GAIR: I think that's -- you've
5 captured it, Justice Gorsuch. The -- the -- the --

6 JUSTICE GORSUCH: Context here is not a
7 couple of unsophisticated entities or individuals
8 who have never --

9 JUSTICE JACKSON: But I guess --

10 JUSTICE GORSUCH: -- never had any
11 financial dealings.

12 MR. GAIR: I -- I --

13 JUSTICE GORSUCH: But -- but it's --
14 but -- but -- but -- but you have a tough row to
15 hoe.

16 MR. GAIR: It -- it -- it's definitely a
17 tough row to hoe whenever you're asking a district
18 court to find that no rational jury could have
19 found something. But there's a lot of evidence
20 from which we can make a solid argument, I -- an
21 argument that I believe is correct.

22 JUSTICE JACKSON: But, Mr. Gair, why
23 hasn't --

24 JUSTICE GORSUCH: Could you spin that
25 out, please, first?

1 MR. GAIR: Pardon me?

2 JUSTICE GORSUCH: Could you spin that
3 out?

4 MR. GAIR: Yes. Three -- three data
5 points.

6 The first is that the government conceded
7 below that the statements were literally true.

8 The second is that, as I've said, in the
9 call with the bank, the -- the statement that was
10 made was, "I borrowed \$110,000, I had a personal
11 note for \$110,000," both true statements in the
12 light of not a precise question or, indeed, even a
13 question at all.

14 And then the call with the FDIC was with
15 these two FDIC examiners, and they made two
16 comments that were very critical. The first is it
17 was -- there was no question about how much he
18 borrowed or how much he owed. Instead, they asked
19 him about his personal note. And he said: "I
20 borrowed" -- "they loaned me \$110,000 on my
21 personal note," which was true. And both of the
22 examiners and -- and the witness from the call
23 center for the bank all testified that he didn't
24 seem to know what it was he had borrowed.

25 So I do think there's a good basis for

1 the district court to make this decision in the
2 first instance, and I think that this Court should
3 decide the important legal issue to make sure that
4 prosecutors don't over-enforce this statute.

5 CHIEF JUSTICE ROBERTS: Thank you --

6 JUSTICE ALITO: Well, what you just
7 said --

8 CHIEF JUSTICE ROBERTS: -- thank you,
9 counsel.

10 None of all this is pertinent on the home
11 improvement loan statement, right? That's --

12 MR. GAIR: Correct.

13 CHIEF JUSTICE ROBERTS: You agree that's
14 completely false?

15 MR. GAIR: That is a false statement.

16 CHIEF JUSTICE ROBERTS: Okay. Thank you.

17 Justice Thomas?

18 Justice Alito?

19 JUSTICE ALITO: Well, your last comment
20 is -- is a fair one, but doesn't it go to a
21 different question? It doesn't go to the question
22 whether the statement was false in context. It
23 goes to whether he knew that it was false.

24 It's a mens rea question. It's not a
25 question of -- of the -- of the actus reus, which

1 is the utterance of a false statement.

2 MR. GAIR: I -- I agree with you that it
3 goes to mens rea. But, if we were to take the
4 perspective of my friends to -- to think that the
5 perception of the listener mattered, this -- that
6 evidence would bear on this question.

7 We don't agree that perception matters.
8 In fact, this -- the -- the government does not
9 cite a single case from this Court suggesting that
10 the question of truth or falsity depends on the
11 perception of the listener.

12 As a matter of fact, the very concept of
13 "misleading" is from the perspective of the
14 listener, an objective listener, and Congress knows
15 how to make that relevant when they want to.

16 JUSTICE ALITO: Well, I'm totally
17 confused by your argument because, unless you're
18 arguing literal falsity, then -- then falsity in
19 context does depend on how people would understand
20 the statement. It does concern -- it does concern
21 the perception of listeners.

22 MR. GAIR: I -- I don't think so, Your
23 Honor. I think that the -- the -- "falsity" is an
24 objective concept. If I say that the sun rises in
25 the west, that's false, and it doesn't matter

1 whether it misleads you or not.

2 JUSTICE ALITO: It may not concern the --
3 the -- the perception of the particular person to
4 whom the -- the statement is directed, but it does
5 concern the perception of some kind of listener --

6 MR. GAIR: It --

7 JUSTICE ALITO: -- some -- otherwise,
8 the -- I don't understand the concept of "falsity"
9 in context.

10 MR. GAIR: Well -- well, if I make a
11 statement and there's no listener at all, it is
12 still capable of being true or false.

13 And my -- my point is that Congress, over
14 and over, tells us when it wishes the perception of
15 the listener to count, by using a term that's
16 explicit -- explicitly refers to the perception of
17 the listener.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 Justice Kagan?

21 Justice Gorsuch?

22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: Just he -- your
24 client's already served the sentence, correct?

25 MR. GAIR: Yes, he has, Your Honor.

1 JUSTICE KAVANAUGH: The prison time's
2 already been served, so that's over. And what's
3 still potentially at stake is restitution, is
4 that --

5 MR. GAIR: No, the restitution was
6 resolved by the Seventh Circuit, and there is --
7 and it's been paid. So -- and -- and that's not an
8 issue before this Court.

9 JUSTICE KAVANAUGH: Okay. So it's just
10 the -- okay. Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Barrett?

12 JUSTICE BARRETT: Just want to take one
13 more crack at, along the lines of Justice Alito,
14 those questions that he was asking you.

15 So am I right -- and I kind of take this
16 from your reply -- that you've backed off this idea
17 that it should be literal falsity?

18 MR. GAIR: I -- I think that the right
19 way to say it is falsity in context of the
20 question.

21 JUSTICE BARRETT: Okay. So we're not
22 talking about literal falsity because you talked a
23 lot about that in your opening brief. Okay. So
24 we're not talking about literal falsity. We're
25 talking about falsity in context.

1 You've suggested both in your briefs and
2 then I think even more clearly today that the only
3 context that matters when we're looking at cues is
4 the question to whom -- to which the defendant was
5 responding.

6 Is that your position?

7 MR. GAIR: Not -- not quite, Judge --
8 Your Honor. I'm sorry.

9 JUSTICE BARRETT: It's okay.

10 MR. GAIR: I'm a trial lawyer.

11 Justice Barrett, the context is the
12 question that's asked, the statement that's made,
13 and the objective facts. So, if the statement is
14 very specific, if Mr. Thompson had said: I only
15 borrowed \$110,000, and not a penny more, and -- and
16 that was essentially the charge, then that would be
17 a false statement.

18 So you have to look to the question, the
19 answer, and the objective facts.

20 JUSTICE BARRETT: Okay. So it's not just
21 the question. It can be surrounding circumstances,
22 as well as the question?

23 MR. GAIR: I would say the objective fact
24 of what -- of what he actually borrowed. So --

25 JUSTICE BARRETT: Right, right, right.

1 MR. GAIR: Yeah.

2 JUSTICE BARRETT: Right. I -- I
3 understand that.

4 But I'm just saying, you know, when we're
5 trying to figure out what a statement communicates,
6 I guess -- I mean, I guess I agree with Justice
7 Alito about how communication works. If we're
8 asking what a statement communicated, and Williams
9 tells us there has to be some sort of statement,
10 there's an assertion -- if you ask what that
11 statement communicated, you have to have some basic
12 understanding of how people use English. That's
13 how the jury is going to decide would a reasonable
14 person have found the statement to be false.

15 So, I mean, I agree you don't look at any
16 kind of idiosyncratic understanding, maybe, of the
17 person on the other side of the table, but, I mean,
18 you do have to have some kind of understanding of
19 how normal people would understand this in the
20 context of the situation, correct?

21 MR. GAIR: Just -- Justice Barrett, I
22 disagree with that. And -- and -- and -- and so
23 did this Court in the Bronston case.

24 In the Bronston case, it was absolutely
25 clear what the petitioner -- what the questioner

1 was driving at. He wanted to know if the person
2 had had Swiss Bank accounts. And the answerer
3 said: Well, my company did. And it wasn't
4 pursued. And so the situation is very analogous.

5 If -- if Bronston's right, then we can't
6 look at what the -- the perception of the listener
7 was. We have to look at only the context of the
8 question, the answer, and the objective facts.

9 CHIEF JUSTICE ROBERTS: Justice Jackson?

10 JUSTICE JACKSON: So I guess I don't
11 understand how, on remand, the Seventh Circuit
12 could make the kinds of determinations that you
13 said that they could make in response to Justice --
14 to Justice Gorsuch, and the reason is because we
15 had a trial in this case.

16 We had a trial in which, presumably,
17 those very same arguments about what, you know, the
18 statement meant to your client, what the bank
19 examiner said, et cetera, et cetera, were evidence
20 that was presented to a jury that was then
21 instructed that they were supposed to make a
22 determination about whether his statement was
23 false, right?

24 MR. GAIR: That's correct, Your Honor.

25 JUSTICE JACKSON: Okay. So why isn't the

1 Seventh Circuit's only potential response on remand
2 to determine whether any reasonable jury, given
3 that set of circumstances and evidence, could have
4 reached the result it reached?

5 I don't think the Seventh Circuit could
6 just pretend as though the jury didn't make a
7 determination in this case and answer the question
8 does it think there was a false statement here,
9 right?

10 MR. GAIR: That's right. I think that
11 it's very likely that the Seventh Circuit would
12 remand to the district court that heard the
13 evidence.

14 And there is a very exacting standard,
15 as -- Justice Jackson, as you know, for a motion
16 for judgment of acquittal, and --

17 JUSTICE JACKSON: So help us to
18 understand whether all of that is, like, really not
19 necessary because it's pretty clear that a
20 reasonable jury could have made this determination.

21 What is your best argument as to why, for
22 example -- and I'll just give you the analogy from
23 the government, the analogy about the kid in the
24 cookie jar, that the mom says, you know: How many
25 cookies did you eat? Or did you -- did you eat

1 cookies? Or whatever the -- the question is. And
2 the kid actually ate -- and I'm now making this
3 up -- 10 cookies. And he responds: I ate three.

4 Why is that not a false statement?

5 MR. GAIR: Your hypothetical -- the
6 answer to your hypotheticals is actually twofold.

7 If the mom had said: Did you eat all the
8 cookies, or how many cookies did you eat, and the
9 child says: I ate three cookies, when she ate 10,
10 that's a false statement. But, if the mom says:
11 Did you eat any cookies, and the child says three,
12 that's not an understatement in response to a
13 specific numerical inquiry.

14 JUSTICE JACKSON: All right. So here's
15 the question here. We -- the question, I guess, in
16 response to that answer is: Why wouldn't it be
17 reasonable for a jury to interpret the submission
18 of the invoice to be the kind of specific question
19 that would -- that would require him to provide an
20 answer?

21 I mean, we don't have a particular
22 question. We have his interpretation of the
23 question and then answering it in a certain way,
24 which you say doesn't make it false. But, in the
25 context of what a reasonable jury could have

1 determined, I don't understand why -- what your
2 argument is to why a jury couldn't have interpreted
3 what happened here to be calling for a specific
4 response to the question how much do you owe.

5 MR. GAIR: Well, I think it's -- it --
6 it -- it's difficult to conceive of an assertion in
7 an invoice as being a specific -- specific
8 numerical --

9 JUSTICE JACKSON: Difficult, but
10 impossible? The question is: Could a reasonable
11 jury have interpreted it that way?

12 MR. GAIR: I -- I don't think so, Justice
13 Jackson, and the reason is, among others, that
14 there wasn't a -- there wasn't a question posed at
15 all. The witnesses testified that it had -- that
16 he was -- or the evidence showed that he was
17 talking about his personal note, not the total
18 amount that he owed.

19 And the government conceded that what he
20 said was, and I quote, "literally true" --

21 JUSTICE JACKSON: All right. Thank you.

22 MR. GAIR: -- "but not the whole story."

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Ms. Flynn.

1 ORAL ARGUMENT OF CAROLINE A. FLYNN

2 ON BEHALF OF THE RESPONDENT

3 MS. FLYNN: Mr. Chief Justice, and may it
4 please the Court:

5 Section 1014 prohibits any false
6 statement. And like any other collection of words,
7 a statement is false if it conveys an untrue
8 message to the listener in context, even if the
9 precise words used, considered in a vacuum, could
10 possibly carry another meaning.

11 So, here, when, in response to receiving
12 an invoice telling Petitioner that he owed the FDIC
13 \$269,000, Petitioner then told the FDIC's agents
14 that he was shocked by the letter, had no idea
15 where the 269 number comes from, and had borrowed
16 \$110,000, he made a false statement because he
17 clearly conveyed the message that he did not owe
18 the higher amount.

19 And 12 members of the jury in this case,
20 who were not given a specialized definition of what
21 "false" means and, therefore, must have applied the
22 concept as ordinarily understood, agreed.

23 Indeed, on page 7 of his reply brief,
24 Petitioner himself agrees that context obviously
25 matters in determining whether a statement is

1 false. I understood my friend to reiterate that
2 position again today.

3 So now it appears we're just debating
4 what context the jury may consider as a matter of
5 law. And to the extent Petitioner is arguing that
6 you can only take account of the immediately
7 preceding question, we urge the Court to reject any
8 such rule. The jury should assess a speaker's
9 meaning the same way the original listener would
10 have: in light of other parts of the conversation
11 and other circumstances that naturally bear on
12 meaning.

13 Our position in this case is not that
14 "false" encompasses anything that might be
15 characterized as misleading or any failure to
16 disclose pertinent information. It is that a
17 statement is untrue if it states only a portion of
18 the truth on the subject it addresses in a context
19 where the statement would be taken as both accurate
20 and complete.

21 If, like Petitioner, the speaker
22 knowingly conveys that untrue message and does it
23 with a specific intent to influence the FDIC to not
24 fully collect on its debt, that violates the
25 statute.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: So it doesn't really
3 matter in this case whether there is a difference
4 between "false" and "misleading?"

5 MS. FLYNN: Our position in this case
6 that Petitioner -- is that Petitioner's statements
7 were false. That's how the jury was instructed.
8 Our position is just that you assess the falsity of
9 something, you know, the inaccuracy of it, by
10 looking to context and what -- whether a false
11 message was imparted.

12 There's been a lot of talk, though, today
13 about what kind of rule the Seventh Circuit applied
14 in this case, and I -- I think the crux of the
15 Seventh Circuit's analysis completely aligns with
16 what I just said.

17 I think you can see this in particular at
18 pages 10a and 13a of the petition appendix. On
19 10a, the Court said: Even if he never used the
20 precise words, the implication of Petitioner's
21 statements was that he owed Washington Federal no
22 more than \$110,000, something that was untrue.

23 And then, on 13a, the court talks about
24 the mistake -- unmistakable impression left by his
25 statements and how the jury found in its verdict

1 that he conveyed the message that he falsely stated
2 that he only owed \$110,000, and any higher amount
3 was incorrect.

4 CHIEF JUSTICE ROBERTS: So -- but, in --
5 in general, do you think there's any difference
6 between the statutes that say "false statement" and
7 the statutes that say "false and misleading?"
8 Because it sounds to me that your -- would argue
9 that when it says "false," that includes misleading
10 statements in context. So is there any difference?

11 MS. FLYNN: We are not taking the
12 position that the word "misleading" does no work in
13 statutes in which it appears. We are -- we think
14 there is some overlap between these concepts, as I
15 understood my friend to agree. But, when we say
16 something has to be false in context, we mean it
17 has to state -- the statement itself has to state
18 a -- a false message, it has to convey a false
19 meaning directly, not lead the listener down a path
20 perhaps to a foreseeable conclusion that additional
21 information might have obviated.

22 But, here, when Petitioner says "I
23 borrowed \$110,000" in response to what was
24 essentially a question from the FDIC saying, did
25 you -- do you owe \$269,000, that is directly

1 conveying through his statement that he only owed
2 that amount.

3 JUSTICE KAVANAUGH: Do you agree that --

4 CHIEF JUSTICE ROBERTS: That's a --

5 JUSTICE KAGAN: But isn't what he said --

6 CHIEF JUSTICE ROBERTS: I was going to
7 say that's a tough -- that's tough to parse, it
8 seems to me, in a lot of cases. I -- I mean, I'm
9 not making these up. I think these are in the
10 case. But, you know, a police officer pulls a
11 person over, thinks he's drunk, says, you know,
12 have -- have you been drinking? And the person
13 says, "I've had one cocktail," when, in fact, he
14 had one cocktail and four glasses of wine.

15 I mean, is that -- is that treated
16 differently under the "false" -- the statute that
17 says just "false" and the statute that says "false
18 and misleading"? I can see that being misleading,
19 but I'm not sure it would qualify as false under
20 the literal meaning of the word.

21 MS. FLYNN: I don't think those would be
22 treated differently under those two statutes. I
23 believe that is a false statement because a
24 reasonable juror could find in context that if an
25 officer pulls somebody over and asks have you been

1 drinking, they're asking for a complete account of
2 how much you've been drinking. And when the person
3 says "I had just one cocktail" --

4 CHIEF JUSTICE ROBERTS: I didn't say
5 "just."

6 MS. FLYNN: -- that implies -- oh, I'm
7 sorry.

8 CHIEF JUSTICE ROBERTS: He didn't say
9 "just." In my hypothetical, it's, "I had a
10 cocktail."

11 MS. FLYNN: I'm sorry. I was -- I was
12 repeating from the brief.

13 CHIEF JUSTICE ROBERTS: Or "I had one
14 cocktail."

15 MS. FLYNN: Right. And I think, in
16 context, a reasonable juror could find that the
17 officer was asking for a complete account of how
18 much the person had had to drink given that the
19 officer was clearly trying to determine whether or
20 not they were inebriated and could not drive.

21 And that's the kind of surrounding
22 circumstance that we think is relevant here. And,
23 I mean, that is what this case comes down to, is
24 whether --

25 JUSTICE GORSUCH: Ms. Flynn, we didn't --

1 we didn't take this case to decide whether a
2 reasonable juror could -- could -- could find that
3 the defendant here in context made a false
4 statement. As important as this case is, that's
5 not why we took it.

6 We took it to resolve whether the statute
7 allows the government to pursue a theory of
8 misleading rather than falsity, right?

9 MS. FLYNN: Well, I believe -- you took
10 this case where the facts presented are a numerical
11 understatement.

12 JUSTICE GORSUCH: We -- we didn't take
13 this case to resolve it on the facts. We took it
14 to resolve a legal question, and the legal question
15 is whether, as the Seventh Circuit held, this
16 statute permits a conviction for not just false
17 statements but misleading ones. And that is a
18 gloss that the Seventh Circuit's put on the
19 statute.

20 Are you here to defend that, or are you
21 simply saying that even under a correct
22 understanding of the statute, we would win and you
23 guys should go ahead and decide what a -- no
24 reasonable juror could have concluded otherwise?

25 MS. FLYNN: It's the latter, Your Honor,

1 but I would add the qualification --

2 JUSTICE GORSUCH: Really?

3 MS. FLYNN: -- that here, the only legal
4 quest --

5 JUSTICE GORSUCH: Really? You're asking
6 us to apply to -- the statute to a fact-bound error
7 correction question? That's -- that's a little
8 strange.

9 I -- I thought we took the case to decide
10 whether the Seventh Circuit in Freed was correct
11 that this statute permits convictions for
12 misleading. Maybe we hold it does, in which case
13 we affirm. Maybe we hold it doesn't, in which case
14 we vacate and remand for this fact-bound question
15 to be resolved by a lower court in the first
16 instance. I mean, we're a court of review, not
17 first view, right?

18 MS. FLYNN: Well, as the case has
19 narrowed during the briefing, the only legal
20 dispute I take to be between my friend and -- and
21 us is what context matters in assessing --

22 JUSTICE GORSUCH: Okay.

23 JUSTICE KAVANAUGH: So you're not --

24 MS. FLYNN: -- falsity in context by --

25 JUSTICE GORSUCH: But you're not denying

1 that falsity is required by this statute?

2 MS. FLYNN: We are not denying that, no.

3 JUSTICE GORSUCH: And are -- and you're
4 not --

5 MS. FLYNN: We've not denied that.

6 JUSTICE GORSUCH: I take it now maybe
7 you're also agreeing that misleading is not enough?

8 MS. FLYNN: So it depends on what you
9 mean. We believe that --

10 JUSTICE GORSUCH: Falsity in context is
11 what's required by the statute.

12 MS. FLYNN: Yeah.

13 JUSTICE GORSUCH: And -- and more is not
14 permitted. So, if it's misleading in another
15 sense, that's not good enough.

16 MS. FLYNN: If it is misleading in the
17 sense that a person makes a numerical
18 understatement and underreports, if you're using
19 the word "misleading" to describe that, we do think
20 that is sufficient, but we do think the better way
21 to understand this concept is falsity in context --

22 JUSTICE KAGAN: No, but, Ms. --

23 MS. FLYNN: -- for the reason --

24 JUSTICE GORSUCH: So, if we hold falsity
25 in context is the standard, why wouldn't we

1 reverse -- vacate and remand? Because that's not
2 what the Seventh Circuit held.

3 MS. FLYNN: Well, I pointed the Court to
4 two instances in which I do believe the court --
5 the Seventh Circuit --

6 JUSTICE GORSUCH: Yeah, but it said --

7 MS. FLYNN: -- reasoned that in context.

8 JUSTICE GORSUCH: -- Freed -- Freed is
9 our standard, and Freed is either falsity or
10 misleading in this dichotomy it created, and it
11 proceeded to say these statements were misleading.

12 MS. FLYNN: The court also quoted the
13 portions of Freed where the Seventh Circuit said
14 that you look at the -- the natural import of what
15 the speaker is trying to say.

16 JUSTICE KAVANAUGH: It said --

17 JUSTICE GORSUCH: Go ahead, please.

18 JUSTICE KAVANAUGH: -- it -- it said on
19 9a: "In the end, we need not decide whether
20 Thompson's statements were literally true because
21 his argument runs head-first into our precedent.
22 We already decided in Freed that Section 1014
23 criminalizes misleading representations."

24 Do you agree with that?

25 MS. FLYNN: So, if you read that sentence

1 to mean all misleading representations, no, we do
2 not agree with that. But, if the --

3 JUSTICE KAVANAUGH: Okay. And that's
4 the -- that's the question I thought we -- I agree
5 with Justice Gorsuch. I mean, we say it all the
6 time, that we don't --

7 JUSTICE KAGAN: And why don't you agree
8 with that? Like, what -- what misleading
9 statements do you think they had in mind that you
10 would walk away from?

11 MS. FLYNN: Well, it's hard to know
12 because, of course, the Seventh Circuit was
13 thinking about the facts of this case when it used
14 the word "misleading," and that's why I'm trying to
15 be careful.

16 JUSTICE KAGAN: I mean, I'll tell you the
17 statements that I think you should walk away from.

18 MS. FLYNN: Sure.

19 JUSTICE KAGAN: And you tell me if you
20 agree.

21 (Laughter.)

22 JUSTICE KAGAN: I mean, there are a whole
23 world of -- I wish I had some good examples at
24 hand, but we've seen these kinds of cases in --
25 these kinds of statements in many cases over the

1 years and talked about them, where somebody says
2 something and it's not just literally true, it is
3 true in context. The reader is hearing the
4 statement in exactly the way that --

5 MS. FLYNN: Right.

6 JUSTICE KAGAN: But there have -- but
7 other statements are not made that would cast a
8 different light on a situation. And so the person
9 says: Oh, I was misled because I know one thing
10 that was relevant to this situation, but you didn't
11 tell me some other thing that was relevant to the
12 situation and relevant to my decision-making.

13 And there are all kinds of cases in which
14 we say, in some statutes, that omission makes you
15 liable, but in other statutes, it doesn't. So, in
16 this statute, it seems pretty clear to me that it
17 doesn't.

18 MS. FLYNN: Yes, I would agree with that.
19 My --

20 JUSTICE KAGAN: So, I -- I guess, like,
21 when I read the Seventh Circuit, it -- it's at
22 least possible that the Seventh Circuit has that
23 wrong, that the Seventh Circuit is sort of treating
24 "falsity" and "misleadingness" as all of a piece
25 and not making this distinction between when a

1 statement in context is false and when that
2 statement is true but nonetheless misleading
3 because there's other stuff that's been left out.

4 MS. FLYNN: And I would say that even if
5 you thought the Seventh Circuit was confused on
6 that particular point, we know how they would
7 analyze this case under the correct legal rule
8 because the court said that even if you never use
9 the precise words, the implication of his statement
10 in -- and looking at context --

11 JUSTICE KAGAN: I -- I would think we
12 could do two things at one time, right?

13 MS. FLYNN: Right.

14 JUSTICE KAGAN: We can both decide the
15 legal question that -- if we think that the Seventh
16 Circuit got it wrong, and we can also say something
17 about this case, and it might actually be useful to
18 other courts out there to say something about this
19 case so they know what we're talking about and what
20 we're not talking about.

21 MS. FLYNN: Exactly. And I would add the
22 further -- the further point that because, right
23 now, we're just debating, I -- I think, what
24 context -- or at least between my friend and I,
25 what context counts, I would think this Court

1 should answer that question as well and say it's
2 not just the preceding question, it's the things --
3 the purpose of the conversation, what was discussed
4 before, the kinds of things that the listener would
5 have taken into account too because I think, if you
6 just say misleading statements don't count, it's
7 falsity in context, full stop, and then have this
8 set of facts and send it back down, that could
9 create a good deal of confusion --

10 JUSTICE KAVANAUGH: Well, don't you think
11 if we --

12 MS. FLYNN: -- and also --

13 JUSTICE KAVANAUGH: -- if we granted cert
14 on that question, we get amicus briefs discussing
15 that important question? Because that is going to
16 have an effect on lots of statutes.

17 You're asking us to decide something much
18 broader than the straightforward question, as
19 Justice Gorsuch said, that -- that was in the
20 question presented and that was in the cert
21 petition. And you don't -- I think you've said you
22 don't really agree with what the Seventh Circuit
23 said.

24 Well -- and then you said: Well, it'll
25 be easy -- it's easy to know what the Seventh

1 Circuit would have done. Well, if that's true, on
2 remand, that's what they're going to do.

3 MS. FLYNN: I mean, we argued at the cert
4 stage as well that "false" means false in context.

5 JUSTICE KAVANAUGH: Yeah.

6 MS. FLYNN: And so I -- I believe that to
7 be fully within the case this --

8 JUSTICE JACKSON: Isn't --

9 MS. FLYNN: -- entire time, and I --

10 JUSTICE GORSUCH: No. Actually, Ms. --

11 JUSTICE ALITO: Well, the question
12 presented --

13 JUSTICE GORSUCH: -- Ms. Flynn, the
14 question presented is whether the statute prohibits
15 making a statement that is misleading but not
16 false. That's the QP, not -- not what qualifies as
17 falsity, how much context, who shot John. None of
18 that's in -- in the QP.

19 And I think Justice Kavanaugh has a very
20 good point that if we were really going to tackle
21 what -- what is falsity, I mean, we might want to
22 consult a few philosophers while we're at it, but
23 we certainly would have had a different set of
24 amici and -- and -- and a different set of briefing
25 than we had in this case if we were going to tackle

1 that question.

2 MS. FLYNN: I don't think -- I mean,
3 respectfully, Your Honor, I don't think that's
4 correct. I think the concept of falsity is one
5 that we fully trust jurors, as lay people, to
6 assess and make determinations about and engage in
7 line drawing. I think it's very similar to
8 material --

9 JUSTICE GORSUCH: Of course. But you're
10 asking us to say, as a matter of law, this is
11 always in and that is always out for -- for
12 determining falsity, and that's just not in the QP,
13 counsel.

14 And it's a -- it -- it -- it -- it has
15 ripple effects not just in 1014 but throughout all
16 of Title 18 because there are literally a -- well,
17 not literally.

18 (Laughter.)

19 JUSTICE GORSUCH: There are a lot of
20 false statement statutes under which you can
21 proceed.

22 JUSTICE JACKSON: Ms. --

23 JUSTICE GORSUCH: And -- and many of them
24 do distinguish between falsity and misleading
25 statements. Each of the --

1 JUSTICE ALITO: The question presented,
2 as -- are you finished? I -- I'm sorry.

3 JUSTICE GORSUCH: Well, I -- I -- I hope
4 Ms. Flynn would have a response.

5 JUSTICE ALITO: Oh, sure.

6 MS. FLYNN: Well, I -- I mean, I -- I'm
7 not sure. One observation I would make about the
8 question presented is that it asks whether making a
9 false statement under -- whether you can satisfy
10 the requirement of a false statement under 1014 by
11 making a statement that is not false. And, I mean,
12 of course, we don't agree with that.

13 And so, in that sense, the question
14 presented answers itself. The issue in this case
15 has always been what does "false" mean. And our
16 argument is falsity in context. And I do think the
17 legal question, answering it, is --

18 JUSTICE GORSUCH: But where is that in --

19 MS. FLYNN: -- I mean, this Court all the
20 time talks about --

21 JUSTICE GORSUCH: -- where is that in the
22 QP, Ms. Flynn? I'm sorry, but you just said in the
23 QP is the question of what makes a statement false.

24 MS. FLYNN: Yes.

25 JUSTICE GORSUCH: I don't see that. I

1 see whether 1014 also prohibits a statement that
2 is -- that is misleading but not false.

3 JUSTICE JACKSON: Right. But --

4 JUSTICE GORSUCH: That -- that's the QP.

5 JUSTICE JACKSON: -- Ms. Flynn, isn't --
6 isn't the problem that in the government's view,
7 the question presented, as Justice Gorsuch is
8 reading it, is actually not implicated on these
9 facts?

10 Meaning you don't see that what happened
11 here is misleading in the sense that it was
12 literally true but led someone down a wrong path.
13 You see this as false. That's why you keep arguing
14 it that way. And so, even though we take questions
15 presented to answer legal questions, we do so
16 ordinarily in cases in which the facts actually
17 implicate that question.

18 So I think the confusion is arising
19 because the government seems here, and in your
20 briefs, to be making arguments about the falsity of
21 this particular set of circumstances, the context
22 that you keep talking about, and that you're not
23 really addressing a situation in which you believe
24 there was a misleading but not false scenario.

25 MS. FLYNN: Yeah.

1 JUSTICE JACKSON: And that's why -- so --
2 so -- so, to answer the question when and under
3 what circumstances does this statute cover
4 misleading but not false situations on these set of
5 facts is like a mismatch because you say that's not
6 happening here, right?

7 MS. FLYNN: Yes, I would agree. And I
8 would also just reiterate that here, it's not like
9 there was a legal error, some kind of legal
10 confusion that infected the jury's verdict,
11 because, here, the jury was just told they had to
12 find that Petitioner knowingly made a false
13 statement.

14 JUSTICE JACKSON: So this takes us back
15 to Justice Alito's original point. It seems like
16 the Seventh Circuit and perhaps, you know,
17 Petitioner in his arguing injected this notion of:
18 You should be looking at this as a misleading but
19 not false situation, and that kind of got carried
20 away and taken over when, really, the jury was
21 instructed on falsity. You say the facts establish
22 falsity.

23 I guess the one thing against you is your
24 colleague on the other side said the government at
25 some point conceded that this was a misleading but

1 not false case. So can you explain why that
2 happened and what we should take from that?

3 MS. FLYNN: Sure. So my friend points to
4 a -- a -- a moment in one of the hearings about
5 this issue where government counsel was sort of
6 paraphrasing the kind of argument that Petitioner
7 was making about literally -- literal falsity. But
8 elsewhere in that same hearing, the counsel said
9 that Petitioner's statements were "not true," I
10 believe three times. They maintained that position
11 afterwards. Of course, we maintained that before
12 the Seventh Circuit as well.

13 So I do not believe it's fair to say that
14 we have conceded that his statements were literally
15 true.

16 JUSTICE SOTOMAYOR: Counsel, assume for
17 the sake of argument that we don't accept your
18 position that "misleading" and "false" are
19 synonymous, that there are some things -- borrowing
20 the phrase of your -- the other side, some things
21 that are true but misleading, just as a hundred --
22 if you say a packet of toxic mushrooms is a hundred
23 percent natural. Toxic mushrooms are a hundred
24 percent toxic. But it may be -- be misleading if
25 you're selling it because people may believe that

1 it's safe, that you can actually eat it. So that's
2 misleading but not false.

3 So assume that there's a difference
4 between the two. And we say this is a Bronston
5 case. It has to be a false statement in the sense
6 of Bronston. How is this -- what is the
7 difference, or is there, in what you're saying
8 about what falsity means in this statute and what
9 we said it meant in Bronston?

10 MS. FLYNN: Yeah. Yeah.

11 JUSTICE SOTOMAYOR: Your -- your -- the
12 other side argues -- and, you know, there's many
13 who have described Bronston as saying you need
14 literal falsity or literal truth. So how do you
15 distinguish what you're arguing -- or how do you
16 get what you're arguing from what we said in
17 Bronston? If we answer the question presented that
18 you can only prosecute false statements, all right,
19 staying within Bronston, how do you argue this
20 case?

21 MS. FLYNN: So we disagree that the --
22 the rule this Court announced for the perjury
23 statute in Bronston applies to the language of
24 1014. And there's a couple --

25 JUSTICE SOTOMAYOR: Assume we disagree

1 because, there, it was -- the perjury was for
2 making a false statement. Here, if you make a
3 false statement, you're guilty, with some other --
4 knowingly, et cetera, et cetera, other elements.

5 So just go back to my -- to the essence
6 of my question. If we apply Bronston, do you win?

7 MS. FLYNN: So I do want --

8 JUSTICE SOTOMAYOR: Or how do you win,
9 and how does your theory fit into Bronston?

10 MS. FLYNN: I do just want to be very
11 clear that I do not think this Court should apply
12 the perjury statute. But, okay, sure.

13 JUSTICE SOTOMAYOR: I understand that.
14 I've said it three times. Assume.

15 MS. FLYNN: Okay. And then I would point
16 this Court to the footnote in Bronston where the
17 Court said: Of course, understating a numerical
18 amount in response to a question would clarify --
19 or would qualify as literally false even under the
20 rule that we're announcing today.

21 And we don't think you need to have -- of
22 course, Bronston was talking about questions and
23 answers during testimony, but we think that here,
24 for instance, the invoice essentially served the
25 same contextual purpose as a direct question about

1 how much Petitioner owed.

2 But it's the -- the -- the principle is
3 the same. The Court was saying, of course, if you
4 under --

5 JUSTICE SOTOMAYOR: Now we go to
6 Justice --

7 MS. FLYNN: -- if you only state part of
8 the whole --

9 JUSTICE SOTOMAYOR: -- now we go to
10 Justice Gorsuch's question. When we describe
11 context, you're -- the other side says what's the
12 question asked directly or implicitly, you're --
13 but I think he's not going to say "implicitly."
14 What's the question you asked? What is the answer
15 you give? And, objectively, do the facts support
16 that answer?

17 How would you describe what we're
18 supposed to do?

19 MS. FLYNN: I think Petitioner's limits
20 to just the precise question asked is very
21 artificial. I would draw an analogy to how this
22 Court looks at context with statutes, for instance.
23 This Court does not draw hard-and-fast rules saying
24 we only look at the proceedings subsection --

25 JUSTICE SOTOMAYOR: But that's what we

1 did in Bronston. We looked at the question asked.

2 MS. FLYNN: In the context of
3 cross-examination, where the questioner is in full
4 control of the witness's presentation by asking the
5 questions, and against a background principle of
6 Anglo-American law --

7 JUSTICE SOTOMAYOR: We disagree with you.

8 MS. FLYNN: -- that we want perjury to
9 be --

10 JUSTICE SOTOMAYOR: If we disagree with
11 you, is that the lesson you take from Bronston,
12 that it's the question asked and whether the answer
13 is objectively right or not?

14 MS. FLYNN: In the context of perjury,
15 yes, I understand that to be the case, though, of
16 course --

17 JUSTICE SOTOMAYOR: But you're arguing --

18 MS. FLYNN: -- I think you have to look
19 at the question --

20 JUSTICE SOTOMAYOR: -- we should apply
21 something different in other contexts?

22 MS. FLYNN: Than perjury, yes, I would.

23 JUSTICE SOTOMAYOR: All right. Thank
24 you.

25 CHIEF JUSTICE ROBERTS: Counsel, we've

1 been talking about things that are technically true
2 but misleading. Does it work the other way?

3 Let's say you have things that are --
4 statements that are technically false but not
5 misleading. If someone's trying to sell you a
6 horse and -- and says this is the fastest horse
7 I've ever seen, and, in fact, it's not, he's seen a
8 faster horse, well, I don't think purchasers would
9 necessarily view that as misleading. They would
10 view that as sort of normal sales talk.

11 So can things be technically true --
12 technically false but not misleading?

13 MS. FLYNN: I don't think in your
14 hypothetical, Your Honor, that that would be
15 considered false because it's in a context where, I
16 mean, it's a -- it's a qualitative opinion, for
17 instance, and so the listener --

18 CHIEF JUSTICE ROBERTS: No, no, it's
19 either --

20 MS. FLYNN: -- takes that with a grain of
21 salt.

22 CHIEF JUSTICE ROBERTS: -- one horse,
23 they -- they had a race and the horse lost.

24 MS. FLYNN: Oh, I'm sorry.

25 CHIEF JUSTICE ROBERTS: Yeah.

1 MS. FLYNN: Yeah, so I think, in the
2 context of what is essentially sort of puffery, the
3 common law see -- like the reasonable listener sees
4 that differently, and there are common law
5 doctrines that kind of give effect to that. And
6 so, no, I don't think that would be false in your
7 hypothetical.

8 CHIEF JUSTICE ROBERTS: Okay.

9 JUSTICE GORSUCH: Ms. Flynn, just to back
10 up about the QP --

11 MS. FLYNN: Yes.

12 JUSTICE GORSUCH: -- at least in your
13 brief in opposition, the government did argue that
14 the statute before us criminalizes misleading
15 representations and is not limited to false
16 statements. So it did make the "misleading versus
17 false" argument there. And -- and -- and I think
18 that was the government's position in defending
19 Freed in the Seventh Circuit at least initially.

20 Now, if I understand it -- I just want to
21 make sure I understand it -- you're pivoting and
22 saying, okay, Freed's wrong, misleading doesn't
23 count, but falsity is more capacious than literal
24 falsity, more capacious than Bronston -- Bronston,
25 and we want to use this Court as a vehicle -- this

1 case as a vehicle for expanding what counts as
2 false beyond our precedent, and even though no
3 one's litigated that precise question below, it's
4 always been about misleading versus falsity, and
5 even though that in this case it probably won't
6 make a whit of difference given you've got such a
7 good standard available to you on remand and the
8 likelihood of overturning the jury verdict is very
9 low.

10 Is that a fair summary of where -- how
11 the ball has bounced in this case?

12 MS. FLYNN: I would respectfully push
13 back on a few aspects of that. I -- we took the
14 position in our opposition brief that the
15 statements have to be false, that --

16 JUSTICE GORSUCH: No, no. Page 6 says:
17 Section 1014 criminalizes misleading
18 misrepresentations and is not limited to literally
19 false statements.

20 MS. FLYNN: I'm sorry, can you give me
21 that page one more time, Your Honor? I apologize.

22 JUSTICE GORSUCH: That was page 6. I
23 don't mean to occupy --

24 MS. FLYNN: I mean, I guess I'm --
25 Petitioner's claim that -- well, Petitioner's claim

1 that Section 1014 does not prohibit merely
2 misleading representations is beside the point.
3 I -- I -- I guess, you know, we could -- we argued
4 before the Seventh Circuit and in our opposition
5 brief that the word "false" encompasses falsity by
6 context. We rejected what we understood to be
7 positions or Petitioner's argument that you have to
8 assess falsity by virtue of looking at the precise
9 words used in the four corners of the statement
10 alone. I now understand Petitioner to have walked
11 away from that rule.

12 And to resolve the only legal
13 disagreement in this case, you have to decide what
14 context counts. We know that the Seventh Circuit
15 found that the unmistakable impression left by
16 Petitioner's statements in context was that he
17 borrowed only \$110,000, and no more. And so --

18 JUSTICE BARRETT: Counsel, do you agree
19 with the First Circuit's pattern jury instruction?
20 It defines it -- it says a statement is false if
21 untrue when made. What if we said, you know, we --
22 we disagree, the Seventh Circuit stated this too
23 broadly; misleading statements don't count, just
24 false statements; and we offered that definition of
25 the standard? Would the government agree with

1 that?

2 MS. FLYNN: Yes, we would agree with that
3 statement. We agree that "false" means "untrue."

4 JUSTICE BARRETT: And then just not say
5 anything else?

6 MS. FLYNN: Yes.

7 JUSTICE BARRETT: We don't need to say
8 anything else about what counts as falsity, this
9 falsity in context, that sort of thing? We don't
10 use the words "literal falsity" and then we just
11 send it back to the Seventh Circuit?

12 MS. FLYNN: Yes, we agree with that. And
13 that's consistent with the pattern jury
14 instructions in every circuit that has a pattern
15 instruction for 1014. The only ones we've seen is
16 that kind of language that says "false" means
17 untrue when made. There's no attempt -- they don't
18 give a specialized definition for the jury trying
19 to parse the issues we've talked about today.

20 JUSTICE BARRETT: Thanks.

21 JUSTICE ALITO: There's been a lot of
22 talk about the question presented. The question
23 presented refers to statements that are misleading
24 but not false.

25 So I don't see how we can answer the

1 question presented unless we understand what is
2 meant by a statement that's misleading and a
3 statement that is not false. There's a
4 distinction, there's a clear distinction, if
5 "false" means literally falsity. But Petitioner
6 does not make that argument.

7 And, therefore, in order to answer the
8 question, if that's how we approach this, we would
9 have to understand what the Seventh Circuit means
10 by a statement that is misleading. And it's
11 entirely possible that what they meant was a
12 statement that is false in context. It's possible
13 that they might have a broader understanding of
14 what "misleading" means. But, to be honest, I
15 don't really understand the distinction between
16 statements that are misleading and statements that
17 are false.

18 I will concede there may be some
19 distinction. The connotation is -- is different.
20 I asked Petitioner's counsel what his -- what he
21 thinks is the difference, and he gave me the
22 example of his website, which that's not exactly a
23 rule. Maybe he'll take another shot at it in
24 reply, but -- in rebuttal, but can you tell me,
25 what do you think is the difference, if any,

1 between a statement that is misleading and a
2 statement that is false in context?

3 MS. FLYNN: I think a statement that is
4 misleading could encompass a broader category of
5 things than just things that are false in context.

6 JUSTICE ALITO: And what would that
7 broader category be? I know that's the connotation
8 that --

9 MS. FLYNN: Right.

10 JUSTICE ALITO: -- of the -- of the term,
11 but if you want to nail it down, if we're dealing
12 with a -- a legal concept, it may be prudent --
13 probably it is prudent -- just to disregard the
14 whole idea of a misleading statement here. The
15 statute says false, it has to be false. Petitioner
16 concedes it can be false in context. It doesn't
17 have to be literally false. We could leave it at
18 that.

19 But, if we were to go further in
20 answering the question, what would we say about
21 statements that are misleading but not false in
22 context?

23 MS. FLYNN: So one of the ways that we
24 have described what we think that falsity
25 encompasses -- or that falsity does not encompass,

1 I'm sorry, that misleading might is a failure to
2 include additional pertinent information not on the
3 same specific subject addressed by the statement.

4 So one example might be if I said -- if
5 I'm a tennis player and I say I won the
6 championship, but I leave out that I -- it was a
7 forfeited match because my opponent failed a drug
8 test, my statement -- when you know that additional
9 information, that doesn't render what I said false.
10 It is still accurate. It's just that I did not
11 take care to obviate what was probably a
12 foreseeable inference that you would have thought I
13 won a contested match.

14 And it's the -- the difference between
15 the statement itself directly stating something
16 inaccurate in context and leading the listener down
17 a path.

18 JUSTICE ALITO: And do we know what the
19 Seventh Circuit means by this phrase when they use
20 it in -- this term when they use it in their
21 opinions?

22 MS. FLYNN: I can't say we know for sure,
23 but I will say that the court was, of course,
24 thinking about the facts before it, which was this
25 numerical understatement fact pattern. And we can

1 look to the parts of the opinion where the court
2 said that in -- that the unmistakable impression
3 left by Petitioner's words was that he only
4 borrowed this amount.

5 I'm sorry, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas, anything?

9 Justice Alito?

10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: Would this be
12 false under -- the example you gave, would it be
13 false under Bronston?

14 MS. FLYNN: The tennis player example?

15 JUSTICE SOTOMAYOR: Yes.

16 MS. FLYNN: No.

17 JUSTICE SOTOMAYOR: Why not if I asked
18 you have you won a championship?

19 MS. FLYNN: If you asked me how you won a
20 championship, I --

21 JUSTICE SOTOMAYOR: Not -- not how.

22 MS. FLYNN: Sorry. Have, yes.

23 JUSTICE SOTOMAYOR: If I asked you, have
24 you won a championship, and you answered the way
25 you did, and that's why you got whatever job you

1 were applying for, have you made a false statement
2 or a misleading statement?

3 MS. FLYNN: I don't believe we made a
4 false statement under Bronston or under the rule
5 we're advocating for today.

6 JUSTICE SOTOMAYOR: Okay.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: A doctor's trying to
9 convince a patient to have a particular surgery,
10 and he says: I've done a hundred of these
11 surgeries. Turns out that 99 of the patients have
12 died.

13 (Laughter.)

14 JUSTICE KAGAN: A hundred of these
15 surgeries. True statement, correct?

16 MS. FLYNN: Yeah, in the context I'm
17 aware of, yes.

18 JUSTICE KAGAN: But he doesn't say 99
19 people have died. He's now misled the patient,
20 correct?

21 MS. FLYNN: Correct.

22 JUSTICE KAGAN: But he hasn't said
23 anything that's false.

24 MS. FLYNN: Correct.

25 JUSTICE KAGAN: So that's the kind of

1 thing where there really is a gap between a false
2 statement and a misleading statement, right?

3 MS. FLYNN: Yes.

4 JUSTICE KAGAN: And, you know, would it
5 be helpful, in your view, to say something like
6 that? There -- there really is a difference. In
7 some -- there might be overlap, but there really is
8 a difference, some things that are super misleading
9 but that are not false. Your example of the tennis
10 player, my example of the surgeon.

11 Why not just say that and instruct the
12 Seventh Circuit and anybody else who may not have a
13 correct understanding of this that there -- there
14 is this gap?

15 MS. FLYNN: Yeah, I would not resist this
16 Court explaining that. I just am only resisting
17 the possibility that you could say this statute
18 does not criminalize misleading representations,
19 full stop, without explaining that falsity by
20 context counts, what that means and that also
21 leaving open the possibility that the facts here,
22 where the Petitioner, in response to a statement
23 saying he owed a certain amount, said: I'm shocked
24 by that, and I owed this different amount, that
25 that could not -- a juror could not find as a

1 matter of law that that is false.

2 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

3 No?

4 Justice Kavanaugh?

5 Justice Barrett?

6 JUSTICE BARRETT: So sorry, Ms. Flynn,
7 just to put a pin in it at the end. What do you
8 want this Court to hold?

9 So you told me that you would be happy
10 with the First Circuit pattern jury instruction,
11 which you understand to be the standard one. And
12 Justice Kagan asked you would it be helpful to go
13 on and, you know, say a little bit more to give
14 guidance on what the distinction between "false"
15 and "misleading" is.

16 What are you -- what would the holding --
17 the rule line in an opinion be that would be ideal
18 from your perspective?

19 MS. FLYNN: It would be that "false" --
20 "false" means untrue or inaccurate but that an
21 assessment of whether a -- a statement is untrue or
22 inaccurate, is the message being sent in context.
23 And you could -- jurors, as a matter of law, can
24 take account of context, including the purpose of
25 the conversation, other parts of it, and the

1 meaning of the words used and to affirm on the
2 record in this case where the Seventh Circuit
3 looked at this and found that a reasonable jury can
4 find -- could find in context that what Petitioner
5 said was untrue and match the charged false
6 statements that the jury was instructed on.

7 CHIEF JUSTICE ROBERTS: Justice Jackson?

8 JUSTICE JACKSON: So, going to Justice
9 Kagan's point, I mean, there is a difference
10 between "false" and "misleading," but I take it
11 that the government's argument is that the facts
12 here don't really implicate that difference.

13 So, in other words, you know, it would be
14 as if, in Justice Kagan's hypothetical, the
15 question to the doctor was: How many times have
16 you done this surgery? And for whatever reason,
17 the doctor said 10, when, really, he had done a
18 hundred.

19 That wouldn't be misleading. That would
20 be false in the government's view, correct?

21 MS. FLYNN: Correct.

22 JUSTICE JACKSON: All right. And so just
23 one other point about what the government's
24 position has always been on this.

25 When you said in response -- in -- in the

1 colloquy with Justice Gorsuch about what the
2 government's position had been in the brief of
3 opposition, could it be that you were referring to
4 the first paragraph of the argument section, where
5 you say on page 5 that: Petitioner renews his
6 claim that he did not make any false statement
7 within the meaning of 114, but his statements were
8 false by any measure, and his contrary argument
9 would not entitle him to relief in any circuit. No
10 further review is warranted.

11 And so your initial argument is that this
12 is a false statement. And the part that Justice
13 Gorsuch was reading was B on page 6, where you say:
14 Even if Petitioner had only made a misleading
15 statement, he still would have violated. But the
16 government's point throughout this is that this
17 should be characterized as a false statement. Is
18 that right?

19 MS. FLYNN: Yes, that's correct. And if
20 I could just clarify my -- my back-and-forth with
21 Justice Gorsuch.

22 We -- I understood our brief to take the
23 position that falsity -- that we are understanding
24 the word "false" -- and that includes contextual
25 falsity. We have argued that Petitioner's

1 statements were false. The jury was instructed
2 that way.

3 If we introduced confusion about whether
4 or not a broader array of things that do not
5 qualify as false but could be described as
6 misleading counts, that is not the government's
7 position, and I hope that I've clarified that
8 today.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Gair, rebuttal?

13 REBUTTAL ARGUMENT OF CHRIS C. GAIR
14 ON BEHALF OF THE PETITIONER

15 MR. GAIR: When we're looking at a
16 statute, the most important thing is for us to look
17 at the text of the statute. The government is
18 committing the fundamental error of atextualism
19 that this Court condemned in Wells and many other
20 cases, where it is trying to supply an additional
21 term to the statute, a term that is used in many
22 other statutes, when Congress means to get at the
23 perception of the listener about a statement, and
24 that is the term "misleading."

25 Wells teaches us that you can't imply

1 the -- a new term into the statute because the
2 court thinks it might be a good idea or because
3 close is good enough for government work. It's
4 not.

5 Justice Thomas's opinion for the Court in
6 Rotkiske is another prime example of a statute
7 where -- in that case, it was the Fair Debt
8 Collection Practices Act. The question was whether
9 the statute of limitations implied a discovery
10 rule. And the Court's opinion there made clear --
11 looked at statutes that had been passed after the
12 Fair Debt Collection Practices Act that had a
13 discovery rule, as well as statutes passed before,
14 and found that the statutory context rebutted
15 the -- the atextualist argument that you should
16 imply a -- a discovery rule into the statute.

17 I think everyone, except possibly my
18 friends with the government, recognize that there's
19 a difference between "false" and "misleading." And
20 some of the Court's questions to the government
21 asked: How do you draw that line? And my
22 suggestion is the line is drawn by Congress
23 because, when Congress means for the relevant
24 context to include the perception of the listener,
25 it says misleading. It doesn't say just false.

1 And the Court has offered a number of
2 hypotheticals that clearly draw the line between
3 misleading and false. And this Court's recent
4 decision in the Macquarie case dealing with 10 --
5 Section 10b-5 could not be a clearer example.

6 The Court there, of course, was dealing
7 with a pure omission, but it had a nice explication
8 of Rule 10b-5 and said the first section, the false
9 statements part of 10b-5, deals with express
10 falsehoods. The second section of 10b-5 deals with
11 statements that say the truth but omit a material
12 fact necessary to make the statement not
13 misleading.

14 Congress has done that in a hundred
15 different places, but it didn't do it here. And --
16 and so we -- we should -- we should heed the text
17 and recognize that because Congress did not use the
18 word "misleading," it was not intending that the
19 perception of the listener matters. As we all
20 know, falsity is an objective question.

21 And despite the fact that people of the
22 younger generation may talk about "I want to speak
23 my truth," there is no such thing as "my truth."
24 It's -- it -- it's true as an objective matter.

25 I -- I do want to touch on a couple of

1 things -- other things that the government
2 suggested.

3 The Seventh Circuit did -- and I'm very
4 glad my friend mentioned it -- say that the
5 implication of this was false. The impression
6 created was false. But -- but that begs the
7 question. Impression and implication go to the
8 perception of the listener. The court never said
9 it was false as an objective matter. Instead, it
10 said that it -- it was not deciding that question.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. GAIR: Thank you.

14 CHIEF JUSTICE ROBERTS: The case is
15 submitted.

16 (Whereupon, at 11:22 a.m., the case was
17 submitted.)

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