

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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

2 (10:04 a.m.)

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

6 Mr. Gair.

7 ORAL ARGUMENT OF CHRIS C. GAIR

8 ON BEHALF OF THE PETITIONER

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

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

15 At the outset, at its most basic, the
16 word "false" means not true. It is, therefore,
17 implausible to suggest that the statute that
18 punishes false statements includes some types of
19 true statement. "False" and "true but misleading"
20 are different concepts. When Congress means to
21 prohibit both, it does so explicitly using both
22 terms, as it has in over 100 places in the United
23 States Code. The government would put this all
24 down to serial, thoughtless redundancy, but that
25 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 -- a false statement is one
14 that is not true when compared to the objective
15 facts. A misleading statement is a statement that
16 depends on the reasonable hearer's understanding.
17 The term "misleading" is -- by its nature focuses
18 on what the hearer hears. The term "false" relates
19 to an 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 -- the
24 context that's relevant is the question that's
25 asked, not the other circumstances. But,

1 obviously, it -- it would be absurd to try and
2 judge a statement in isolation from the question
3 that it answers.

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

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

7 JUSTICE JACKSON: --- even --

8 JUSTICE BARRETT: Oh. Sorry.

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

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

22 JUSTICE JACKSON: -- assess?

23 MR. GAIR: I'm sorry.

24 JUSTICE JACKSON: Yeah.

25 MR. GAIR: I'd point out at the outset,

1 Your Honor, that neither of the lower courts
2 applied this standard to the facts of the case, and
3 so this Court would be doing it for the first time.

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

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

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

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

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

1 I borrowed \$110,000; I had a promissory note for
2 \$110,000.

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

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

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

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

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

1 MR. GAIR: I -- I -- I don't think so
2 because the -- if the question is how much you owe,
3 that's a different issue than borrow. And
4 Mr. Thompson gave an answer that was actually true.

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

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

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

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

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

23 JUSTICE BARRETT: Do you regard it --

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

25 JUSTICE BARRETT: Do you regard it as a

1 material omission case? I'm just trying to figure
2 out -- I mean, I -- I agree with you there's a
3 distinction between -- you know, as the Sixth
4 Circuit opinion distinguished between material
5 omissions and concealment and falsity.

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

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

14 JUSTICE BARRETT: I --

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

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

23 I can see that as an omission. It's a
24 material omission insofar as you're trying to
25 represent it as a better deal that you're trying to

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

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

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

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

19 CHIEF JUSTICE ROBERTS: What --

20 JUSTICE KAGAN: -- like the --

21 CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

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

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

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

1 a hundred thousand dollars and, in fact, I made
2 \$70,000 or \$130,000, or whichever way the exchange
3 rate goes.

4 (Laughter.)

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

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

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

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

1 note.

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

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

9 He took the statement the bank sent to
10 him -- I'm quoting him: "I have no idea. The
11 numbers you sent me shows that I have a loan for
12 \$269,000. I borrowed a hundred thousand, period."

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

16 MR. GAIR: Your Honor --

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

19 MR. GAIR: Justice Sotomor -- mayor, I
20 think that by putting the period after the
21 \$110,000, we're not getting the full context of his
22 statement. He said a few more words about the
23 circumstances, and then he said, "I had a note for
24 \$110,000," so that I think that his statement --

25 JUSTICE SOTOMAYOR: So he had a note for

1 110,000 might be true, but he was asked: What did
2 you borrow? And he said: Only a hundred thousand.

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

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

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

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

19 MR. GAIR: Correct.

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

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

24 JUSTICE SOTOMAYOR: So I -- I hate the
25 word "literally" because I don't know what it

1 means. I think that the question is: Did he make
2 a false statement? And wouldn't -- could a
3 rational jury have understood him to have made a
4 false statement in the way that I read this?

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

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

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

12 JUSTICE SOTOMAYOR: So do --

13 MR. GAIR: No -- no --

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

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

24 JUSTICE SOTOMAYOR: All right. Thank
25 you.

1 JUSTICE KAGAN: Well, however the
2 district court --

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

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

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

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

24 First of all --

25 CHIEF JUSTICE ROBERTS: So just to be

1 clear then, then that means all the discussion
2 about what he thought and all that and how
3 reasonable, that -- that's beside the point.

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

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

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

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

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

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

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

24 JUSTICE KAVANAUGH: Right.

25 MR. GAIR: And there was evidence in the

1 record from which a -- a jury could have found the
2 mens rea, and we haven't challenged that. But
3 the -- but the mens rea is a separate element. And
4 the question of falsity is not --

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

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

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

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

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

21 JUSTICE KAGAN: Yeah, but --

22 JUSTICE KAVANAUGH: The question
23 presented --

24 JUSTICE KAGAN: I -- I -- I -- I mean,
25 just -- because that is the important inquiry here,

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

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

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

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

25 So I -- I do think that a rational --

1 that no rational jury in this context could have
2 found that. And, certainly, the district court
3 could have made that determination but didn't reach
4 it.

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

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

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

23 JUSTICE ALITO: All right. Well, tell
24 me -- tell me again what is the difference between
25 a statement that is false in context, not literally

1 false when viewed just by itself but false in
2 context, and a statement that is misleading.

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

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

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

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

20 (Laughter.)

21 MR. GAIR: Well --

22 JUSTICE KAGAN: It -- it is, though, the
23 humblest answer I've ever heard from the Supreme
24 Court podium.

25 (Laughter.)

1 JUSTICE KAGAN: So good show on that one.

2 (Laughter.)

3 JUSTICE ALITO: I think your --

4 CHIEF JUSTICE ROBERTS: Maybe not so good
5 for Mr. Francisco and Mr. Waxman.

6 (Laughter.)

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

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

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

1 this "misleading" idea into the case?

2 MR. GAIR: No, I definitely don't think
3 the Court would -- would want to do that, but this
4 is an important statute that deals with people's
5 dealings with sophisticated financial entities.
6 And it is important for the Court to give some
7 guidance on the question of whether a statement is
8 misleading or false precisely because the statute
9 is so important and so -- such broad application.

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

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

24 And the question, if it is a question at
25 all, it's a statement: You owe 269. He responds:

1 I borrowed 110. The government itself says it
2 understood him to be confused about how much he
3 borrowed and how much he owed.

4 And, under those circumstances, you know,
5 we can -- we can make a judgment, or we could maybe
6 leave it to somebody else to do it in the first
7 instance. Them's our choices. Is that about it?

8 MR. GAIR: I -- I -- I think that's --
9 you've captured it, Justice Gorsuch. The -- the --
10 the --

11 JUSTICE GORSUCH: Context here is not
12 an -- a couple of unsophisticated entities or
13 individuals who have never --

14 JUSTICE JACKSON: But I guess --

15 JUSTICE GORSUCH: -- never had any
16 financial dealings.

17 MR. GAIR: I -- I --

18 JUSTICE GORSUCH: But -- but it's --
19 but -- but -- but -- but you have a tough row to
20 hoe.

21 MR. GAIR: It -- it -- it's definitely a
22 tough row to hoe whenever you're asking a -- a
23 district court to find that no rational jury could
24 have found something. But there's a lot of
25 evidence from which we can make a solid argument,

1 I -- an argument that I believe is correct.

2 JUSTICE JACKSON: But, Mr. Gair, why
3 hasn't --

4 JUSTICE GORSUCH: Could you spin that
5 out, please, first?

6 MR. GAIR: Pardon me?

7 JUSTICE GORSUCH: Could you spin that
8 out?

9 MR. GAIR: Yes. Three -- three data
10 points.

11 The -- the first is that the government
12 conceded below that the statements were literally
13 true.

14 The second is that, as I've said, in the
15 call with the bank, the -- the statement that was
16 made was, "I borrowed \$110,000, I had a personal
17 note for \$110,000," both true statements in the
18 light of not a precise question or, indeed, even a
19 question at all.

20 And then the call with the FDIC was with
21 these two FDIC examiners, and they made two
22 comments that were very critical. The first is it
23 was -- there was no question about how much he
24 borrowed or how much he owed. Instead, they asked
25 him about his personal note. And he said: "I

1 borrowed" -- "they loaned me \$110,000 on my
2 personal note," which was true. And both of the
3 examiners and -- and the witness from the call
4 center for the bank all testified that he didn't
5 seem to know what it was he had borrowed.

6 So I do think there's a -- a good basis
7 for the district court to make this decision in the
8 first instance, and I think that this Court should
9 decide the important legal issue to make sure that
10 prosecutors don't over-enforce this statute.

11 CHIEF JUSTICE ROBERTS: Thank you --

12 JUSTICE ALITO: Well, what you just
13 said --

14 CHIEF JUSTICE ROBERTS: -- thank you,
15 counsel.

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

18 MR. GAIR: Correct.

19 CHIEF JUSTICE ROBERTS: You agree that's
20 completely false?

21 MR. GAIR: That is a false statement.

22 CHIEF JUSTICE ROBERTS: Okay. Thank you.

23 Justice Thomas?

24 Justice Alito?

25 JUSTICE ALITO: Well, your last comment

1 is a -- is a fair one, but doesn't it go to a
2 different question? It doesn't go to the question
3 whether the statement was false in context. It
4 goes to his -- whether he knew that it was false.

5 It's a mens rea question. It's not a
6 question of -- of the -- of the actus reus, which
7 is the utterance of a false statement.

8 MR. GAIR: I -- I agree with you that it
9 goes to mens rea. But, if we were to take the
10 perspective of my friends to -- to think that the
11 perception of the listener mattered, this -- that
12 evidence would bear on this question.

13 We don't agree that perception matters.
14 In fact, this -- the -- the government does not
15 cite a single case from this Court suggesting that
16 the question of truth or falsity depends on the
17 perception of the listener.

18 As a matter of fact, the -- the very
19 concept of "misleading" is from the perspective of
20 the listener, an objective listener, and Congress
21 knows how to make that relevant when they want to.

22 JUSTICE ALITO: Well, I'm totally
23 confused by your argument because, unless you're
24 arguing literal falsity, then -- then falsity in
25 context does depend on how people would understand

1 the statement. It does concern -- it does concern
2 the perception of listeners.

3 MR. GAIR: I -- I don't think so, Your
4 Honor. I -- I think that the -- the -- "falsity"
5 is an objective concept. If I say that the sun
6 rises in the west, that's false, and it doesn't
7 matter whether it misleads you or not.

8 JUSTICE ALITO: It may not concern the --
9 the -- the perception of the particular person to
10 whom the -- the statement is directed, but it does
11 concern the perception of some kind of listener --

12 MR. GAIR: It --

13 JUSTICE ALITO: -- some -- otherwise,
14 the -- the -- I don't understand the concept of
15 "falsity" in context.

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

19 And my -- my point is that Congress, over
20 and over, tells us when it wishes the perception of
21 the listener to count, by using a term that's
22 explicit -- explicitly refers to the perception of
23 the listener.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 Justice Kagan?

2 Justice Gorsuch?

3 Justice Kavanaugh?

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

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

7 JUSTICE KAVANAUGH: The prison time's
8 already been served, so that's over. And what's
9 still potentially at stake is restitution, is
10 that --

11 MR. GAIR: No, the restitution was
12 resolved by the Seventh Circuit, and there is --
13 and it's been paid. So -- and -- and that's not an
14 issue before this Court.

15 JUSTICE KAVANAUGH: Okay. So it's just
16 the -- okay. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

24 MR. GAIR: I -- I think that the right
25 way to say it is falsity in context of the

1 question.

2 JUSTICE BARRETT: Okay. So we're not
3 talking about literal falsity because you talked a
4 lot about that in your opening brief. Okay. So
5 we're not talking about literal falsity. We're
6 talking about falsity in context.

7 You've suggested both in your briefs and
8 then I think even more clearly today that the only
9 context that matters when we're looking at cues is
10 the question to whom -- to which the defendant was
11 responding.

12 Is that your position?

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

15 JUSTICE BARRETT: It's okay.

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

17 Justice Barrett, the context is the
18 question that's asked, the statement that's made,
19 and the objective facts. So, if the statement is
20 very specific, if Mr. Thompson had said: I only
21 borrowed \$110,000, and not a penny more, and -- and
22 that was essentially the charge, then that would be
23 a false statement.

24 So you have to look to the question, the
25 answer, and the objective facts.

1 JUSTICE BARRETT: Okay. So it's not just
2 the question. It can be surrounding circumstances,
3 as well as the question?

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

6 JUSTICE BARRETT: Right, right, right,
7 right.

8 MR. GAIR: Yeah.

9 JUSTICE BARRETT: Right. I -- I
10 understand that.

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

22 So, I mean, I agree you don't look at any
23 kind of idiosyncratic understanding, maybe, of the
24 person on the other side of the table, but, I mean,
25 you do have to have some kind of understanding of

1 how normal people would understand this in the
2 context of the situation, correct?

3 MR. GAIR: Just -- Justice Barrett, I
4 disagree with that. And -- and -- and -- and so
5 did this Court in the Bronston case.

6 In the Bronston case, it was absolutely
7 clear what the petitioner -- what the questioner
8 was driving at. He wanted to know if the person
9 had had Swiss Bank accounts. And the answerer
10 said: Well, my company did. And it wasn't
11 pursued. And so the situation is very analogous.

12 If -- if Bronston's right, then we can't
13 look at what the -- the perception of the listener
14 was. We have to look at only the context of the
15 question, the answer, and the objective facts.

16 CHIEF JUSTICE ROBERTS: Justice Jackson?

17 JUSTICE JACKSON: So I guess I don't
18 understand how, on remand, the Seventh Circuit
19 could make the kinds of determinations that you
20 said that they could make in response to Justice --
21 to Justice Gorsuch, and the reason is because we
22 had a trial in this case.

23 We had a trial in which, presumably,
24 those very same arguments about what, you know, the
25 statement meant to your client, what the bank

1 examiner said, et cetera, et -- cetera, were
2 evidence that was presented to a jury that was then
3 instructed that they were supposed to make a
4 determination about whether his statement was
5 false, right?

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

7 JUSTICE JACKSON: Okay. So why isn't the
8 Seventh Circuit's only potential response on remand
9 to determine whether any reasonable jury, given
10 that set of circumstances and evidence, could have
11 reached the result it reached?

12 I don't think the Seventh Circuit could
13 just pretend as though the jury didn't make a
14 determination in this case and answer the question
15 does it think there was a false statement here,
16 right?

17 MR. GAIR: That's right. I think that
18 it's very likely that the Seventh Circuit would
19 remand to the district court that heard the
20 evidence.

21 And there is a very exacting standard,
22 as -- Justice Jackson, as you know, for a motion
23 for judgment of acquittal, and --

24 JUSTICE JACKSON: So help us to
25 understand whether all of that is, like, really not

1 necessary because it's pretty clear that a
2 reasonable jury could have made this determination.

3 What is your best argument as to why, for
4 example -- and I'll just give you the analogy from
5 the government, the analogy about the -- the kid in
6 the cookie jar, that the mom says, you know: How
7 many cookies did you eat? Or did you -- did you
8 eat cookies? Or whatever the -- the question is.
9 And the kid actually ate -- and I'm now making this
10 up -- 10 cookies. And he responds: I ate three.

11 Why is that not a false statement?

12 MR. GAIR: Your hypothetical -- the
13 answer to your hypotheticals is actually twofold.

14 If the mom had said: Did you eat all the
15 cookies, or how many cookies did you eat, and the
16 child says: I ate three cookies, when she ate 10,
17 that's a false statement. But, if the mom says:
18 Did you eat any cookies, and the child says three,
19 that's not an understatement in response to a
20 specific numerical inquiry.

21 JUSTICE JACKSON: All right. So here's
22 the question here. We -- the question, I guess, in
23 response to that answer is: Why wouldn't it be
24 reasonable for a jury to interpret the submission
25 of the invoice to be the kind of specific question

1 that would -- that would require him to provide an
2 answer?

3 I mean, we don't have a particular
4 question. We have his interpretation of the
5 question and then answering it in a certain way,
6 which you say doesn't make it false. But, in the
7 context of what a reasonable jury could have
8 determined, I don't understand why -- what your
9 argument is to why a jury couldn't have interpreted
10 what happened here to be calling for a specific
11 response to the question: How much do you owe?

12 MR. GAIR: Well, I think it's -- it --
13 it -- it -- it's difficult to conceive of an
14 assertion in an invoice as being a specific --
15 specific numerical --

16 JUSTICE JACKSON: Difficult, but
17 impossible? The question is: Could a reasonable
18 jury have interpreted it that way?

19 MR. GAIR: I -- I don't think so, Justice
20 Jackson, and the reason is, among others, that
21 there wasn't a -- there wasn't a question posed at
22 all. The witnesses testified that it had -- that
23 he was -- or the evidence showed that he was
24 talking about his personal note, not the total
25 amount that he owed.

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

3 JUSTICE JACKSON: All right. Thank you.

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

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Ms. Flynn.

8 ORAL ARGUMENT OF CAROLINE A. FLYNN

9 ON BEHALF OF THE RESPONDENT

10 MS. FLYNN: Mr. Chief Justice, and may it
11 please the Court:

12 Section 1014 prohibits any false
13 statement. And like any other collection of words,
14 a statement is false if it conveys an untrue
15 message to the listener in context, even if the
16 precise words used, considered in a vacuum, could
17 possibly carry another meaning.

18 So, here, when, in response to receiving
19 an invoice telling Petitioner that he owed the FDIC
20 \$269,000, Petitioner then told the FDIC's agents
21 that he was shocked by the letter, had no idea
22 where the 269 number comes from, and had borrowed
23 \$110,000, he made a false statement because he
24 clearly conveyed the message that he did not owe
25 the higher amount.

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

5 Indeed, on page 7 of his reply brief,
6 Petitioner himself agrees that context obviously
7 matters in determining whether a statement is
8 false. I understood my friend to reiterate that
9 position again today.

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

20 Our position in this case is not that
21 "false" encompasses anything that might be
22 characterized as misleading or any failure to
23 disclose pertinent information. It is that a
24 statement is untrue if it states only a portion of
25 the truth on the subject it addresses in a context

1 where the statement would be taken as both accurate
2 and complete.

3 If, like Petitioner, the speaker
4 knowingly conveys that untrue message and does it
5 with a specific intent to influence the FDIC to not
6 fully collect on its debt, that violates the
7 statute.

8 I welcome the Court's questions.

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

12 MS. FLYNN: Our position in this case
13 that Petitioner's -- is that Petitioner's
14 statements were false. That's how the jury was
15 instructed. Our position is just that you assess
16 the falsity of something, you know, the inaccuracy
17 of it, by looking to context and what -- whether a
18 false message was imparted.

19 There's been a lot of talk, though, today
20 about what kind of rule the Seventh Circuit applied
21 in this case, and I -- I think the crux of the
22 Seventh Circuit's analysis completely aligns with
23 what I just said.

24 I think you can see this in particular at
25 pages 10a and 13a of the petition appendix. On

1 10a, the Court said: Even if he never used the
2 precise words, the implication of Petitioner's
3 statements was that he owed Washington Federal no
4 more than \$110,000, something that was untrue.

5 And then, on 13a, the court talks about
6 the mistake -- unmistakable impression left by his
7 statements and how the jury found in its verdict
8 that he conveyed the message that he falsely stated
9 that he only owed \$110,000, and any higher amount
10 was incorrect.

11 CHIEF JUSTICE ROBERTS: So -- but, in --
12 in general, do you think there's any difference
13 between the statutes that say "false statement" and
14 the statutes that say "false and misleading?"
15 Because it sounds to me that your -- would argue
16 that when it says "false," that includes misleading
17 statements in context. So is there any difference?

18 MS. FLYNN: We are not taking the
19 position that the word "misleading" does no work in
20 statutes in which it appears. We are -- we think
21 there is some overlap between these concepts, as I
22 understood my friend to agree. But, when we say
23 something has to be false in context, we mean it
24 has to state -- the statement itself has to state
25 a -- a false message, it has to convey a false

1 meaning directly, not lead the listener down a path
2 perhaps to a foreseeable conclusion that additional
3 information might have obviated.

4 But, here, when Petitioner says "I
5 borrowed \$110,000" in response to what was
6 essentially a question from the FDIC saying, did
7 you -- do you owe \$269,000, that is directly
8 conveying through his statement that he only owed
9 that amount.

10 JUSTICE KAVANAUGH: Do you agree that --

11 CHIEF JUSTICE ROBERTS: That's a --

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

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

22 I mean, is that -- is that treated
23 differently under the "false" -- the statute that
24 says just "false" and the statute that says "false
25 and misleading"? I can see that being misleading,

1 but I'm not sure it would qualify as false under
2 the literal meaning of the word.

3 MS. FLYNN: I don't think those would be
4 treated differently under those two statutes. I
5 believe that is a false statement because a
6 reasonable juror could find in context that if an
7 officer pulls somebody over and asks have you been
8 drinking, they're asking for a complete account of
9 how much you've been drinking. And when the person
10 says "I had just one cocktail" --

11 CHIEF JUSTICE ROBERTS: I didn't say
12 "just."

13 MS. FLYNN: -- that implies -- oh, I'm
14 sorry.

15 CHIEF JUSTICE ROBERTS: He didn't say
16 "just." In my hypothetical, it's, "I had a
17 cocktail."

18 MS. FLYNN: I'm sorry. I was -- I was
19 repeating from the brief.

20 CHIEF JUSTICE ROBERTS: Or "I had one
21 cocktail."

22 MS. FLYNN: Right. And I think, in
23 context, a reasonable juror could find that the
24 officer was asking for a complete account of how
25 much the person had had to drink given that the

1 officer was clearly trying to determine whether or
2 not they were inebriated and could not drive.

3 And that's the kind of surrounding
4 circumstance that we think is relevant here. And,
5 that -- I mean, that is what this case comes down
6 to, is whether --

7 JUSTICE GORSUCH: Ms. Flynn, we didn't --
8 we didn't take this case to decide whether a
9 reasonable juror could -- could -- could find that
10 the defendant here in context made a false
11 statement. As important as this case is, that's
12 not why we took it.

13 We took it to resolve whether the statute
14 allows the government to pursue a theory of
15 misleading rather than falsity, right?

16 MS. FLYNN: Well, I believe -- you took
17 this case where the facts presented are a numerical
18 understatement.

19 JUSTICE GORSUCH: We -- we didn't take
20 this case to resolve it on the facts. We took it
21 to resolve a legal question, and the legal question
22 is whether, as the Seventh Circuit held, this
23 statute permits a conviction for not just false
24 statements but misleading ones. And that is a
25 gloss that the Seventh Circuit's put on the

1 statute.

2 Are you here to defend that, or are you
3 simply saying that even under a correct
4 understanding of the statute, we would win and you
5 guys should go ahead and decide what a -- no
6 reasonable juror could have concluded otherwise?

7 MS. FLYNN: It's the latter, Your Honor,
8 but I would add the qualification --

9 JUSTICE GORSUCH: Really?

10 MS. FLYNN: -- that here, the only
11 legal --

12 JUSTICE GORSUCH: Really? You're asking
13 us to apply to -- the statute to a fact-bound error
14 correction question? That's -- that's a little
15 strange.

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

25 MS. FLYNN: Well, as the case has

1 narrowed during the briefing, the only legal
2 dispute I take to be between my friend and -- and
3 us is what context matters in assessing --

4 JUSTICE GORSUCH: Okay.

5 JUSTICE KAVANAUGH: So you're not --

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

7 JUSTICE GORSUCH: But you're not denying
8 that falsity is required by this statute?

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

10 JUSTICE GORSUCH: And are -- and you're
11 not --

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

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

15 MS. FLYNN: So it depends on what you
16 mean. We believe that --

17 JUSTICE GORSUCH: Falsity in context is
18 what's required by the statute.

19 MS. FLYNN: Yeah.

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

23 MS. FLYNN: If it is misleading in the
24 sense that a person makes a -- a numerical
25 understatement and underreports, if you're using

1 the word "misleading" to describe that, we do think
2 that is sufficient, but we do think the better way
3 to understand this concept is falsity in context --

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

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

6 JUSTICE GORSUCH: So, if we hold falsity
7 in context is the standard, why wouldn't we
8 reverse -- vacate and remand? Because that's not
9 what the Seventh Circuit held.

10 MS. FLYNN: Well, I pointed the Court to
11 two instances --

12 JUSTICE GORSUCH: You --

13 MS. FLYNN: -- in which I do believe the
14 court -- the Seventh Circuit --

15 JUSTICE GORSUCH: Yeah, but it said --

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

17 JUSTICE GORSUCH: -- Freed -- Freed is
18 our standard, and Freed is either falsity or
19 misleading in this dichotomy it created, and it
20 proceeded to say these statements were misleading.

21 MS. FLYNN: The court also quoted the
22 portions of Freed where the Seventh Circuit said
23 that you look at the -- the natural import of what
24 the speaker is trying to say.

25 JUSTICE GORSUCH: I --

1 JUSTICE KAVANAUGH: It said --

2 JUSTICE GORSUCH: Go ahead, please.

3 JUSTICE KAVANAUGH: -- it -- it said on

4 9a: "In the end, we need not decide whether

5 Thompson's statements were literally true because

6 his argument runs head-first into our precedent.

7 We already decided in Freed that Section 1014

8 criminalizes misleading representations."

9 Do you agree with that?

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

11 to mean all misleading representations, no, we do

12 not agree with that. But, if the --

13 JUSTICE KAVANAUGH: Okay. And that's

14 the -- that's the question I thought we -- I agree

15 with Justice Gorsuch. I mean, we say it all the

16 time, that we don't --

17 JUSTICE KAGAN: And why don't you agree

18 with that? Like, what -- what misleading

19 statements do you think they had in mind that you

20 would walk away from?

21 MS. FLYNN: Well, it's hard to know

22 because, of course, the Seventh Circuit was

23 thinking about the facts of this case when it used

24 the word "misleading," and that's why I'm trying to

25 be careful.

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

3 MS. FLYNN: Sure.

4 JUSTICE KAGAN: And you tell me if you
5 agree.

6 (Laughter.)

7 JUSTICE KAGAN: I mean, there are a whole
8 world of -- I wish I had some good examples at
9 hand, but we've seen these kinds of cases in --
10 these kinds of statements in many cases over the
11 years and talked about them, where somebody says
12 something and it's not just literally true, it is
13 true in context. The reader is hearing the
14 statement in exactly the way that --

15 MS. FLYNN: Right.

16 JUSTICE KAGAN: But there have -- but
17 other statements are not made that would cast a
18 different light on a situation. And so the person
19 says: Oh, I was misled because I know one thing
20 that was relevant to this situation, but you didn't
21 tell me some other thing that was relevant to the
22 situation and relevant to my decision-making.

23 And there are all kinds of cases in which
24 we say, in some statutes, that omission makes you
25 liable, but in other statutes, it doesn't. So, in

1 this statute, it seems pretty clear to me that it
2 doesn't.

3 MS. FLYNN: Yes, I would agree with that.
4 My --

5 JUSTICE KAGAN: So, I -- I guess, like,
6 when I read the Seventh Circuit, it -- it's at
7 least possible that the Seventh Circuit has that
8 wrong, that the Seventh Circuit is sort of treating
9 "falsity" and "misleadingness" as all of a piece
10 and not making this distinction between the -- when
11 a -- a statement in context is false and when that
12 statement is true but nonetheless misleading
13 because there's other stuff that's been left out.

14 MS. FLYNN: And I would say that even if
15 you thought the Seventh Circuit was confused on
16 that particular point, we know how they would
17 analyze this case under the correct legal rule
18 because the court said that even if you never use
19 the precise words, the implication of his statement
20 in -- and looking at context --

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

23 MS. FLYNN: Right.

24 JUSTICE KAGAN: We can both decide the
25 legal question that -- if we think that the Seventh

1 Circuit got it wrong, and we can also say something
2 about this case, and it might actually be useful to
3 other courts out there to say something about this
4 case so they know what we're talking about and what
5 we're not talking about.

6 MS. FLYNN: Exactly. And I would add the
7 further -- the further point that because, right
8 now, we're just debating, I -- I think, what
9 context -- or at least between my friend and I,
10 what context counts, I would think this Court
11 should answer that question as well and say it's
12 not just the preceding question, it's the things --
13 the purpose of the conversation, what was discussed
14 before, the kinds of things that the listener would
15 have taken into account too because I think, if you
16 just say misleading statements don't count, it's
17 falsity in context, full stop, and then have this
18 set of facts and send it back down, that could
19 create a good deal of confusion --

20 JUSTICE KAVANAUGH: Well, don't you think
21 if we --

22 MS. FLYNN: -- and also --

23 JUSTICE KAVANAUGH: -- if we granted cert
24 on that question, we get amicus briefs discussing
25 that important question? Because that is going to

1 have an effect on lots of statutes.

2 You're asking us to decide something much
3 broader than the -- the straightforward question,
4 as Justice Gorsuch said, that -- that was in the
5 question presented and that was in the cert
6 petition. And you don't -- I think you've said you
7 don't really agree with what the Seventh Circuit
8 said.

9 Well -- and then you said: Well, it'll
10 be easy -- it's easy to know what the Seventh
11 Circuit would have done. Well, if that's true, on
12 remand, that's what they're going to do.

13 MS. FLYNN: I mean, we argued at the cert
14 stage as well --

15 JUSTICE KAVANAUGH: Yeah.

16 MS. FLYNN: -- that "false" means false
17 in context.

18 JUSTICE KAVANAUGH: Yeah.

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

21 JUSTICE JACKSON: Isn't --

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

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

24 JUSTICE ALITO: Well, the question
25 presented --

1 JUSTICE GORSUCH: -- Ms. Flynn, the
2 question presented is whether the statute prohibits
3 making a statement that is misleading but not
4 false. That's the QP, not -- not what qualifies as
5 falsity, how much context, who shot John. None of
6 that's in -- in the QP.

7 And I think Justice Kavanaugh has a very
8 good point that if we were really going to tackle
9 what -- what is falsity, I mean, we might want to
10 consult a few philosophers while we're at it, but
11 we certainly would have had a different set of
12 amici and -- and -- and a different set of briefing
13 than we had in this case if we were going to tackle
14 that question.

15 MS. FLYNN: I don't think -- I mean,
16 respectfully, Your Honor, I don't think that's
17 correct. I think the concept of falsity is one
18 that we fully trust jurors, as lay people, to
19 assess and make determinations about and engage in
20 line drawing. I think it's very similar to
21 material --

22 JUSTICE GORSUCH: Of course. But you're
23 asking us to say, as a matter of law, this is
24 always in and that is always out for -- for
25 determining falsity, and that's just not in the QP,

1 counsel.

2 And it's a -- it -- it -- it -- it has
3 ripple effects not just in 1014 but throughout all
4 of Title 18 because there are literally a -- well,
5 not literally.

6 (Laughter.)

7 JUSTICE GORSUCH: There are a lot of
8 false statement statutes under which you can
9 proceed.

10 JUSTICE JACKSON: Ms. --

11 JUSTICE GORSUCH: And -- and many of them
12 do distinguish between falsity and misleading
13 statements. Each of the --

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

16 JUSTICE GORSUCH: Well, I -- I -- I hope
17 Ms. Flynn would have a response.

18 JUSTICE ALITO: Oh, sure.

19 MS. FLYNN: Well, I -- I mean, I -- I'm
20 not sure. One observation I would make about the
21 question presented is that it asks whether making a
22 false statement under -- whether you can satisfy
23 the requirement of a false statement under 1014 by
24 making a statement that is not false. And, I mean,
25 of course, we don't agree with that.

1 And so, in that sense, the question
2 presented answers itself. The issue in this case
3 has always been what does "false" mean. And our
4 argument is falsity in context. And I do think the
5 legal question, answering it, is --

6 JUSTICE GORSUCH: But where is that in --

7 MS. FLYNN: -- I mean, this Court all the
8 time talks about --

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

12 MS. FLYNN: Yes.

13 JUSTICE GORSUCH: I don't see that. I
14 see whether 1014 also prohibits a statement that
15 is -- that is misleading but not false.

16 JUSTICE JACKSON: Right. But --

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

18 JUSTICE JACKSON: -- Ms. Flynn, isn't --
19 isn't the problem that in the government's view,
20 the question presented, as Justice Gorsuch is
21 reading it, is actually not implicated on these
22 facts?

23 Meaning you don't see that what happened
24 here is misleading in the sense that it was
25 literally true but led someone down a wrong path.

1 You see this as false. That's why you keep arguing
2 it that way. And so, even though we take questions
3 presented to answer legal questions, we do so
4 ordinarily in cases in which the facts actually
5 implicate that question.

6 So I think the confusion is arising
7 because the government seems here, and in your
8 briefs, to be making arguments about the falsity of
9 this particular set of circumstances, the context
10 that you keep talking about, and that you're not
11 really addressing a situation in which you believe
12 there was a misleading but not false scenario.

13 MS. FLYNN: Yeah.

14 JUSTICE JACKSON: And that's why -- so --
15 so -- so, to answer the question when and under
16 what circumstances does this statute cover
17 misleading but not false situations on these set of
18 facts is like a mismatch because you say that's not
19 happening here, right?

20 MS. FLYNN: Yes, I would agree. And I
21 would also just reiterate that here, it's not like
22 there was a legal error, some kind of legal
23 confusion that infected the jury's verdict,
24 because, here, the jury was just told they had to
25 find that Petitioner knowingly made a false

1 statement.

2 JUSTICE JACKSON: So this takes us back
3 to Justice Alito's original point. This -- it
4 seems like the Seventh Circuit and perhaps, you
5 know, Petitioner in his arguing injected this
6 notion of: You should be looking at this as a
7 misleading but not false situation, and that kind
8 of got carried away and taken over when, really,
9 the jury was instructed on falsity. You say the
10 facts establish falsity.

11 I guess the one thing against you is your
12 colleague on the other side said the government at
13 some point conceded that this was a misleading but
14 not false case. So can you explain why that
15 happened and what we should take from that?

16 MS. FLYNN: Sure. So my friend points to
17 a -- a -- a moment in one of the hearings about
18 this issue where government counsel was sort of
19 paraphrasing the kind of argument that Petitioner
20 was making about literally -- literal falsity. But
21 elsewhere in that same hearing, the counsel said
22 that Petitioner's statements were "not true," I
23 believe three times. They maintained that position
24 afterwards. Of course, we maintained that before
25 the Seventh Circuit as well.

1 So I do not believe it's fair to say that
2 we have conceded that his statements were literally
3 true.

4 JUSTICE SOTOMAYOR: Counsel, assume for
5 the sake of argument that we don't accept your
6 position that "misleading" and "false" are
7 synonymous, that there are some things -- borrowing
8 the phrase of your -- the other side, some things
9 that are true but misleading, just as a hundred --
10 if you say a packet of toxic mushrooms is a hundred
11 percent natural. Toxic mushrooms are a hundred
12 percent toxic. But it may be -- be misleading if
13 you're selling it because people may believe that
14 it's safe, that you can actually eat it. So that's
15 misleading but not false.

16 So assume that there's a difference
17 between the two. And we say this is a Bronston
18 case. It has to be a false statement in the sense
19 of Bronston. How is this -- what is the
20 difference, or is there, in what you're saying
21 about what falsity means in this statute and what
22 we said it meant in Bronston?

23 MS. FLYNN: Yeah. Yes.

24 JUSTICE SOTOMAYOR: Your -- your -- the
25 other side argues -- and, you know, there's many

1 who have described Bronston as saying you need
2 literal falsity or literal truth. So how do you
3 distinguish what you're arguing -- or how do you
4 get what you're arguing from what we said in
5 Bronston? If we answer the question presented that
6 you can only prosecute false statements, all right,
7 staying within Bronston, how do you argue this
8 case?

9 MS. FLYNN: So we disagree that the --
10 the rule this Court announced for the perjury
11 statute in Bronston applies to the language of
12 1014. And there's a couple --

13 JUSTICE SOTOMAYOR: Assume we disagree
14 because, there, it was -- the perjury was for
15 making a false statement. Here, if you make a
16 false statement, you're guilty, with some other --
17 knowingly, et cetera, et cetera, other elements.

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

20 MS. FLYNN: So I do just want --

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

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

1 JUSTICE SOTOMAYOR: I understand that.

2 I've said it three times. Assume.

3 MS. FLYNN: Okay. And then I would point
4 this Court to the footnote in Bronston where the
5 Court said: Of course, understating a numerical
6 amount in response to a question would clarify --
7 or would qualify as literally false even under the
8 rule that we're announcing today.

9 And we don't think you need to have -- of
10 course, Bronston was talking about questions and
11 answers during testimony, but we think that here,
12 for instance, the invoice essentially served the
13 same contextual purpose as a direct question about
14 how much Petitioner owed.

15 But it's the -- the -- the principle is
16 the same. The Court was saying, of course, if you
17 under --

18 JUSTICE SOTOMAYOR: Now we go to
19 Justice --

20 MS. FLYNN: -- if you only state part of
21 the whole --

22 JUSTICE SOTOMAYOR: -- now we go to
23 Justice -- Gorsuch's question. When we describe
24 context, you're -- the other side says what's the
25 question asked directly or implicitly, you're --

1 but I think he's not going to say "implicitly."
2 What's the question you asked? What is the answer
3 you give? And, objectively, do the facts support
4 that answer?

5 How would you describe what we're
6 supposed to do?

7 MS. FLYNN: I think Petitioner's limits
8 to just the precise question asked is very
9 artificial. I -- I would draw an analogy to how
10 this Court looks at context with statutes, for
11 instance. This Court does not draw hard-and-fast
12 rules saying we only look at the proceedings
13 subsection --

14 JUSTICE SOTOMAYOR: But that's what we
15 did in Bronston. We looked at the question asked.

16 MS. FLYNN: In the context of
17 cross-examination, where the questioner is in full
18 control of the witness's presentation by asking the
19 questions, and against a background principle of
20 Anglo-American law --

21 JUSTICE SOTOMAYOR: We disagree with you.

22 MS. FLYNN: -- that we want perjury to
23 be --

24 JUSTICE SOTOMAYOR: If we disagree with
25 you, is that the lesson you take from Bronston,

1 that it's the question asked and whether the answer
2 is objectively right or not?

3 MS. FLYNN: In the context of perjury,
4 yes, I understand that to be the case, though, of
5 course --

6 JUSTICE SOTOMAYOR: But you're arguing --

7 MS. FLYNN: -- I think you have to look
8 at the question --

9 JUSTICE SOTOMAYOR: -- we should apply
10 something different in other contexts?

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

12 JUSTICE SOTOMAYOR: All right. Thank
13 you.

14 CHIEF JUSTICE ROBERTS: Counsel, we've
15 been talking about things that are technically true
16 but misleading. Does it work the other way?

17 Let's say you have things that are --
18 statements that are technically false but not
19 misleading. If someone's trying to sell you a
20 horse and -- and says this is the fastest horse
21 I've ever seen, and, in fact, it's not, he's seen a
22 faster horse, well, I don't think purchasers would
23 necessarily view that as misleading. They would
24 view that as sort of normal sales talk.

25 So can things be technically true --

1 technically false but not misleading?

2 MS. FLYNN: I don't think in your
3 hypothetical, Your Honor, that that would be
4 considered false because it's in a context where, I
5 mean, it's a -- it's a qualitative opinion, for
6 instance, and so the listener --

7 CHIEF JUSTICE ROBERTS: No, no, it's
8 either --

9 MS. FLYNN: -- takes that with a grain of
10 salt.

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

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

14 CHIEF JUSTICE ROBERTS: Yeah.

15 MS. FLYNN: Yeah, so I think, in the
16 context of what is essentially sort of puffery, the
17 common law see -- like the reasonable listener sees
18 that differently, and there are common law
19 doctrines that kind of give effect to that. And
20 so, no, I don't think that would be false in your
21 hypothetical.

22 CHIEF JUSTICE ROBERTS: Okay.

23 JUSTICE GORSUCH: Ms. Flynn, just to back
24 up about the QP --

25 MS. FLYNN: Yes.

1 JUSTICE GORSUCH: -- at least in your
2 brief in opposition, the government did argue that
3 the statute before us criminalizes misleading
4 representations and is not limited to false
5 statements. So it did make the "misleading versus
6 false" argument there. And -- and -- and I think
7 that was the government's position in defending
8 Freed in the Seventh Circuit at least initially.

9 And now, if I understand it -- I just
10 want to make sure I understand it -- you're
11 pivoting and saying, okay, Freed's wrong,
12 misleading doesn't count, but falsity is more
13 capacious than literal falsity, more capacious than
14 Bronston -- Bronston, and we want to use this Court
15 as a vehicle -- this case as a vehicle for
16 expanding what counts as false beyond our
17 precedent, and even though no one's litigated that
18 precise question below, it's always been about
19 misleading versus falsity, and even though that in
20 this case it probably won't make a whit of
21 difference given you've got such a good standard
22 available to you on remand and the likelihood of
23 overturning the jury verdict is very low.

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

1 MS. FLYNN: I would respectfully push
2 back on a few aspects of that. I -- we took the
3 position in our opposition brief that the
4 statements have to be false, that --

5 JUSTICE GORSUCH: No, no. Page 6 says:
6 Section 1014 "criminalizes misleading
7 misrepresentations and is not limited to 'literally
8 false' statements."

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

11 JUSTICE GORSUCH: That was page 6.

12 MS. FLYNN: That was 6.

13 JUSTICE GORSUCH: I don't mean to
14 occupy --

15 MS. FLYNN: I mean -- I mean, I guess
16 I'm -- Petitioner's claim that -- well,
17 Petitioner's claim that Section 1014 does not
18 prohibit merely misleading representations is
19 beside the point. I -- I -- I guess, you know, we
20 could -- we argued before the Seventh Circuit and
21 in our opposition brief that the word "false"
22 encompasses falsity by context. We rejected what
23 we understood to be positions or Petitioner's
24 argument that you have to assess falsity by virtue
25 of looking at the precise words used in the four

1 corners of the statement alone. I now understand
2 Petitioner to have walked away from that rule.

3 And to resolve the only legal
4 disagreement in this case, you have to decide what
5 context counts. We know that the Seventh Circuit
6 found that the unmistakable impression left by
7 Petitioner's statements in context was that he
8 borrowed only \$110,000, and no more. And so --

9 JUSTICE BARRETT: Counsel, do you agree
10 with the First Circuit's pattern jury instruction?
11 It defines it -- it says a statement is false if
12 untrue when made. What if we said, you know, we --
13 we disagree, the Seventh Circuit stated this too
14 broadly; misleading statements don't count, just
15 false statements; and we offered that definition of
16 the standard? Would the government agree with
17 that?

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

20 JUSTICE BARRETT: And then just not say
21 anything else?

22 MS. FLYNN: Yes.

23 JUSTICE BARRETT: We don't need to say
24 anything else about what counts as falsity, this
25 falsity in context, that sort of thing? We don't

1 use the words "literal falsity" and then we just
2 send it back to the Seventh Circuit?

3 MS. FLYNN: Yes, we agree with that. And
4 that's consistent with the pattern jury
5 instructions in every circuit that has a pattern
6 instruction for 1014. The only ones we've seen is
7 that kind of language that says "false" means
8 untrue when made. There's no attempt there -- they
9 don't give a specialized definition for the jury
10 trying to parse the issues we've talked about
11 today.

12 JUSTICE BARRETT: Thanks.

13 JUSTICE ALITO: There's been a lot of
14 talk about the question presented. The question
15 presented refers to statements that are misleading
16 but not false.

17 So I don't see how we can answer the
18 question presented unless we understand what is
19 meant by a statement that's misleading and a
20 statement that is not false. There's a
21 distinction, there's a clear distinction, if
22 "false" means literal falsity. But Petitioner does
23 not make that argument.

24 And, therefore, in order to answer the
25 question, if that's how we approach this, we would

1 have to understand what the Seventh Circuit means
2 by a statement that is misleading. And it's
3 entirely possible that what they meant was a
4 statement that is false in context. It's possible
5 that they might have a broader understanding of
6 what "misleading" means. But, to be honest, I
7 don't really understand the distinction between
8 statements that are misleading and statements that
9 are false.

10 I will concede there may be some
11 distinction. The connotation is -- is different.
12 I asked Petitioner's counsel what his -- what he
13 thinks is the difference, and he gave me the
14 example of his website, which that's not exactly a
15 rule. Maybe he'll take another shot at it in
16 reply, but -- in -- in rebuttal, but can you tell
17 me, what do you think is the difference, if any,
18 between a statement that is misleading and a
19 statement that is false in context?

20 MS. FLYNN: I think a statement that is
21 misleading could encompass a broader category of
22 things than just things that are false in context.

23 JUSTICE ALITO: And what would that
24 broader category be? I know that's the connotation
25 that --

1 MS. FLYNN: Right.

2 JUSTICE ALITO: -- of the -- of the term,
3 but if you want to nail it down, if we're dealing
4 with a -- a legal concept, it may be prudent --
5 probably it is prudent -- just to disregard the
6 whole idea of a misleading statement here. The
7 statute says false, it has to be false. Petitioner
8 concedes it can be false in context. It doesn't
9 have to be literally false. We could leave it at
10 that.

11 But, if we were to go further in
12 answering the question, what would we say about
13 statements that are misleading but not false in
14 context?

15 MS. FLYNN: So one of the ways that we
16 have described what we think that falsity
17 encompasses -- or that falsity does not encompass,
18 I'm sorry, that misleading might is a failure to
19 include additional pertinent information not on the
20 same specific subject addressed by the statement.

21 So one example might be if I said -- if
22 I'm a tennis player and I say I won the
23 championship, but I leave out that I -- it was a
24 forfeited match because my opponent failed a drug
25 test, my statement -- when you know that additional

1 information, that doesn't render what I said false.
2 It is still accurate. It's just that I did not
3 take care to obviate what was probably a
4 foreseeable inference that you would have thought I
5 won a contested match.

6 And it's the -- the difference between
7 the statement itself directly stating something
8 inaccurate in context and leading the listener down
9 a path.

10 JUSTICE ALITO: And do we know what the
11 Seventh Circuit means by this phrase when they use
12 it in -- this term when they use it in their
13 opinions?

14 MS. FLYNN: I can't say we know for sure,
15 but I will say that the court was, of course,
16 thinking about the facts before it, which was this
17 numerical understatement fact pattern. And we can
18 look to the parts of the opinion where the court
19 said that in -- that the unmistakable impression
20 left by Petitioner's words was that he only
21 borrowed this amount.

22 I'm sorry, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas, anything?

1 Justice Alito?

2 Justice Sotomayor?

3 JUSTICE SOTOMAYOR: Would this be

4 false under -- the example you gave, would it be

5 false under Bronston?

6 MS. FLYNN: The tennis player example?

7 JUSTICE SOTOMAYOR: Yes.

8 MS. FLYNN: No.

9 JUSTICE SOTOMAYOR: Why not if I asked

10 you have you won a championship?

11 MS. FLYNN: If you asked me how you won a

12 championship, I --

13 JUSTICE SOTOMAYOR: Not -- not how.

14 MS. FLYNN: Sorry. Have, yes.

15 JUSTICE SOTOMAYOR: If I asked you, have

16 you won a championship, and you answered the way

17 you did, and that's why you got whatever job you

18 were applying for, have you made a false statement

19 or a misleading statement?

20 MS. FLYNN: I don't believe we made a

21 false statement under Bronston or under the rule

22 we're advocating for today.

23 JUSTICE SOTOMAYOR: Okay.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: A doctor's trying to

1 convince a patient to have a particular surgery,
2 and he says: I've done a hundred of these
3 surgeries. Turns out that 99 of the patients have
4 died.

5 (Laughter.)

6 JUSTICE KAGAN: A hundred of these
7 surgeries. True statement, correct?

8 MS. FLYNN: Yeah, in the context I'm
9 aware of, yes.

10 JUSTICE KAGAN: But he doesn't say 99
11 people have died. He's now misled the patient,
12 correct?

13 MS. FLYNN: Correct.

14 JUSTICE KAGAN: But he hasn't said
15 anything that's false.

16 MS. FLYNN: Correct.

17 JUSTICE KAGAN: So that's the kind of
18 thing where there really is a gap between a false
19 statement and a misleading statement, right?

20 MS. FLYNN: Yes.

21 JUSTICE KAGAN: And, you know, would it
22 be helpful, in your view, to say something like
23 that? There -- there really is a difference. In
24 some -- there might be overlap, but there really is
25 a difference, some things that are super misleading

1 but that are not false. Your example of the tennis
2 player, my example of the surgeon.

3 Why not just say that and instruct the
4 Seventh Circuit and anybody else who may not have
5 a -- a correct understanding of this that there --
6 there is this gap?

7 MS. FLYNN: Yeah, I would not resist this
8 Court explaining that. I just am only resisting
9 the possibility that you could say this statute
10 does not criminalize misleading representations,
11 full stop, without explaining that falsity by
12 context counts, what that means and that also
13 leaving open the possibility that the facts here,
14 where the Petitioner, in response to a statement
15 saying he owed a certain amount, said: I'm shocked
16 by that, and I owed this different amount, that
17 that could not -- a juror could not find as a
18 matter of law that that is false.

19 CHIEF JUSTICE ROBERTS: Justice Gorsuch?
20 No?

21 Justice Kavanaugh?

22 Justice Barrett?

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

1 So you -- you told me that you would be
2 happy with the First Circuit pattern jury
3 instruction, which you understand to be the
4 standard one. And Justice Kagan asked you would it
5 be helpful to go on and, you know, say a little bit
6 more to give guidance on what the distinction
7 between "false" and "misleading" is.

8 What are you -- what would the holding --
9 the -- the rule line in an opinion be that would be
10 ideal from your perspective?

11 MS. FLYNN: It would be that "false" --
12 "false" means untrue or inaccurate but that an
13 assessment of whether a -- a statement is untrue or
14 inaccurate, is the message being sent in context.
15 And you could -- jurors, as a matter of law, can
16 take account of context, including the purpose of
17 the conversation, other parts of it, and the
18 meaning of the words used and to affirm on the
19 record in this case where the Seventh Circuit
20 looked at this and found that a reasonable jury can
21 find -- could find in context that what Petitioner
22 said was untrue and match the charged false
23 statements that the jury was instructed on.

24 CHIEF JUSTICE ROBERTS: Justice Jackson?

25 JUSTICE JACKSON: So, going to Justice

1 Kagan's point, I mean, there is a difference
2 between "false" and "misleading," but I take it
3 that the government's argument is that the facts
4 here don't really implicate that difference.

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

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

13 MS. FLYNN: Correct.

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

17 When you said in response -- in -- in the
18 colloquy with Justice Gorsuch about what the
19 government's position had been in the brief of
20 opposition, could it be that you were referring to
21 the first paragraph of the argument section, where
22 you say on page 5 that: "Petitioner renews his
23 claim that he did not make any false statement
24 within the meaning of 114, but his statements were
25 false by any measure, and his contrary argument

1 would not entitle him to relief in any circuit. No
2 further review is warranted."

3 And so your initial argument is that this
4 is a false statement. And the part that Justice
5 Gorsuch was reading was B on page 6, where you say:
6 Even if Petitioner had only made a misleading
7 statement, he still would have violated. But the
8 government's point throughout this is that this
9 should be characterized as a false statement. Is
10 that right?

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

14 We -- I understood our brief to take the
15 position that falsity -- that we are understanding
16 the word "false" -- and that includes contextual
17 falsity. We have argued that Petitioner's
18 statements were false. The jury was instructed
19 that way.

20 If we introduced confusion about whether
21 or not a broader array of things that do not
22 qualify as false but could be described as
23 misleading counts, that is not the government's
24 position, and I hope that I've clarified that
25 today.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Gair, rebuttal?

5 REBUTTAL ARGUMENT OF CHRIS C. GAIR

6 ON BEHALF OF THE PETITIONER

7 MR. GAIR: When we're looking at a
8 statute, the most important thing is for us to look
9 at the text of the statute. The government is
10 committing the fundamental error of atextualism
11 that this Court condemned in Wells and many other
12 cases, where it is trying to supply an additional
13 term to the statute, a term that is used in many
14 other statutes, when Congress means to get at the
15 perception of the listener about a statement, and
16 that is the term "misleading."

17 Wells teaches us that you can't imply
18 the -- a new term into the statute because the
19 court thinks it might be a good idea or because
20 close is good enough for government work. It's
21 not.

22 Justice Thomas's opinion for the Court in
23 Rotkiske is another prime example of a statute
24 where -- in that case, it was the Fair Debt
25 Collection Practices Act. The question was whether

1 the statute of limitations implied a discovery
2 rule. And the Court's opinion there made clear --
3 looked at statutes that had been passed after the
4 Fair Debt Collection Practices Act that had a
5 discovery rule, as well as statutes passed before,
6 and found that the statutory context rebutted
7 the -- the atextualist argument that you should
8 imply a -- a discovery rule into the statute.

9 I think everyone, except possibly my
10 friends with the government, recognize that there's
11 a difference between "false" and "misleading." And
12 some of the Court's questions to the government
13 asked: How do you draw that line? And my
14 suggestion is the line is drawn by Congress
15 because, when Congress means for the relevant
16 context to include the perception of the listener,
17 it says misleading. It doesn't say just false.

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

23 The Court there, of course, was dealing
24 with a pure omission, but it had a nice explication
25 of Rule 10b-5 and said the first section, the false

1 statements part of 10b-5, deals with express
2 falsehoods. The second section of 10b-5 deals with
3 statements that say the truth but omit a material
4 fact necessary to make the statement not
5 misleading.

6 Congress has done that in a hundred
7 different places, but it didn't do it here. And --
8 and so we -- we should -- we should heed the text
9 and recognize that because Congress did not use the
10 word "misleading," it was not intending that the
11 perception of the listener matters. As we all
12 know, falsity is an objective question.

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

17 I -- I do want to touch on a couple of
18 things -- other things that the -- the government
19 suggested.

20 The Seventh Circuit did -- and I'm very
21 glad my friend mentioned it -- say that the
22 implication of this was false. The impression
23 created was false. But -- but that begs the
24 question. Impression and implication go to the
25 perception of the listener. The court never said

1 it was false as an objective matter. Instead, it
2 said that it -- it was not deciding that question.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. GAIR: Thank you.

6 CHIEF JUSTICE ROBERTS: The case is
7 submitted.

8 (Whereupon, at 11:22 a.m., the case was
9 submitted.)

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