

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

WISCONSIN BELL, INC.,)
Petitioner,)
v.) No. 23-1127
UNITED STATES, EX REL. TODD HEATH,)
Respondent.)

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13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.
16
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19 the Petitioner.
20 TEJINDER SINGH, ESQUIRE, Washington, D.C.; on behalf
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25 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 this morning in Case 23-1127, Wisconsin
5 Bell versus United States ex rel. Todd Heath.

6 Ms. Ho.

7 ORAL ARGUMENT OF ALLYSON N. HO

8 ON BEHALF OF THE PETITIONER

9 MS. HO: Mr. Chief Justice, and may it
10 please the Court:

11 The False Claims Act, which casts its
12 shadow over every aspect of the administrative
13 state, has always been trained on guarding the
14 public fisc. The FCA protects government funds
15 by defining a claim as a request for money the
16 government provides or that's presented to a
17 government agent.

18 As a result of political branch
19 choices, E-rate reimbursement requests check
20 neither box. The program could have been funded
21 with public money and administered by a
22 government agency, but the political branches
23 chose private funding and a private
24 administrator to prevent E-rate money from being
25 used to mask budget shortfalls and to avoid the

1 Government Corporation Control Act.

2 The consequence of those choices is
3 that E-rate reimbursement requests aren't FCA
4 claims.

5 First, the government doesn't provide
6 any money in the E-rate program. Text, context,
7 structure, and history all confirm that the
8 government provides money for FCA purposes only
9 if it supplies money from its own funds, putting
10 the public fisc at risk. That never happened
11 here. The government doesn't provide money by
12 making one private party pay another private
13 party, and the government doesn't provide money
14 by collecting debts owed to a private party and
15 in which the government has no financial stake.

16 Second, the program's private
17 administrator, the Administrative Company, isn't
18 a government agent. By design, it lacks power
19 to bind the government, which in turn lacks
20 control over what matters here: grants of
21 E-rate reimbursement requests. In fact, we know
22 the company can't be a government agent because,
23 if it were, it would violate the Government
24 Corporation Control Act.

25 Choices have consequences, and the

1 choices made by the political branches to
2 insulate the E-rate program from the public fisc
3 foreclose applying the FCA.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Ms. Ho, could you
6 focus just briefly on the \$100 million that the
7 government says it contributes or provides.
8 That -- much of that is collected under a debt
9 collection provision that authorizes the
10 government to collect its -- a debt owed to it.
11 That seems somewhat at odds with your argument
12 that it's not the government's money.

13 It -- how could it be collected under
14 that Act if it is not owed to the government?
15 And if -- if it is owed to the government, then
16 why isn't it the government's money after that?

17 MS. HO: Yes, Justice Thomas, and let
18 me answer both parts of your question. Let me
19 begin by addressing the debt settlement and
20 restitution.

21 Those funds are no different than the
22 E-rate contributions themselves. They are owed
23 to the Administrative Company. The United
24 States just collects and returns those funds to
25 their private owner. A -- a -- a good analogy

1 is like child support. Like a parent provides
2 child support even when the United States
3 withholds from the parent's income and sends to
4 the other parent, the private telecom carriers
5 provide E-rate funds even when the United States
6 collects their delinquent debts, just like when
7 a private litigant uses a sheriff to go after a
8 property to pay judgment.

9 Now let -- Justice Thomas, let me --
10 let -- address directly your question about the
11 Debt Collection Improvement Act. And those
12 debts don't belong to the government, even under
13 the Debt Collection Improvement Act, for three
14 reasons.

15 Number one, that's a different
16 statutory scheme with different language.
17 That's the Blanca case from the Tenth Circuit
18 that we cite in our brief. The FCA limits a
19 claim to money that the United States provides,
20 and the Debt Collection Improvement Act defines
21 "claim" more expansively without regard to its
22 effect on the public fisc.

23 And, number two, relatedly, the Debt
24 Collection Improvement Act applies to funds that
25 the United States is authorized by statute to

1 collect for the benefit of any person. That is
2 Section 3701(b)(1)(D). So money belongs to the
3 person for whose benefit the government collects
4 it. The government just holds it in trusts.
5 And that's in our brief on page 32.

6 And my friend, the Solicitor General,
7 admits on page 17 of the Solicitor General's
8 brief that they are obligated, the government is
9 obligated, to transmit funds back to the
10 Administrative Company.

11 CHIEF JUSTICE ROBERTS: Okay -- the --

12 JUSTICE JACKSON: Can I ask you a
13 question why -- oh. Sorry.

14 CHIEF JUSTICE ROBERTS: I was just
15 going to -- the government, though, treats this,
16 these funds, as appropriated funds, right?
17 They -- they're -- as I understand it, they're
18 called backdoor appropriations?

19 MS. HO: You're correct, Mr. Chief
20 Justice, that OMB and the President's budget
21 have -- have labeled the E-rate funds as -- I
22 think they're -- I think the -- the bureaucratic
23 term is "permanent indefinite appropriations,"
24 but even -- even OMB, in using that term,
25 admitted that -- I think -- I think the language

1 used was that the line between the private
2 sector and government can be murky and that it
3 was including those funds in the budget out of a
4 desire to be -- to be comprehensive.

5 So, ultimately, it is this Court's
6 responsibility to interpret this statute and
7 determine what the nature of the funds are. So
8 bookkeeping labels aren't dispositive of that
9 question, Mr. Chief Justice.

10 JUSTICE JACKSON: But I guess I'm
11 wondering why the government isn't collecting
12 the money here for a public purpose for the
13 funding of this program. You suggest that the
14 money belongs to the person for whom the
15 government collects the funds, and I thought the
16 funds were being collected to operate this
17 government program.

18 MS. HO: So, Justice Jackson, I take
19 your question to be focused on, you know, is
20 it -- is it money that the government
21 collects -- which, of course, we know the
22 government isn't actually collecting the money
23 here. The private carriers are paying their
24 money --

25 JUSTICE JACKSON: Right. I was just

1 responding --

2 MS. HO: -- to another private person.

3 JUSTICE JACKSON: Yeah, I was just --
4 I was just trying to understand your response to
5 Justice Thomas, who said --

6 MS. HO: Yes.

7 JUSTICE JACKSON: -- we have a hundred
8 million dollars that the government is
9 collecting, admittedly, as a result of sell --
10 settlements and debt collection, in the context
11 of this program, but, ultimately, the reason why
12 the money is being collected is because the
13 government has ordered telecom companies to fund
14 this government program.

15 So the ultimate beneficiary, I would
16 think, is the public, right?

17 MS. HO: So we know, Your Honor, from
18 the text of the False Claims Act and its
19 definition of "claim" that just having a
20 government purpose isn't enough and that the --
21 the precise language -- and this is
22 3729(b)(2)(A). It defines a claim, and it says,
23 "if the money or property is to be spent or used
24 on the government's behalf or to advance a
25 government program or interest," which is what

1 you're asking me about, "and if the United
2 States provides or has provided any portion of
3 the money or property."

4 So it's not enough to --

5 JUSTICE JACKSON: So I guess I don't
6 understand your argument about "provides." Can
7 you help me? Because it seems to me that you're
8 saying that because the government here has
9 ordered these telecom companies to pay directly
10 into the fund, it is not "provides," but if the
11 government had ordered the telecom companies to
12 pay them a fee, for example, and then directed
13 that into the fund, it would be "provides."

14 And I guess I don't understand why
15 that distinction should make a difference.

16 MS. HO: Yes. And the -- the
17 distinction is critical, and the distinction is
18 that under the scenario as Congress and the
19 political branches designed it, the public fisc
20 is never put at risk. The money goes from the
21 private carriers --

22 JUSTICE JACKSON: But I guess I'm
23 thinking never --

24 MS. HO: -- to the private fund.

25 JUSTICE JACKSON: -- the -- in --

1 even -- in either scenario, the public fisc is
2 not really put at risk. I mean, you -- you have
3 this pot of money that's the public fisc, and in
4 my second scenario, the government is exacting a
5 fee from the telecom companies, and while it
6 might be put into the public fisc for two
7 seconds, the point is they're exacting the fee
8 to pay for this fund.

9 What difference does it make if
10 they're doing it that way versus just telling
11 the telecom companies you put it into the fund
12 directly?

13 MS. HO: I -- I think that the key --
14 the key difference for False Claims Act purposes
15 is that in the first scenario, even -- even if
16 the money is only in the public fisc for a
17 limited amount of time, that is still
18 endangering the public fisc. It is going into
19 the public fisc, and the government is providing
20 the funds out of the public -- of the public
21 fisc.

22 And -- and the political branches,
23 Congress and the FCC, in choosing this rather
24 unique setup, this design, did that quite
25 intentionally --

1 JUSTICE JACKSON: Didn't they do it --

2 MS. HO: -- to protect this --

3 JUSTICE JACKSON: -- intentionally to
4 avoid the cost, the administrative cost, of
5 it -- the government being the one -- I mean,
6 what's so peculiar about your argument to me is
7 that I would think good government would
8 actually be trying to hold down costs.

9 We have this program we've created,
10 and it seems far more efficient to have the
11 telecom companies just put the money in directly
12 than it does to say: Give the money to us, and
13 then we will in cost -- you know, incur the
14 costs of rerouting it out to the fund.

15 MS. HO: And --

16 JUSTICE JACKSON: I don't understand
17 why that's a problematic thing from your
18 perspective.

19 MS. HO: Oh, we don't think it's a --
20 it's problematic. We just think those choices,
21 which, as -- as you -- as you lay out, may have
22 been for very sound reasons, those choices have
23 consequences, and the consequence of that choice
24 to insulate the public fisc and perhaps to gain
25 some efficiency in doing it this way --

1 JUSTICE JACKSON: Means that it can --

2 JUSTICE BARRETT: But, Ms. Ho --

3 JUSTICE JACKSON: -- be defrauded from
4 your -- your perspective under the FCA? The FCA
5 doesn't apply in that situation?

6 MS. HO: We believe that the FCA does
7 not apply, but there are -- there are plenty of
8 tools in the toolbox to -- to safeguard the
9 administrative fund from -- from fraud.

10 JUSTICE BARRETT: Ms. Ho, can I ask
11 you a question? It seems like your argument
12 rests on the premise that only one person can
13 provide, and I'm not really sure why that's
14 true.

15 I was thinking of an example of --
16 think back to the days when proctors used to
17 give out test booklets and pencils. So let's
18 say that I'm working as a proctor. It would be
19 perfectly natural for me to say to the students:
20 I'm going to provide each of you with a pencil
21 and a booklet. Now I didn't go out and purchase
22 those with my own money. The school presumably
23 provided them to me and then I provided them to
24 the students.

25 I mean, I think one person doesn't

1 have to provide. I think we could say that the
2 United States provided funds, for example, that
3 it -- this hundred million dollars that it got
4 through debt collection, et cetera, and then
5 also say that the carriers provided money to the
6 funds through their fees or that the carriers
7 provided -- funds to the United States, which
8 was a conduit.

9 I just don't understand. I mean, are
10 you assuming that "provides" has to be
11 exclusive, that there's one ultimate provider?

12 MS. HO: In this case, yes, Your
13 Honor, because we look at the two parties that
14 are involved, the -- the -- who are -- who are
15 providing it. And the statute says the
16 government has to provide the money.

17 So my disagreement with my friends on
18 the other side with their reading of "provides"
19 is how that is provided. So our position is you
20 can't provide funds by making some -- making
21 someone else provide the funds, and you don't
22 provide funds when someone else acts as a
23 conduit --

24 JUSTICE KAGAN: Well, why not?

25 JUSTICE BARRETT: But they --

1 MS. HO: -- for those funds.

2 JUSTICE KAGAN: I mean, I had the same
3 sort of question that Justice Barrett did, a
4 different example.

5 If I have a sick friend and I arrange
6 for Uber to bring that sick friend chicken soup,
7 I mean, in some ways, it's the deliveryman who
8 provides the soup, but I provided the soup
9 because I paid for it and I told the deliveryman
10 to go deliver it.

11 And so, here, you might have two
12 people that could in some sense be said to
13 furnish or supply or provide the soup.

14 MS. HO: Justice Kagan, I would say in
15 your -- in your hypothetical that you are
16 providing the funds, you're providing the funds
17 that then is used to -- to transmit the soup
18 or -- or the ride.

19 JUSTICE KAGAN: Well, I think my
20 friend --

21 MS. HO: And that -- and that's
22 what --

23 JUSTICE KAGAN: -- would thank me for
24 giving her the soup, not the funds, you know? I
25 mean -- I mean, I think my friend would

1 understand that the Uber guy was a kind of
2 conduit and it went through -- but -- but --
3 but -- but I ordered the soup. And, here, the
4 mandate is coming from the federal government in
5 the same way.

6 MS. HO: And -- and, Justice Kagan, I
7 think your hypothetical gets it exactly right
8 when you say that your friend would thank --
9 would thank you. The thank you note would go to
10 you, Justice Kagan, right, because you provided
11 the funds that then in turn led --

12 JUSTICE KAGAN: And so too I think --

13 MS. HO: -- however many -- down
14 the -- down the way.

15 JUSTICE KAGAN: -- the school might
16 say: Thank you to Congress and the FCC for
17 setting up this program that enables us to, you
18 know, get these services in our schools, because
19 everybody understands that the carriers aren't
20 doing from the goodness of their hearts.
21 Everybody understands that the carriers are
22 doing it because the U.S. government, the
23 Congress, the FCC, and then -- and then the
24 particular administrative entity that's been set
25 up pursuant to the statutory scheme, you know,

1 that's -- the -- you know, that's where the
2 directive is coming from. That's who's
3 responsible for schools getting what they're
4 getting.

5 MS. HO: Yes. And Congress made the
6 choice to set up the system to -- to deliver
7 those -- those resources, those important
8 resources, and it made choices. It chose to
9 require the private telecom carriers to pay.
10 And the FCC made the choice to have a private
11 administrator administer the system.

12 And in that system that Congress
13 designed, one consequence of that decision is
14 that the public funds, which is the -- the
15 cornerstone here of the False Claims Act, right,
16 threat to the public fisc is never implicated,
17 and so one consequence that flows from those
18 choices is the fall -- you -- you cannot have a
19 False Claims Act.

20 But, as I was -- as I was talking with
21 Justice Jackson about, that does not mean that
22 the fund is left without protections. There are
23 a toolbox of tools, everything from fees and
24 fines to disbarment from the program.

25 JUSTICE BARRETT: But, Ms. Ho, it

1 doesn't say that the threat -- I mean, clearly,
2 it -- one purpose is to protect the public fisc.

3 MS. HO: Yes.

4 JUSTICE BARRETT: But, I mean, also
5 protecting federal programs could be a purpose.
6 I mean, so you can't rely just, I think, on that
7 one purpose to narrow it.

8 And it -- it also seems at least for
9 the post-2009 claims that there's some tension
10 between the addition saying that it doesn't
11 matter if the money -- if the United States has
12 title to the money or property, but defining it
13 as public funds implies that is so.

14 MS. HO: Let me take both parts of
15 your question, Justice Barrett. Let me start
16 with your -- the -- the -- the last part, the --
17 the title clause.

18 And I think the -- the title clause
19 clarifies that the False Claims Act applies even
20 if the United States no longer has title,
21 present tense, to the money or property when the
22 request is made.

23 So a request for money that's been
24 provided to -- by the United States to a grantee
25 is still a claim even though the grantee and not

1 the United States holds title to the money when
2 the request is made. And the -- the revised
3 addition of the "provides for" clause
4 strengthens that interpretation because Congress
5 also amended that to say "provides or has
6 provided."

7 So it's really a timing issue. And I
8 would think, if Congress -- if Congress were
9 going to sever the link between the False Claims
10 Act and protecting the public fisc that has been
11 its historic focus, it would not have done
12 that -- it would not have taken that huge step
13 through such an oblique way as to revising the
14 title clause, which really is more about timing
15 and doesn't sever the link between the public
16 fisc and the FCA.

17 And, Justice Barrett, let me take on
18 your second question -- your second aspect of --
19 of your question about the government -- the
20 purpose and the interest here, and that gets
21 back to what I was talking with Justice Jackson
22 about.

23 And the text of the False Claims Act
24 really answers that because, in the revised --
25 in the revisions, the amendments that were made

1 in 2009, Congress specified: If the money or
2 property is to be spent or used on the
3 government's behalf or to advance a government
4 program or interest and if the United States
5 provides or has provided any portion of the
6 money.

7 So, if -- if Congress wanted to sever
8 this historic link between the False Claims Act
9 and protecting the public fisc, the easiest way
10 for it to do that would have been just to
11 eliminate the "provides" clause altogether.

12 And Congress didn't -- didn't do that.
13 It adopted a very narrow amendment --

14 JUSTICE KAVANAUGH: To --

15 MS. HO: -- that was focused on the
16 timing issue, not severing the -- the False
17 Claims Act from the --

18 JUSTICE KAVANAUGH: On -- on Justice
19 Thomas's question about the hundred million
20 dollars --

21 MS. HO: Mm-hmm.

22 JUSTICE KAVANAUGH: -- I want to focus
23 on that as well for a minute -- what exactly
24 makes something part of the public fisc, to use
25 your terms, or makes something government funds,

1 to use your term? What are the precise indicia?

2 MS. HO: Sure. I would say public
3 money, money that is owed to the United States.
4 So that would take in taxes, certainly, but also
5 fees, say, that people pay the post office --

6 JUSTICE KAVANAUGH: Mm-hmm.

7 MS. HO: -- or customs that go into
8 the public fisc.

9 So I think the key -- the key -- the
10 key indicia is that it's simply money that the
11 government owns.

12 JUSTICE KAVANAUGH: From taxes or fees
13 or fines? No?

14 MS. HO: Yes. If the money -- if
15 it's -- if it's -- if it's money that's going
16 from private pockets into the public fisc, into
17 the government, the government owns that money
18 and the government can do with that money what
19 it wills. And by contrast --

20 JUSTICE KAVANAUGH: When you say "owns
21 the money," what are --

22 MS. HO: Owns the money.

23 JUSTICE KAVANAUGH: -- what are the
24 precise things we look at to determine whether
25 the government "owns the money"?

1 MS. HO: Sure. I think -- I think you
2 would -- I think one way -- maybe one helpful
3 way to look at it within --

4 JUSTICE KAVANAUGH: And, again, I'm
5 focused on the hundred million here.

6 MS. HO: Yes. Maybe one helpful way
7 to look at it within the False Claims Act
8 context that our case arises in is it is -- it
9 is money that -- that, if anything were to
10 happen to that money, right, that that --
11 that -- that the -- the -- the incidence of that
12 loss would be borne by the government.

13 And, in our case, whether you're
14 talking about the contributions or you're
15 talking about the debt, the settlement, the
16 restitution, all of which is owed to the
17 Administrative Company, all of which is being
18 paid by the private carriers, and the
19 government's role, as this Court said in the
20 Cohn case, right, money or property that is just
21 in the government's hands for temporary
22 possession before it's being returned to its
23 rightful owner is not public money or public
24 funds or endangering the public fisc --

25 JUSTICE KAVANAUGH: But couldn't you

1 say that --

2 MS. HO: -- for purposes of the False
3 Claims Act.

4 JUSTICE KAVANAUGH: -- about all
5 public funds? You know, taxes come in and then
6 they go out to pay for government programs; in
7 other words, the -- that's what I'm trying to
8 distinguish. Most government money comes from
9 taxes, some from fees --

10 MS. HO: Yes.

11 JUSTICE KAVANAUGH: -- some from
12 leases, et cetera.

13 MS. HO: Yes.

14 JUSTICE KAVANAUGH: But it's coming in
15 and going out.

16 MS. HO: And it is -- and it is -- it
17 is the government, right, it is coming into the
18 public fisc, right, and the government is then
19 sending it out. And that is not -- that's the
20 opposite -- that is what Congress did not want
21 here. Congress wanted money coming into a
22 private --

23 JUSTICE KAVANAUGH: Right. On your
24 broader argument, I get that. I'm still trying
25 to get the hundred million. But I -- I'm --

1 I --

2 MS. HO: Yes, I -- I think -- I
3 think -- I think the way to think about that
4 money is that is money just -- it's no different
5 than the contributions, Justice Kavanaugh.

6 JUSTICE KAVANAUGH: Okay.

7 MS. HO: It is owed to the
8 Administrative Company, and the government is
9 simply getting it and taking it back to its
10 private owner. The government doesn't keep any
11 of that money.

12 CHIEF JUSTICE ROBERTS: What --
13 what --

14 MS. HO: So, if something were to
15 happen to that money, all of the incidence of
16 loss would fall on the Administrative Company,
17 which, by the way, cannot have -- does not have
18 recourse to the Treasury for funds if it falls
19 short. It has to go involve commercially --

20 CHIEF JUSTICE ROBERTS: What -- what
21 if we --

22 MS. HO: Yes, Mr. Chief Justice.

23 CHIEF JUSTICE ROBERTS: What if we
24 don't agree with your treatment of the hundred
25 million and think -- agree with the government's

1 view of the hundred million? Is there any way
2 that you -- any argument you have that that
3 doesn't taint the 4 billion or whatever the
4 number is? In other words --

5 MS. HO: Yep.

6 CHIEF JUSTICE ROBERTS: -- if part of
7 it is the whatever -- you know, hundred million
8 over whatever the denominator is, does that mean
9 you lose?

10 MS. HO: So the plain text of the
11 False Claims Act refers to "any portion of the
12 money." I do think that would have damages
13 implications, right, because the remedial
14 provision -- and I think this is actually
15 another structural cue why we're right about all
16 of the money, the contributions and the money,
17 that the -- that comes back to the company as a
18 result of restitutions, debts, and settlements,
19 is the remedial provision says a civil penalty
20 of not less than 5,000, not more than 10,000,
21 plus three times the amount of damages which the
22 government sustains.

23 So, whether you're talking about the
24 contributions coming in or you're talking about
25 the contributions that weren't paid and that are

1 coming back into the fund, the government did --
2 was -- did not sustain loss either -- either way
3 under any -- any of those -- those funds, and --

4 JUSTICE KAGAN: Just to follow up the
5 Chief Justice's question, you're not suggesting,
6 are you, that there's some kind of tracing
7 requirement, that, you know, you have to find
8 the dollar that came into the Treasury and see
9 what happened to that exact dollar, because that
10 wouldn't make much sense, would it? So you're
11 not suggesting that?

12 MS. HO: No, I'm not suggesting that.
13 There -- that -- that sort of -- you might have
14 a question like that along the damages prong,
15 right, because you're looking at the damages
16 that the government sustains. That's the Custer
17 Battles case, right, where the tracing was an
18 issue in that.

19 JUSTICE KAGAN: Yeah.

20 MS. HO: But, no, no.

21 JUSTICE GORSUCH: Can you explain that
22 to --

23 JUSTICE KAGAN: And then --

24 JUSTICE GORSUCH: Sorry. Please go
25 ahead.

1 JUSTICE KAGAN: So one -- if I just
2 could go back to what Justice Kavanaugh was
3 asking you because, as I took Justice
4 Kavanaugh's question, it was really like every
5 time you tell me it comes in and it goes out,
6 again, putting the rest of the money aside, but
7 that a hundred million, it's just coming in and
8 going out in the typical way money always comes
9 in and goes out.

10 And you said the loss doesn't fall on
11 the government. But, in some sense, that's
12 always true because the money is appropriated
13 for some other thing, some other activity, and
14 the loss falls on that other activity or
15 purpose. So I guess I'm still searching for
16 what your answer is to Justice Kavanaugh's
17 question.

18 MS. HO: Sure. And I -- I -- I think
19 the -- the key to the debt settlements and
20 restitutions is that they -- they are no
21 different than the contributions that the
22 carriers pay directly to the Administrative
23 Company and that the Administrative Company then
24 disburses -- may I finish?

25 CHIEF JUSTICE ROBERTS: Yeah -- yeah.

1 Sure.

2 MS. HO: Thank you.

3 It is simply -- it is money that
4 belongs to the Administrative Company, owed to
5 the Administrative Company, and that is brought
6 back to, and that the -- the only role of the
7 government with respect to the -- the debts and
8 the settlements and the restitution is to hold
9 that in trust for its rightful owner. No
10 different than when the government collects
11 restitution in a criminal case, it holds that
12 money in trust for the victim --

13 JUSTICE KAGAN: Thank you.

14 MS. HO: -- who is the owner. Thank
15 you.

16 CHIEF JUSTICE ROBERTS: Thank -- thank
17 you, counsel.

18 Justice Thomas, anything further?

19 Justice Sotomayor?

20 JUSTICE SOTOMAYOR: Your -- earlier
21 answer suggests to me that you think you -- that
22 this case won't end this matter unless we rule
23 on the government -- on the Respondent's first
24 ground, that this is a government program in
25 total, correct? Because what you're -- I think

1 what you're saying is we -- if our ruling relies
2 simply on the hundred million, that your next
3 case is going to be: Okay, I'll accept that,
4 but I'm going to fight about whatever the
5 recovery is under the False Claims Act. That's
6 what you just said to me.

7 MS. HO: I -- I -- I -- I -- I
8 think -- I -- I -- what I was -- what it is --
9 it is trying to say is the text of the False
10 Claims Act reads that so long as any portion of
11 the money in government -- is government funds.
12 Our -- our position is that the government
13 doesn't provide a cent of the money at -- at
14 all.

15 JUSTICE SOTOMAYOR: If we say they
16 provide at least a hundred million, is your
17 argument going to be that recovery is limited to
18 that hundred million or that recovery, assuming
19 you go under the False Claims Act, that recovery
20 is limited to a hundred million, or are you
21 going to take this position you're now taking,
22 that the government hasn't suffered any harm so
23 that nothing would come to the government?

24 MS. HO: Well, our -- our -- our
25 position is that the government hasn't suffered

1 any harm. If you -- if you disagree and you
2 hold that the government has provided any
3 portion of that money, then, Justice Sotomayor,
4 you're right, that then does -- that becomes a
5 damages issue because the --

6 JUSTICE SOTOMAYOR: So this case
7 doesn't end. Then you're going to argue that
8 their damages have to be limited to a hundred
9 million? What are you going to argue?

10 MS. HO: Well, I think we would -- you
11 know, our -- position is that there is no fraud
12 here at all. We would go -- we would go back
13 and -- and have -- have a trial. Our position
14 is that there's -- there's no fraud here,
15 period.

16 JUSTICE SOTOMAYOR: Assume there's a
17 finding of fraud, that you should have paid
18 more -- you should have given them a greater
19 discount than you did. So assume you -- you
20 lose the fraud parts. Are we back to a case
21 where you're going to claim the damages are
22 limited because?

23 MS. HO: Justice Sotomayor, I think,
24 if we're in a situation where we have a trial on
25 the claim, that would depend on what --

1 JUSTICE SOTOMAYOR: Counsel, just ask
2 my --

3 MS. HO: -- what -- what the -- what
4 the jury --

5 JUSTICE SOTOMAYOR: -- answer my
6 question.

7 MS. HO: It would be -- it would be
8 what -- whatever the jury finds in terms of
9 damages, the limit on that would be the amount
10 of damages the government sustains, and that --
11 that would depend on what the jury were -- were
12 to find in that case.

13 JUSTICE SOTOMAYOR: And you're saying
14 there would be no damages because the -- the --
15 the fund got the hundred million from the
16 government.

17 MS. HO: Our -- our position is no
18 fraud, no damages.

19 JUSTICE SOTOMAYOR: Okay.

20 MS. HO: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?
22 Justice Gorsuch?

23 JUSTICE GORSUCH: Ms. Ho, I just want
24 to follow up on that just so I understand.

25 So assume you lose on the hundred

1 million. It would be sent back.

2 MS. HO: Yes.

3 JUSTICE GORSUCH: And there would be a
4 trial.

5 MS. HO: Yes.

6 JUSTICE GORSUCH: And let's assume you
7 lose on the -- on the -- on the merits of the
8 trial. And I know those are unpleasant
9 assumptions, but work with me a minute.

10 I think you would have open to you two
11 arguments. One, that the hundred million
12 dollars is not traceable to the losses in this
13 case because the funds didn't follow through. I
14 assume you'd make that argument, is that
15 correct?

16 MS. HO: Yes, Justice.

17 JUSTICE GORSUCH: And then I'm --
18 I'm -- I'm detecting in your colloquy with
19 Justice Sotomayor that you might make an
20 additional argument that damages would be
21 limited to a hundred million dollars in any
22 event, is that correct?

23 MS. HO: Yes.

24 JUSTICE GORSUCH: Okay. Thank you.

25 MS. HO: Yes. Thank you, Justice

1 Gorsuch.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: In your brief, you
5 mentioned constitutional avoidance --

6 MS. HO: Mm-hmm.

7 JUSTICE KAVANAUGH: -- and I'm, I
8 guess, having trouble connecting that argument
9 to this case in the sense of how it would be any
10 more or less unconstitutional if -- the overall
11 scheme -- if we disagreed with you here. So can
12 you connect that up?

13 MS. HO: Sure. So our -- our
14 position -- and, as -- as -- as you say, it's a
15 constitutional avoidance argument that looks at
16 the justification for a relator, right?

17 And so the relator has standing under
18 this Court's decision in Stevens, right,
19 because, in a sense, it -- it is the -- the
20 delegate of the government's injury, right, its
21 proprietary injury, right, its pocketbook
22 injury.

23 So, in a case like ours, where the
24 government hasn't sustained any loss, right,
25 then that leaves the relator only with the

1 government's sovereign interest to go after
2 violators of the law.

3 So we -- we agree that our -- our
4 argument in terms of constitutional avoidance
5 doesn't -- doesn't completely solve the problem,
6 but we would urge the Court not to go further
7 down the path and make the -- the situation
8 worse by allowing a situation where a relator is
9 only operating on the basis of the government's
10 sovereign interest, which is the Article II
11 problem --

12 JUSTICE KAVANAUGH: Thank you.

13 MS. HO: -- that we raised. Thank
14 you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 JUSTICE BARRETT: Ms. Ho, I want to
18 follow up on the questions that Justice
19 Sotomayor and Justice Gorsuch asked you, and let
20 me just see -- I just want to make sure. I
21 don't -- I don't think I quite have your answer.

22 So let's assume you lose on the
23 hundred million dollars, and let's assume again
24 that you lose at trial, and then it's a question
25 of calculating the damages sustained.

1 I can't really tell how damages
2 sustained are measured here in this situation
3 where you have someone other than the government
4 itself collecting or disbursing the funds. I
5 saw one Fourth Circuit case that addressed that
6 and that was it.

7 So my question is: I -- I don't think
8 it would be a hundred million dollars, right,
9 because that's not the allegation of -- maybe
10 I'm wrong. I didn't think Wisconsin Bell was
11 accused of shortchanging by overcharging by a
12 hundred million dollars. That's just --

13 MS. HO: No.

14 JUSTICE BARRETT: -- not the
15 government --

16 MS. HO: No.

17 JUSTICE BARRETT: Okay. So let -- I'm
18 just picking a number. Let's say it's \$20,000.
19 If that money -- if the government itself had
20 been directly defrauded of that money and you
21 had treble damages, it would be \$60,000.

22 I think what -- what -- if I -- if --
23 I have the same question that they do. My
24 question is: If you get to that point and
25 you're trying to calculate damages sustained to

1 the government, are you going to say: Yeah,
2 it's 60,000 once you treble it, just like it
3 would be if they were dealing directly with the
4 government?

5 Or would you say: No, we have to
6 calculate the marginal cost to the government in
7 some kind of way? Or you might say: It's
8 zeroed out. Like, the government didn't
9 actually sustain any damage here. And so then
10 it doesn't mean that the relator gets nothing
11 because then there are other -- penalties and
12 fines that are available under the FCA.

13 That's my question.

14 MS. HO: Justice Barrett, let me take
15 a step back and say I think that the discussions
16 that we've been having highlight the mismatch
17 here and show why the government couldn't
18 possibly have provided the funds at issue --

19 JUSTICE BARRETT: Okay. But assume
20 you lose that.

21 MS. HO: -- including -- including
22 the --

23 JUSTICE BARRETT: Assume you lose
24 that.

25 MS. HO: If we lose that, then what

1 that means -- all that means is that we have a
2 claim, right? The relator has a claim. And it
3 would certainly be the relator's job, assuming
4 this gets to trial, to prove up damages and the
5 jury's job then to decide what is that.

6 JUSTICE BARRETT: Right, right, right.

7 MS. HO: So I think the mismatch --

8 JUSTICE BARRETT: But is the relevant
9 number that the relator, in your view, would be
10 aiming at the \$20,000 that I'm hypothesizing, or
11 would it be some marginal cost to the
12 government, or, as a matter of law, for a jury
13 instruction, would you be saying, you know, it's
14 zero because the government didn't actually
15 suffer any loss? Even though the government
16 provided the hundred million dollars, the
17 damages sustained to the government were none?

18 MS. HO: I -- I think the way I would
19 answer that, Justice Barrett, is to -- to look
20 to the text of the remedial provision, which
21 refers to damages that the government sustains.
22 And so it would be the relator's job at trial to
23 prove that amount, whatever that is.

24 And I -- and we would -- we would
25 retain our full panoply of arguments why the

1 relator isn't entitled to a dime for that or for
2 other reasons.

3 JUSTICE BARRETT: Thank you, Ms. Ho.

4 MS. HO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: So it seems to me
8 that your "provides" argument rests on the
9 premise that the FCA is about putting the public
10 fisc at risk.

11 MS. HO: Mm-hmm.

12 JUSTICE JACKSON: You've said this
13 many times and that there is, you said, a
14 historical link between the public fisc and the
15 FCA. And I guess I'm looking at the history and
16 I don't really see it that way, so I'd like for
17 you to respond.

18 You know, as I read the history of the
19 FCA, the purpose is broader than just trying to
20 protect the public fix -- fisc. In fact, when
21 Congress passed in 1986 the amendments where
22 "claim" -- the "claim" definition --

23 MS. HO: Mm-hmm.

24 JUSTICE JACKSON: -- that we're
25 talking about here was put into the statute, it

1 also had a report that talked about what it was
2 doing, and that GAO report documented widespread
3 fraud in government programs and focused on "the
4 non-monetary effects" of the fraud and
5 Congress's concern that it wasn't just about the
6 money. It talked about things like the loss of
7 confidence in government programs. It pointed
8 to incidents in which the beneficiaries of the
9 program did not get the benefits that Congress
10 wanted them to get. So it was clearly beyond
11 the fiscal impact.

12 And so what I guess I'm wondering is:
13 Doesn't that sort of undermine your argument
14 that all we need to care about here is looking
15 at this through the lens of whether or not the
16 government has actual monetary skin in the game
17 in this way?

18 MS. HO: Yeah. Respectfully, no,
19 Justice Jackson, and -- and I think that's the
20 case for three reasons.

21 And let me start with this Court's
22 precedents on the False Claims Act, and this
23 Court has said again and again that the False
24 Claims Act is not an all-purpose fraud statute,
25 even fraud against the government. It is not an

1 all-purpose fraud statute against the
2 government.

3 I think the reason for that is that at
4 every juncture from the 1980 -- '86 amendments
5 to the 2009 amendments, Congress has made
6 adjustments to the False Claims Act, but it has
7 never --

8 JUSTICE JACKSON: Yeah. No, I'm not
9 talking -- I -- I -- I --

10 MS. HO: -- it has never severed the
11 rule from that.

12 JUSTICE JACKSON: No, I understand.
13 But I guess what I'm trying to perhaps get your
14 feedback on is if we think that the False Claims
15 Act was doing more than just caring about
16 whether the government lost a dollar as a result
17 of this fraud but, in fact, was also about
18 whether the fraud prevented the program from
19 operating.

20 The government has lots of different
21 ways in which it might fund its programs. Some
22 of them might be direct funding from the
23 government. Some of them might be orders by the
24 government to have other people fund the
25 program.

1 But, at the end of the day, what the
2 government wants is for that program to operate
3 effectively. It wants it to work. And fraud,
4 says the government in its reports when it put
5 out the FCA, is undermining the effectiveness of
6 our program.

7 So you want us to make a distinction
8 about whether or not the FCA applies that based
9 on the -- that is based on the mechanism of
10 funding, but that just assumes that the
11 mechanism of funding mattered to the government.

12 And I'm telling you that from the
13 history, what -- the -- the government was
14 broader than the mechanism of funding as the
15 reason why the FCA should apply.

16 MS. HO: And I think, Justice Jackson,
17 the best -- our -- our -- our surest instrument
18 for registering the concern and purpose of
19 Congress is the text of the statute that it
20 enacted. And it --

21 JUSTICE JACKSON: No, I understand. I
22 understand. But you make --

23 MS. HO: -- and it referred -- and it
24 referred to money --

25 JUSTICE JACKSON: -- a lot of

1 representations about what the -- I'm only going
2 this route because your whole argument is the
3 government wanted in the FCA to have this
4 protection of the government funds.

5 MS. HO: Yes.

6 JUSTICE JACKSON: So let me just ask
7 you one final question. What -- what do you do
8 with the fact that the House report from 1986
9 that discusses the statutory --

10 MS. HO: Mm-hmm.

11 JUSTICE JACKSON: -- definition of
12 "claim" says, "'A claim upon any government
13 agency or instrumentality, quasi-governmental
14 corporation, or non-appropriated fund activity
15 is a claim 'against'" -- "upon the United States
16 under the Act.'"

17 It seems very clear that Congress
18 wanted to get at things beyond just actual
19 government agencies in this way, that they were
20 also sweeping in government corporations, et
21 cetera, as necessary to make sure that its
22 programs operated.

23 MS. HO: Yes, Justice Jackson. I
24 think the key word in -- in all of the examples
25 you just made is -- is "government," right?

1 Government agency, government --

2 JUSTICE JACKSON: So is this a

3 quasi-govern -- I thought this was a

4 quasi-governmental corporation, the USAC.

5 MS. HO: No.

6 JUSTICE JACKSON: It's not?

7 MS. HO: No. The -- the -- the --

8 the -- the Administrative Company --

9 JUSTICE JACKSON: Yeah.

10 MS. HO: -- is a private company. It

11 is private -- corporation incorporated in --

12 in -- in Delaware, it -- and -- and -- and we --

13 we know that it's not a government

14 instrumentality or agent because, if it were, it

15 would run afoul of the Government Corporation

16 Control Act because --

17 JUSTICE JACKSON: Thank you.

18 MS. HO: -- the FCC sought permission,

19 and it -- it wasn't provided.

20 CHIEF JUSTICE ROBERTS: Thank you,

21 counsel.

22 MS. HO: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Singh.

24

25

1 ORAL ARGUMENT OF TEJINDER SINGH

2 ON BEHALF OF THE RESPONDENT

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

5 When Wisconsin Bell requests E-rate
6 funds, the government provides the money. The
7 administrator pays on the government's behalf
8 using money the government collects and controls
9 to advance a federal program that the government
10 created.

11 FCC mandates, which the administrator
12 must follow, specify who must be paid and how
13 much they must be paid. So, when the
14 administrator paid Wisconsin Bell, that was the
15 government providing money through its agent.

16 Indeed, many government programs,
17 including most notably Medicare, use private
18 claims administrators to provide billions of
19 dollars to beneficiaries of government programs.
20 As Justice Kagan's soup hypothetical, Justice
21 Barrett's proctor hypothetical illustrate, when
22 an entity like the government provides money
23 through agents, we credit the principal in that
24 situation. So, when Wisconsin Bell receives
25 money, claims money, from the E-rate program, we

1 credit the government with providing it.
2 FCC mandates also determine carriers'
3 obligations to contribute to the Universal
4 Service Fund. Those mandates are how the
5 government provided funds to this program, and
6 it doesn't matter that the government routed the
7 funds directly from the carriers to the
8 Universal Service Fund instead of requiring an
9 unnecessary detour through federal Treasury
10 accounts because the False Claims Act's
11 applicability doesn't turn on bookkeeping
12 conventions, which is also a point Ms. Ho made,
13 I think, quite well.

14 The point is not exactly how did the
15 money move through a bureaucracy, was it routed
16 efficiently or less efficiently. The point is
17 who is really making the money move, and it is
18 the government. The government is the only
19 relevant decision-maker at all stages of
20 creating, funding, and then controlling the
21 distributions from this program. The
22 administrator merely does what the government
23 wants.

24 Under the plain meaning of the word
25 "provide," the government therefore provides the

1 money Wisconsin Bell claims. That's true of all
2 the money and especially the hundred million
3 that was discussed more -- earlier.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Mr. Singh, if this
6 had been an appropriated fund and the
7 administrator had been an federal agency, this
8 would be, of course, a very straightforward
9 case. We'd know exactly what the government's
10 financial stake was.

11 But this is private money from private
12 parties to another private party, and it's very
13 difficult to see what the government's financial
14 stake is. And I think it's -- it -- you might
15 ultimately conclude, or we might, that it is
16 enough to be federal funds. But it doesn't look
17 like federal funds. It looks like private
18 funds.

19 So, in this -- in this instance, would
20 you explain exactly what the government's
21 financial stake is here? It hasn't appropriated
22 any monies, it hasn't given any grants, and it
23 hasn't lost anything. No matter what happens
24 here, the government's not out of pocket.

25 MR. SINGH: Sure. So let me -- let me

1 start with part of the premise I'm not sure I
2 agree with. As Ms. Ho admitted in the first
3 part of the argument, this is treated for budget
4 purposes as a permanent indefinite
5 appropriation. The appropriation is located in
6 the Telecommunications Act, so it's not a
7 year-to-year appropriation where a specific
8 amount of money is designated, but it is treated
9 for budget purposes as appropriated funds.

10 And so, to the extent that that's
11 significant, I think it's satisfied here. Such
12 permanent indefinite appropriations are pretty
13 commonplace throughout the federal budget, and
14 so that piece of the premise I'm not sure I
15 agree with.

16 But I take the point that there are
17 aspects in which the funding structure of this
18 program is unusual, that there is less
19 government touching the money than there might
20 be for other federal programs. And, as I said
21 in my introduction, I just don't think that that
22 can be dispositive as to the question whether
23 the federal government is providing the money.

24 On the specific question of what has
25 the government lost, I think, if you look at

1 this the way that I do, which is to say the
2 government could have ingested this money into
3 Treasury accounts and then moved it to the
4 administrator and out to beneficiaries -- in
5 fact, we know it could have because it did so in
6 2018. It relocated all of the funds into
7 Treasury accounts. Nothing changed about how
8 the program works. It is still the same --
9 quintessentially the exact same program except
10 for the flows of funds.

11 And so I would say what the government
12 loses is all that money coming in because that
13 is money that it -- the government solely
14 controls to achieve its governmental purposes.
15 And so, when that money is not available because
16 fraud depletes the Universal Service Fund, there
17 is less money on hand to pay the beneficiaries
18 that the government is trying to provide
19 affordable telecommunication services to. And
20 that is really no different, I think, from any
21 other government spending program.

22 CHIEF JUSTICE ROBERTS: Well -- I'm
23 sorry, why don't you finish your answer.

24 MR. SINGH: No, I think that that's
25 what I've got.

1 CHIEF JUSTICE ROBERTS: It -- it is a
2 little bit different, and you mentioned this in
3 the beginning. It -- the GAO calls this back --
4 backdoor appropriations, which is not -- you
5 know, that's a little bit of a pejorative term,
6 I mean, and the reason I think is because you do
7 get very large amount of money without going
8 through the normal appropriations process.

9 And it seems to me that that's a
10 significant question, maybe at too high a level
11 of generality, but it -- it -- if you can take
12 and spend for whatever purposes you would like
13 any amount of money so long as you require a --
14 a -- a -- a private entity to pay it into a fund
15 and then you exercise whatever authority you
16 want to dispose of it in a particular way, that
17 seems to me a significant exception to the
18 normal appropriations process, and I wonder if
19 that's a concern at all.

20 MR. SINGH: I don't think it's a
21 concern in this instance. Nobody has made the
22 argument that anytime you have a permanent
23 indefinite appropriation, the False Claims Act
24 just doesn't apply or the program is invalid.

25 There is a --

1 CHIEF JUSTICE ROBERTS: Well --

2 MR. SINGH: As the Court may be aware,
3 there are other cases pending about the validity
4 of the Universal Service Fund structure,
5 precisely under doctrines like non-delegation,
6 that go to some of the concerns you're raising.
7 But I don't think those are False Claims Act
8 concerns.

9 What the False Claims Act is concerned
10 with is protecting the integrity of government
11 programs, as Justice Jackson pointed out, and
12 ensuring that pro -- program funds move to their
13 intended beneficiaries, which are identified by
14 the government, and the amounts they're supposed
15 to get come from the government as well.

16 And so I think, if you have concerns
17 about how the program is structured, those are
18 really concerns for another case, not this one,
19 because they don't bear on whether the Universal
20 Service Administrative Company is an agent of
21 the United States, nor whether the funds are
22 provided by the government.

23 And I would just say one more thing
24 which may help with the concern you're drawing,
25 is that the Universal Service Administrative

1 Company, the administrator here, is not like
2 just any private entity. You know, it's not as
3 if private carriers are being ordered to pay
4 funds to just another private company that's out
5 there. This company has one job. Its only job
6 is to administer this government program or this
7 set of Universal Service government programs.

8 It has no real other function, and I
9 think that really does distinguish this
10 situation from things the other side talks
11 about, like minimum wage or potentially other
12 examples where the government is causing money
13 to move between private parties and we don't
14 normally think of it as providing money.

15 CHIEF JUSTICE ROBERTS: If -- if we're
16 persuaded by your argument on the hundred
17 million dollars, it -- it seems to me a -- a
18 difficult question whether or not that sort
19 of -- whatever a non-pejorative word for
20 "taints" is, in other words, whether that
21 determines the characteristic of -- of the other
22 umpteen billion dollars. I mean, if -- if it
23 were 10 million, would that be enough to
24 characterize the -- the entire rest of the fund,
25 or -- or \$1? Or are you limited with respect

1 to, whether it's damages or whatever, to
2 the percent of money that you actually collect?

3 MR. SINGH: The text of the statute
4 says that if the government provides any portion
5 of the money requested or demanded, then it's
6 covered. Now, as I say, I think the government
7 provides it all. Wisconsin Bell can't get a
8 penny that the government does not authorize it
9 to get. And so that's our frontline argument,
10 of course.

11 CHIEF JUSTICE ROBERTS: So -- so just
12 to stop there --

13 MR. SINGH: Yes.

14 CHIEF JUSTICE ROBERTS: -- your
15 frontline argument is, if it's a dollar, the
16 entire billion-dollar account is government
17 funds?

18 MR. SINGH: Well -- well, to be clear,
19 our frontline argument is all of the money is
20 government funds. Now --

21 CHIEF JUSTICE ROBERTS: Okay.

22 MR. SINGH: -- coming down to your
23 question, which is about what if only a subset
24 of the money is provided by the government, I
25 think that under the "any portion" language, all

1 of the claims are still false claims.

2 I do acknowledge that there will be
3 damages questions down the line, and to be
4 candid, that is part of why we're saying all of
5 the money is government money. We don't want to
6 talk about those questions down the line. We
7 want it to be clear because this litigation has
8 been pending for a very long time, and we think
9 resolving it expeditiously is to everybody's
10 benefit.

11 So part of the reason we're arguing
12 for all of the money is looking around the
13 corner at the damages questions. But, to be
14 clear, in this case, the Petitioner has not made
15 an argument. They have not even attempted to
16 make the tracing argument that Justice Gorsuch
17 was alluding to.

18 They could have said: Well, if it's
19 only the hundred million, then that's not enough
20 to make us liable. They have said nothing of
21 the sort. And so I don't think that question is
22 before you.

23 I think you can acknowledge, as both
24 parties have, that the "any portion" language
25 basically gets us home on liability if you're

1 inclined to go that way, but I really do want to
2 talk through all of the money.

3 JUSTICE GORSUCH: Mr. Singh, on -- on
4 the hundred million, just to wrap that up, so
5 there is no traceability argument, so that takes
6 us to the question of damages.

7 Would a ruling on the hundred million
8 point in your favor cause you any heartburn when
9 it comes to damages and, if so, what would it
10 be?

11 MR. SINGH: Yes. Well, Your Honor, I
12 think it will cause the government more
13 heartburn than it causes me specifically, but it
14 will cause a lot of heartburn.

15 Here's why. The hundred million --
16 if -- if a hundred million were treated as the
17 upper limit on damages and --

18 JUSTICE GORSUCH: Would it be, or --
19 or --

20 MR. SINGH: Yeah.

21 JUSTICE GORSUCH: -- or would that be
22 relevant at all under the damages provision?

23 MR. SINGH: The issue has not been
24 briefed in this case or argued. The law of
25 damages is --

1 JUSTICE GORSUCH: I suspect you've
2 done a lot of thinking about that.

3 MR. SINGH: I have done a bit.

4 This Court's precedents are quite
5 favorable to us in saying that the amount of
6 damages should be liberally construed to make
7 the government completely whole --

8 JUSTICE GORSUCH: Okay.

9 MR. SINGH: -- and words to that
10 effect. But --

11 JUSTICE GORSUCH: So you'd take the
12 position that the hundred million is not the
13 upper limit?

14 MR. SINGH: We certainly would. But
15 it's -- I -- I acknowledge that it would be a
16 fight over the -- a legal fight over this that's
17 unnecessary, I think.

18 JUSTICE GORSUCH: Okay. Okay. I -- I
19 got that.

20 MR. SINGH: Yeah.

21 JUSTICE GORSUCH: So your -- is your
22 first preference then it provides all the money?

23 MR. SINGH: Certainly.

24 JUSTICE GORSUCH: Okay. And if we
25 rule on that ground, there's no need to get into

1 the agency stuff either, I would think.

2 MR. SINGH: Sure.

3 JUSTICE GORSUCH: And -- and, there,
4 there's some complications too because Congress
5 added the word "agent" in 2009, and some of your
6 claims predate that, right?

7 MR. SINGH: Yeah. Let me refund that
8 a moment. So I do think you're right that
9 presenting a claim to an agent, whether the
10 government provided the money or not, that's
11 actionable only after the 2009 amendments.

12 JUSTICE GORSUCH: Right. Okay.

13 MR. SINGH: But I actually think that
14 if you agree with us on the substance of the
15 agency point that the Administrative Company is
16 the government's agent, it sheds a lot of light
17 on who's providing the money.

18 JUSTICE GORSUCH: I -- I -- I get
19 that. But -- but -- but your frontline argument
20 is it provides all. And that would be your
21 preference because -- over the hundred million,
22 for the obvious reasons we've discussed, it
23 would be your preference over the agency line of
24 reasoning because of 2009?

25 MR. SINGH: Yeah.

1 JUSTICE GORSUCH: Okay.

2 MR. SINGH: But I don't want this to

3 sound just like my naked litigation preference

4 as it is also my --

5 JUSTICE GORSUCH: No, I -- I -- I want

6 to know your naked litigation preferences.

7 (Laughter.)

8 MR. SINGH: And you have them.

9 JUSTICE GORSUCH: Okay.

10 MR. SINGH: You have them.

11 JUSTICE GORSUCH: That's all I need to

12 know. Thank you.

13 JUSTICE BARRETT: So, Mr. --

14 JUSTICE KAVANAUGH: What you've got on

15 the --

16 JUSTICE SOTOMAYOR: You were just cut

17 off.

18 MR. SINGH: Oh, yeah. So --

19 JUSTICE SOTOMAYOR: No, I --

20 JUSTICE GORSUCH: Well, no.

21 MR. SINGH: -- so it's not only what I

22 want. It's also really about what this statute

23 is meant to accomplish.

24 You know, I think there is a point in

25 which I -- I somewhat agree with the other side,

1 which is when Ms. Ho says that the -- the
2 hundred million is really not terribly different
3 from all of the contributions, there's a sense
4 in which I agree with that because, although
5 that money is the money that the government
6 collects, banks, and then transfers, and so you
7 have to just ignore what you see with your own
8 eyes to ignore that the government is providing
9 that money, all of the money is dedicated to the
10 same purpose. It's all moving for the same
11 reason.

12 JUSTICE KAVANAUGH: That -- that's a
13 huge difference, I think, in practice. I mean,
14 all taxes come into a government account and
15 then go out. And with the hundred million, you
16 can really analogize to how the -- almost the
17 entire federal appropriations process works,
18 right?

19 So that's why the word "provides"
20 there -- I think the other side has a little bit
21 of trouble on the hundred million, but then,
22 when you get to the rest of it, it seems like
23 you have a -- a bit of a problem because the
24 word "provides" does not to me at least
25 ordinarily fit when the government orders one

1 private party to provide money to another
2 private party, which is, when we get outside the
3 hundred million, what I think is going on here.

4 JUSTICE BARRETT: Can --

5 JUSTICE KAVANAUGH: But correct me if
6 I'm wrong or respond otherwise.

7 MR. SINGH: Yeah, let me chew on this
8 a little bit with you. So I think the -- when
9 you think about the providing of money, I think
10 that there are two ways you can think about it
11 at least.

12 One is, who is providing money to the
13 Universal Service Fund, right?

14 We say the government provides it
15 because it created the fund and mandates the
16 money go into it. They say the carriers
17 provided it. Okay. And I get that there's a
18 debate, and as you acknowledge, we can fight
19 over that.

20 But you can think about it slightly
21 differently. The statute doesn't say, you know,
22 who provides money to the fund. It says: Who
23 provides the money requested or demanded? And
24 so you also, I think, should ask the question:
25 Who is providing the money to Wisconsin Bell and

1 claimants like Wisconsin Bell?

2 And when you think about it that way,
3 there is no plausible argument, I think, that
4 the carriers are providing that money. They
5 have relinquished all control of the funds by
6 the time it gets to the Universal Service Fund.

7 At that point, your only choices are:
8 It's either the administrator or it's the
9 government, right? And the administrator --

10 JUSTICE KAVANAUGH: Well, is the
11 administrator a government --

12 MR. SINGH: -- is only doing what --

13 JUSTICE KAVANAUGH: -- is the
14 administrator a government official?

15 MR. SINGH: No, but it is --

16 JUSTICE KAVANAUGH: No, and that's --

17 MR. SINGH: -- an agent.

18 JUSTICE KAVANAUGH: -- that -- that's
19 critical here, right?

20 MR. SINGH: Well --

21 JUSTICE KAVANAUGH: That's -- on -- on
22 the -- again, on the bigger argument, that's
23 critical?

24 MR. SINGH: -- no, because, for the
25 reasons that Justice Kagan gave with her soup

1 hypothetical and Justice Barrett with her
2 proctor hypothetical, when you have someone
3 who's just acting as an agent, we normally
4 attribute the providing of the thing to the
5 principal.

6 And, in fact, this is an example the
7 other side uses in their brief. They say, when
8 Grandma sends \$20 through the post office, we
9 credit Grandma, not the post office.

10 In this situation, if you ask who's
11 providing the money to Wisconsin Bell, well, the
12 administrator is transferring the money, but
13 it's doing so because the government requires it
14 to. It can't transfer a dollar more or a dollar
15 less.

16 JUSTICE GORSUCH: But, Mr. Singh, just
17 to give an example maybe in aid of Justice
18 Kavanaugh's line of thinking -- we've had some
19 colorful ones. This is less colorful, I
20 admit -- but a court order ordering a judgment,
21 plaintiff, you get money from defendant.

22 Does the court provide that money or
23 does the defendant provide that money and in --
24 if -- if so, what makes that example different?

25 MR. SINGH: Yeah. So I don't think we

1 would say in ordinary usage that the court
2 provides that money.

3 I want to make two points kind of
4 clear. First, I think that we read the word
5 "provides" in context, right, and so the whole
6 context is the government provides any portion
7 of the money or property requested or demanded,
8 and then there's that stuff about government
9 programs, government interests.

10 And I think, when you look at it in
11 context, what we're asking is: Here, did the
12 government fund this government program or not?

13 JUSTICE GORSUCH: Well --

14 MR. SINGH: And I think it did.

15 JUSTICE GORSUCH: -- court orders have
16 certainly funded the plaintiff's coffers very
17 nicely, and --

18 MR. SINGH: Yes, but it's not a
19 government program.

20 JUSTICE GORSUCH: -- and it did
21 through government coercion in the same way that
22 we have here, right? It's -- it's, you know, on
23 pains of going to jail if you don't do it. So
24 what -- what's the difference?

25 MR. SINGH: So I think what the

1 difference is if you look at just exactly what I
2 was talking to Justice Kavanaugh about. In that
3 situation, certainly, the defendant who has to
4 pay the plaintiff is not the government's agent,
5 right? And so you normally -- as I was saying,
6 when a principal says, agent, give the money to
7 someone, you attribute the giving to the
8 principal.

9 JUSTICE GORSUCH: But putting aside
10 the agency argument --

11 MR. SINGH: I like the agency
12 argument.

13 (Laughter.)

14 JUSTICE GORSUCH: I know you do.

15 MR. SINGH: Okay.

16 JUSTICE GORSUCH: Do you have anything
17 beyond the agency argument?

18 MR. SINGH: That is my --

19 JUSTICE GORSUCH: Okay.

20 MR. SINGH: -- that is the clearest,
21 most crystallized response, but I think more
22 broadly --

23 JUSTICE KAVANAUGH: Well, isn't the --

24 JUSTICE BARRETT: Mr. Singh --

25 JUSTICE KAVANAUGH: -- entire civil

1 litigation system -- under what you're
2 describing as government program --

3 MR. SINGH: I --

4 JUSTICE KAVANAUGH: -- the entire
5 civil litigation system is a "government
6 program"?

7 MR. SINGH: So, in context, I don't
8 think that's true, Your Honor. I -- I don't
9 think the government has been construed to mean
10 the court system under the False Claims Act.
11 That's kind of a separate question.

12 I would also add --

13 JUSTICE KAVANAUGH: But just on your
14 theory of "provides" --

15 MR. SINGH: Yeah. I would also add,
16 though --

17 JUSTICE KAVANAUGH: Wait. Can you
18 stop there?

19 MR. SINGH: Yeah, yeah. Sorry.

20 JUSTICE KAVANAUGH: On your theory of
21 "provides," why wouldn't it be? Put aside, you
22 know, the government hasn't contended or --

23 MR. SINGH: So, under our theory of
24 "provides," as I'm saying, the -- the court
25 system in that --

1 JUSTICE KAVANAUGH: Which you've
2 connected to the word "program" as opposed to
3 "fisc." That's a key move in your argument, I
4 think, government program rather than government
5 fisc. The word "provides" goes to government
6 program.

7 Under your theory of that, why isn't
8 the civil litigation system a government program
9 that -- in which the government is providing the
10 money, in Justice Gorsuch's example, to the
11 plaintiff?

12 MR. SINGH: Yeah. So, as I was
13 saying, I don't think the word "government,"
14 with a capital G in the statute, has been
15 construed to mean the court system.

16 I would also say that, like, to the
17 extent you're concerned about this --

18 JUSTICE KAVANAUGH: That doesn't
19 answer my question, but you can keep going.

20 JUSTICE JACKSON: Isn't the answer,
21 Mr. Singh, about the duties that are running in
22 the civil litigation? In other words, the
23 duties, the duty to pay comes from the
24 defendant, the private person, right --

25 MR. SINGH: Yes.

1 JUSTICE JACKSON: -- based on the --
2 the claim that the plaintiff has. It's not --
3 the duty is not coming from the court in the
4 same way.

5 MR. SINGH: Well, that's right. I
6 mean, the court will enforce the duty or --
7 yeah.

8 JUSTICE JACKSON: The court is just
9 enforcing --

10 MR. SINGH: Yes.

11 JUSTICE JACKSON: -- in that
12 situation. That's why the court is not like --

13 MR. SINGH: And that also is, I think,
14 my point about how, when a principal orders an
15 agent to pay, that's different from regulating,
16 where -- when the government -- it's not -- you
17 do not have to accept the proposition and we do
18 not want you to accept the proposition that
19 anytime the -- government causes money to flow
20 from A to B, it has provided money within the
21 meaning of the False Claims Act.

22 We think that this statute is limited
23 to the situation where the government is funding
24 its programs. It's not going to encompass all
25 regulation. And I would say that to the extent

1 you have any concerns about this, empirically,
2 the fact that there aren't cases all the time
3 where every plaintiff who's recovered in civil
4 litigation is bringing False Claims Act cases
5 because someone defrauded them is good evidence
6 that the statute --

7 JUSTICE KAVANAUGH: Well, until we
8 rule --

9 JUSTICE KAGAN: If I --

10 JUSTICE KAVANAUGH: -- for you here.
11 (Laughter.)

12 JUSTICE KAVANAUGH: And then -- then
13 we might. I mean, that's --

14 JUSTICE BARRETT: Mr. Singh --

15 JUSTICE KAVANAUGH: -- the concern.
16 Sorry to interrupt.

17 JUSTICE BARRETT: No, no, I
18 interrupted you. Go ahead.

19 JUSTICE KAVANAUGH: I -- I'm done.

20 JUSTICE BARRETT: You're done?

21 What -- regardless of -- let -- let's
22 assume you win, and regardless of whether you
23 win on the hundred million argument or your
24 larger argument, what are the damages sustained?

25 MR. SINGH: In our view, the damages

1 sustained are all of the money that went into
2 the E-rate program because the government has
3 caused that money to be available for the
4 beneficiaries, and so, when Wisconsin Bell takes
5 it unlawfully, they have made a false claim for
6 money.

7 JUSTICE BARRETT: So it's not just the
8 money that Wisconsin Bell took unlawfully?

9 MR. SINGH: So there will be a debate
10 about whether the entire amount claimed --

11 JUSTICE BARRETT: Assuming that it
12 took it unlawfully, of course.

13 MR. SINGH: Yeah, yeah.

14 JUSTICE BARRETT: Yeah.

15 MR. SINGH: There will be a debate
16 about that between the parties. We think that
17 the right way to make the government whole is to
18 take the entire claim amount. They may argue
19 that it's the delta. So if, you know, they
20 violate the lower -- lowest-corresponding price
21 rule by charging -- sorry. Can I finish, Your
22 Honor?

23 CHIEF JUSTICE ROBERTS: Sure.

24 MR. SINGH: Yeah. If they violate it
25 by charging 50 percent more than they should

1 have, then there is some delta of overcharge,
2 which results in a delta of subsidy, and maybe
3 they'll argue that that amount is the damages.
4 That has not been hashed out yet in the lower
5 courts.

6 Our position will be -- you can guess,
7 our position will be the broader damages
8 position. Their position will be the narrowest
9 one. And that will be something to be figured
10 out on remand.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 JUSTICE THOMAS: Just a matter of
15 curiosity. What would be the difference between
16 the authorities of the agent as opposed to a
17 case if -- where there was a sub-agency that
18 administered the fund?

19 MR. SINGH: I'm sorry. I want to make
20 sure that I'm --

21 JUSTICE THOMAS: Normally, you would
22 have an agency in the government administering a
23 government program.

24 MR. SINGH: Mm-hmm.

25 JUSTICE THOMAS: The -- here, you're

1 saying that the private entity is an agent. So
2 what is the difference in their authority and
3 their liability and -- and their conduct in --
4 in this E-rate program?

5 MR. SINGH: So, if I hear the question
6 correctly, and please correct me if I don't, the
7 idea is how is it different -- how can USAC, the
8 Administrative Company, be held accountable
9 differently from if a government sub-agency were
10 administering the program?

11 JUSTICE THOMAS: That's close enough.

12 MR. SINGH: Okay. So the way that
13 USAC's appointment works, they have a memorandum
14 of understanding with the government. They are
15 appointed to be the permanent administrator by
16 virtue of FCC regulations. They receive -- they
17 have regular oversight meetings with the FCC.
18 They get letters and phone calls telling them
19 what to do. And, of course, they have a bunch
20 of regulations telling them what to do as well
21 and the memoranda of understanding.

22 If they breach the terms of that, the
23 FCC can correct them. If they refuse to be
24 corrected, the sanctions can go as high as them
25 losing their job, which would be kind of

1 similar, I think, to what would happen to
2 federal employees. And I think, overall, that's
3 a really strong point in our favor because, if
4 this entire function could be in-housed and look
5 essentially the same, I think that tells you
6 that they are acting as government agents.

7 JUSTICE THOMAS: The difference is
8 that the program, that the administrator here
9 has no liability or no relationship with the --
10 the -- with Congress, for example, and it's not
11 treated as a government agency and is not
12 subject to the government rules. It's just,
13 you're saying, a -- and -- a memorandum of
14 understanding. It's just an agreement.

15 MR. SINGH: Well, I think, if Congress
16 wanted to say don't use this entity, it could
17 say that. I think, if Congress -- if the FCC
18 wanted to terminate the relationship, it can do
19 so. And so I think that there may be slightly
20 greater freedom in the current structure because
21 maybe the FCC couldn't get rid of a sub-agency.
22 It would depend how it was created.

23 But I think it's very, very similar.
24 I -- I -- I don't see a lot of practical
25 differences between how this program actually

1 works and how it would work if it were entirely
2 housed within the government. I think it was
3 put outside just to be efficient, and I don't
4 think government should be punished for shying
5 away from big government and doing the more
6 efficient thing.

7 JUSTICE THOMAS: Well, for those of us
8 who have run agencies, it would be a lot easier
9 to control the -- an -- an agent under an MOU
10 than to have to deal with an agency that is also
11 subject to oversight.

12 MR. SINGH: Your Honor, that may be
13 true. I don't know. In this case, I think what
14 we understand is that the control structure
15 allows the FCC with fairly comprehensive control
16 over the administrator's actions, which is one
17 reason why we think it's an agent.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

19 JUSTICE ALITO: Let me see if I
20 correctly understand some of what you have just
21 told us. The question here -- the only question
22 before us is whether the reimbursement requests
23 are claims under the False Claims Act.

24 You could win on any of three grounds.
25 The narrowest of those would concern the 100

1 million. But you've argued that we should
2 really decide the case under one of the other
3 broader grounds because that might have an
4 effect on a damages question that has not been
5 briefed and we don't know whether the case will
6 ever get to the issue of damages.

7 Is -- is that a correct summary of
8 some of what you've said?

9 MR. SINGH: That is part of why I want
10 to do it, but, as I pointed out, I think that
11 there is a legal doctrinal reason to decide the
12 case on slightly broader grounds.

13 One of the reasons -- so it's true, if
14 you say that we win on the hundred million, you
15 will resolve the technical circuit split over
16 the question presented, which is whether E-rate
17 funds are covered by the False Claims Act.

18 But there is a little bit of
19 disuniformity in the legal rules that courts
20 have used to get there. The Fifth Circuit said
21 the money has to come from the Treasury. The
22 Seventh Circuit said no. And so there would be
23 a little bit of disuniformity still remaining.
24 I think it's worthwhile, if easy, to resolve
25 that by reaching the broader ground that the

1 government provided all the money.

2 And I think it will -- will also
3 provide more clarity for other cases that aren't
4 just about the E-rate program if folks
5 understand that when the government funds its
6 programs, even if it does so through this direct
7 efficient mechanism instead of an inefficient
8 mechanism, the False Claims Act still applies.

9 So, yes, I -- I do think you can
10 resolve it on the narrowest ground. I don't
11 know that that's the most satisfactory
12 resolution.

13 JUSTICE ALITO: Well, what if you were
14 to -- what if we thought that you should win
15 under the hundred million argument but lose
16 under the other two? Then I assume you would
17 prefer to just take your narrow victory and go
18 home, right?

19 MR. SINGH: Oh, sure. Then you should
20 say the hundred million, we decide nothing else.
21 And I'll work with the courts on remand. No
22 problem.

23 (Laughter.)

24 JUSTICE ALITO: Thanks a lot.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: That was quite
3 fascinating. I'm still laughing over it,
4 counsel.

5 I -- I -- I do want to go back to
6 these two theories. I -- I actually thought
7 there were three theories that you had proposed.
8 The first was that the entire program is a
9 government program. The government is supplying
10 the money because the government's setting the
11 rate at which the contractors have to pay.
12 They're telling the Universal Service Fund how
13 to spend that money. And they're creating the
14 FCC program that qualifies carriers to receive
15 the money. So they're controlling every aspect
16 of the distribution, correct?

17 MR. SINGH: Yes. That's our argument
18 for sure.

19 JUSTICE SOTOMAYOR: I think they're
20 doing this more specifically than many of the
21 appropriations mechanisms that we reviewed
22 recently -- think one of my colleagues wrote
23 about this -- in which we have appropriations to
24 agencies with no more guidance than says it's a
25 continuing X amount and you spend it on these

1 things and that's it.

2 We have more specificity than that
3 here, correct?

4 MR. SINGH: Quite correct. The FCC's
5 rules are very detailed.

6 JUSTICE SOTOMAYOR: Okay. And we have
7 some appropriations that -- that are based on
8 how much is collected by the -- that agency, and
9 they're entitled to spend that, and if they
10 don't spend that, they can save it for the
11 future, correct?

12 MR. SINGH: Yeah. And this is one
13 such program, yes.

14 JUSTICE SOTOMAYOR: And that's your
15 point, that this is very similar to those
16 appropriation programs?

17 MR. SINGH: Yes. Our point, Your
18 Honor, is that the E-rate program and the
19 Universal Service programs are fundamentally no
20 different from basically every government
21 spending program.

22 JUSTICE SOTOMAYOR: All right. I
23 missed an answer you were giving, I think, to
24 Justice Barrett when she was asking you about
25 the measure of damages.

1 I -- I thought that your claim was
2 that under this program, they should have paid
3 us -- or they should have not charged us a
4 certain amount; they should have charged us a
5 lot less.

6 But you seemed to be suggesting in
7 your answer to Justice Barrett that your claim
8 is something more than the amount that you were
9 charged.

10 MR. SINGH: Yeah. So --

11 JUSTICE SOTOMAYOR: Am I understanding
12 your answer to her? And if that's true, what's
13 that something more? What has the U.S. lost
14 besides the fact that you should have been
15 paid -- that you should have paid less money, I
16 guess?

17 MR. SINGH: Yeah. So I think that if
18 the outcome of the damages analysis is that
19 the -- you know, only the extra amount of
20 subsidy that was given to Wisconsin Bell and its
21 customers is the measure of damages, that would
22 be a reasonable outcome to the damages
23 discussion. But all I was say -- telling
24 Justice Barrett is, you know, that has not been
25 hashed out yet. We're not at the damages stage.

1 And so -- yeah.

2 JUSTICE SOTOMAYOR: I understand that.
3 I'm going back to, what else are you claiming
4 you're entitled to besides that? That's the
5 part that I don't understand.

6 MR. SINGH: So, in certain contexts,
7 when claims are made that should not have been
8 paid, courts have determined that the entire
9 amount claimed constitutes damages.

10 This may not be such a case. The
11 other side may win, that, no, we were allowed to
12 make a claim, you just think we made it too big,
13 and so the damages are less.

14 My point is only that because that
15 discussion hasn't yet happened, I don't want to
16 prejudice what my colleagues may talk about on
17 remand. I just wanted to give you the gamut of
18 the arguments that may be presented. But,
19 certainly, one of the arguments that I think
20 could carry the day in this case down the line
21 is that what we're talking -- the loss is the
22 delta between what was paid and what should have
23 been paid.

24 JUSTICE SOTOMAYOR: You still haven't
25 answered my question. What is the amount of the

1 claim, the total claim, that's your alternative
2 argument?

3 MR. SINGH: So it would be the amount
4 of each subsidy claim made in whole, and so --

5 JUSTICE SOTOMAYOR: Even though they
6 paid a part of it? So, if you asked for a
7 \$50,000 subsidy and they only gave you 20,
8 you're still entitled to the 50, or are you
9 claiming something more?

10 MR. SINGH: Right. So the question
11 for damages would be, should this claim have
12 been paid at all? And if the answer is no, then
13 the entire amount of the claim is going to be
14 damages.

15 If the answer is yes, it should have
16 been paid but for a lesser amount, then the
17 amount of damages is going to be the delta. And
18 so my only point is that that debate has not yet
19 happened, but that's what's teed up.

20 JUSTICE SOTOMAYOR: All right. Thank
21 you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: Could I go back to the
24 conversation you were having with Justice
25 Gorsuch when he gave you the other example and

1 you said to him, no, that would not be a -- a
2 normal use of the word "provide" and you said
3 it's all a matter of context.

4 And then you said the context here is
5 that the administrator is acting as an agent.
6 And is -- if we don't feel like getting into the
7 question of exactly whether the administrator is
8 an agent, the sort of back 10 pages of
9 everybody's briefs where we have to figure out,
10 you know, does an agent have to have the power
11 to bind the government or all that, if we just
12 take that off the table and -- and said: Okay,
13 now we want a different kind of rule that
14 separates the case in front of us from the case
15 that Justice Gorsuch raised, do you have another
16 rule for that?

17 MR. SINGH: Yeah. So I think that
18 when I say context, the context of the statutory
19 text is the government provides any portion of
20 the money or property requested or demanded in
21 the context, of course, of government programs.

22 And so I think, when you try to
23 distinguish -- this was the conversation that
24 was also happening, I think, with Justices
25 Jackson and Kavanaugh about how do you

1 distinguish mere regulation from things that are
2 going to be covered by the False Claims Act.

3 And I think that what you look to is
4 the -- the sort of core of it, is the government
5 funding one of its spending program here? And
6 if it is, then we think context suggests that
7 when the government is the one causing the money
8 to move into and out of the program, it's
9 providing.

10 And we think that that's quite
11 different from a lot of the situations you can
12 imagine where the government might cause money
13 to move but is not running a government program.

14 And I think one -- one thing that is
15 interesting about the word "provide," it is an
16 extraordinarily flexible word. There are all
17 sorts of situations where I could say to you,
18 you know, give you a hypothetical and you would
19 say: Oh, yeah, that sounds like someone's
20 providing it. And I give you a slightly
21 different hypothetical and you say: Well, that
22 doesn't really sound like someone else is
23 providing it. And both our brief and the
24 government's brief have focused on what -- and
25 so what you do is you interpret it in context.

1 And both our brief and the
2 government's brief have focused on the fact that
3 this is the context of a government spending
4 program that Congress created, that the FCC
5 administers tip to tail, and where all of the
6 rules, both for how money comes out, how it has
7 to be housed -- comes in, is housed, and then
8 goes out are all set by the government. It's
9 the only one making any decisions.

10 And so I think that's how you would
11 distinguish it even if you didn't want to talk
12 about the vagaries of -- of agency law under the
13 Restatement and all that.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 JUSTICE GORSUCH: Mr. Singh, on --
18 on -- on your -- on -- on the 150 -- or the
19 hundred million dollar option, the other side
20 hasn't argued traceability, so that's good for
21 you. And then the question comes to damages and
22 whether there might be some upper limit based on
23 the hundred million.

24 Are you going to come anywhere near
25 that under either theory of damages you've laid

1 out here?

2 MR. SINGH: In this case, possibly
3 not, but the issue would be that --

4 JUSTICE GORSUCH: Okay. So that could
5 be resolved in a future case. The -- the larger
6 "provides" question could be resolved in a
7 future case without doing damage to this one?

8 MR. SINGH: If you leave it open,
9 absolutely, yeah.

10 JUSTICE GORSUCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 Justice Jackson?

14 JUSTICE JACKSON: Let me just ask one
15 quick question. The hundred million dollars, it
16 seems to me, is premised on the notion that
17 that's the government's only stake in this,
18 that -- that -- that you have to have skin in
19 the game as the government. Here, they have a
20 hundred million dollars in it, so that is really
21 why the FCA cares about this.

22 And I guess I just am struggling with
23 that in light of my view based on the history
24 and the broader statute that the FCA was the
25 government's concern about the integrity of its

1 program, that it was trying to fund a program
2 and have it operate and, yes, it put money into
3 it, but it's not just the money that's at stake.

4 Do you have a reaction to that?

5 MR. SINGH: Sure. I share your view
6 that the concerns animating the False Claims Act
7 are broader than financial loss. I think the
8 text of the statute in multiple places makes
9 that very clear when it talks about whether or
10 not the government has title to the money, when
11 it includes any claim presented to an employee,
12 officer, or agent, whether or not the government
13 has provided the money.

14 Even the remedial provision, which Ms.
15 Ho says is a point in their favor, is, I think,
16 a strong point in our favor because you actually
17 still have civil monetary penalties even if the
18 government sustains no damages.

19 I think this case provides a useful
20 illustration of the point you're raising. As we
21 explained in our statement of the case, it's not
22 only the federal government that suffered here,
23 it's also schools and libraries. Schools and
24 libraries were overcharged in the first
25 instance. The federal government suffers the

1 brunt of the financial harm because it
2 subsidizes that overcharging, but the schools
3 and libraries also suffer in other contexts.

4 Think about Medicare. Think of all --
5 all the programs that the False Claims Act
6 defends. It's not just the government's
7 pocketbook. It's the health of beneficiaries,
8 senior citizens. It's defense programs and our
9 ability to field a fighting force that can
10 survive out there.

11 There are all kinds of interests that
12 the False Claims Act protects that have nothing
13 to do with money, and that is why the statute
14 does not require proof of financial loss. And,
15 as you say, it's made quite clear in the
16 legislative history as well.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Suri.

21 ORAL ARGUMENT OF VIVEK SURI

22 FOR THE UNITED STATES, AS AMICUS CURIAE,
23 SUPPORTING THE RESPONDENT

24 MR. SURI: Mr. Chief Justice, and may
25 it please the Court:

1 Unless the Court would prefer that I
2 spend my time some other way, there are two
3 points that I'd like to cover over the course of
4 this 10 minutes. The first is how we'd prefer
5 to win if the Court were to rule in our favor,
6 and the second is addressing some of the
7 questions that Justice Kavanaugh and Justice
8 Gorsuch raised about the limits of our theory.

9 If the Court were to rule in our
10 favor, we'd prefer to win on the ground that the
11 United States provides all of the money in the
12 Universal Service Fund. The reasons were
13 discussed in the previous discussion, namely,
14 that there would be questions about damages that
15 would be raised if the Court were to say the
16 United States provided only \$100 million.

17 Now we think we have answers to those,
18 but, of course, we'd prefer avoiding getting
19 into those issues in the first place.

20 If the Court doesn't want to go that
21 far, then we'd urge the Court to say that the
22 United States provided \$100 million and say
23 nothing at all about whether the United States
24 provided all the money.

25 As for Justice Kavanaugh's and Justice

1 Gorsuch's questions, I take the point that if
2 this rule isn't carefully limited, then you get
3 into applying the False Claims Act to all sorts
4 of situations that it wasn't designed to apply
5 to, like civil litigation.

6 What distinguishes this case from
7 those cases is that the government isn't just
8 exercising control at the front end, requiring
9 the money to be paid in. It's also exercising
10 control at the back end, deciding how the money
11 is paid out, how it's distributed, whether it
12 goes to schools and libraries, rural hospitals,
13 or -- or whatever other beneficiaries the
14 government chooses.

15 In the civil litigation context, that
16 back-end control doesn't exist. Congress
17 couldn't take the judgment and apply it to some
18 other purpose that the government prefers.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Is there -- can you
21 recall a case similar to this FCA case?

22 MR. SURI: Similar in what sense?

23 I --

24 JUSTICE THOMAS: In the sense that
25 we're talking about what looks like private

1 money going to a private organization and being
2 distributed privately.

3 MR. SURI: No, Justice Thomas, but I
4 would like to resist the premise that this is
5 private money. The strongest indication that
6 this is the government's money is that, in 2008,
7 Congress appropriated \$21 million out of the
8 Universal Service Fund for -- not for the
9 beneficiaries but for oversight activities.

10 Now that's something that simply
11 couldn't have been done if this were a private
12 bank account. Congress can't take money out of
13 a bank account that belongs to a private
14 individual and appropriate it for government --
15 governmental purposes. That's --

16 CHIEF JUSTICE ROBERTS: Well -- go
17 ahead. I'm --

18 MR. SURI: But that's what Congress
19 did with respect to the Universal Service Fund.

20 CHIEF JUSTICE ROBERTS: Well, you're
21 not saying it was okay because Congress did it,
22 are you?

23 MR. SURI: I'm say -- I'm saying that
24 the fact that Congress did it is a clue that, as
25 a statutory matter, these are the government's

1 funds. Congress regards it as the government's
2 money. If it didn't regard it as the
3 government's money, it wouldn't have taken it.

4 CHIEF JUSTICE ROBERTS: Well, I gather
5 you're still asking us --

6 JUSTICE KAVANAUGH: Really?

7 CHIEF JUSTICE ROBERTS: -- to put a
8 lot of weight on the fact that Congress did
9 something when the question is whether or not
10 they had the authority to do it.

11 MR. SURI: No, the question is not a
12 constitutional question, where, I agree,
13 Congress's decision wouldn't be controlling.
14 It's a statutory question. What are these funds
15 for purposes of the False Claims Act? And
16 there, it seems to me what Congress has done is
17 pretty important because you're just
18 interpreting what Congress did.

19 CHIEF JUSTICE ROBERTS: Well, whether
20 it's the Constitution or a statute, I still
21 think the fact that Congress did it is not
22 particularly determinative.

23 MR. SURI: I respectfully disagree,
24 Mr. Chief Justice. When you're interpreting a
25 statute, the fact that Congress did something is

1 surely relevant to the meaning of the statute.

2 CHIEF JUSTICE ROBERTS: Well, we've
3 had a few cases that say that Congress's
4 position is not borne out by the statute.

5 MR. SURI: I think, in those cases,
6 the Court may be referring to what individual
7 lawmakers have done or to legislative history.
8 Here, we have a statute that in 2008
9 appropriated money out of the Universal Service
10 Fund. That, I think, proves dispositively that
11 Congress regards this as the government's money.

12 But, even if you think that what
13 Congress has said isn't good enough, I'll turn
14 to an even higher authority, this Court's
15 precedents. This Court --

16 (Laughter.)

17 MR. SURI: -- this Court had a --

18 CHIEF JUSTICE ROBERTS: Now I
19 understand what you're saying.

20 (Laughter.)

21 MR. SURI: This Court had a case about
22 a -- a First Amendment challenge to conditions
23 that were attached to the E-rate program.
24 Libraries were required to install certain
25 filtering software in order to receive these

1 funds.

2 And the Court said these are federal
3 subsidies provided by the federal government,
4 all of it, not just some portion of it, and it
5 said we're going to analyze these subsidies
6 under the First Amendment framework for
7 conditions attached to government funds.

8 So not only Congress but also this
9 Court has regarded these funds as the
10 government's money to the extent that's relevant
11 here.

12 JUSTICE BARRETT: Mr. Suri, can you
13 just remind me the state of play? It -- it was
14 the Fifth Circuit and the Seventh Circuit here
15 who split, and the Seventh Circuit said, well,
16 one reason we feel better about this is the
17 Fifth Circuit didn't know about the hundred
18 million. But, on the larger claim, we haven't
19 had a lot hashed out about that in the lower
20 courts, right?

21 MR. SURI: That's right. I think
22 there have been cases in district courts where
23 courts have regarded this money as the
24 government's money in various contexts. We've
25 also brought criminal prosecutions in -- under

1 other statutes with respect to fraud on the
2 Universal Service program.

3 But, in the specific context of the
4 False Claims Act, these are the two --

5 JUSTICE BARRETT: So, if we decided
6 that larger question, we would be wading into
7 something that really hasn't percolated very
8 much?

9 MR. SURI: Not necessarily. It --
10 I -- depends on what --

11 JUSTICE BARRETT: Besides in the
12 district courts.

13 MR. SURI: It -- it depends on what
14 Your Honor means by the "larger question." If
15 the question simply did the government provide
16 all of the money in the fund, then that has
17 percolated in the sense that the Fifth Circuit
18 and the Seventh Circuit have both addressed that
19 question.

20 JUSTICE GORSUCH: But, to resolve --

21 JUSTICE KAVANAUGH: I thought --

22 JUSTICE GORSUCH: -- but, to
23 resolve -- sorry. But, to resolve the current
24 split, we now know about the hundred million
25 dollars. The Fifth Circuit didn't know about

1 the hundred million dollars. And if we were to
2 rely on that, that would -- that would resolve
3 the split as present -- presently constituted?

4 MR. SURI: Yes, that's correct.

5 JUSTICE GORSUCH: And -- and -- I --
6 just to understand your -- your distinction on
7 the civil litigation side, as I heard you in
8 your opening, the answer was because the
9 government doesn't exercise control at the back
10 end in how it's spent or how it's distributed,
11 is that right?

12 MR. SURI: That's correct.

13 JUSTICE GORSUCH: Well, what -- what
14 about in a class action case where the court has
15 very reticulated rules about distribution and
16 notice and claim processing and, gosh, a lot
17 of -- a lot of control on the back end?

18 MR. SURI: The degree of control even
19 in that circumstance doesn't approach the degree
20 of control here. Congress --

21 JUSTICE GORSUCH: So it's a degree of
22 control now at the back end that's the
23 distinction?

24 MR. SURI: Yes.

25 JUSTICE GORSUCH: Okay.

1 MR. SURI: Congress couldn't step in
2 and say we're going to take that money from that
3 class action and spend it on schools and
4 libraries and such.

5 JUSTICE GORSUCH: No, but a court
6 could say this claimant no, that claimant yes,
7 and if there's money left over, I'm going to
8 give it to my alma mater. I mean, that happens.

9 MR. SURI: There are questions about
10 whether courts have the authority to do that.

11 JUSTICE GORSUCH: Yeah, but if -- but
12 if you -- again, it's one of those things that's
13 happened, whether or not there's authority,
14 right?

15 MR. SURI: Yeah. It has happened --

16 JUSTICE GORSUCH: Yeah.

17 MR. SURI: -- yes, I agree. But --
18 but, again, I don't think a court could say
19 we're going to spend this money on anything the
20 court likes. There are much more significant
21 constraints in that context than here.

22 CHIEF JUSTICE ROBERTS: Counsel --
23 Justice Thomas, anything further?

24 Justice Alito? No?

25 Justice Kagan?

1 JUSTICE KAGAN: Could you tell me more
2 about why you want to do the broader route, what
3 you think the damages inquiry would look like in
4 a case like this, and what you're worried about
5 leaving on the table?

6 MR. SURI: Yes. There are two reasons
7 that we would prefer to win on this ground that
8 we provide all the money. The first, relating
9 to damages, is that Wisconsin Bell would argue
10 that if the government has provided, say, only
11 100 million out of a billion dollars, then it
12 should receive only a corresponding percentage
13 of whatever the loss might be.

14 Now we don't think that argument is
15 right, but, again, we'd prefer in our ideal
16 world to pretermite that altogether.

17 The second --

18 JUSTICE KAGAN: What argument might
19 you think is right? I mean, is it just you
20 can't go over a hundred million? Is it you can
21 go over a hundred million?

22 MR. SURI: No, our position is, even
23 if the government provided only the hundred
24 million, then we would still be entitled to the
25 full value of -- at -- at least the increment

1 between what was charged and what should have
2 been charged.

3 JUSTICE KAGAN: Yeah. But is -- but
4 what you're saying is Wisconsin Bell would
5 certainly have an argument that's like you can't
6 go -- you -- you -- you can't ask us for
7 anything more than they've collected, the a
8 hundred million. And Wisconsin Bell also might
9 have an argument, which is actually you can't
10 even get us for the whole a hundred million
11 because you have to sort of have a pro rata
12 share.

13 MR. SURI: Correct. They would have
14 that argument. Again, we don't think that
15 argument is right, but we'd prefer to avoid that
16 fight.

17 The other reason is that there were
18 some questions about what kind of tracing would
19 need to be done. Now we don't think there's any
20 tracing required. The very words "any portion"
21 suggests that one drop of money is sufficient.
22 But, again, we'd prefer to avoid that fight if
23 we could.

24 JUSTICE KAGAN: And are there other
25 programs that you're thinking about when you

1 stand up here, or is this the full universe of
2 programs?

3 MR. SURI: The other Universal Service
4 programs, there are three others, would be the
5 ones most directly affected. In addition, there
6 are a few other FCC programs that are operated
7 on a similar model to this one, namely, a
8 private administrator.

9 Outside that, I think it would depend
10 on how the Court rules. There are some programs
11 where the government relies on an intermediary
12 outside the government in order to handle the
13 fiscal administration. Medicare is a good
14 example of that. Insurance companies are
15 intermediaries who handle reimbursement requests
16 on behalf of the government.

17 Now I take Petitioner to be saying
18 that's different because those are tax dollars
19 whereas these are not labeled as taxes. So
20 perhaps we'd prevail on that regardless. But it
21 depends on how the Court rules with respect to
22 how far-reaching the implications would be.

23 JUSTICE KAGAN: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 Justice Kavanaugh?

2 JUSTICE KAVANAUGH: I think that just
3 illustrates that the implications, if we go
4 beyond the hundred million argument to the
5 broader argument, are -- are -- are potentially
6 large and a lot of potentially unintended
7 consequences we have no idea about. I mean,
8 it's -- just to save you from making -- doing
9 the briefing on an argument that you think
10 you're going to win anyway, I mean, I -- it
11 seems pretty aggressive to me to go beyond the
12 hundred million --

13 MR. SURI: I -- I certainly --

14 JUSTICE KAVANAUGH: -- and -- and not
15 prudent because we don't even know what we're
16 getting into.

17 MR. SURI: I certainly appreciate the
18 concern, but I think that's why the limiting
19 principle we've offered is important. The fact
20 that the government exercises --

21 JUSTICE KAVANAUGH: But you just said
22 it would depend on how we write the opinion.
23 And we haven't gotten a lot -- a ton of guidance
24 on this limiting principle and how it would
25 affect all these -- these other programs that

1 you're now identifying in response to Justice
2 Kagan's questions.

3 MR. SURI: I -- again, I think the
4 limiting principle is, if the government
5 controls where the money is going on the back
6 end as well, that is an indication that the
7 government is providing the money.

8 And that, I think, does deal with the
9 hypotheticals that have been raised about child
10 support or minimum wage or funds provided in
11 civil litigation.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: Mr. Suri, if we
16 wrote the opinion to say "at least" here, where
17 the government has provided, you have all these
18 arguments open to you and all of these hard
19 questions could be fleshed out later, correct?

20 MR. SURI: Correct.

21 JUSTICE BARRETT: I mean, I understand
22 you'd rather win big than win little, but --

23 MR. SURI: Yes, that would be
24 satisfactory, if not ideal.

25 JUSTICE BARRETT: Okay. And then the

1 other question is just in terms of -- I -- I
2 take that point. But, in -- in terms of the
3 practical consequences to you, you know, we
4 haven't talked much about the agency argument,
5 but, you know, for any claims that were for
6 post-2009, the government isn't necessarily
7 going to be getting into this whole splicing
8 because you would be relying on the agency
9 argument.

10 So, even for you, there's kind of a
11 limited time window where you would be focused
12 on this as opposed to focusing on your agency
13 argument, right?

14 MR. SURI: That's right, but I imagine
15 that entities like Wisconsin Bell would say that
16 even if the administrator were an agent of the
17 United States, you'd still have these arguments
18 about how much the United States is entitled to
19 in damages.

20 JUSTICE BARRETT: Sure. But we don't
21 have the damages question before us.

22 MR. SURI: Right. Right.

23 JUSTICE BARRETT: We just have the
24 "provided."

25 MR. SURI: I agree, yes

1 JUSTICE BARRETT: Okay. Okay.

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 Thank you, counsel.

5 Rebuttal?

6 REBUTTAL ARGUMENT OF ALLYSON N. HO

7 ON BEHALF OF THE PETITIONER

8 MS. HO: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 To just hit just three brief points. And
11 I'd like to follow up on the discussion, Justice
12 Kavanaugh, that you were having with my friend. I
13 haven't heard my friends on the other side offer any
14 meaningful limiting principle to their theory that the
15 government provides money by requiring one private
16 party to pay another.

17 And I think that's -- that's because there
18 isn't any. I think their theory would sweep in things
19 like minimum wage laws that require private employers
20 to pay higher wages to their employees. All sorts of
21 private parties to private transactions would be
22 surprised to find themselves subject to FCA treble
23 damages liability just because a government regulation
24 lurks in the background, and that can't be right.

25 Second, I haven't heard my friends explain

1 when Congress supposedly severed the FCA's historic
2 connection to the public fisc. The only answer
3 they've gestured at is the title clause. But the text
4 of the title clause makes plain that it was narrowly
5 focused on a timing problem: the situation where the
6 government no longer has title to the money at the
7 time of the request because it supplied that money to
8 the grantee before the request.

9 If Congress had intended to break the
10 link between the FCA and the public fisc for the
11 first time in 146 years and to overrule this
12 Court's decision in Kohen and other cases, it
13 would have done so much more directly than the
14 title clause and at minimum would have deleted
15 the "provides" clause altogether and revised the
16 remedial provision to reference -- that
17 references damages to -- that the government
18 sustains.

19 We talked a lot today about the debts,
20 settlement, and restitution the government
21 collected and returned to the Administrative
22 Company, but that money is no different in
23 character than the private contributions that
24 carriers pay directly to the company.

25 Justice Jackson, I think you actually

1 had it exactly right when you were
2 distinguishing the scenario with the court
3 system. You said, well, because that -- in that
4 situation, government is acting as an enforcer.
5 That is exactly the role that the government is
6 playing here with respect to the debts, the
7 obligations, and the settlements and
8 restitution. It is simply acting as an enforcer
9 to provide -- to take money that is owed to the
10 Administrative Company from the carriers, no
11 different source.

12 The government is not providing that
13 money, just like the sheriff who collects
14 judgment -- a judgment owed to the judgment
15 debtor from the judgment debtor is providing
16 money. It doesn't provide in any sense of that.

17 The Court's decision in Kohen makes
18 clear that the FCA does not apply to requests
19 for property merely in the temporary possession
20 of the government, which precisely describes the
21 debts, settlements, and restitution here.

22 We would urge the Court at a minimum
23 to reject my friend's broadest reading that the
24 government provides all the money in the E-rate
25 program. Clarity on that issue may be very

1 important for damages calculations in this case
2 and others involving the E-rate program.

3 Finally, the government cannot have
4 its cake and eat it too. The political branches
5 chose to insulate the E-rate program from the
6 public fisc, to keep it from being raided to
7 plug holes in the budget and to avoid the
8 Government Corporation Control Act.

9 But, even though the program never
10 puts one cent of public money at risk, my
11 friends say they should be able to haul out the
12 FCA's heavy artillery and recover treble damages
13 for the supposed loss of funds that were never
14 the government's to lose.

15 The government can't have it both
16 ways. Like the rest of us, it has to live with
17 the consequences of its choices, and one of
18 those consequences here is that the False Claims
19 Act doesn't apply.

20 We respectfully request that the Court
21 reverse the judgment below.

22 Thank you, Mr. Chief Justice.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

1 (Whereupon, at 11:39 a.m., the case
2 was submitted.)
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