

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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

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

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Pages: 1 through 86  
Place: Washington, D.C.  
Date: April 18, 2023

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15                    Respondent.         )

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17  
18                                   Washington, D.C.  
19                                   Tuesday, April 18, 2023

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

24  
25

1 APPEARANCES:  
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3 of the Petitioners.  
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7 Petitioners.  
8 CARTER G. PHILLIPS, ESQUIRE, Washington, D.C.; on  
9 behalf of the Respondents.  
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P R O C E E D I N G S

(11:57 a.m.)

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

Mr. Singh.

ORAL ARGUMENT OF TEJINDER SINGH

ON BEHALF OF THE PETITIONERS

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

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

1 reckless.

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

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

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

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

10                   I welcome the Court's questions.

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

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

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

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

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

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

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

16 MR. SINGH: Sure.

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

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



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

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

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

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

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

1 that's necessary before you can say it's false.

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

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

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

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

25 JUSTICE THOMAS: Well, that's the only

1 reason I'm asking that, is shouldn't -- you said  
2 they -- they took money they shouldn't take.  
3 So, in order to determine that, we have to know  
4 what they should have taken and they have to  
5 know what they should have taken.

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

14 JUSTICE THOMAS: Yes.

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

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

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

1 question is just, what did they know?

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

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

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

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

10 JUSTICE KAVANAUGH: What --

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

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

25 It turns out later on that's ruled

1 wrong. You're using the word "false." So  
2 that's false. Why liability in a situation like  
3 that, or is there liability in a situation like  
4 that?

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

7 JUSTICE KAVANAUGH: There well might  
8 be?

9 MR. SINGH: Liability, yes.

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

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

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

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

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

1 wrong, right?

2 JUSTICE KAVANAUGH: Well --

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

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

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

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

16 MR. SINGH: Sure.

17 JUSTICE KAVANAUGH: Yeah.

18 MR. SINGH: But I think that that's  
19 how this statute is meant to work. That is to  
20 say, I agree with you, Your Honor, very strongly  
21 that left to their own devices, companies  
22 believe our job is to make money, and they will  
23 do the thing that -- that will make the most  
24 money. And it would be naive to expect them to  
25 follow a different interpretation if there

1 weren't some incentive to do so.

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

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

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

17 MR. SINGH: Yes, Your Honor.

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

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

24 JUSTICE KAGAN: Well, not -- not  
25 you've argued.



1           MR. SINGH: -- I don't think liability  
2 is limited to that circumstance.

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

6           MR. SINGH: Yes, Your Honor.

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

9           JUSTICE KAVANAUGH: And they --

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

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

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

1 JUSTICE KAGAN: I thought that that's  
2 the question before us --

3 MR. SINGH: Yeah.

4 JUSTICE KAGAN: -- at time A --

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

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

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

14 MR. SINGH: Yeah.

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

23 And you said you're still liable even  
24 in that circumstance, and I find that -- now  
25 Justice Kagan correctly says that's not this

1 case. I just want the answer to the  
2 hypothetical so I can figure out how to think  
3 about all this.

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

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

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

18 JUSTICE KAVANAUGH: We've got to --  
19 we're trying to make money.

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

1 clarification.

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

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

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

20           JUSTICE GORSUCH: I -- I think  
21 that's --

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

1 choose to ignore it.

2           And so I think that does cover this  
3 potential hypothetical as well, which is to say,  
4 when you have the three interpretations, you  
5 know that one's a --

6           JUSTICE GORSUCH: You might be  
7 reckless.

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

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

24           MR. SINGH: Yes, Your Honor, that's  
25 correct.

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

3 MR. SINGH: Yes, absolutely right.

4 JUSTICE GORSUCH: And -- okay.

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

6 JUSTICE SOTOMAYOR: I've never heard  
7 anybody --

8 MR. SINGH: -- that mental state can  
9 be --

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

13 (Laughter.)

14 MR. SINGH: And I'm not trying to. I  
15 promise.

16 JUSTICE SOTOMAYOR: This is what --  
17 well, you -- you're --

18 JUSTICE GORSUCH: It happens all the  
19 time here.

20 JUSTICE SOTOMAYOR: Well, it certainly  
21 happens right now.

22 JUSTICE KAVANAUGH: Can I --

23 JUSTICE SOTOMAYOR: Counsel --

24 JUSTICE KAVANAUGH: Oh, go ahead.

25 JUSTICE SOTOMAYOR: -- the -- the

1 bottom-line question, I think, that we're asking  
2 is, however we define "reckless," we're not  
3 being asked to define "reckless" today. We're  
4 being asked whether the intent of someone to  
5 make a false statement is actionable even if  
6 later they come up with a different -- an  
7 objectively reasonable argument, correct?

8 MR. SINGH: Yes, Your Honor, that's  
9 correct.

10 JUSTICE SOTOMAYOR: All right. So the  
11 only --

12 MR. SINGH: But your -- your question  
13 --

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

20 MR. SINGH: Yes, Your Honor.

21 JUSTICE SOTOMAYOR: And how we define  
22 that we can leave for later, right?

23 MR. SINGH: Yes. So objective  
24 recklessness is not really before the Court.

25 JUSTICE KAVANAUGH: So we can leave

1 the hypothetical of the person who at the time  
2 thought about these different options as opposed  
3 to the person who only later came up with the  
4 legal interpretation?

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

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

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

13 JUSTICE KAVANAUGH: Well, I agree with  
14 Justice Kagan.

15 MR. SINGH: -- points to present.

16 JUSTICE KAVANAUGH: That's how the  
17 case came to us.

18 MR. SINGH: Yeah.

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

23 MR. SINGH: Sure. So, in -- in  
24 that -- in that mode of deciding the case, the  
25 question before you is the straightforward one



1 of was the Seventh Circuit correct to say  
2 subjective understanding and beliefs are  
3 irrelevant and we think always irrelevant if the  
4 interpretation can be shown reasonable after the  
5 fact.

6 We think that's the easy case. No,  
7 they're not, because actual knowledge is in the  
8 statute because it's a false statute.

9 JUSTICE KAGAN: Well, that's this  
10 case.

11 MR. SINGH: Yes. Yeah, and so you  
12 could decide -- you could reverse, going no more  
13 broadly than that.

14 JUSTICE KAGAN: Why are you arguing  
15 all these hard cases?

16 (Laughter.)

17 JUSTICE KAVANAUGH: Because I -- I  
18 asked him. I asked him.

19 JUSTICE KAGAN: Well, I know, but  
20 your -- your case is the easy case, isn't it?  
21 You need to tell us why it's different from the  
22 hard cases.

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

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

1           MR. SINGH: Well, that's -- that's  
2 correct, Your Honor. And so I -- you're right  
3 that I don't need to win the hard case. I was  
4 trying to address the hypothetical on its own  
5 terms. But, of course, we believe this case is  
6 quite different.

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

15           JUSTICE ALITO: Well, that sounds like  
16 you're arguing that it wasn't a reasonable  
17 interpretation. I find it easier to apply the  
18 scienter requirements to facts than to law, so  
19 let me give you this hypothetical.

20           The law could mean X or it could mean  
21 Y, and a -- an entity that ends up being the  
22 defendant in a False Claims Act case says, we  
23 think there's a 49 percent chance the courts  
24 will say it's X, which is good for us, and a 51  
25 percent chance that they will say that it's Y,

1     which is bad for us, and, therefore, we think it  
2     really means X -- I mean, I'm sorry, really  
3     means Y, the unfavorable interpretation. But  
4     there's a 49 percent chance that the court will  
5     adopt the more favorable interpretation.

6             What would -- would there be liability  
7     there --

8             MR. SINGH: So --

9             JUSTICE ALITO: -- because they turn  
10     out to be accurate. The court says, you know,  
11     this is a tough question. We think it's 51  
12     percent for Y, 49 percent for X. Therefore,  
13     we're going with X -- with Y.

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

18            JUSTICE ALITO: Well, I mean, we do  
19     take these cases --

20            MR. SINGH: Yeah.

21            JUSTICE ALITO: -- to decide legal  
22     questions and not just to decide the particular  
23     case.

24            MR. SINGH: Yes. And so, again, I  
25     believe that if the company affirmatively

1 believes we are probably wrong in our  
2 interpretation and yet presents a claim with no  
3 qualifications, no transparency about the  
4 ambiguity, but does so in a way that the  
5 government couldn't tell from the face of the  
6 claim that they're following interpretation X  
7 and not Y, right, then, yeah, that's either  
8 actual knowledge or recklessness, we think, and  
9 it could be deliberate ignorance if there are  
10 avenues for clarification that they did not  
11 seek.

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

16 CHIEF JUSTICE ROBERTS: Briefly.

17 MR. SINGH: Sure. I actually think  
18 it's not harder to do this for law than for  
19 facts. You could posit a situation in which the  
20 facts are really, really hard to determine.  
21 Let's say it was based on whether a majority of  
22 your sales happened. And there was a computer  
23 virus. You lost a lot of your data. But an  
24 employee says internally, you know, I'm pretty  
25 sure that more than half of our sales were at

1 this price. I can't be a hundred percent sure.  
2 I'm pretty sure. And then you submit the claim  
3 as if that weren't true.

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

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Counsel, when  
8 you allege fraudulent or filing of false claims,  
9 is that something you have to allege with  
10 particularity?

11 MR. SINGH: Yes, Your Honor.

12 CHIEF JUSTICE ROBERTS: Okay.

13 Justice Thomas?

14 Justice Alito?

15 JUSTICE ALITO: Does this difference  
16 matter mostly for purposes of summary judgment,  
17 how many cases are going to be disposed of at  
18 summary judgment? Does it matter so much if the  
19 case gets beyond summary judgment?

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

1 could they win? Sure.

2           And so, yeah, I do think the rule  
3 matters beyond because I do think -- and this  
4 goes to some degree to the question of why we  
5 get into the harder hypotheticals, is because,  
6 in certain cases, there's going to be questions  
7 that need to be resolved. So, yeah, I do think  
8 it matters beyond summary judgment.

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

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

23           I would refer the Court back to --  
24 this Court's decision in *Omnicare* gave an  
25 example of a -- a CEO who says, we believe our

1 conduct is lawful, and the -- the premise was,  
2 well, you know, that would be misleading if you  
3 -- you hadn't consulted a lawyer, if you  
4 honestly didn't think your conduct was lawful.

5 On the other hand, if, you know, seven  
6 lawyers told you it was lawful and one junior  
7 lawyer said, oh, maybe it's not lawful, that  
8 wouldn't be enough to make it misleading. So  
9 it's going to be fact-intensive. But, yes,  
10 there are situations where I think, at the  
11 margins, this could matter.

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

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

24 JUSTICE ALITO: All right. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 JUSTICE KAVANAUGH: Two things. One,  
6 in response to Justice Alito, he asks a  
7 hypothetical, you know, we think we're going to  
8 lose 51-49, and you changed that into we are  
9 probably wrong. Those are two different things.

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

18 JUSTICE KAVANAUGH: Have you ever won  
19 a case in court where you thought you had the  
20 worse argument?

21 MR. SINGH: Not yet, Your Honor.

22 (Laughter.)

23 MR. SINGH: I mean, you know, I'm --  
24 I'm waiting for the day.

25 CHIEF JUSTICE ROBERTS: Justice



1 Barrett?

2 Justice Jackson?

3 JUSTICE JACKSON: Can I just give you  
4 a chance to respond to your friend on the other  
5 side's reliance on the Safeco Footnote Number  
6 20?

7 MR. SINGH: Yeah.

8 JUSTICE JACKSON: I mean, they get  
9 that standard, they say, from that case. So why  
10 -- why are they wrong about that?

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

25 The same is really true in the fraud

1 context. People who are intentionally trying to  
2 cheat the government, there's no realistic  
3 argument for why the Safeco --

4 JUSTICE JACKSON: Is that because the  
5 statute has actual knowledge in it?

6 MR. SINGH: Yeah. So --

7 JUSTICE JACKSON: Yeah.

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

22 And then there's also just the way  
23 that we read that footnote, which is that we  
24 don't read it to apply in a situation where, at  
25 the moment the company made its decision, it had

1 no inkling of the defense that it now seeks  
2 refuge in. We read it to mean that the company  
3 contemporaneously followed an interpretation  
4 that was reasonable at the time, not that it  
5 came up with that interpretation later.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Mr. Stewart?

10 ORAL ARGUMENT OF MALCOLM L. STEWART  
11 FOR THE UNITED STATES, AS AMICUS CURIAE,  
12 SUPPORTING THE PETITIONERS

13 MR. STEWART: Mr. Chief Justice, and  
14 may it please the Court:

15 I -- I'd like to begin by addressing  
16 the line of questions that Justice Kavanaugh  
17 posed earlier about the -- the internal company  
18 meetings where three possible interpretations of  
19 the law were discussed.

20 And there are really two important  
21 differences between the hypothetical and this  
22 one. The first one is the hypothetical seemed  
23 to involve a situation in which the company was  
24 not attempting to have contact with the  
25 government but was deciding what course of

1 action it would take and was contemplating the  
2 possible litigation risks down the road if it  
3 was sued.

4           And what's extremely important about  
5 the False Claims Act is we're not just talking  
6 about conduct; we're talking about  
7 representations. In the course of submitting  
8 claims, the claimant is making representations  
9 either to the federal government or, in the  
10 Medicaid and Medicare context, to state and  
11 private intermediaries, and they are describing  
12 their own practices. And in our view, the --  
13 the one bedrock requirement is they should not  
14 say things they do not believe to be true.

15           And even if they think there is a  
16 reasonable argument down the road that it is  
17 true, if their best judgment is the statement we  
18 are making is not true, they shouldn't make it.

19           The -- the second thing I'd say is the  
20 representations we're talking about here are not  
21 pure propositions of law. In rep -- in giving  
22 figures as to their usual and customary prices,  
23 they were, in -- in essence, using a mixed term  
24 of fact and law. They were -- they needed some  
25 legal conception of what "usual and customary"

1       meant in order to do the calculations. But the  
2       whole reason that the state agencies and the  
3       pharmacy benefit manufacturers were asking for  
4       this information was it for -- was factual  
5       information about the prices that they  
6       customarily charged to their cash customers, and  
7       that was information that the agencies and the  
8       PBMs didn't have on it -- their own. That was  
9       information they needed to give to the company.

10                   And if the --

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

18                   MR. STEWART: Yes.

19                   CHIEF JUSTICE ROBERTS: It's not  
20       simply, you know, this is X and -- and it turns  
21       out I know it's Y. It was this falls within a  
22       particular statutory provision, applying this,  
23       and you'd say they knowingly represented that  
24       mixed question to have this answer, and that was  
25       wrong.

1                   MR. STEWART: That's correct. Now --  
2                   now, if they had laid it out, if they had shown  
3                   their work, as it were, and they had said our  
4                   retail price is \$20, 80 percent of our cash  
5                   customers pay \$4 to this drug, but our  
6                   understanding of the term "usual and customary"  
7                   is that it refers to the retail price and,  
8                   therefore, we're claiming \$20, if they had done  
9                   all of that, there wouldn't have been anything  
10                  deceitful and there wouldn't have been any real  
11                  danger that the state agencies and the pharmacy  
12                  benefit manufacturers would be deceived. They'd  
13                  have the right facts and they could decide for  
14                  themselves what the correct view of the law is.

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

23                  MR. STEWART: I mean, I -- I would say  
24                  they should give their better view of what the  
25                  usual and customary price is. And if their --

1 if their understanding is probably the better  
2 view is that the usual and customary price in  
3 this context is the discounted price, and if  
4 they understand that the state agencies and the  
5 PBMs believe that to be the price, then, when  
6 they say \$20 is our usual and customary price,  
7 they understand this will be -- misconstrued --

8 CHIEF JUSTICE ROBERTS: You're  
9 making -- you're making it too easy for  
10 yourself. I mean, that -- that this is probably  
11 true.

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

22 MR. STEWART: It -- it -- again, if  
23 they were laying out their work, we're not  
24 saying it would be unreasonable for them to  
25 assert the more aggressive view of the law

1 having apprised the counter-party of the facts.

2 But, if they are creating the obvious  
3 danger that the counter-party will be misled and  
4 will think the representation that \$20 is your  
5 usual and customary price is a representation  
6 that most cash customers pay that, then the --  
7 the intermediary or the -- the pharmacy benefit  
8 manufacturer, the state agency will have been  
9 misled as to an important point of fact.

10 I mean, Mr. Singh referred to Omnicare  
11 and the hypothetical statement, we believe that  
12 our company's practices are lawful, and the  
13 Court said, in some circumstances, that would  
14 imply that you've done some investigation, but  
15 the most basic thing you are conveying is that  
16 is actually our subjectively held belief.

17 JUSTICE KAVANAUGH: Well --

18 MR. STEWART: And the Court in  
19 Omnicare said, if you said that and you didn't  
20 actually -- believe it was true, you would be  
21 lying and you would presumably know you were  
22 lying.

23 I'm sorry.

24 JUSTICE KAVANAUGH: Mr. Stewart, your  
25 -- your law/fact distinction's helpful for me.



1 Obviously, if you say it's \$20 and, in fact,  
2 you're charging everyone 10, okay, false, I get  
3 that.

4 But, if it's based on a legal  
5 understanding, it's a little hard for me to say  
6 your legal view is false. Your view of the law  
7 is false.

8 Normally, we'd say your view of the  
9 law is incorrect or your view of the law is so  
10 incorrect as to be completely unreasonable. We  
11 don't usually say your view of the law is false.

12 MR. STEWART: I -- I --

13 JUSTICE KAVANAUGH: So help me with  
14 that.

15 MR. STEWART: I -- I think that's  
16 right, but what we are saying was false was  
17 not -- for purposes of liability it is not the  
18 view of the law. The thing that was false was  
19 the statement "our usual and customary prices  
20 were \$20" when, in fact, under a proper  
21 calculation, they were \$4.

22 And -- and I think -- take -- leaving  
23 aside scienter for a second, just for the  
24 purposes of deciding were false claims  
25 submitted, I think it's common ground on both

1 sides that if you misstate your usual and  
2 customary prices and state them to be --

3 JUSTICE KAVANAUGH: Yeah, that's  
4 false.

5 MR. STEWART: That's false, even if  
6 the source of the error is a misunderstanding or  
7 a misconception of the relevant law rather than  
8 a misunderstanding of the facts.

9 JUSTICE KAVANAUGH: What was your  
10 answer to the hypothetical if you at the time do  
11 the three interpretations and at the time  
12 conclude, but you don't disclose it at the time?  
13 You go with the most aggressive one at the time,  
14 but you don't disclose it and you just list 20.

15 MR. STEWART: We would say that would  
16 be with actual knowledge that the -- your --

17 JUSTICE KAVANAUGH: Really?

18 MR. STEWART: Yes, that would be with  
19 actual knowledge --

20 JUSTICE KAVANAUGH: Wow.

21 MR. STEWART: -- that your claim was  
22 false. And -- and I -- I -- I think --

23 JUSTICE KAVANAUGH: I mean, doesn't  
24 the government all the time -- this was my  
25 allusion earlier -- debate what position to take

1 in national security situations or EPA  
2 regulation or what have you and -- and be --  
3 well, we have a couple different interpretations  
4 here. This might not be the best one, but we're  
5 going to go with the most aggressive one. That  
6 never happens in the federal government?

7 MR. STEWART: Oh, I think it happens,  
8 and I think it happens in private practice, and  
9 I'm really focusing on the fact that we're not  
10 just talking about what you do and whether you  
11 can be held liable after the fact for --  
12 penalized for doing it in bad faith. We're  
13 talking about things you say.

14 And -- and the Court, for instance,  
15 last year dealt with this problem in Unicolors,  
16 where it was dealing with a Copyright Act  
17 provision.

18 JUSTICE KAVANAUGH: Well, the federal  
19 government would say it to a court -- the  
20 federal government might adopt a legal  
21 interpretation for various views that some  
22 people in the federal government don't think is  
23 the best, but they still think it's reasonable.

24 MR. STEWART: And -- and, again, we  
25 would say --

1 JUSTICE KAVANAUGH: And represent that  
2 to a court. Is that fraud on the court?

3 MR. STEWART: No, it's not fraud on  
4 the court because I think there is an  
5 understanding that filing a legal document  
6 doesn't constitute an implied representative --  
7 representation that either the client or the  
8 lawyer subjectively believes that this view of  
9 the law is correct.

10 JUSTICE GORSUCH: Mr. Stewart --

11 MR. STEWART: And that --

12 JUSTICE GORSUCH: -- I -- I -- I --  
13 I -- I -- I guess I'm -- I'm more confused after  
14 your presentation than I was before. I -- I --  
15 I had -- I would have thought that in -- in the  
16 hypotheticals Justice Kavanaugh is giving you,  
17 where there's some reasonable good-faith basis  
18 for it that you are relying on in making a  
19 presentation, that at most that would be  
20 reckless and probably maybe not even reckless if  
21 objectively there was enough evidence out there  
22 in the law to support your claim, and -- and  
23 that all -- all that's at issue before us isn't  
24 that.

25 It's an allegation yet to be proven

1 that the company knew -- knew that -- that its  
2 representations were not its ordinary and  
3 customary price. Under its understanding of the  
4 law, it knew that, that there was no good-faith  
5 basis, and that that is potentially actionable  
6 here. I thought that's all that was before us.

7 MR. STEWART: Well, I -- I think  
8 Respondents will say that there's much more than  
9 that before you because --

10 JUSTICE GORSUCH: Oh, I'm sure they  
11 will.

12 (Laughter.)

13 MR. STEWART: But I -- I -- I guess,  
14 to respond more directly to your question, there  
15 are lots of propositions that I understood --  
16 stand reasonable people could believe and that  
17 might even be right, but I don't believe them,  
18 and if somebody asks --

19 JUSTICE GORSUCH: Correct.

20 MR. STEWART: -- do you believe X and  
21 I say, yes --

22 JUSTICE GORSUCH: Well, no --

23 MR. STEWART: -- I do, I'm lying, and  
24 I know that I'm lying because I understand that  
25 my subjective belief is not what I have just --

1 JUSTICE GORSUCH: Yes.

2 MR. STEWART: -- represented it to be,  
3 and --

4 JUSTICE GORSUCH: And that's -- that's  
5 all we have to decide in this case, is whether  
6 that is actionable.

7 MR. STEWART: Well, the irony is, even  
8 in the kind of -- let's make it 40-60 percent,  
9 the company thinks 60 percent likelihood that  
10 this is false, 40 percent that this is true, if  
11 they were asked to say do you believe -- what do  
12 you believe your usual and customary price is  
13 and they said, we think it's the \$20, the higher  
14 figure, when they thought, in fact, that the  
15 better argument was it was the \$4 figure, under  
16 Omnicare, they would have falsely stated their  
17 belief and they would have stated it with  
18 scienter, and yet they're saying we can get  
19 all --

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

23 MR. STEWART: They believed it to  
24 be \$4, yes. They believed --

25 JUSTICE KAGAN: Yes. So that's the

1 question before us, I believe it to be \$4, but  
2 I'm saying it's \$20.

3 MR. STEWART: Yes, but the question  
4 is --

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

11 But I guess I'm -- I'm still having  
12 the same trouble that I was having with Mr.  
13 Singh. That seems to be not the case before us.  
14 The case before us is, I believe it was \$4, but  
15 it -- I'm saying it was \$20.

16 MR. STEWART: I -- I mean, just --  
17 just to clarify the way we read the Seventh  
18 Circuit's opinion -- and I -- I -- I don't want  
19 to be accused of turning down help, but I --  
20 I -- I --

21 (Laughter.)

22 MR. STEWART: -- I -- I -- I -- I do  
23 want to make this clarification.

24 I don't understand the Seventh Circuit  
25 to have said subjectively they absolutely,

1 absolutely thought that it was \$4, but they said  
2 it was \$20, and then they came up with a post  
3 hoc rationale down the road.

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

7 JUSTICE KAGAN: Yes, of course, it's  
8 an allegation, but the allegation is that they  
9 believed something different from what they told  
10 the government.

11 MR. STEWART: And, again, I would say,  
12 in order to believe that \$4 is the right price,  
13 you don't have to think there is no conceivable  
14 argument for the other prices. In the other --  
15 in the circumstance --

16 JUSTICE JACKSON: But that doesn't  
17 really --

18 CHIEF JUSTICE ROBERTS: Thank -- thank  
19 -- thank you, Mr. Stewart. I -- I just have one  
20 very brief question. You're -- you're saying  
21 that this was false.

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

25 MR. STEWART: Yes.



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

5 Now do you mean -- you're simply  
6 saying they didn't -- the -- the legal analysis  
7 they put in was the 40 percent and not the 60  
8 percent?

9 MR. STEWART: Yes. That if --

10 CHIEF JUSTICE ROBERTS: Okay.

11 MR. STEWART: Yes.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Thomas?

14 Justice Alito?

15 JUSTICE ALITO: Well, I like to resist  
16 the temptation to make easy cases hard, but it  
17 does seem to me that the legal issue here is --  
18 is harder than it has been portrayed, unless you  
19 think that people have the same certainty about  
20 the meaning of the law that they have about  
21 facts.

22 So I -- I know as a fact that it is  
23 Tuesday, but I have ideas about what the law  
24 means and what it should mean and what courts  
25 will interpret it to mean, but I can't hold that

1 with most of those, many of those -- I'll amend  
2 that, some of those -- with the same degree of  
3 certainty that you have generally about facts.  
4 That's what makes this a hard case.

5 MR. STEWART: I mean, I agree it's a  
6 hard case, but -- and it may be more difficult  
7 for that reason to prove that the person  
8 subjectively believed that he was giving the  
9 wrong numbers. But I think the bedrock  
10 criterion in these circumstances is, when you're  
11 making representations to the government and  
12 asking for money, you should say what you  
13 believe to be true.

14 And if we imagine a lawyer, for  
15 instance, advising a client who's -- who asks do  
16 you think what I propose to do is legal, the  
17 lawyer may recognize there are good arguments  
18 both ways, but if the -- if the lawyer actually  
19 thinks the better argument is this is illegal  
20 and he says, I think the better argument is that  
21 it's legal, that -- that's just knowingly making  
22 a false statement.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: I mean, I think  
4 that last statement was pretty extreme, but it's  
5 not this case.

6 MR. STEWART: To -- to clarify, I'm  
7 not talking about the lawyer's representation in  
8 court because we do understand that when the  
9 lawyer argues in court, he or she is not making  
10 an implicit representation: I would adopt all  
11 of these views if I were a judge.

12 When the lawyer is advising a client,  
13 that is a circumstance where, even in cases of  
14 indeterminacy, we would expect the lawyer to  
15 provide his or her best judgment, and it  
16 wouldn't -- if the lawyer failed to do that, it  
17 wouldn't be a sufficient answer to say I  
18 understood at the time that this was a -- a  
19 possible respectable view of the law.

20 JUSTICE KAVANAUGH: If the client  
21 says, well, I realize it's not your best  
22 interpretation, but if I go with the other  
23 interpretation, can I win in court, and the  
24 lawyer says, yeah, I think you have a good  
25 chance of winning?

1           MR. STEWART: That would -- that would  
2 all be fine, again, assuming that is actually  
3 the lawyer's good-faith view. There -- there  
4 are some circumstances in which we expect -- you  
5 know, if for some reason expert testimony on a  
6 question of law were admissible, we would want  
7 the -- the witness to give his or her best  
8 judgment about what the law is, and if the  
9 person gave anything other than that, it  
10 wouldn't be a sufficient justification that  
11 there was a reasonable argument to be made.

12           CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14           JUSTICE BARRETT: Just a quick  
15 question about the limits of your argument. I  
16 mean, to decide this case, right, I mean, if we  
17 were just to say it's not a 49-51, it's a case  
18 where there's no confidence, where there's a --  
19 a belief that it's false and not even a belief  
20 at the time that there was a reasonable argument  
21 later, you're happy with that if we decided in  
22 your favor on that basis?

23           MR. STEWART: I -- I mean, if you  
24 decide the case on that basis, I think that  
25 would lead to a reversal, so it would be the

1 right disposition. To the extent the Court  
2 implied that this was the only circumstance in  
3 which a misstatement about a -- a mixed question  
4 of law and fact could -- could be made with  
5 scienter --

6 JUSTICE BARRETT: But I guess I'm  
7 saying not bleeding into reckless disregard and  
8 stuff like that. Deliberate ignorance. I mean,  
9 the -- the -- the hard cases that might come up  
10 in the medium, if we classify this at one end of  
11 the spectrum, you're not happy with that or you  
12 are?

13 MR. STEWART: Not -- not really  
14 because --

15 (Laughter.)

16 MR. STEWART: -- I mean, in --  
17 because, in other contexts, applying this vision  
18 of knowledge seems extravagant. That is --

19 JUSTICE KAGAN: We wouldn't be saying  
20 anything about other contexts.

21 MR. STEWART: Okay.

22 CHIEF JUSTICE ROBERTS: Thank --

23 JUSTICE BARRETT: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Jackson?

1 JUSTICE JACKSON: Yeah. So I'm -- I'm  
2 over here struggling as to why this is a hard  
3 case. I don't understand it at all. I was with  
4 Justice Kagan. I thought the Seventh Circuit  
5 said, essentially, that the subjective beliefs  
6 of the supermarkets were irrelevant.

7 MR. STEWART: Yes.

8 JUSTICE JACKSON: All right. And so  
9 then the only question, I thought, is whether  
10 the allegations that are being made about their  
11 subjective beliefs matter. They're not  
12 irrelevant. If we're trying to figure out what  
13 the scient -- scienter is in this case, you --  
14 you -- you, the jury -- let's say I'm charging  
15 the jury -- you, the jury, can take into account  
16 evidence concerning their actual beliefs, what  
17 they subjectively believed about the \$4 or the  
18 \$20 or whatever. Isn't that the question? Is  
19 the Seventh Circuit wrong when it says,  
20 essentially, jury, the only thing that matters  
21 in terms of establishing knowledge and scienter  
22 in this case is an objective view of the price,  
23 but all of this evidence with respect to what  
24 they actually thought, that can't be used in --  
25 to determine whether or not they had actual

1 knowledge?

2 MR. STEWART: If all the Court does is  
3 say that was a misconception on the Seventh  
4 Circuit's part, we send it back for the Seventh  
5 Circuit to redo the analysis without regard to  
6 that misconception, that's certainly a step in  
7 the right direction.

8 JUSTICE JACKSON: But it's not the  
9 step --

10 (Laughter.)

11 JUSTICE JACKSON: -- it's not the only  
12 step that you want to take in this case? I  
13 thought that's what we were doing. I thought  
14 what we were doing was assessing whether the  
15 Seventh Circuit's statement that it was -- the  
16 subjective knowledge was irrelevant was wrong.

17 MR. STEWART: Obviously, we would  
18 prefer -- from the standpoint of somebody who's  
19 not just working on this case but who is --  
20 represents the government that is litigating  
21 False Claims Act cases across the board, we  
22 would -- prefer greater clarification about what  
23 the rules are in the hypothetical case where the  
24 allegation is, yes, at the time you acted, you  
25 considered the possibility of this

1 interpretation, you just thought it was wrong  
2 and said it anyway. We would prefer to have it  
3 clarified that that's actual knowledge as well.  
4 But what you propose is certainly, as I say, a  
5 step in the right direction.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Mr. Phillips.

9 ORAL ARGUMENT OF CARTER G. PHILLIPS  
10 ON BEHALF OF THE RESPONDENTS

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

13 I think I want to start by trying to  
14 make this a hard case.

15 (Laughter.)

16 MR. PHILLIPS: Justice Kagan, I -- I  
17 -- I don't think this is just a case about post  
18 hoc lawyer rationalization. That was Halo.  
19 There's no question those were the facts in  
20 Halo.

21 In this case, I think you have to go  
22 back to 2005, when all -- when -- when "usual  
23 and customary" had been in place for -- for many  
24 years, Walmart adopts a pricing mechanism where  
25 it discounts deeply and across the board for all



1 generics, and the question is, what do the rest  
2 of the pharma -- pharmaceutical business do in  
3 that context?

4           And it does it, Justice Thomas,  
5 against the backdrop that there is no usual and  
6 customary guidance. There is nothing from the  
7 federal government that tells you what the right  
8 answer is. And there are lots of different  
9 states that take lots of different positions.  
10 There's lots in the record in this case that  
11 says that the -- that the interpretation adopted  
12 by my clients was absolutely correct, those  
13 discounts didn't count.

14           And the reason why I don't think you  
15 can look at this as a post hoc justification for  
16 what they did is, at the time, those -- my  
17 clients, who actually matched, directly matched  
18 the Walmart scheme and said, okay, \$4 flat  
19 discount across the board, that's exactly what  
20 they charged as a usual and customary number.

21           But, when they didn't adopt that  
22 approach, when they -- when they stuck with the  
23 -- with the individual matching programs or when  
24 they adopted membership programs that had some  
25 discounts and not some discounts in certain

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

19                   And -- and put it into context,  
20      alright? These are prices that were offered and  
21      audited in one instance 12,000 times over a  
22      decade. Not once anybody complained about  
23      whether or not these were usual and customary  
24      and an acceptable price under those --

25                   JUSTICE GORSUCH: Mr. Phillips, it

1 sounds to me like an excellent jury argument.

2 And --

3 MR. PHILLIPS: No, but --

4 JUSTICE GORSUCH: Just a second. And  
5 maybe --

6 MR. PHILLIPS: Fair enough.

7 JUSTICE GORSUCH: -- maybe even a good  
8 summary judgment argument that -- that my client  
9 had no reckless disregard, deliberate  
10 indifference, or knowledge of the falsity of the  
11 information it was supplying the government.

12 But I think the question before us is  
13 a narrow one, and that is, did the Seventh  
14 Circuit err when it said that the only evidence  
15 that could be admitted against your client was  
16 objective proof. And I think the statute makes  
17 that argument pretty hard, that knowing and  
18 deliberate indifference require subjective  
19 proof, proof of internal knowledge and -- and  
20 actual knowledge.

21 And so that the law makes that an  
22 available course to meet the case for a  
23 plaintiff. Whether they can do so here I know  
24 not. And you may have a very good argument.  
25 But why -- why -- why wouldn't we reverse the

1 Seventh Circuit on the narrow question presented  
2 because they failed to account for the fact that  
3 the statute has some mens rea attached to it?

4 MR. PHILLIPS: I -- I -- well, I think  
5 the Court's going to at least have to deal with  
6 Safeco and the -- and the statement in Safeco  
7 that it would defy history and current thinking  
8 to treat a defendant who merely adopts one such  
9 reasonable interpretation as a knowing and  
10 reckless violator. Congress could not have  
11 intended that result -- such a result for those  
12 who followed an interpretation that could  
13 reasonably have found support in the courts.

14 And I submit -- I submit, you know,  
15 the subjective evidence is not relevant. And  
16 that's all the Seventh Circuit did. Now there's  
17 -- you know, obviously, there's a whole  
18 discussion and a debate between the majority and  
19 the dissent on the issue of, you know, does that  
20 mean post hoc rationalization, et cetera.

21 I don't think the Court has to decide  
22 that issue in this case. I think, in this case,  
23 what the Court has to recognize is that we deal  
24 in a situation where there's no guidance, we  
25 have an inherently ambiguous term, we used what

1 was by all accounts and is, you know, is  
2 undisputed before this Court an absolutely  
3 objectively reasonable interpretation, so the  
4 number we gave was based on an objectively  
5 reasonable interpretation.

6 JUSTICE GORSUCH: And, therefore,  
7 Members of the Jury, you should not infer  
8 knowledge?

9 MR. PHILLIPS: No, it should never get  
10 to the jury, and that's the whole point of this,  
11 because, if you adopt the opposite rule, Justice  
12 Gorsuch, then you -- one -- the same position  
13 the United States took in Safeco, right? You  
14 guarantee that in every single case you have to  
15 waive the privilege for attorney-client -- the  
16 attorney-client relationship. You're going to  
17 have to scrutinize what happened, what was  
18 the difference, who said what to who.

19 JUSTICE GORSUCH: I mean, I can easily  
20 imagine a case, Mr. Phillips, in which there's  
21 all kinds of internal communications, not among  
22 lawyers but among businesspeople, saying, we  
23 know this isn't our usual and customary price  
24 under any reasonable definition, but we're going  
25 to do it anyway, okay?

1                   And for reasons that turn out later  
2                   with subsequent guidance, it might be  
3                   objectively reasonable, if mistaken, but they  
4                   knew. And that would be fraud in a normal  
5                   circumstance. And I don't know why it wouldn't  
6                   be here.

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

9                   JUSTICE GORSUCH: Oh, I --

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

12                  JUSTICE GORSUCH: So -- so -- so you  
13                  think --

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

16                  JUSTICE GORSUCH: No, well I -- I  
17                  think -- I think -- I think acknowledging that  
18                  -- that you have no problem with that suggests  
19                  the Seventh Circuit erred in suggesting  
20                  otherwise.

21                  MR. PHILLIPS: Well, because what that  
22                  situation is, if you -- if you have -- you're at  
23                  the summary judgment stage, because my -- my  
24                  clients and -- and the business communities'  
25                  interests here is can these cases end at summary

1 judgment or are we, one, insisting, you know --

2 JUSTICE GORSUCH: Oh, I -- I  
3 understand that, but I think, if you concede  
4 that knowledge, internal knowledge, can be  
5 relevant, that's all we're -- that's all we  
6 would say in this disposition. We would not  
7 take away any of your defenses on knowledge or  
8 deliberate indifference based on --

9 MR. PHILLIPS: Well, I -- I mean, I --

10 JUSTICE GORSUCH: -- based on the  
11 facts.

12 MR. PHILLIPS: -- I mean, I think it  
13 could -- it -- it goes to the objective  
14 reasonableness of the ultimate determination --

15 JUSTICE GORSUCH: Sure.

16 MR. PHILLIPS: -- and -- and, it -- it  
17 -- you know, of the fact that everybody --

18 JUSTICE GORSUCH: It may go to  
19 knowledge too.

20 MR. PHILLIPS: And if everybody thinks  
21 it's wrong, it may be that that's not an  
22 objectively reasonable assessment. If that's --  
23 I mean, the reality is --

24 JUSTICE GORSUCH: I think Justice  
25 Kagan had a question.

1 MR. PHILLIPS: All right.

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

13 The Seventh Circuit thought that as  
14 long as you could find somebody later that said  
15 that what you said was objectively reasonable,  
16 it didn't matter that you believed it to be  
17 entirely wrong.

18 MR. PHILLIPS: Except -- except  
19 that's, I mean, there -- there's undeniably  
20 discussion in the Seventh Circuit's opinion and  
21 a debate between the majority and the dissent on  
22 what to deal -- what to do in connection with  
23 post hoc rationalization situations.

24 That is not -- that was not the way --  
25 that was not the basis for the district court's



1     rulings in this case, which come off of Safeco,  
2     which are based on was the action taken  
3     reasonable, objectively reasonable under the law  
4     at the time it was taken, or was there some  
5     evidence -- or was -- and was there evidence  
6     that would lead them away from that  
7     interpretation.

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

19                    Two, we should have to put it in the  
20    context of -- of the scheme, right? We're  
21    talking about a punitive scheme where the  
22    definition of "usual and customary" is  
23    completely unknowable, candidly, at least in the  
24    time that -- that -- during this litigation.  
25    There were no determinations as to what's usual

1 and -- and customary. And --

2 JUSTICE JACKSON: Can I -- can I --

3 MR. PHILLIPS: -- and that notice  
4 requires scienter to be interpreted in an  
5 aggressive and -- and -- and protective way for  
6 the defendants in order to avoid what would  
7 otherwise be a due process problem. Sorry.

8 JUSTICE JACKSON: Mr. Phillips, can I  
9 read you two sentences from the Seventh  
10 Circuit's opinion, and can you tell me whether  
11 they are right or wrong?

12 "Ultimately, the crucial point is that  
13 the Court" -- meaning the Supreme Court -- "has  
14 articulated a standard for acts committed  
15 knowingly or with reckless disregard that  
16 excludes subjective intent. In the absence of  
17 textual indicia in the FCA supporting that  
18 subjective intent matters here, we apply Supreme  
19 Court precedent to interpret the same common law  
20 terms addressed in Safeco."

21 In other words, we believe, says the  
22 Seventh Circuit, that based on Supreme Court  
23 precedent, subjective intent does not matter for  
24 the standard for acts committed knowingly or  
25 with reckless disregard.

1 Do you agree with that statement?

2 MR. PHILLIPS: Yes, I -- yes, that's  
3 what Safeco says.

4 JUSTICE JACKSON: All right. So, if  
5 we disagree, if we think Safeco doesn't say that  
6 or Safeco doesn't apply here or subjective  
7 intent can matter with respect to actual  
8 knowledge in the FCA or the other definitions,  
9 what result? Do you lose?

10 MR. PHILLIPS: No, because -- because  
11 I -- still seems to me that the -- that -- I  
12 mean, you can take subjective -- you can take  
13 all of the employee emails into account. Those  
14 are nonprivileged documents. They are in the  
15 record. They were in front of the district  
16 court.

17 And -- and -- and at the end of the  
18 day, the right answer to this case is that our  
19 clients followed an undeniably objectively  
20 reasonable approach in what they did, that there  
21 was no guidance, that the federal government  
22 steadfastly refused to provide any guidance that  
23 would have assisted us in how to deal with this  
24 problem.

25 And here we are 15 years after the

1 fact and being -- and being exposed to treble  
2 damages, to literally thousands of individual  
3 claims and circumstances where we had no notice  
4 that that would happen.

5 JUSTICE JACKSON: So your standard is  
6 objective intent --

7 MR. PHILLIPS: Yes, Your Honor.

8 JUSTICE JACKSON: -- is the only thing  
9 that is relevant to the assessment --

10 MR. PHILLIPS: Yes.

11 JUSTICE JACKSON: -- of knowledge or  
12 recklessness?

13 MR. PHILLIPS: Yes.

14 JUSTICE JACKSON: All right.

15 MR. PHILLIPS: I think, in deciding  
16 whether what we said was objective -- what we  
17 did was objective or not, whether we didn't  
18 believe it may say something about objectivity,  
19 but it's not an examination into their -- into  
20 their specific understanding.

21 It has to be, unless -- unless you're  
22 going to make it open season on every federal  
23 government contractor. And the -- and those  
24 contractors have all told you the problem here.  
25 And the amicus briefs couldn't be clearer. Both

1 the Chamber and the -- and the Dreeben brief  
2 tell you, first of all, this is an enormously  
3 expensive enterprise and that -- and that -- and  
4 that when entities act in an objectively  
5 reasonable fashion and without the benefit of  
6 guidance from the government as to what is  
7 permitted and what --

8 JUSTICE JACKSON: Objectively  
9 reasonable but subjectively unreasonable in the  
10 sense that they are making a statement that they  
11 know to be untrue at least as alleged. You say  
12 that's irrelevant.

13 MR. PHILLIPS: Well, I mean, the  
14 problem with that is it, I guess, goes -- maybe  
15 it's an epistemological issue -- but I think the  
16 way the law normally -- I mean, the way the  
17 common law normally has treated questions of law  
18 is that those are not things that aren't  
19 knowable. I think that was one of the questions  
20 that Justice Alito was alluding to, is that  
21 typically you don't know that. All you're doing  
22 is giving an opinion in -- in a circumstance.

23 JUSTICE JACKSON: No, I understand.  
24 But it's sort of like you're fighting the  
25 hypothetical. I just want to know the sentence

1 that says, sub -- excluding subjective intent is  
2 what we have to do to evaluate knowledge. You  
3 say it doesn't matter, subjective intent to  
4 evaluate actual knowledge for the purpose of the  
5 FCA.

6 MR. PHILLIPS: Right, because actual  
7 knowledge --

8 JUSTICE JACKSON: All right. Thank  
9 you.

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

20 And the Court, you know, in Safeco  
21 recognized as much. And I haven't heard the  
22 other side -- my friend says that Safeco is a  
23 more narrow position. But, you know, this Court  
24 has pretty consistently held in dealing with the  
25 False Claims Act that it's not designed simply

1 as a regulatory enforcement tool.

2 JUSTICE KAGAN: No, but -- but --

3 MR. PHILLIPS: That is exactly how  
4 it's being used here.

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

11 MR. PHILLIPS: Right, with respect to  
12 facts.

13 JUSTICE KAGAN: Acts in reckless  
14 disregard.

15 MR. PHILLIPS: With respect to facts.

16 JUSTICE KAGAN: That -- that what you  
17 think isn't -- isn't relevant?

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

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

24 MR. PHILLIPS: Not -- not necessarily  
25 for anything that's got a legal judgment that's

1 enmeshed in it, but with the theory of the case  
2 is that you made a false statement because you  
3 said usual and customary is X and it could have  
4 been determined to be Y, that that gives --

5 JUSTICE KAGAN: Well, again --

6 MR. PHILLIPS: -- rise to a claim  
7 against us, a knowing claim.

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

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

20 JUSTICE GORSUCH: Well, Safe -- Safeco  
21 was a recklessness case, and so I -- I -- I  
22 think, you know, there's an argument that, you  
23 know, recklessness looks at objective evidence,  
24 at least sometimes, but that's pretty hard to  
25 extend that to the mens rea we have here,



1 knowing and -- and -- and deliberate disregard.

2 MR. PHILLIPS: Well, I mean, you can  
3 say it was a mens -- that it's a recklessness  
4 case, but, I mean, the statement of the Court is  
5 as a knowing -- knowing or reckless violator.  
6 You would not normally think of them as a  
7 knowing or reckless violator.

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

22 Our point is you shouldn't get to that  
23 stage if indeed all the actions taken by the  
24 defendants were objectively reasonable at the  
25 time that they took them and there was nothing

1 to lead them away.

2 CHIEF JUSTICE ROBERTS: I think maybe  
3 Halo pushed Safeco from 51 to 49, and what is  
4 your distinction of Halo?

5 MR. PHILLIPS: Yeah. I mean, the  
6 patent statute is -- is fundamentally different,  
7 I think, from this, because the patent statute  
8 didn't have a scienter requirement embedded in  
9 the -- in the text of the statute.

10 Section 284 says, you know, you can  
11 treble the -- the district court can in its  
12 discretion treble the damages for any --  
13 essentially, for any reason that had been  
14 construed by the Court to be narrower than that.

15 But, when the Court said that it --  
16 you had to take into account or you -- you know,  
17 you couldn't rely solely on objective  
18 determinations, it was because there was  
19 embedded in the history of the patent law bad  
20 faith. And, therefore, an examination of bad  
21 faith was required as part of that, or you  
22 couldn't limit the district court's discretion  
23 in deciding how to enhance the damages by  
24 excluding the bad faith element.

25 JUSTICE KAGAN: I -- I mean, that

1 makes Halo sound very patent-specific, and, you  
2 know, maybe I'm wrong about this, somebody  
3 that -- that there's definitely someone on this  
4 bench who knows better than I do what Halo meant  
5 in that footnote.

6 But I would take that footnote to mean  
7 something like we've read the Safeco footnote  
8 and we kind of don't really understand it, and  
9 -- and -- and -- and we're definitely going to  
10 say it depends on circumstances and -- and  
11 consign it to its facts.

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

18 (Laughter.)

19 MR. PHILLIPS: -- you know, and the  
20 facts there were quite extreme. They dealt with  
21 the precise problem of post hoc rationalization  
22 and was exclusively --

23 JUSTICE SOTOMAYOR: So --

24 MR. PHILLIPS: -- on that  
25 understanding.

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

10 MR. PHILLIPS: Because what the --  
11 what the statute requires is knowingly, and then  
12 it has three definitions of knowingly, are  
13 actual knowledge, reckless disregard, and  
14 deliberate ignorance.

15 Those all have common law meanings.  
16 And -- and the understanding is, is that even --  
17 even fraud generally or making false statements  
18 has always treated legal issues, statements with  
19 regard to legal issues --

20 JUSTICE SOTOMAYOR: The problem --

21 MR. PHILLIPS: -- differently --

22 JUSTICE SOTOMAYOR: -- is Escobar.

23 MR. PHILLIPS: -- than the factual.

24 Yeah. I'm sorry?

25 JUSTICE SOTOMAYOR: The problem is

1 Escobar. Mixed legal questions with fact are a  
2 different thing altogether. Every time we try  
3 to tease out that issue, we fail.

4 MR. PHILLIPS: Well, I don't think it  
5 --

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

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

15 JUSTICE SOTOMAYOR: Well I -- I --

16 MR. PHILLIPS: -- legal standard --

17 JUSTICE SOTOMAYOR: -- I think that  
18 the person --

19 MR. PHILLIPS: -- to inquire into the  
20 attorney-client privilege --

21 JUSTICE SOTOMAYOR: I think the person  
22 most knowledgeable about that, what Congress  
23 intended, is probably Senator Grassley, because  
24 I suspect he's the one who initiated almost all  
25 these laws and follows them so closely, and he

1 disagrees with you.

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

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

20 JUSTICE ALITO: Well, Mr. --

21 MR. PHILLIPS: -- and to do so on the  
22 basis of statements from -- from employees  
23 trying to figure out what the law means.

24 JUSTICE ALITO: Mr. Stewart said the  
25 problem was you didn't show your work. Did you

1 have an opportunity to show your work?

2 MR. PHILLIPS: Well, we -- we were  
3 audited 12,000 times, which means that there  
4 were probably more than a few opportunities for  
5 somebody to ask us and -- and -- and, in fact,  
6 to show our work.

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

20 The General Accounting Office said the  
21 price -- in -- in setting the price, discounts  
22 don't count. CMS recognized discounts don't  
23 count. You get all that, those statements, from  
24 the federal government as to how you're supposed  
25 to proceed, and no state governments involved in

1 this case who told us that Medicaid doesn't take  
2 into -- you know, you can't -- if you discount,  
3 you have to discount in full.

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

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

19 Our position would obviously not be --  
20 it would either be viewed as objectively  
21 unreasonable or we had been given guidance that  
22 said to us don't go in that direction.

23 So I -- in -- in response  
24 specifically, Justice Alito, I think -- you  
25 know, part of it, I mean, we clearly had the



1 opportunity or there were opportunities for  
2 information to be exchanged. The government's  
3 view of the world is that we're supposed to come  
4 in and identify problems.

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

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

20           This is -- this is not just about this  
21 case. This is a problem that the False Claims  
22 Act is going to present to the entire business  
23 community in ways that I think are  
24 inappropriate.

25           CHIEF JUSTICE ROBERTS: Justice

1 Thomas?

2 JUSTICE THOMAS: Just so I understand  
3 you, Mr. Phillips, the -- you're saying, if  
4 there had been a rule -- and I'm just giving an  
5 example -- that the price is four and you  
6 charged five, that that would be a false --

7 MR. PHILLIPS: That would be a false  
8 claim, yes, Your Honor.

9 JUSTICE THOMAS: But you're saying  
10 that no one gave you guidance on usual and  
11 customary and that you arrived at a price that  
12 was above your discount price and that that  
13 cannot be false?

14 MR. PHILLIPS: Right, under -- and  
15 that that -- and that that choice was, under the  
16 circumstances, objectively reasonable given --  
17 given the language "usual and customary" in the  
18 way that it was generally interpreted by -- by  
19 contractor -- contracting parties on the other  
20 side and by state and federal agencies.

21 CHIEF JUSTICE ROBERTS: Justice Alito?  
22 Justice Sotomayor?  
23 Justice Kagan?  
24 Justice Gorsuch?  
25 Justice Kavanaugh?

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

11 Do you agree with that in terms --

12 MR. PHILLIPS: Yeah.

13 JUSTICE KAVANAUGH: Do you understand  
14 what I'm referring to --

15 MR. PHILLIPS: No, yeah, of course, of  
16 course.

17 JUSTICE KAVANAUGH: -- for post hoc  
18 here?

19 MR. PHILLIPS: Of course. I mean,  
20 look, if -- if -- if -- if it is a full defense  
21 under -- call it the Safeco defense, even though  
22 it says modified by Safeco -- that says that as  
23 -- as long as the parties had a reasonable --  
24 you know, took a position that was reasonable  
25 under the circumstances, you cannot come in and

1 waive something after the fact and -- and save  
2 you if you -- if you otherwise didn't  
3 have anything that would -- you know, that --  
4 that -- where your intent was -- was up in the  
5 air.

6           Yeah, I mean, that would obviously be  
7 more important for the business community than  
8 the -- or, well, less damaging to the business  
9 community than the alternative.

10           JUSTICE KAVANAUGH: Thank you.

11           CHIEF JUSTICE ROBERTS: Justice  
12 Barrett?

13           Justice Jackson?

14           Thank you, counsel.

15           Mr. Singh?

16           REBUTTAL ARGUMENT OF TEJINDER SINGH

17           ON BEHALF OF THE PETITIONERS

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

20           The first is, as Mr. Phillips says,  
21 the statute says what it says, and it says  
22 something very different from the Fair Credit  
23 Reporting Act and very different from the  
24 Seventh Circuit's rendition of Safeco and the  
25 rule that it adopted. Terms like "objectively

1 reasonable," "authoritative guidance" appear  
2 nowhere in the False Claims Act. It refers to  
3 clearly subjective terms.

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

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

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

23 What the subjective rule asks is, look  
24 at what people actually believed at the time  
25 they were filing claims. Did they believe they

1 were doing the right thing or the wrong thing?  
2 And that could be because of a legal reason or a  
3 factual reason. It's one-size-fits-all.

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

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

17           Lastly, I just want to push a little  
18 bit on some of the descriptions that Mr.  
19 Phillips is offering of the record in this case.  
20 You know, he says there's no guidance, there's  
21 nothing. But we have cited the contrary  
22 guidance, and we have, moreover, cited all of  
23 the internal communications showing that their  
24 employees understood that guidance.

25           As Justice Gorsuch said, these are all

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

8 For those reasons, we would ask the  
9 Court to reverse the judgments below.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel. The case is submitted.

12 (Whereupon, at 1:10 p.m., the case was  
13 submitted.)

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## Official

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