

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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PATRICK D. THOMPSON,)

Petitioner,)

v.) No. 23-1095

UNITED STATES,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, January 14, 2025

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Gair.

ORAL ARGUMENT OF CHRIS C. GAIR

ON BEHALF OF THE PETITIONER

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

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

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

1 interpretation, to heed the text.

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

9 I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

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

8 Congress chose not to do that here.

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

13 MR. GAIR: No. I --

14 JUSTICE ALITO: Is that correct?

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

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

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

20 JUSTICE ALITO: -- that is your argument?

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

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

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

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

6 JUSTICE JACKSON: --- even --

7 JUSTICE BARRETT: Oh. Sorry.

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

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

21 JUSTICE JACKSON: -- assess?

22 MR. GAIR: I'm sorry.

23 JUSTICE JACKSON: Yeah.

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

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

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

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

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

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

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

1 \$110,000.

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

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

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

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

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

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

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

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

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

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

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

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

22 JUSTICE BARRETT: Do you regard it --

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

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

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

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

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

13 JUSTICE BARRETT: I --

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

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

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

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

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

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

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

18 CHIEF JUSTICE ROBERTS: What --

19 JUSTICE KAGAN: -- like the --

20 CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

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

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

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

25 If I say I made a hundred thousand

1 dollars and, in fact, I made \$70,000 or \$130,000,
2 or whichever way the exchange rate goes --

3 (Laughter.)

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

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

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

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

25 And I think that the -- the -- the -- the

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

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

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

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

14 MR. GAIR: Your Honor --

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

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

23 JUSTICE SOTOMAYOR: So he had a note for
24 110,000 might be true, but he was asked: What did
25 you borrow? And he said: Only a hundred thousand.

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

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

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

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

17 MR. GAIR: Correct.

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

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

22 JUSTICE SOTOMAYOR: So I -- I hate the
23 word "literally" because I don't know what it
24 means. I think that the question is: Did he make
25 a false statement? And wouldn't -- could a

1 rational jury have understood him to have made a
2 false statement in the way that I read this.

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

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

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

10 JUSTICE SOTOMAYOR: So do --

11 MR. GAIR: No -- no --

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

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

22 JUSTICE SOTOMAYOR: All right. Thank
23 you.

24 JUSTICE KAGAN: Well, however the
25 district court --

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

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

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

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

22 First of all --

23 CHIEF JUSTICE ROBERTS: So just to be
24 clear then, then that means all the discussion
25 about what he thought and all that and how

1 reasonable, that -- that's beside the point.

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

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

10 MR. GAIR: And there is. The question,
11 though --

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

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

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

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

22 JUSTICE KAVANAUGH: Right.

23 MR. GAIR: And there was evidence in the
24 record from which a jury could have found the mens
25 rea, and we haven't challenged that, but the -- but

1 the mens rea is a separate element. And the
2 question of falsity is not --

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

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

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

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

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

19 JUSTICE KAGAN: Yeah, but --

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

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

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

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

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

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

23 So I do think that a rational -- that no
24 rational jury in this context could have found
25 that. And, certainly, the district court could

1 have made that determination but didn't reach it.

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

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

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

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

25 MR. GAIR: So a statement -- let's take

1 an example of a statement that -- that might be
2 misleading.

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

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

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

17 (Laughter.)

18 JUSTICE KAGAN: Well, it is, though, the
19 humblest answer I've ever heard from the Supreme
20 Court podium.

21 (Laughter.)

22 JUSTICE KAGAN: So good show on that one.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: Not so good for
25 Mr. Francisco and Mr. Waxman.

1 (Laughter.)

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

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

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

22 MR. GAIR: No, I definitely don't think
23 the Court would -- would want to do that, but this
24 is an important statute that deals with people's
25 dealings with sophisticated financial entities.

1 And it is important for the Court to give some
2 guidance on the question of whether a statement is
3 misleading or false precisely because the statute
4 is so important and so -- such broad application.

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

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

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

23 And, under those circumstances, you know,
24 we can -- we can make a judgment, or we could maybe
25 leave it to somebody else to do it in the first

1 instance. Them's our choices. Is that about it?

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

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

7 JUSTICE JACKSON: But I guess --

8 JUSTICE GORSUCH: -- never had any
9 financial dealings.

10 MR. GAIR: I -- I --

11 JUSTICE GORSUCH: But -- but it's -- but
12 -- but -- but you have a tough row to hoe.

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

19 JUSTICE JACKSON: But, Mr. Gair, why
20 doesn't --

21 JUSTICE GORSUCH: Could you spin that
22 out, please, first?

23 MR. GAIR: Pardon me?

24 JUSTICE GORSUCH: Could you spin that
25 out?

1 MR. GAIR: Yes. Three -- three data
2 points.

3 The first is that the government conceded
4 below that the statements were literally true.

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

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

22 So I do think there's a good basis for
23 the district court to make this decision in the
24 first instance, and I think that this Court should
25 decide the important legal issue to make sure that

1 prosecutors don't over-enforce this statute.

2 CHIEF JUSTICE ROBERTS: Thank you --

3 JUSTICE ALITO: Well, what you just said

4 --

5 CHIEF JUSTICE ROBERTS: -- thank you,
6 counsel.

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

9 MR. GAIR: Correct.

10 CHIEF JUSTICE ROBERTS: You agree that's
11 completely false?

12 MR. GAIR: That is a false statement.

13 CHIEF JUSTICE ROBERTS: Okay. Thank you.
14 Justice Thomas?

15 Justice Alito?

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

21 It's a mens rea question. It's not a
22 question of -- of the -- of the actus reus, which
23 is the utterance of a false statement.

24 MR. GAIR: I -- I agree with you that it
25 goes to mens rea. But, if we were to take the

1 perspective of my friends to -- to think that the
2 perception of the listener mattered, this -- that
3 evidence would bear on this question.

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

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

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

19 MR. GAIR: I -- I don't think so, Your
20 Honor. I think that the -- the falsity is an
21 objective concept. If I say that the sun rises in
22 the west, that's false, and it doesn't matter
23 whether it misleads you or not.

24 JUSTICE ALITO: It may not concern the --
25 the -- the perception of the particular person to

1 whom the -- the statement is directed, but it does
2 concern the perception of some kind of listener --

3 MR. GAIR: It --

4 JUSTICE ALITO: -- some -- otherwise,
5 the -- I don't understand the concept of falsity in
6 context.

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

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

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 Justice Kagan?

18 Justice Gorsuch?

19 Justice Kavanaugh?

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

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

23 JUSTICE KAVANAUGH: The prison time's
24 already been served, so that's over. And what's
25 still potentially at stake is restitution, is that

1 --

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

6 JUSTICE KAVANAUGH: Okay. So it's just
7 the -- okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

15 MR. GAIR: I -- I think that the right
16 way to say it is falsity in context of the
17 question.

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

23 You've suggested both in your briefs and
24 then I think even more clearly today that the only
25 context that matters when we're looking at cues is

1 the question to whom -- to which the defendant was
2 responding.

3 Is that your position?

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

6 JUSTICE BARRETT: It's okay.

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

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

15 So you have to look to the question, the
16 answer, and the objective facts.

17 JUSTICE BARRETT: Okay. So it's not just
18 the question. It can be surrounding circumstances,
19 as well as the question?

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

22 JUSTICE BARRETT: Right, right, right.

23 MR. GAIR: Yeah.

24 JUSTICE BARRETT: Right. I -- I
25 understand that.

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

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

18 MR. GAIR: Just -- Justice Barrett, I
19 disagree with that. And -- and -- and -- and so
20 did this Court in the Bronston case.

21 In the Bronston case, it was absolutely
22 clear what the petitioner -- what the questioner
23 was driving at. He wanted to know if the person
24 had had Swiss Bank accounts. And the answerer
25 said: Well, my company did. And it wasn't

1 pursued. And so the situation is very analogous.

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

6 CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

22 JUSTICE JACKSON: Okay. So why isn't the
23 Seventh Circuit's only potential response on remand
24 to determine whether any reasonable jury, given
25 that set of circumstances and evidence, could have

1 reached the result it reached?

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

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

11 And there is a very exacting standard,
12 as -- Justice Jackson, as you know, for a motion
13 for judgment of acquittal, and --

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

18 What is your best argument as to why, for
19 example -- and I'll just give you the analogy from
20 the government, the analogy about the kid in the
21 cookie jar, that the mom says, you know: How many
22 cookies did you eat? Or did you -- did you eat
23 cookies? Or whatever the -- the question is. And
24 the kid actually ate -- and I'm now making this
25 up -- 10 cookies. And he responds: I ate three.

1 Why is that not a false statement?

2 MR. GAIR: Your hypothetical -- the
3 answer to your hypotheticals is actually twofold.

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

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

18 I mean, we don't have a particular
19 question. We have his interpretation of the
20 question and then answering it in a certain way,
21 which you say doesn't make it false. But, in the
22 context of what a reasonable jury could have
23 determined, I don't understand why -- what your
24 argument is to why a jury couldn't have interpreted
25 what happened here to be calling for a specific

1 response to the question: How much do you owe?

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

6 JUSTICE JACKSON: Difficult, but
7 impossible? The question is: Could a reasonable
8 jury have interpreted it that way?

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

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

18 JUSTICE JACKSON: All right. Thank you.

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Ms. Flynn.

23 ORAL ARGUMENT OF CAROLINE A. FLYNN

24 ON BEHALF OF THE RESPONDENT

25 MS. FLYNN: Mr. Chief Justice, and may it

1 please the Court:

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

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

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

20 Indeed, on page 7 of his reply brief,
21 Petitioner himself agrees that context obviously
22 matters in determining whether a statement is
23 false. I understood my friend to reiterate that
24 position again today.

25 So now it appears we're just debating

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

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

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

23 I welcome the Court's questions.

24 JUSTICE THOMAS: So it doesn't really
25 matter in this case whether there is a difference

1 between false and misleading?

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

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

14 I think you can see this in particular at
15 pages 10a and 13a of the petition appendix. On
16 10a, the Court said: Even if he never used the
17 precise words, the implication of Petitioner's
18 statements was that he owed Washington Federal no
19 more than \$110,000, something that was untrue.

20 And then, on 13a, the court talks about
21 the mistake -- unmistakable impression left by his
22 statements and how the jury found in its verdicts
23 that he conveyed the message that he falsely stated
24 that he only owed \$110,000 and any higher amount
25 was incorrect.

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

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

19 But, here, when Petitioner says "I
20 borrowed \$110,000" in response to what was
21 essentially a question from the FDIC saying, did
22 you -- do you owe \$269,000, that is directly
23 conveying through his statement that he only owed
24 that amount.

25 JUSTICE KAVANAUGH: Do you agree that --

1 CHIEF JUSTICE ROBERTS: That's a --

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

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

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

18 MS. FLYNN: I don't think those would be
19 treated differently under those two statutes. I
20 believe that is a false statement because a
21 reasonable juror could find in context that when an
22 officer pulls somebody over and asks have you been
23 drinking, they're asking for a complete account of
24 how much you've been drinking. And when the person
25 says "I had just one cocktail" --

1 CHIEF JUSTICE ROBERTS: I didn't say
2 "just."

3 MS. FLYNN: -- that implies -- oh, I'm
4 sorry.

5 CHIEF JUSTICE ROBERTS: He didn't say
6 "just." In my hypothetical, it's, "I had a
7 cocktail."

8 MS. FLYNN: I'm sorry. I was -- I was
9 repeating from the brief.

10 CHIEF JUSTICE ROBERTS: Or "I had one
11 cocktail."

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

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

22 JUSTICE GORSUCH: Ms. Flynn, we didn't --
23 we didn't take this case to decide whether a
24 reasonable juror could -- could -- could find that
25 the defendant here in context made a false

1 statement. As important as this case is, that's
2 not why we took it.

3 We took it to resolve whether the statute
4 allows the government to pursue a theory of
5 misleading rather than falsity, right?

6 MS. FLYNN: Well, I believe -- you took
7 this case where the facts presented are a numerical
8 understatement.

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

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

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

24 JUSTICE GORSUCH: Really?

25 MS. FLYNN: -- that here, the only legal

1 --

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

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

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

19 JUSTICE GORSUCH: Okay.

20 JUSTICE KAVANAUGH: So you're not --

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

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

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

25 JUSTICE GORSUCH: And are -- and you're

1 not --

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

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

5 MS. FLYNN: So it depends on what you
6 mean. We believe that --

7 JUSTICE GORSUCH: Falsity in context is
8 what's required by the statute.

9 MS. FLYNN: Yeah.

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

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

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

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

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

25 MS. FLYNN: Well, I pointed the Court to

1 two instances in which I do believe the court --
2 the Seventh Circuit --

3 JUSTICE GORSUCH: Yeah, but it said --

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

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

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

13 JUSTICE KAVANAUGH: It said --

14 JUSTICE GORSUCH: Go ahead, please.

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

21 Do you agree with that?

22 MS. FLYNN: So, if you read that sentence
23 to mean all misleading representations, no, we do
24 not agree with that. But, if the --

25 JUSTICE KAVANAUGH: Okay. And that's the

1 -- that's the question I thought we -- I agree with
2 Justice Gorsuch. I mean, we say it all the time,
3 that we don't --

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

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

13 JUSTICE KAGAN: I mean, I'll tell you the
14 statements that I think you should walk away from
15 --

16 MS. FLYNN: Sure.

17 JUSTICE KAGAN: -- and you tell me if you
18 agree.

19 (Laughter.)

20 JUSTICE KAGAN: I mean, there are a whole
21 world of -- I wish I had some good examples at
22 hand, but we've seen these kinds of cases in --
23 these kinds of statements in many cases over the
24 years and talked about them, where somebody says
25 something and it's not just literally true; it is

1 true in context. The reader is hearing the
2 statement in exactly the way that --

3 MS. FLYNN: Right.

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

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

16 MS. FLYNN: Yes, I would agree with that.
17 My --

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

1 because there's other stuff that's been left out.

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

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

11 MS. FLYNN: Right.

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

19 MS. FLYNN: Exactly. And I would add the
20 further -- the further point that because, right
21 now, we're just debating, I -- I think, what
22 context -- or at least between my friend and I,
23 what context counts, I would think this Court
24 should answer that question as well and say it's
25 not just the preceding question, it's the things --

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

8 JUSTICE KAVANAUGH: Well, don't you think
9 if we -- if we granted cert on that question, we
10 get amicus briefs discussing that important
11 question? Because that is going to have an effect
12 on lots of statutes.

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

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

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

1 JUSTICE KAVANAUGH: Yeah.

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

4 JUSTICE JACKSON: Isn't --

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

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

7 JUSTICE ALITO: Well, the question
8 presented --

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

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

23 MS. FLYNN: I don't think -- I mean,
24 respectfully, Your Honor, I don't think that's
25 correct. I think the concept of falsity is one

1 that we fully trust jurors, as lay people, to
2 assess and make determinations about and engage in
3 line drawing. I think it's very similar to
4 material --

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

10 And it's a -- it -- it -- it -- it has
11 ripple effects not just in 1014 but throughout all
12 of Title 18 because there are literally -- well,
13 not literally.

14 (Laughter.)

15 JUSTICE GORSUCH: There are a lot of
16 false statement statutes under which you can
17 proceed.

18 JUSTICE JACKSON: Ms. --

19 JUSTICE GORSUCH: And -- and many of them
20 do distinguish between falsity and misleading
21 statements. Each of the --

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

24 JUSTICE GORSUCH: Well, I -- I -- I hope
25 Ms. Flynn would have a response.

1 JUSTICE ALITO: Oh, sure.

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

9 And so, in that sense, the question
10 presented answers itself. The issue in this case
11 has always been what does "false" mean. And our
12 argument is falsity in context. And I do think the
13 legal question, answering it, is -- I mean, this
14 Court all the time talks about --

15 JUSTICE GORSUCH: But where is that in --
16 where is that in the QP, Ms. Flynn? I'm sorry, but
17 you just said in the QP is a question of what makes
18 a statement false.

19 MS. FLYNN: Yes.

20 JUSTICE GORSUCH: I don't see that. I
21 see whether 1014 also prohibits a statement that
22 is -- that is misleading but not false.

23 JUSTICE JACKSON: Right. But --

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

25 JUSTICE JACKSON: -- Ms. Flynn, isn't --

1 isn't the problem that in the government's view,
2 the question presented, as Justice Gorsuch is
3 reading it, is actually not implicated on these
4 facts?

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

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

20 MS. FLYNN: Yeah.

21 JUSTICE JACKSON: And that's why -- so --
22 so -- so, to answer the question when and under
23 what circumstances does this statute cover
24 misleading but not false situations on these set of
25 facts is like a mismatch because you say that's not

1 happening here, right?

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

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

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

23 MS. FLYNN: Sure. So my friend points to
24 a -- a -- a moment in one of the hearings about
25 this issue where government counsel was sort of

1 paraphrasing the kind of argument that Petitioner
2 was making about literally -- literal falsity. But
3 elsewhere in that same hearing, the counsel said
4 that Petitioner's statements were "not true," I
5 believe three times. They maintained that position
6 afterwards. Of course, we maintained that before
7 the Seventh Circuit as well.

8 So I do not believe it's fair to say that
9 we have conceded that his statements were literally
10 true.

11 JUSTICE SOTOMAYOR: Counsel, assume for
12 the sake of argument that we don't accept your
13 position that "misleading" and "false" are
14 synonymous, that there are some things -- borrowing
15 the phrase of your -- the other side, some things
16 that are true but misleading.

17 Just as a hundred -- if you say a packet
18 of toxic mushrooms is a hundred percent natural.
19 Toxic mushrooms are a hundred percent toxic. But
20 it may be -- be misleading if you're selling it
21 because people may believe that it's safe, that you
22 can actually eat it. So that's misleading but not
23 false.

24 So assume that there's a difference
25 between the two. And we say this is a Bronston

1 case. It has to be a false statement in the sense
2 of Bronston. How is this -- what is the
3 difference, or is there, in what you're saying
4 about what falsity means in this statute and what
5 we said it meant in Bronston?

6 MS. FLYNN: Yes.

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

17 MS. FLYNN: So we disagree that the --
18 the rule this Court announced for the perjury
19 statute in Bronston applies to the language of
20 1014. And there's a couple --

21 JUSTICE SOTOMAYOR: Assume we disagree
22 because, there, it was -- the perjury was for
23 making a false statement. Here, if you make a
24 false statement, you're guilty, with some other --
25 knowingly, et cetera, et cetera, other elements.

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

3 MS. FLYNN: So I do want --

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

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

9 JUSTICE SOTOMAYOR: I understand that.
10 I've said it three times. Assume.

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

17 And we don't think you need to have -- of
18 course, Bronston was talking about questions and
19 answers during testimony, but we think that here,
20 for instance, the invoice essentially served the
21 same contextual purpose as a direct question about
22 how much Petitioner owed.

23 But it's -- the -- the principle is the
24 same. The Court was saying, of course, if you
25 under -- if you only state part of the whole --

1 JUSTICE SOTOMAYOR: Now we go to Justice
2 -- now we go to Justice Gorsuch's question. When
3 we describe context, you're -- the other side says
4 what's the question asked directly or implicitly,
5 you're -- but I think he's not going to say
6 "implicitly." What's the question you asked? What
7 is the answer you give? And, objectively, do the
8 facts support that answer?

9 How would you describe what we're
10 supposed to do?

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

17 JUSTICE SOTOMAYOR: That's what we did in
18 Bronston. We looked at the question asked.

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

24 JUSTICE SOTOMAYOR: If we disagree with
25 you --

1 MS. FLYNN: -- that we want perjury to be
2 --

3 JUSTICE SOTOMAYOR: If we disagree with
4 you, is that the lesson you take from Bronston?
5 That it's the question asked and whether the answer
6 is objectively right or not?

7 MS. FLYNN: In the context of perjury,
8 yes, I understand that to be the case, though, of
9 course --

10 JUSTICE SOTOMAYOR: But you're arguing --

11 MS. FLYNN: -- I think you have to look
12 at the question --

13 JUSTICE SOTOMAYOR: -- we should apply
14 something different in other contexts?

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

16 JUSTICE SOTOMAYOR: All right. Thank
17 you.

18 CHIEF JUSTICE ROBERTS: Counsel, we've
19 been talking about things that are technically true
20 but misleading. Does it work the other way? Let's
21 say you have things that are -- statements that are
22 technically false but not misleading. If someone's
23 trying to sell you a horse and -- and says this is
24 the fastest horse I'd ever seen, and, in fact, it's
25 not, he's seen a faster horse, but I don't think

1 purchasers would necessarily view that as
2 misleading. They would view that as sort of normal
3 sales talk.

4 So can things be technically true --
5 technically false but not misleading?

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

11 CHIEF JUSTICE ROBERTS: No, no, it's
12 either --

13 MS. FLYNN: -- takes that with a grain of
14 salt.

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

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

18 CHIEF JUSTICE ROBERTS: Yeah.

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

1 CHIEF JUSTICE ROBERTS: Okay.

2 JUSTICE GORSUCH: Ms. Flynn, just to back
3 up about the QP --

4 MS. FLYNN: Yes.

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

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

1 likelihood of overturning the jury verdict is very
2 low.

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

5 MS. FLYNN: I'd respectfully push back on
6 a few aspects of that. I -- we took the position
7 in our opposition brief that the statements have to
8 be false, that --

9 JUSTICE GORSUCH: No, no. Page 6 says,
10 Section 1014 criminalizes misleading
11 misrepresentations and is not limited to literally
12 false statements.

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

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

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

1 to assess falsity by virtue of looking at the
2 precise words used in the four corners of the
3 statement alone. I now understand Petitioner to
4 have walked away from that rule.

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

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

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

22 JUSTICE BARRETT: And then just not say
23 anything else?

24 MS. FLYNN: Yes.

25 JUSTICE BARRETT: We don't need to say

1 anything else about what counts as falsity, this
2 falsity in context, that sort of thing? We don't
3 use the words "literal falsity" and then we just
4 send it back to the Seventh Circuit?

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

14 JUSTICE BARRETT: Thanks.

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

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

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

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

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

25 JUSTICE ALITO: And what would that

1 broader category be? I know that's the connotation
2 that --

3 MS. FLYNN: Right --

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

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

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

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

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

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

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

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

22 I'm sorry, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas? Anything?

1 Justice Alito?

2 Justice Sotomayor?

3 JUSTICE SOTOMAYOR: Would this be
4 false under -- the example you gave, would it be
5 false under Bronston?

6 MS. FLYNN: The tennis player example?

7 JUSTICE SOTOMAYOR: Yes.

8 MS. FLYNN: No.

9 JUSTICE SOTOMAYOR: Why not? If I asked
10 you: Have you won a championship?

11 MS. FLYNN: If you asked me have you won
12 a championship --

13 JUSTICE SOTOMAYOR: Not -- not how.

14 MS. FLYNN: Sorry. Have, yes.

15 JUSTICE SOTOMAYOR: If I asked you: Have
16 you won a championship, and you answered the way
17 you did, and that's why you got whatever job you
18 were applying for, have you made a false statement
19 or a misleading statement?

20 MS. FLYNN: I don't believe we made a
21 false statement under Bronston or under the rule
22 we're advocating for today.

23 JUSTICE SOTOMAYOR: Okay.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: Doctors trying to

1 convince a patient to have a particular surgery,
2 and he says: I've done 100 of these surgeries.
3 Turns out that 99 of the patients have died.

4 (Laughter.)

5 JUSTICE KAGAN: 100 of these surgeries.
6 True statement, correct?

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

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

12 MS. FLYNN: Correct.

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

15 MS. FLYNN: Correct.

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

19 MS. FLYNN: Yes.

20 JUSTICE KAGAN: And, you know, would it
21 be helpful, in your view, to say something like
22 that? There -- there really is a difference. In
23 some -- there might be overlap, but there really is
24 a difference. Some things that are super
25 misleading, but that are not false. Your example

1 of the tennis player, my example of the surgeon.

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

6 MS. FLYNN: Yeah, I would not resist this
7 Court explaining that. I just am only resisting
8 the possibility that you could say this statute
9 does not criminalize misleading representations,
10 full stop, without explaining that falsity by
11 context counts, what that means.

12 And that also leaving open the
13 possibility that the facts here, where the
14 Petitioner in response to a statement saying he
15 owed a certain amount, said: I'm shocked by that,
16 and I owed this different amount. That that could
17 not -- a juror could not find, as a matter of law,
18 that that is false.

19 CHIEF JUSTICE ROBERTS: Justice Gorsuch?
20 No?

21 Justice Kavanaugh?

22 Justice Barrett?

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

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

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

11 MS. FLYNN: It would be that "false" --
12 "false" means untrue or inaccurate, but that an
13 assessment of whether a -- a statement is untrue or
14 inaccurate, is the message being sent in context.
15 And you could -- jurors, as a matter of law, can
16 take account of context, including the purpose of
17 the conversation, other parts of it, and the
18 meaning of the words used.

19 And to affirm on the record in this case
20 where the Seventh Circuit looked at this and found
21 that a reasonable jury can find -- could find in
22 context that what Petitioner said was untrue, and
23 match the charged false statements that the jury
24 was instructed on.

25 CHIEF JUSTICE ROBERTS: Justice Jackson?

1 JUSTICE JACKSON: So going to Justice
2 Kagan's point, I mean, there is a difference
3 between false and misleading, but I take it that
4 the government's argument is that the facts here
5 don't really implicate that difference.

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

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

14 MS. FLYNN: Correct.

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

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

1 false by any measure, and his contrary argument
2 would not entitle him to relief in any circuit. No
3 further review is warranted.

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

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

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

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

1 today.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Gair, rebuttal?

6 REBUTTAL ARGUMENT OF CHRIS C. GAIR

7 ON BEHALF OF THE PETITIONER

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

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

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

1 the statute of limitations implied a discovery
2 rule.

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

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

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

24 The Court there, of course, was dealing
25 with a pure omission, but it had a nice explication

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

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

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

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

21 The Seventh Circuit did -- and I'm very
22 glad my friend mentioned it -- say that the
23 implication of this was false. The impression
24 created was false. But -- but that begs the
25 question. Impression and implication go to the

1 perception of the listener. The court never said
2 it was false as an objective matter. Instead, it
3 said that it -- it was not deciding that question.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 MR. GAIR: Thank you.

7 CHIEF JUSTICE ROBERTS: The case is
8 submitted.

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

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