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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 this morning in Case 23-1127, Wisconsin Bell versus United States ex rel. Todd Heath.

Ms. Ho.

ORAL ARGUMENT OF ALLYSON N. HO
ON BEHALF OF THE PETITIONER

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

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

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

1 Government Corporation Control Act.

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

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

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

25 Choices have consequences, and the

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

4 I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

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

11 CHIEF JUSTICE ROBERTS: The -- the --

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

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

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

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

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

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

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

24 JUSTICE JACKSON: Right. I was just
25 responding --

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

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

5 MS. HO: Yes.

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

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

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

1 States provides or has provided any portion of
2 the money or property."

3 So it's not enough that --

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

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

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

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

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

24 JUSTICE JACKSON: -- even -- in either
25 scenario, the public fisc is not really put at

1 risk. I mean, you have this pot of money that's
2 the public fisc, and in my second scenario, the
3 government is exacting a fee from the telecom
4 companies, and while it might be put into the
5 public fisc for two seconds, the point is
6 they're exacting the fee to pay for this fund.

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

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

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

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

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

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

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

13 MS. HO: And --

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

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

24 JUSTICE JACKSON: Means that it can --

25 JUSTICE BARRETT: But, Ms. Ho --

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

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

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

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

23 I mean, I think one person doesn't
24 have to provide. I think we could say that the
25 United States provided funds, for example, that

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

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

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

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

21 JUSTICE KAGAN: Well, why not?

22 JUSTICE BARRETT: But they --

23 MS. HO: -- for those funds.

24 JUSTICE KAGAN: I mean, I had the same
25 sort of question that Justice Barrett did, a

1 different example.

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

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

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

16 JUSTICE KAGAN: Well, I think my
17 friend --

18 MS. HO: And that -- and that's
19 what --

20 JUSTICE KAGAN: -- would thank me for
21 giving her the soup, not the funds, you know? I
22 mean -- I mean, I think my friend would
23 understand that the Uber guy was a kind of
24 conduit and it went through -- but -- but -- but
25 -- but I ordered the soup. And, here, the

1 mandate is coming from the federal government in
2 the same way.

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

9 JUSTICE KAGAN: And so too I think --

10 MS. HO: -- to how it gets achieved
11 down the -- down the way.

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

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

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

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

21 JUSTICE BARRETT: But, Ms. Ho, it
22 doesn't say that the threat -- I mean, clearly,
23 one purpose is to protect the public fisc.

24 MS. HO: Yes.

25 JUSTICE BARRETT: But, I mean, also

1 protecting federal programs could be a purpose.
2 I mean, so you can't rely just, I think, on that
3 one purpose to narrow it.

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

10 MS. HO: Let me take both parts of
11 your question, Justice Barrett. Let me start
12 with your -- the -- the last part, the title
13 clause.

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

19 So a request for money that's been
20 provided to -- by the United States to a grantee
21 is still a claim even though the grantee and not
22 the United States holds title to the money when
23 the request is made. And the -- the revised
24 addition of the "provides for" clause
25 strengthens that interpretation because Congress

1 also amended that to say "provides or has
2 provided."

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

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

19 And the text of the False Claims Act
20 really answers that because, in the revised --
21 in the revisions, the amendments that were made
22 in 2009, Congress specified: If the money or
23 property is to be spent or used on the
24 government's behalf or to advance a government
25 program or interest and if the United States

1 provides or has provided any portion of the
2 money.

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

8 And Congress didn't -- didn't do that.
9 It adopted a very narrow amendment --

10 JUSTICE KAVANAUGH: Do --

11 MS. HO: -- that was focused on the
12 timing issue, not severing the -- the False
13 Claims Act from the --

14 JUSTICE KAVANAUGH: On -- on Justice
15 Thomas's question about the hundred million
16 dollars -- I want to focus on that as well for a
17 minute -- what exactly makes something part of
18 the public fisc, to use your terms, or makes
19 something government funds, to use your term?
20 What are the precise indicia?

21 MS. HO: Sure. I would say public
22 money, money that is owed to the United States.
23 So that would take in taxes, certainly, but also
24 fees, say, that people pay the post office or
25 customs that go into the public fisc.

1 So I think the key -- the key -- the
2 key indicia is that it's simply money that the
3 government owns.

4 JUSTICE KAVANAUGH: From taxes or fees
5 or fines? No?

6 MS. HO: Yes. If the money -- if it's
7 -- if it's -- if it's money that's going from
8 private pockets into the public fisc, into the
9 government, the government owns that money and
10 the government can do with that money what it
11 will. And by contrast --

12 JUSTICE KAVANAUGH: When you say "owns
13 the money," what are --

14 MS. HO: Owns the money.

15 JUSTICE KAVANAUGH: -- what are the
16 precise things we look at to determine whether
17 the government "owns the money"?

18 MS. HO: Sure. I think -- I think you
19 would -- I think one way -- maybe one helpful
20 way to look at it within --

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

23 MS. HO: Yes. Maybe one helpful way
24 to look at it within the False Claims Act
25 context that our case arises in is it is -- it

1 is money that -- that, if anything were to
2 happen to that money, right, that that -- that
3 -- that the -- the incidence of that loss would
4 be borne by the government.

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

17 JUSTICE KAVANAUGH: But couldn't you
18 say that --

19 MS. HO: -- for purposes of the False
20 Claims Act.

21 JUSTICE KAVANAUGH: -- about all
22 public funds? You know, taxes come in and then
23 they go out to pay for government programs; in
24 other words, the -- that's what I'm trying to
25 distinguish. Most government money comes from

1 taxes, some from fees --

2 MS. HO: Yes.

3 JUSTICE KAVANAUGH: -- some from
4 leases, et cetera.

5 MS. HO: Yes.

6 JUSTICE KAVANAUGH: But it's coming in
7 and going out.

8 MS. HO: And it is -- and it is -- it
9 is the government, right, it is coming into the
10 public fisc, right, and the government is then
11 sending it out. And that is not -- that's the
12 opposite -- that is what Congress did not want
13 here. Congress wanted money coming into a
14 private --

15 JUSTICE KAVANAUGH: Right. On your
16 broader argument, I get that. I'm still trying
17 to get the hundred million. But I'm -- I --

18 MS. HO: Yes, I -- I think -- I think
19 -- I think the way to think about that money is
20 that is money just -- it's no different than the
21 contributions, Justice Kavanaugh.

22 JUSTICE KAVANAUGH: Okay.

23 MS. HO: It is owed to the
24 Administrative Company, and the government is
25 simply getting it and taking it back to its

1 private owner. The government doesn't keep any
2 of that money.

3 CHIEF JUSTICE ROBERTS: What --

4 MS. HO: So, if something were to
5 happen to that money, all of the incidence of
6 loss would fall on the Administrative Company,
7 which, by the way, cannot have -- does not have
8 recourse to the Treasury for funds if it falls
9 short. It has to go involve commercially --

10 CHIEF JUSTICE ROBERTS: What if we --

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

12 CHIEF JUSTICE ROBERTS: What if we
13 don't agree with your treatment of the hundred
14 million and think -- agree with the government's
15 view of the hundred million? Is there any way
16 that you -- any argument you have that that
17 doesn't taint the 4 billion or whatever the
18 number is? In other words, if part of it is the
19 whatever -- you know, hundred million over
20 whatever the denominator is, does that mean you
21 lose?

22 MS. HO: So the plain text of the
23 False Claims Act refers to "any portion of the
24 money." I do think that would have damages
25 implications, right, because the remedial

1 provision -- and I think this is actually
2 another structural cue why we're right about all
3 of the money, the contributions and the money,
4 that the -- that comes back to the company as a
5 result of restitutions, debts, and settlements,
6 is the remedial provision says a civil penalty
7 of not less than 5,000, not more than 10,000,
8 plus three times the amount of damages which the
9 government sustains.

10 So, whether you're talking about the
11 contributions coming in or you're talking about
12 the contributions that weren't paid and that are
13 coming back into the fund, the government did
14 not sustain loss either -- either way under any
15 -- any of those -- those funds, and --

16 JUSTICE KAGAN: Just to follow up the
17 Chief Justice's question, you're not suggesting,
18 are you, that there's some kind of tracing
19 requirement, that, you know, you have to find
20 the dollar that came into the Treasury and see
21 what happened to that exact dollar, because that
22 wouldn't make much sense, would it? So you're
23 not suggesting that?

24 MS. HO: No, I'm not suggesting that.
25 That -- that sort of -- you might have a

1 question like that along the damages prong,
2 right, because you're looking at the damages
3 that the government sustains. That's the Custer
4 Battles case, right, where the tracing was an
5 issue in that.

6 JUSTICE KAGAN: Yeah.

7 MS. HO: But, no, no.

8 JUSTICE GORSUCH: Can you explain that
9 --

10 JUSTICE KAGAN: And then --

11 JUSTICE GORSUCH: Sorry. Please go
12 ahead.

13 JUSTICE KAGAN: So one -- if I just
14 could go back to what Justice Kavanaugh was
15 asking you because, as I took Justice
16 Kavanaugh's question, it was really like every
17 time you tell me it comes in and it goes out,
18 again, putting the rest of the money aside, but
19 that a hundred million, it's just coming in and
20 going out in the typical way money always comes
21 in and goes out.

22 And you said the loss doesn't fall on
23 the government. But, in some sense, that's
24 always true because the money is appropriated
25 for some other thing, some other activity, and

1 the loss falls on that other activity or
2 purpose. So I guess I'm still searching for
3 what your answer is to Justice Kavanaugh's
4 question.

5 MS. HO: Sure. And I -- I -- I think
6 the -- the key to the debt settlements and
7 restitutions is that they -- they are no
8 different than the contributions that the
9 carriers pay directly to the Administrative
10 Company and that the Administrative Company then
11 disburses -- may I finish?

12 CHIEF JUSTICE ROBERTS: Sure.

13 MS. HO: Thank you.

14 It is simply -- it is money that
15 belongs to the Administrative Company, owed to
16 the Administrative Company, and that is brought
17 back to, and that the -- the only role of the
18 government with respect to the -- the debts and
19 the settlements and the restitution is to hold
20 that in trust for its rightful owner. No
21 different than when the government collects
22 restitution in a criminal case, it holds that
23 money in trust for the victim --

24 JUSTICE KAGAN: Thank you.

25 MS. HO: -- who is the owner. Thank

1 you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas, anything further?
5 Justice Sotomayor?

6 JUSTICE SOTOMAYOR: Your earlier
7 answer suggests to me that you think you -- that
8 this case won't end this matter unless we rule
9 on the government -- on the Respondent's first
10 ground, that this is a government program in
11 total, correct? Because what you're -- I think
12 what you're saying is we -- if our ruling relies
13 simply on the hundred million, that your next
14 case is going to be: Okay, I'll accept that,
15 but I'm going to fight about whatever the
16 recovery is under the False Claims Act. That's
17 what you just said to me.

18 MS. HO: I -- I -- I think -- I think
19 what I was -- what I was -- what I was trying to
20 say is the text of the False Claims Act reads
21 that so long as any portion of the money in
22 government -- is government funds. Our -- our
23 position is that the government doesn't provide
24 a cent of the money at -- at all.

25 JUSTICE SOTOMAYOR: If we say they

1 provide at least a hundred million, is your
2 argument going to be that recovery is limited to
3 that hundred million or that recovery, assuming
4 you go under the False Claims Act, that recovery
5 is limited to a hundred million, or are you
6 going to take this position you're now taking,
7 that the government hasn't suffered any harm so
8 that nothing would come to the government?

9 MS. HO: Well, our -- our -- our
10 position is that the government hasn't suffered
11 any harm. If you -- if you disagree and you
12 hold that the government has provided any
13 portion of that money, then, Justice Sotomayor,
14 you're right, that then does -- that becomes a
15 damages issue because the --

16 JUSTICE SOTOMAYOR: So this case
17 doesn't end. Then you're going to argue that
18 their damages have to be limited to a hundred
19 million? What are you going to argue?

20 MS. HO: Well, I think we would -- you
21 know, our position is that there is no fraud
22 here at all. We would go -- we would go back
23 and -- and have -- have a trial. Our position
24 is that there's -- there's no fraud here,
25 period.

1 JUSTICE SOTOMAYOR: Assume there's a
2 finding of fraud, that you should have paid more
3 -- you should have given them a greater discount
4 than you did. So assume you -- you lose the
5 fraud parts. Are we back to a case where you're
6 going to claim the damages are limited because?

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

10 JUSTICE SOTOMAYOR: Counsel, just ask
11 my --

12 MS. HO: -- like, what the -- what the
13 jury --

14 JUSTICE SOTOMAYOR: -- answer my
15 question.

16 MS. HO: It would be -- it would be
17 what -- whatever the jury finds in terms of
18 damages, the limit on that would be the amount
19 of damages the government sustains, and that --
20 that would depend on what the jury were to find
21 in that case.

22 JUSTICE SOTOMAYOR: And you're saying
23 there would be no damages because the -- the --
24 the fund got the hundred million from the
25 government.

1 MS. HO: Our -- our position is no
2 fraud, no damages.

3 JUSTICE SOTOMAYOR: Okay.

4 MS. HO: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?
6 Justice Gorsuch?

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

9 So assume you lose on the hundred
10 million. It would be sent back.

11 MS. HO: Yes.

12 JUSTICE GORSUCH: And there would be a
13 trial.

14 MS. HO: Yes.

15 JUSTICE GORSUCH: And let's assume you
16 lose on the -- on the -- on the merits of the
17 trial. And I know those are unpleasant
18 assumptions, but work with me a minute.

19 I think you would have open to you two
20 arguments. One, that the hundred million
21 dollars is not traceable to the losses in this
22 case because the funds didn't follow through. I
23 assume you'd make that argument, is that
24 correct?

25 MS. HO: Yes, Justice.

1 JUSTICE GORSUCH: And then I'm -- I'm
2 -- I'm detecting in your colloquy with Justice
3 Sotomayor that you might make an additional
4 argument that damages would be limited to a
5 hundred million dollars in any event, is that
6 correct?

7 MS. HO: Yes.

8 JUSTICE GORSUCH: Okay. Thank you.

9 MS. HO: Yes. Thank you, Justice
10 Gorsuch.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: In your brief, you
14 mentioned constitutional avoidance, and I'm, I
15 guess, having trouble connecting that argument
16 to this case in the sense of how it would be any
17 more or less unconstitutional if -- the overall
18 scheme -- if we disagreed with you here. So can
19 you connect that up?

20 MS. HO: Sure. So our -- our
21 position -- and, as -- as -- as you say, it's a
22 constitutional avoidance argument that looks at
23 the justification for a relator, right?

24 And so the relator has standing under
25 this Court's decision in Stevens, right,

1 because, in a sense, it -- it is the -- the
2 delegate of the government's injury, right, its
3 proprietary injury, right, its pocketbook
4 injury.

5 So, in a case like ours, where the
6 government hasn't sustained any loss, right,
7 then that leaves the relator only with the
8 government's sovereign interest to go after
9 violators of the law.

10 So we -- we agree that our -- our
11 argument in terms of constitutional avoidance
12 doesn't -- doesn't completely solve the problem,
13 but we would urge the Court not to go further
14 down the path and make the -- the situation
15 worse by allowing a situation where a relator is
16 only operating on the basis of the government's
17 sovereign interest, which is the Article II
18 problem --

19 JUSTICE KAVANAUGH: Thank you.

20 MS. HO: -- that we raised. Thank
21 you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: I want to follow up
25 on the questions that Justice Sotomayor and

1 Justice Gorsuch asked you, and let me just
2 see -- I just want to make sure. I don't -- I
3 don't think I quite have your answer.

4 So let's assume you lose on the
5 hundred million dollars, and let's assume again
6 that you lose at trial, and then it's a question
7 of calculating the damages sustained.

8 I can't really tell how damages
9 sustained are measured here in this situation
10 where you have someone other than the government
11 itself collecting or disbursing the funds. I
12 saw one Fourth Circuit case that addressed that
13 and that was it.

14 So my question is: I -- I don't think
15 it would be a hundred million dollars, right,
16 because that's not the allegation of -- maybe
17 I'm wrong. I didn't think Wisconsin Bell was
18 accused of shortchanging by overcharging by a
19 hundred million dollars. That's just --

20 MS. HO: No.

21 JUSTICE BARRETT: -- not the
22 government --

23 MS. HO: No.

24 JUSTICE BARRETT: Okay. So I'm just
25 picking a number. Let's say it's \$20,000. If

1 that money -- if the government itself had been
2 directly defrauded of that money and you had
3 treble damages, it would be \$60,000.

4 I think what -- what -- if I -- if --
5 I have the same question that they do. My
6 question is: If you get to that point and
7 you're trying to calculate damages sustained to
8 the government, are you going to say: Yeah,
9 it's 60,000 once you treble it, just like it
10 would be if they were dealing directly with the
11 government?

12 Or would you say: No, we have to
13 calculate the marginal cost to the government in
14 some kind of way? Or you might say: It's
15 zeroed out. Like, the government didn't
16 actually sustain any damage here. And so then
17 it doesn't mean that the relator gets nothing
18 because then there are other penalties and fines
19 that are available under the FCA.

20 That's my question.

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

1 JUSTICE BARRETT: Okay. But assume
2 you lose that.

3 MS. HO: -- including -- including
4 the --

5 JUSTICE BARRETT: Assume you lose
6 that.

7 MS. HO: If we lose that, then what
8 that means -- all that means is that we have a
9 claim, right? The relator has a claim. And it
10 would certainly be the relator's job, assuming
11 this gets to trial, to prove up damages and the
12 jury's job then to decide what it is.

13 JUSTICE BARRETT: Right, right, right.

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

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

25 MS. HO: I think the way I would

1 answer that, Justice Barrett, is to -- to look
2 to the text of the remedial provision, which
3 refers to damages that the government sustains.
4 And so it would be the relator's job at trial to
5 prove that amount, whatever that is.

6 And I -- and we would -- we would
7 retain our full panoply of arguments why the
8 relator isn't entitled to a dime for that or for
9 other reasons.

10 JUSTICE BARRETT: Thank you, Ms. Ho.

11 MS. HO: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: So it seems to me
15 that your "provides" argument rests on the
16 premise that the FCA is about putting the public
17 fisc at risk.

18 MS. HO: Mm-hmm.

19 JUSTICE JACKSON: You've said this
20 many times and that there is, you said, a
21 historical link between the public fisc and the
22 FCA. And I guess I'm looking at the history and
23 I don't really see it that way, so I'd like for
24 you to respond.

25 You know, as I read the history of the

1 FCA, the purpose is broader than just trying to
2 protect the public fisc. In fact, when Congress
3 passed in 1986 the amendments where "claim" --
4 the "claim" definition that we're talking about
5 here was put into the statute, it also had a
6 report that talked about what it was doing, and
7 that GAO report documented widespread fraud in
8 government programs and focused on "the
9 non-monetary effects" of the fraud and
10 Congress's concern that it wasn't just about the
11 money. It talked about things like the loss of
12 confidence in government programs. It pointed
13 to incidents in which the beneficiaries of the
14 program did not get the benefits that Congress
15 wanted them to get. So it was clearly beyond
16 the fiscal impact.

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

23 MS. HO: Yeah. Respectfully, no,
24 Justice Jackson, and -- and I think that's the
25 case for three reasons.

1 And let me start with this Court's
2 precedents on the False Claims Act, and this
3 Court has said again and again that the False
4 Claims Act is not an all-purpose fraud statute,
5 even fraud against the government. It is not an
6 all-purpose fraud statute against the
7 government.

8 I think the reason for that is that at
9 every juncture from the 1986 amendments to the
10 2009 amendments, Congress has made adjustments
11 to the False Claims Act, but it has never --

12 JUSTICE JACKSON: Yeah. No, I'm not
13 talking -- I -- I -- I --

14 MS. HO: -- it has never severed the
15 rule from that.

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

24 The government has lots of different
25 ways in which it might fund its programs. Some

1 of them might be direct funding from the
2 government. Some of them might be orders by the
3 government to have other people fund the
4 program.

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

11 So you want us to make a distinction
12 about whether or not the FCA applies that based
13 on the -- that is based on the mechanism of
14 funding, but that just assumes that the
15 mechanism of funding mattered to the government.

16 And I'm telling you that from the
17 history, what -- the -- the government was
18 broader than the mechanism of funding as the
19 reason why the FCA should apply.

20 MS. HO: And I think, Justice Jackson,
21 the best -- our -- our -- our surest instrument
22 for registering the concern and purpose of
23 Congress is the text of the statute that it
24 enacted. And --

25 JUSTICE JACKSON: No, I understand. I

1 understand. But you make --

2 MS. HO: -- and it referred -- and it
3 referred to me --

4 JUSTICE JACKSON: -- a lot of
5 representations about what -- I'm only going
6 this route because your whole argument is the
7 government wanted in the FCA to have this
8 protection of the government funds.

9 MS. HO: Yes.

10 JUSTICE JACKSON: So let me just ask
11 you one final question. What -- what do you do
12 with the fact that the House report from 1986
13 that discusses the statutory definition of
14 "claim" says, "A claim upon any government
15 agency or instrumentality, quasi-governmental
16 corporation, or non-appropriated fund activity
17 is a claim against" -- "upon the United States
18 under the Act."

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

25 MS. HO: Yes, Justice Jackson. I

1 think the key word in all of the examples you
2 just made is -- is "government," right?
3 Government agency, government --

4 JUSTICE JACKSON: So is this a
5 quasi-govern -- I thought this was a
6 quasi-governmental corporation, the USAC.

7 MS. HO: No.

8 JUSTICE JACKSON: It's not?

9 MS. HO: No. The -- the -- the -- the
10 Administrative Company --

11 JUSTICE JACKSON: Yeah.

12 MS. HO: -- is a private company. It
13 is a private corporation incorporated in -- in
14 -- in Delaware, and -- and -- and we -- we know
15 that it's not a government instrumentality or
16 agent because, if it were, it would run afoul of
17 the Government Corporation Control Act because
18 --

19 JUSTICE JACKSON: Thank you.

20 MS. HO: -- the FCC sought permission,
21 and it wasn't provided.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 MS. HO: Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Singh.

1 ORAL ARGUMENT OF TEJINDER SINGH
2 ON BEHALF OF THE RESPONDENT

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

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

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

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

1 credit the government with providing it.

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

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

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

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

4 I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 There is a --

1 CHIEF JUSTICE ROBERTS: Well --

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

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

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

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

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

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

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

1 whatever, to the percent of money that you
2 actually collect?

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

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

13 MR. SINGH: Yes.

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

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

21 CHIEF JUSTICE ROBERTS: Okay.

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

1 of the claims are still false claims.

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

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

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

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

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

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

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

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

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

18 JUSTICE GORSUCH: Would it be, or --
19 or would that be relevant at all under the
20 damages provision?

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

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

1 MR. SINGH: I have done a bit.

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

6 JUSTICE GORSUCH: Okay.

7 MR. SINGH: -- and words to that
8 effect.

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

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

16 JUSTICE GORSUCH: Okay. Okay. And I
17 got that.

18 MR. SINGH: Yeah.

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

21 MR. SINGH: Certainly.

22 JUSTICE GORSUCH: Okay. And if we
23 rule on that ground, there's no need to get into
24 the agency stuff either, I would think.

25 MR. SINGH: Sure.

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

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

10 JUSTICE GORSUCH: Right. Okay.

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

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

23 MR. SINGH: Yeah.

24 JUSTICE GORSUCH: Okay.

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

1 sound just like my naked litigation preference
2 as it is also my --

3 JUSTICE GORSUCH: No, I -- I -- I want
4 to know your naked litigation preferences.

5 (Laughter.)

6 MR. SINGH: And you have them.

7 JUSTICE GORSUCH: Okay.

8 MR. SINGH: You have them.

9 JUSTICE GORSUCH: That's all I need to
10 know. Thank you.

11 JUSTICE BARRETT: So, Mr. --

12 JUSTICE KAVANAUGH: What you've got on
13 the --

14 JUSTICE SOTOMAYOR: You were just cut
15 off.

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

17 JUSTICE SOTOMAYOR: No, I --

18 JUSTICE GORSUCH: Well, no.

19 MR. SINGH: -- so it's not only what I
20 want. It's also really about what this statute
21 is meant to accomplish.

22 You know, I think there is a point in
23 which I -- I somewhat agree with the other side,
24 which is when Ms. Ho says that the -- the
25 hundred million is really not terribly different

1 from all of the contributions, there's a sense
2 in which I agree with that because, although
3 that money is the money that the government
4 collects, banks, and then transfers, and so you
5 have to just ignore what you see with your own
6 eyes to ignore that the government is providing
7 that money, all of the money is dedicated to the
8 same purpose. It's all moving for the same
9 reason.

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

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

1 hundred million, what I think is going on here.
2 But correct me if I'm wrong or respond
3 otherwise.

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

9 One is, who is providing money to the
10 Universal Service Fund, right?

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

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

24 And when you think about it that way,
25 there is no plausible argument, I think, that

1 the carriers are providing that money. They
2 have relinquished all control of the funds by
3 the time it gets to the Universal Service Fund.

4 At that point, your only choices are:
5 It's either the administrator or it's the
6 government, right? And the administrator --

7 JUSTICE KAVANAUGH: Well, is the
8 administrator a government --

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

10 JUSTICE KAVANAUGH: -- is the
11 administrator a government official?

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

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

14 MR. SINGH: -- an agent.

15 JUSTICE KAVANAUGH: -- that -- that's
16 critical here, right?

17 MR. SINGH: Well --

18 JUSTICE KAVANAUGH: That's -- on
19 the -- again, on the bigger argument, that's
20 critical?

21 MR. SINGH: -- no, because, for the
22 reasons that Justice Kagan gave with her soup
23 hypothetical and Justice Barrett with her
24 proctor hypothetical, when you have someone
25 who's just acting as an agent, we normally

1 attribute the providing of the thing to the
2 principal.

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

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

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

19 Does the court provide that money or
20 does the defendant provide that money and in --
21 if -- if so, what makes that example different?

22 MR. SINGH: Yeah. So I don't think we
23 would say in ordinary usage that the court
24 provides that money.

25 I want to make two points kind of

1 clear. First, I think that we read the word
2 "provides" in context, right, and so the whole
3 context is the government provides any portion
4 of the money or property requested or demanded,
5 and then there's that stuff about government
6 programs, government interests.

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

10 JUSTICE GORSUCH: Well --

11 MR. SINGH: And I think it did.

12 JUSTICE GORSUCH: -- court orders have
13 certainly funded the plaintiff's coffers very
14 nicely, and --

15 MR. SINGH: Yes, but it's not a
16 government program.

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

22 MR. SINGH: So I think what the
23 difference is if you look at just exactly what I
24 was talking to Justice Kavanaugh about. In that
25 situation, certainly, the defendant who has to

1 pay the plaintiff is not the government's agent,
2 right? And so you normally -- as I was saying,
3 when a principal says, agent, give the money to
4 someone, you attribute the giving to the
5 principal.

6 JUSTICE GORSUCH: Putting aside the
7 agency argument --

8 MR. SINGH: I like the agency
9 argument.

10 (Laughter.)

11 JUSTICE GORSUCH: I know you do.

12 MR. SINGH: Okay.

13 JUSTICE GORSUCH: Do you have anything
14 beyond the agency argument?

15 MR. SINGH: That is my --

16 JUSTICE GORSUCH: Okay.

17 MR. SINGH: -- that is the clearest,
18 most crystallized response, but I think more
19 broadly --

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

21 JUSTICE BARRETT: Mr. Singh --

22 JUSTICE KAVANAUGH: -- entire civil
23 litigation system -- under what you're
24 describing as government program, the entire
25 civil litigation system is a "government

1 program"?

2 MR. SINGH: So, in context, I don't
3 think that's true, Your Honor. I -- I don't
4 think the government has been construed to mean
5 the court system under the False Claims Act.
6 That's kind of a separate question.

7 I would also add --

8 JUSTICE KAVANAUGH: But just on your
9 theory of "provides" --

10 MR. SINGH: Yeah. I would also add,
11 though --

12 JUSTICE KAVANAUGH: Wait. Can you
13 stop there?

14 MR. SINGH: Yeah, yeah. Sorry.

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

18 MR. SINGH: So, under our theory of
19 "provides," as I'm saying, the -- the court
20 system in that --

21 JUSTICE KAVANAUGH: Which you've
22 connected to the word "program" as opposed to
23 "fisc." That's a key move in your argument, I
24 think, government program rather than government
25 fisc. The word "provides" goes to government

1 program.

2 Under your theory of that, why isn't
3 the civil litigation system a government program
4 that -- in which the government is providing the
5 money, in Justice Gorsuch's example, to the
6 plaintiff?

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

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

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

15 JUSTICE JACKSON: Isn't the answer,
16 Mr. Singh, about the duties that are running in
17 the civil litigation? In other words, the
18 duties, the duty to pay comes from the
19 defendant, the private person, right --

20 MR. SINGH: Yes.

21 JUSTICE JACKSON: -- based on the --
22 the claim that the plaintiff has. It's not --
23 the duty is not coming from the court in the
24 same way.

25 MR. SINGH: Well, that's right. I

1 mean, the court will enforce the duty or --
2 yeah.

3 JUSTICE JACKSON: The court is just
4 enforcing --

5 MR. SINGH: Yes.

6 JUSTICE JACKSON: -- in that
7 situation. That's why the court is not --

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

17 We think that this statute is limited
18 to the situation where the government is funding
19 its programs. It's not going to encompass all
20 regulation. And I would say that to the extent
21 you have any concerns about this, empirically,
22 the fact that there aren't cases all the time
23 where every plaintiff who's recovered in civil
24 litigation is bringing False Claims Act cases
25 because someone defrauded them is good evidence

1 that the statute --

2 JUSTICE KAVANAUGH: Well, until we
3 rule --

4 JUSTICE KAGAN: If I --

5 JUSTICE KAVANAUGH: -- for you here.
6 (Laughter.)

7 JUSTICE KAVANAUGH: And then we might.
8 I mean, that's --

9 JUSTICE BARRETT: Mr. Singh --

10 JUSTICE KAVANAUGH: -- the concern.
11 Sorry to interrupt.

12 JUSTICE BARRETT: No, no, I
13 interrupted you. Go ahead.

14 JUSTICE KAVANAUGH: I'm done.

15 JUSTICE BARRETT: You're done?

16 What -- regardless of -- let -- let's
17 assume you win, and regardless of whether you
18 win on the hundred million argument or your
19 larger argument, what are the damages sustained?

20 MR. SINGH: In our view, the damages
21 sustained are all of the money that went into
22 the E-rate program because the government has
23 caused that money to be available for the
24 beneficiaries, and so, when Wisconsin Bell takes
25 it unlawfully, they have made a false claim for

1 money.

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

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

6 JUSTICE BARRETT: Assuming that it
7 took it unlawfully, of course.

8 MR. SINGH: Yeah, yeah.

9 JUSTICE BARRETT: Yeah.

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

17 CHIEF JUSTICE ROBERTS: Sure.

18 MR. SINGH: Yeah. If they violate it
19 by charging 50 percent more than they should
20 have, then there is some delta of overcharge,
21 which results in a delta of subsidy, and maybe
22 they'll argue that that amount is the damages.
23 That has not been hashed out yet in the lower
24 courts.

25 Our position will be -- you can guess,

1 our position will be the broader damages
2 position. Their position will be the narrowest
3 one. And that will be something to be figured
4 out on remand.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 JUSTICE THOMAS: Just a matter of
9 curiosity. What would be the difference between
10 the authorities of the agent as opposed to a
11 case if -- where there was a sub-agency that
12 administered the fund?

13 MR. SINGH: I'm sorry. I want to make
14 sure that I'm --

15 JUSTICE THOMAS: Normally, you would
16 have an agency in the government administering a
17 government program.

18 MR. SINGH: Mm-hmm.

19 JUSTICE THOMAS: The -- here, you're
20 saying that the private entity is an agent. So
21 what is the difference in their authority and
22 their liability and -- and their conduct in --
23 in this E-rate program?

24 MR. SINGH: So, if I hear the question
25 correctly, and please correct me if I don't, the

1 idea is how is it different -- how can USAC, the
2 Administrative Company, be held accountable
3 differently from if a government sub-agency were
4 administering the program?

5 JUSTICE THOMAS: That's close enough.

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

16 If they breach the terms of that, the
17 FCC can correct them. If they refuse to be
18 corrected, the sanctions can go as high as them
19 losing their job, which would be kind of
20 similar, I think, to what would happen to
21 federal employees. And I think, overall, that's
22 a really strong point in our favor because, if
23 this entire function could be in-housed and look
24 essentially the same, I think that tells you
25 that they are acting as government agents.

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

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

17 But I think it's very, very similar.
18 I -- I -- I don't see a lot of practical
19 differences between how this program actually
20 works and how it would work if it were entirely
21 housed within the government. I think it was
22 put outside just to be efficient, and I don't
23 think government should be punished for shying
24 away from big government and doing the more
25 efficient thing.

1 JUSTICE THOMAS: Well, for those of us
2 who have run agencies, it would be a lot easier
3 to control the -- an agent under an MOU than to
4 have to deal with an agency that is also subject
5 to oversight.

6 MR. SINGH: Your Honor, that may be
7 true. I don't know. In this case, I think what
8 we understand is that the control structure
9 allows the FCC with fairly comprehensive control
10 over the administrator's actions, which is one
11 reason why we think it's an agent.

12 CHIEF JUSTICE ROBERTS: Justice Alito?

13 JUSTICE ALITO: Let me see if I
14 correctly understand some of what you have just
15 told us. The question here -- the only question
16 before us is whether the reimbursement requests
17 are claims under the False Claims Act.

18 You could win on any of three grounds.
19 The narrowest of those would concern the 100
20 million. But you've argued that we should
21 really decide the case under one of the other
22 broader grounds because that might have an
23 effect on a damages question that has not been
24 briefed and we don't know whether the case will
25 ever get to the issue of damages.

1 Is that a correct summary of some of
2 what you've said?

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

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

12 But there is a little bit of
13 disuniformity in the legal rules that courts
14 have used to get there. The Fifth Circuit said
15 the money has to come from the Treasury. The
16 Seventh Circuit said no. And so there would be
17 a little bit of disuniformity still remaining.
18 I think it's worthwhile, if easy, to resolve
19 that by reaching the broader ground that the
20 government provided all the money.

21 And I think it will also provide more
22 clarity for other cases that aren't just about
23 the E-rate program if folks understand that when
24 the government funds its programs, even if it
25 does so through this direct efficient mechanism

1 instead of an inefficient mechanism, the False
2 Claims Act still applies.

3 So, yes, I -- I do think you can
4 resolve it on the narrowest ground. I don't
5 know that that's the most satisfactory
6 resolution.

7 JUSTICE ALITO: Well, what if you were
8 to -- what if we thought that you should win
9 under the hundred million argument but lose
10 under the other two? Then I assume you would
11 prefer to just take your narrow victory and go
12 home, right?

13 MR. SINGH: Oh, sure. Then you should
14 say the hundred million, we decide nothing else.
15 And I'll work with the courts on remand. No
16 problem.

17 (Laughter.)

18 JUSTICE ALITO: Thanks a lot.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: That was quite
22 fascinating. I'm still laughing over it,
23 counsel.

24 I -- I do want to go back to these two
25 theories. I -- I actually thought there were

1 three theories that you had proposed. The first
2 was that the entire program is a government
3 program. The government is supplying the money
4 because the government's setting the rate at
5 which the contractors have to pay. They're
6 telling the Universal Service Fund how to spend
7 that money. And they're creating the FCC
8 program that qualifies carriers to receive the
9 money. So they're controlling every aspect of
10 the distribution, correct?

11 MR. SINGH: Yes. That's our argument
12 for sure.

13 JUSTICE SOTOMAYOR: I think they're
14 doing this more specifically than many of the
15 appropriations mechanisms that we reviewed
16 recently -- I think one of my colleagues wrote
17 about this -- in which we have appropriations to
18 agencies with no more guidance than says it's a
19 continuing X amount and you spend it on these
20 things and that's it.

21 We have more specificity than that
22 here, correct?

23 MR. SINGH: Quite correct. The FCC's
24 rules are very detailed.

25 JUSTICE SOTOMAYOR: Okay. And we have

1 some appropriations that -- that are based on
2 how much is collected by the -- that agency, and
3 they're entitled to spend that, and if they
4 don't spend that, they can save it for the
5 future, correct?

6 MR. SINGH: Yeah. And this is one
7 such program, yes.

8 JUSTICE SOTOMAYOR: And that's your
9 point, that this is very similar to those
10 appropriation programs?

11 MR. SINGH: Yes. Our point, Your
12 Honor, is that the E-rate program and the
13 Universal Service programs are fundamentally no
14 different from basically every government
15 spending program.

16 JUSTICE SOTOMAYOR: All right. I
17 missed an answer you were giving, I think, to
18 Justice Barrett when she was asking you about
19 the measure of damages.

20 I -- I thought that your claim was
21 that under this program, they should have paid
22 us -- or they should have not charged us a
23 certain amount; they should have charged us a
24 lot less.

25 But you seemed to be suggesting in

1 your answer to Justice Barrett that your claim
2 is something more than the amount that you were
3 charged.

4 MR. SINGH: Yeah. So --

5 JUSTICE SOTOMAYOR: Am I understanding
6 your answer to her? And if that's true, what's
7 that something more? What has the U.S. lost
8 besides the fact that you should have been paid
9 -- that you should have paid less money, I
10 guess?

11 MR. SINGH: Yeah. So I think that if
12 the outcome of the damages analysis is that the
13 -- you know, only the extra amount of subsidy
14 that was given to Wisconsin Bell and its
15 customers is the measure of damages, that would
16 be a reasonable outcome to the damages
17 discussion. But all I was telling Justice
18 Barrett is, you know, that has not been hashed
19 out yet. We're not at the damages stage. And
20 so -- yeah.

21 JUSTICE SOTOMAYOR: I understand that.
22 I'm going back to, what else are you claiming
23 you're entitled to besides that? That's the
24 part that I don't understand.

25 MR. SINGH: So, in certain contexts,

1 when claims are made that should not have been
2 paid, courts have determined that the entire
3 amount claimed constitutes damages.

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

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

18 JUSTICE SOTOMAYOR: You still haven't
19 answered my question. What is the amount of the
20 claim, the total claim, that's your alternative
21 argument?

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

24 JUSTICE SOTOMAYOR: Even though they
25 paid a part of it? So, if you asked for a

1 \$50,000 subsidy and they only gave you 20,
2 you're still entitled to the 50, or are you
3 claiming something more?

4 MR. SINGH: Right. So the question
5 for damages would be, should this claim have
6 been paid at all? And if the answer is no, then
7 the entire amount of the claim is going to be
8 damages.

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

14 JUSTICE SOTOMAYOR: All right. Thank
15 you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: Could I go back to the
18 conversation you were having with Justice
19 Gorsuch when he gave you the other example and
20 you said to him, no, that would not be a -- a
21 normal use of the word "provide" and you said
22 it's all a matter of context.

23 And then you said the context here is
24 that the administrator is acting as an agent.
25 And is -- if we don't feel like getting into the

1 question of exactly whether the administrator is
2 an agent, the sort of back 10 pages of
3 everybody's briefs where we have to figure out,
4 you know, does an agent have to have the power
5 to bind the government or all that, if we just
6 take that off the table and -- and said: Okay,
7 now we want a different kind of rule that
8 separates the case in front of us from the case
9 that Justice Gorsuch raised, do you have another
10 rule for that?

11 MR. SINGH: Yeah. So I think that
12 when I say context, the context of the statutory
13 text is the government provides any portion of
14 the money or property requested or demanded in
15 the context, of course, of government programs.

16 And so I think, when you try to
17 distinguish -- this was the conversation that
18 was also happening, I think, with Justices
19 Jackson and Kavanaugh about how do you
20 distinguish mere regulation from things that are
21 going to be covered by the False Claims Act.

22 And I think that what you look to is
23 the -- the sort of core of it, is the government
24 funding one of its spending program here? And
25 if it is, then we think context suggests that

1 when the government is the one causing the money
2 to move into and out of the program, it's
3 providing.

4 And we think that that's quite
5 different from a lot of the situations you can
6 imagine where the government might cause money
7 to move but is not running a government program.

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

20 And both our brief and the
21 government's brief have focused on the fact that
22 this is the context of a government spending
23 program that Congress created, that the FCC
24 administers tip to tail, and where all of the
25 rules, both for how money comes out, how it has

1 to be housed -- comes in, is housed, and then
2 goes out are all set by the government. It's
3 the only one making any decisions.

4 And so I think that's how you would
5 distinguish it even if you didn't want to talk
6 about the vagaries of agency law under the
7 Restatement and all that.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 JUSTICE GORSUCH: Mr. Singh, on -- on
12 -- on your -- on -- on the 150 -- or the hundred
13 million dollar option, the other side hasn't
14 argued traceability, so that's good for you.
15 And then the question comes to damages and
16 whether there might be some upper limit based on
17 the hundred million.

18 Are you going to come anywhere near
19 that under either theory of damages you've laid
20 out here?

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

23 JUSTICE GORSUCH: Okay. So that could
24 be resolved in a future case. The larger
25 "provides" question could be resolved in a

1 future case without doing damage to this one?

2 MR. SINGH: If you leave it open,
3 absolutely, yeah.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

7 Justice Jackson?

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

16 And I guess I just am struggling with
17 that in light of my view based on the history
18 and the broader statute that the FCA was the
19 government's concern about the integrity of its
20 program, that it was trying to fund a program
21 and have it operate and, yes, it put money into
22 it, but it's not just the money that's at stake.

23 Do you have a reaction to that?

24 MR. SINGH: Sure. I share your view
25 that the concerns animating the False Claims Act

1 are broader than financial loss. I think the
2 text of the statute in multiple places makes
3 that very clear when it talks about whether or
4 not the government has title to the money, when
5 it includes any claim presented to an employee,
6 officer, or agent, whether or not the government
7 has provided the money.

8 Even the remedial provision, which Ms.
9 Ho says is a point in their favor, is, I think,
10 a strong point in our favor because you actually
11 still have civil monetary penalties even if the
12 government sustains no damages.

13 I think this case provides a useful
14 illustration of the point you're raising. As we
15 explained in our statement of the case, it's not
16 only the federal government that suffered here,
17 it's also schools and libraries. Schools and
18 libraries were overcharged in the first
19 instance. The federal government suffers the
20 brunt of the financial harm because it
21 subsidizes that overcharging, but the schools
22 and libraries also suffer in other contexts.

23 Think about Medicare. Think of all
24 the programs that the False Claims Act defends.
25 It's not just the government's pocketbook. It's

1 the health of beneficiaries, senior citizens.
2 It's defense programs and our ability to field a
3 fighting force that can survive out there.

4 There are all kinds of interests that
5 the False Claims Act protects that have nothing
6 to do with money, and that is why the statute
7 does not require proof of financial loss. And,
8 as you say, it's made quite clear in the
9 legislative history as well.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Suri.

14 ORAL ARGUMENT OF VIVEK SURI
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE RESPONDENT

17 MR. SURI: Mr. Chief Justice, and may
18 it please the Court:

19 Unless the Court would prefer that I
20 spend my time some other way, there are two
21 points that I'd like to cover over the course of
22 this 10 minutes. The first is how we'd prefer
23 to win if the Court were to rule in our favor,
24 and the second is addressing some of the
25 questions that Justice Kavanaugh and Justice

1 Gorsuch raised about the limits of our theory.

2 If the Court were to rule in our
3 favor, we'd prefer to win on the ground that the
4 United States provides all of the money in the
5 Universal Service Fund. The reasons were
6 discussed in the previous discussion, namely,
7 that there would be questions about damages that
8 would be raised if the Court were to say the
9 United States provided only \$100 million.

10 Now we think we have answers to those,
11 but, of course, we'd prefer avoiding getting
12 into those issues in the first place.

13 If the Court doesn't want to go that
14 far, then we'd urge the Court to say that the
15 United States provided \$100 million and say
16 nothing at all about whether the United States
17 provided all the money.

18 As for Justice Kavanaugh's and Justice
19 Gorsuch's questions, I take the point that if
20 this rule isn't carefully limited, then you get
21 into applying the False Claims Act to all sorts
22 of situations that it wasn't designed to apply
23 to, like civil litigation.

24 What distinguishes this case from
25 those cases is that the government isn't just

1 exercising control at the front end, requiring
2 the money to be paid in. It's also exercising
3 control at the back end, deciding how the money
4 is paid out, how it's distributed, whether it
5 goes to schools and libraries, rural hospitals,
6 or -- or whatever other beneficiaries the
7 government chooses.

8 In the civil litigation context, that
9 back-end control doesn't exist. Congress
10 couldn't take the judgment and apply it to some
11 other purpose that the government prefers.

12 I welcome the Court's questions.

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

15 MR. SURI: Similar in what sense?

16 I --

17 JUSTICE THOMAS: In the sense that
18 we're talking about what looks like private
19 money going to a private organization and being
20 distributed privately.

21 MR. SURI: No, Justice Thomas, but I
22 would like to resist the premise that this is
23 private money. The strongest indication that
24 this is the government's money is that, in 2008,
25 Congress appropriated \$21 million out of the

1 Universal Service Fund for -- not for the
2 beneficiaries but for oversight activities.

3 Now that's something that simply
4 couldn't have been done if this were a private
5 bank account. Congress can't take money out of
6 a bank account that belongs to a private
7 individual and appropriate it for government --
8 governmental purposes. That's --

9 CHIEF JUSTICE ROBERTS: Well -- go
10 ahead.

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

13 CHIEF JUSTICE ROBERTS: Well, you're
14 not saying it was okay because Congress did it,
15 are you?

16 MR. SURI: I'm say -- I'm saying that
17 the fact that Congress did it is a clue that, as
18 a statutory matter, these are the government's
19 funds. Congress regards it as the government's
20 money. If it didn't regard it as the
21 government's money, it wouldn't have taken it.

22 CHIEF JUSTICE ROBERTS: Well, I gather
23 you're still asking us --

24 JUSTICE KAVANAUGH: Really?

25 CHIEF JUSTICE ROBERTS: -- to put a

1 lot of weight on the fact that Congress did
2 something when the question is whether or not
3 they had the authority to do it.

4 MR. SURI: No, the question is not a
5 constitutional question, where, I agree,
6 Congress's decision wouldn't be controlling.
7 It's a statutory question. What are these funds
8 for purposes of the False Claims Act? And
9 there, it seems to me what Congress has done is
10 pretty important because you're just
11 interpreting what Congress did.

12 CHIEF JUSTICE ROBERTS: Well, whether
13 it's the Constitution or a statute, I still
14 think the fact that Congress did it is not
15 particularly determinative.

16 MR. SURI: I respectfully disagree,
17 Mr. Chief Justice. When you're interpreting a
18 statute, the fact that Congress did something is
19 surely relevant to the meaning of the statute.

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

23 MR. SURI: I think, in those cases,
24 the Court may be referring to what individual
25 lawmakers have done or to legislative history.

1 Here, we have a statute that in 2008
2 appropriated money out of the Universal Service
3 Fund. That, I think, proves dispositively that
4 Congress regards this as the government's money.

5 But, even if you think that what
6 Congress has said isn't good enough, I'll turn
7 to an even higher authority, this Court's
8 precedents. This Court --

9 (Laughter.)

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

11 CHIEF JUSTICE ROBERTS: Now I
12 understand what you're saying.

13 (Laughter.)

14 MR. SURI: This Court had a case about
15 a First Amendment challenge to conditions that
16 were attached to the E-rate program. Libraries
17 were required to install certain filtering
18 software in order to receive these funds.

19 And the Court said these are federal
20 subsidies provided by the federal government,
21 all of it, not just some portion of it, and it
22 said we're going to analyze these subsidies
23 under the First Amendment framework for
24 conditions attached to government funds.

25 So not only Congress but also this

1 Court has regarded these funds as the
2 government's money to the extent that's relevant
3 here.

4 JUSTICE BARRETT: Mr. Suri, can you
5 just remind me the state of play? It was the
6 Fifth Circuit and the Seventh Circuit here who
7 split, and the Seventh Circuit said, well, one
8 reason we feel better about this is the Fifth
9 Circuit didn't know about the hundred million.
10 But, on the larger claim, we haven't had a lot
11 hashed out about that in the lower courts,
12 right?

13 MR. SURI: That's right. I think
14 there have been cases in district courts where
15 courts have regarded this money as the
16 government's money in various contexts. We've
17 also brought criminal prosecutions in -- under
18 other statutes with respect to fraud on the
19 Universal Service program.

20 But, in the specific context of the
21 False Claims Act, these are the two --

22 JUSTICE BARRETT: So, if we decided
23 that larger question, we would be wading into
24 something that really hasn't percolated very
25 much?

1 MR. SURI: Not necessarily. It
2 depends on what --

3 JUSTICE BARRETT: Besides in the
4 district courts.

5 MR. SURI: It depends on what Your
6 Honor means by the "larger question." If the
7 question is simply did the government provide
8 all of the money in the fund, then that has
9 percolated in the sense that the Fifth Circuit
10 and the Seventh Circuit have both addressed that
11 question.

12 JUSTICE GORSUCH: But, to resolve --

13 JUSTICE KAVANAUGH: I thought --

14 JUSTICE GORSUCH: -- but, to resolve
15 -- sorry. But, to resolve the current split, we
16 now know about the hundred million dollars. The
17 Fifth Circuit didn't know about the hundred
18 million dollars. And if we were to rely on
19 that, that would -- that would resolve the split
20 as present -- presently constituted?

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

22 JUSTICE GORSUCH: And -- and just to
23 understand your -- your distinction on the civil
24 litigation side, as I heard you in your opening,
25 the answer was because the government doesn't

1 exercise control at the back end in how it's
2 spent or how it's distributed, is that right?

3 MR. SURI: That's correct.

4 JUSTICE GORSUCH: Well, what -- what
5 about in a class action case where the court has
6 very reticulated rules about distribution and
7 notice and claim processing and, gosh, a lot of
8 -- a lot of control on the back end?

9 MR. SURI: The degree of control even
10 in that circumstance doesn't approach the degree
11 of control here. Congress --

12 JUSTICE GORSUCH: So it's a degree of
13 control now at the back end that's the
14 distinction?

15 MR. SURI: Yes.

16 JUSTICE GORSUCH: Okay.

17 MR. SURI: Congress couldn't step in
18 and say we're going to take that money from that
19 class action and spend it on schools and
20 libraries and such.

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

25 MR. SURI: There are questions about

1 whether courts have the authority to do that.

2 JUSTICE GORSUCH: Yeah, but if -- but
3 if you -- again, it's one of those things that's
4 happened, whether or not there's authority,
5 right?

6 MR. SURI: It has happened --

7 JUSTICE GORSUCH: Yeah.

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

13 CHIEF JUSTICE ROBERTS: Counsel --
14 Justice Thomas, anything further?

15 Justice Alito? No?

16 Justice Kagan?

17 JUSTICE KAGAN: Could you tell me more
18 about why you want to do the broader route, what
19 you think the damages inquiry would look like in
20 a case like this, and what you're worried about
21 leaving on the table?

22 MR. SURI: Yes. There are two reasons
23 that we would prefer to win on this ground that
24 we provide all the money. The first, relating
25 to damages, is that Wisconsin Bell would argue

1 that if the government has provided, say, only
2 100 million out of a billion dollars, then it
3 should receive only a corresponding percentage
4 of whatever the loss might be.

5 Now we don't think that argument is
6 right, but, again, we'd prefer in our ideal
7 world to pretermit that altogether.

8 The second --

9 JUSTICE KAGAN: What argument might
10 you think is right? I mean, is it just you
11 can't go over a hundred million? Is it you can
12 go over a hundred million?

13 MR. SURI: No, our position is, even
14 if the government provided only the hundred
15 million, then we would still be entitled to the
16 full value of -- at least the increment between
17 what was charged and what should have been
18 charged.

19 JUSTICE KAGAN: Yeah. But is -- but
20 what you're saying is Wisconsin Bell would
21 certainly have an argument that's like you can't
22 go -- you -- you -- you can't ask us for
23 anything more than they've collected, the a
24 hundred million. And Wisconsin Bell also might
25 have an argument, which is actually you can't

1 even get us for the whole a hundred million
2 because you have to sort of have a pro rata
3 share.

4 MR. SURI: Correct. They would have
5 that argument. Again, we don't think that
6 argument is right, but we'd prefer to avoid that
7 fight.

8 The other reason is that there were
9 some questions about what kind of tracing would
10 need to be done. Now we don't think there's any
11 tracing required. The very words "any portion"
12 suggests that one drop of money is sufficient.
13 But, again, we'd prefer to avoid that fight if
14 we could.

15 JUSTICE KAGAN: And are there other
16 programs that you're thinking about when you
17 stand up here, or is this the full universe of
18 programs?

19 MR. SURI: The other Universal Service
20 programs, there are three others, would be the
21 ones most directly affected. In addition, there
22 are a few other FCC programs that are operated
23 on a similar model to this one, namely, a
24 private administrator.

25 Outside that, I think it would depend

1 on how the Court rules. There are some programs
2 where the government relies on an intermediary
3 outside the government in order to handle the
4 fiscal administration. Medicare is a good
5 example of that. Insurance companies are
6 intermediaries who handle reimbursement requests
7 on behalf of the government.

8 Now I take Petitioner to be saying
9 that's different because those are tax dollars
10 whereas these are not labeled as taxes. So
11 perhaps we'd prevail on that regardless. But it
12 depends on how the Court rules with respect to
13 how far-reaching the implications would be.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: I think that just
19 illustrates that the implications, if we go
20 beyond the hundred million argument to the
21 broader argument, are -- are potentially large
22 and a lot of potentially unintended consequences
23 we have no idea about. I mean, it's -- just to
24 save you from making -- doing the briefing on an
25 argument that you think you're going to win

1 anyway, I mean, I -- it seems pretty aggressive
2 to me to go beyond the hundred million --

3 MR. SURI: I -- I certainly --

4 JUSTICE KAVANAUGH: -- and not prudent
5 because we don't even know what we're getting
6 into.

7 MR. SURI: I certainly appreciate the
8 concern, but I think that's why the limiting
9 principle we've offered is important. The fact
10 that the government exercises --

11 JUSTICE KAVANAUGH: But you just said
12 it would depend on how we write the opinion.
13 And we haven't gotten a lot -- a ton of guidance
14 on this limiting principle and how it would
15 affect all these -- these other programs that
16 you're now identifying in response to Justice
17 Kagan's questions.

18 MR. SURI: I -- again, I think the
19 limiting principle is, if the government
20 controls where the money is going on the back
21 end as well, that is an indication that the
22 government is providing the money.

23 And that, I think, does deal with the
24 hypotheticals that have been raised about child
25 support or minimum wage or funds provided in

1 civil litigation.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: Mr. Suri, if we
6 wrote the opinion to say "at least" here, where
7 the government has provided, you have all these
8 arguments open to you and all of these hard
9 questions could be fleshed out later, correct?

10 MR. SURI: Correct.

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

13 MR. SURI: Yes, that would be
14 satisfactory, if not ideal.

15 JUSTICE BARRETT: Okay. And then the
16 other question is just in terms of -- I take
17 that point. But, in terms of the practical
18 consequences to you, you know, we haven't talked
19 much about the agency argument, but, you know,
20 for any claims that were for post-2009, the
21 government isn't necessarily going to be getting
22 into this whole splicing because you would be
23 relying on the agency argument.

24 So, even for you, there's kind of a
25 limited time window where you would be focused

1 on this as opposed to focusing on your agency
2 argument, right?

3 MR. SURI: That's right, but I imagine
4 that entities like Wisconsin Bell would say that
5 even if the administrator were an agent of the
6 United States, you'd still have these arguments
7 about how much the United States is entitled to
8 in damages.

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

11 MR. SURI: Right. Right.

12 JUSTICE BARRETT: We just have the
13 "provided."

14 MR. SURI: I agree, yes

15 JUSTICE BARRETT: Okay. Okay.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 Thank you, counsel.

19 Rebuttal?

20 REBUTTAL ARGUMENT OF ALLYSON N. HO

21 ON BEHALF OF THE PETITIONER

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

24 I'd like to hit just three brief points.
25 And I'd like to follow up on the discussion, Justice

1 Kavanaugh, that you were having with my friend. I
2 haven't heard my friends on the other side offer any
3 meaningful limiting principle to their theory that the
4 government provides money by requiring one private
5 party to pay another.

6 And I think that's -- that's because there
7 isn't any. I think their theory would sweep in things
8 like minimum wage laws that require private employers
9 to pay higher wages to their employees. All sorts of
10 private parties to private transactions would be
11 surprised to find themselves subject to FCA treble
12 damages liability just because a government regulation
13 lurks in the background, and that can't be right.

14 Second, I haven't heard my friends explain
15 when Congress supposedly severed the FCA's historic
16 connection to the public fisc. The only answer
17 they've gestured at is the title clause. But the text
18 of the title clause makes plain that it was narrowly
19 focused on a timing problem: the situation where the
20 government no longer has title to the money at the
21 time of the request because it supplied that money to
22 the grantee before the request.

23 If Congress had intended to break the
24 link between the FCA and the public fisc for the
25 first time in 146 years and to overrule this

1 Court's decision in Kohen and other cases, it
2 would have done so much more directly than the
3 title clause and at minimum would have deleted
4 the "provides" clause altogether and revised the
5 remedial provision to reference -- that
6 references damages to -- that the government
7 sustains.

8 We talked a lot today about the debts,
9 settlement, and restitution the government
10 collected and returned to the Administrative
11 Company, but that money is no different in
12 character than the private contributions that
13 carriers pay directly to the company.

14 Justice Jackson, I think you actually
15 had it exactly right when you were
16 distinguishing the scenario with the court
17 system. You said, well, because that -- in that
18 situation, government is acting as an enforcer.
19 That is exactly the role that the government is
20 playing here with respect to the debts, the
21 obligations, and the settlements and
22 restitution. It is simply acting as an enforcer
23 to provide -- to take money that is owed to the
24 Administrative Company from the carriers, no
25 different source.

1 The government is not providing that
2 money, just like the sheriff who collects
3 judgment -- a judgment owed to the judgment
4 debtor from the judgment debtor is providing
5 money. It doesn't provide in any sense of that.

6 The Court's decision in Kohen makes
7 clear that the FCA does not apply to requests
8 for property merely in the temporary possession
9 of the government, which precisely describes the
10 debts, settlements, and restitution here.

11 We would urge the Court at a minimum
12 to reject my friend's broadest reading that the
13 government provides all the money in the E-rate
14 program. Clarity on that issue may be very
15 important for damages calculations in this case
16 and others involving the E-rate program.

17 Finally, the government cannot have
18 its cake and eat it too. The political branches
19 chose to insulate the E-rate program from the
20 public fisc, to keep it from being raided to
21 plug holes in the budget and to avoid the
22 Government Corporation Control Act.

23 But, even though the program never
24 puts one cent of public money at risk, my
25 friends say they should be able to haul out the

1 FCA's heavy artillery and recover treble damages
2 for the supposed loss of funds that were never
3 the government's to lose.

4 The government can't have it both
5 ways. Like the rest of us, it has to live with
6 the consequences of its choices, and one of
7 those consequences here is that the False Claims
8 Act doesn't apply.

9 We respectfully request that the Court
10 reverse the judgment below.

11 Thank you, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 11:39 a.m., the case
15 was submitted.)

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Official - Subject to Final Review

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