

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SCHINDLER ELEVATOR CORPORATION, :

4 Petitioner : No. 10-188

5 v. :

6 UNITED STATES, EX REL. DANIEL KIRK:

7 - - - - - x

8 Washington, D.C.

9 Tuesday, March 1, 2011

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:20 a.m.

14 APPEARANCES:

15 STEVEN ALAN REISS, ESQ., New York, New York; on behalf
16 of Petitioner.

17 JONATHAN A. WILLENS, ESQ., New York, New York; on behalf
18 of Respondent.

19 MELISSA ARBUS SHERRY, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the United States, as amicus curiae,
22 supporting Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	STEVEN ALAN REISS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JONATHAN A. WILLENS, ESQ.	
7	On behalf of the Respondent	15
8	ORAL ARGUMENT OF	
9	MELISSA ARBUS SHERRY, ESQ.	
10	On behalf of the United States, as	
11	amicus curiae, supporting Respondent	32
12	REBUTTAL ARGUMENT OF	
13	STEVEN ALAN REISS, ESQ.	
14	On behalf of the Petitioner	42
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:20 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 10-188, Schindler Elevator Corporation v.
5 United States ex rel. Daniel Kirk.

6 Mr. Reiss.

7 ORAL ARGUMENT OF STEVEN ALAN REISS

8 ON BEHALF OF THE PETITIONER

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

11 The question in this case is whether a FOIA
12 response is a report or investigation within the meaning
13 of the False Claims Act public disclosure bar. Our
14 position that it is allows the Court to reach the
15 critical question whether a relator has contributed
16 genuinely valuable information. The position taken by
17 Mr. Kirk and the Government would disallow the public
18 disclosure bar before reaching that critical issue, and
19 it would therefore lead to a host of lawsuits by
20 relators with no meaningful information to contribute,
21 and that is precisely the result that the public -- the
22 public disclosure bar is intended to prohibit.

23 Now --

24 JUSTICE GINSBURG: But suppose the FOIA
25 information is just to confirm, to back up, to fill out;

1 that the -- the relator suspects there's a fraud going
2 on, and he thinks that the -- the fraud will be
3 documented by filings that the alleged fraudulent party
4 has made in the government.

5 MR. REISS: Justice --

6 JUSTICE GINSBURG: Yes.

7 MR. REISS: Justice Ginsburg, that may well
8 be a legitimate use of a FOIA request, and the question
9 then becomes whether the information disclosed in the
10 FOIA response reveals the allegations and transactions
11 upon which the qui tam suit is based. But that
12 question, that use by a relator of the FOIA process,
13 doesn't go to whether or not a FOIA response is itself a
14 report or investigation within the statute.

15 A relator can still escape the public
16 disclosure bar if the relator can demonstrate that his
17 complaint is not based upon the allegations and
18 transactions that are disclosed in the FOIA response.

19 JUSTICE GINSBURG: So in each case, we'd
20 have to tell what was the -- the false claims claim; was
21 it so heavily dependent on FOIA disclosures, or was the
22 FOIA disclosures -- say they were a minimal part of
23 the --

24 MR. REISS: Precisely, Justice Ginsburg. In
25 fact, what a court should do is precisely what the

1 district court did in this very case in a very thorough
2 opinion. Judge Stein went through every element
3 required for the public disclosure bar to be invoked,
4 including whether the FOIA response was a report or
5 investigation, including whether Mr. Kirk's complaint
6 was based on allegations and transactions disclosed in
7 that FOIA response, and concluded that every prong of
8 the disclosure -- public disclosure bar was met, and,
9 therefore, the public disclosure bar prevented
10 Mr. Kirk's claims. And that is precisely the analysis
11 that we contend ought to happen.

12 Under the Government's position and
13 Mr. Kirk's position, you never get to the critical
14 inquiries about whether the allegations in a relator's
15 complaint were publicly disclosed in a report or
16 investigation, because under their view, a FOIA response
17 itself is rarely going to qualify as a -- as an
18 administrative report or as an administrative
19 investigation.

20 We think that view is plainly incorrect
21 under the ordinary uses of the words "report or
22 investigation," a position that was obviously found to
23 be the case by the First, Fifth, and Third Circuits.

24 JUSTICE GINSBURG: If I -- if I submitted,
25 as we -- all Federal judges do, financial disclosure

1 statements to an administrative office, and then someone
2 from the press has a Freedom of Information Act request
3 to see that financial disclosure statement, does it then
4 become -- does it become the report of the
5 administrative office, rather than my report to the
6 administrative office?

7 MR. REISS: Well, Justice Ginsburg, that's
8 an interesting question, and whether -- and some lower
9 courts have held that if the Federal -- if the -- if the
10 report -- even though the report is filled out by a
11 nongovernmental person, such as yourself in this
12 instance, it might still qualify as an administrative
13 report because the information being sought is dictated
14 by a Federal administrative agency.

15 Now, we don't think you have to reach that
16 position for -- for Schindler to prevail here, because
17 the one thing that is clear is that a FOIA response by
18 the Department of Labor is itself an administrative
19 report or investigation. It is a Federal --

20 JUSTICE KENNEDY: Suppose that in this case,
21 the agency has said: Well, we have 10 files where these
22 documents are, and we'll make them available you to in
23 the reading room. Go to the reading room.

24 Is that a report?

25 MR. REISS: Justice Kennedy, if the agency

1 has exercised some selectivity in terms of what it's put
2 in that reading room, we would argue that it is a
3 report. That's a far cry from what we have here, but
4 that's a much closer case.

5 But with respect to FOIA responses, the
6 third way in which information is disclosed by an agency
7 under FOIA, it is always in response to a specific FOIA
8 request. The FOIA response constitutes the agency's
9 official response to that request. It's subject to
10 appeal, appeals -- even subject to appeal in the Federal
11 courts, and this Court itself has had --

12 JUSTICE KENNEDY: Well, I don't know if the
13 files are digitized or not, but if they want this
14 particular veteran's report, suppose you could just push
15 a button, and they all come out. Is -- is that a report
16 when those veteran's documents are just put together in
17 a rubber band and shipped off?

18 MR. REISS: It certainly is a report. A
19 report is any officially sanctioned notification.
20 Common understanding.

21 CHIEF JUSTICE ROBERTS: It doesn't sound
22 like in normal parlance if you come to an agency and say
23 I want these documents, and the person comes down and
24 says here they are, he's not going to say here's my
25 report. He's going to say here are the documents you

1 asked for; this is our response.

2 MR. REISS: Mr. Chief Justice, it is a
3 report in the following sense: The agency is saying,
4 one, we have these documents; two, these documents are
5 the very documents you're asking for. That is --

6 CHIEF JUSTICE ROBERTS: There's information,
7 facts, that you can glean from their action, but that
8 doesn't make what they've done a report.

9 MR. REISS: Well, with all due respect,
10 Mr. Chief Justice, I think their response in handing
11 over the documents, saying these are the documents, is a
12 report that we have these documents; here are the
13 documents you've requested. Now, of course --

14 JUSTICE SOTOMAYOR: So that means that if
15 they tell you go look for it on the Web site of X
16 agency, then they are incorporating everything that that
17 other agency has as part of their report?

18 MR. REISS: Well, they are --

19 JUSTICE SOTOMAYOR: That it's not a response
20 in telling you you've got to find what you're looking
21 for?

22 MR. REISS: It is a report in the sense
23 they're reporting where to look for it. It is a far cry
24 from the FOIA responses at issue in this case and most
25 FOIA responses. In this case, there are three different

1 FOIA responses at issue. The first two FOIA responses
2 have two important pieces to them. They say, one, for
3 certain years we couldn't find any of these VETS-100
4 reports, we don't have them. We do have them for other
5 years.

6 Those responses communicated key facts upon
7 which Mr. Kirk based his qui tam complaint. He alleged
8 that in 6 of the years -- 6 of the 9 years at issue
9 here, his allegation is Schindler never filed these
10 required VETS-100 reports. The communication by the
11 Department of Labor, we don't have those reports in
12 those years, was the sole basis on which those
13 allegations are made and is clearly a report. The
14 report is: We don't have those reports.

15 CHIEF JUSTICE ROBERTS: Is your position
16 that sometimes it can't -- a FOIA response can be a
17 report and other times it's not?

18 MR. REISS: No, Mr. Chief Justice. Our
19 position is that every FOIA response is itself a
20 report -- many will require an investigation -- but
21 every FOIA response is itself a report within the
22 ordinary meaning of the word "report," which is a
23 notification. There are news reports, there are weather
24 reports, there are traffic reports. There are, as in
25 this case, VETS-100 reports. They are all reports.

1 JUSTICE GINSBURG: So there's no difference
2 between a report -- the government has an investigating
3 commission and it works up a report -- as opposed to the
4 many government agencies that are just repositories?
5 They accept pieces of paper, reports, filed by other
6 people, like a tax return, like a financial disclosure.
7 The agency does nothing, has no input.

8 I mean, there's surely different between
9 those two kinds -- one, I would say, the natural
10 understanding would be it's a report by the person who's
11 filing it to the agency; and the other, where the agency
12 puts personnel to investigate an issue, is a report of
13 the agency. And you seem to say, no, they're all
14 reports of the agency.

15 MR. REISS: Justice Ginsburg, let me be
16 clear. If -- if the agency simply had an open-door
17 policy, just filed everything in a room and said in
18 response to a FOIA request those documents are publicly
19 available, you can go in and search our files, figure
20 out if those reports are there or not -- that agency
21 response would not be a -- a report or investigation. A
22 response that simply says do the search yourself --

23 JUSTICE GINSBURG: Let's take this very
24 case --

25 MR. REISS: We may or may not have the

1 document.

2 JUSTICE GINSBURG: I'm asking you isn't
3 there a difference between saying we want the raw
4 filings, we want what Schindler filed, we don't want the
5 government to do any investigations, we want them to do
6 just the mechanical thing that they do under FOIA, and
7 an agency saying we're going to investigate and make a
8 report, we're going to put our people under the
9 investigators, and we're going to interview witnesses,
10 they're going to examine documents, and -- and we'll
11 make a report?

12 That's how I understand a government report.
13 But it's very hard for me to understand how a report by
14 Schindler becomes a government report simply because it
15 is filed with the agency.

16 MR. REISS: Justice Ginsburg, we think that
17 reports and investigations can certainly vary
18 drastically in degree and kind. An antitrust
19 investigation may require millions and millions of
20 documents and take the Justice Department 4 years.

21 On the other hand, if the Department of
22 Labor itself had decided to determine or to investigate
23 whether Schindler itself had filed these VETS-100
24 reports, it would have done exactly what it did in
25 response to Mr. Kirk's FOIA request. It would have --

1 it went to -- his request started out with the
2 Department of Labor Office of Information.

3 It was sent to the Division on Investigation
4 and Compliance, located in a completely separate
5 building. The response to his request was delivered by
6 Mr. Robert Wilson, who is the chief of the
7 Investigations and Compliance Division. His activity
8 clearly constitutes an investigation, and the results
9 that he gives to Mr. Kirk is clearly a report.

10 There may be many other agency activities
11 that are far more detailed, far more complex, but it
12 doesn't make what is done in response to a FOIA request
13 not a report or investigation. They are still reports
14 and investigations within the ordinary meaning of those
15 words.

16 JUSTICE ALITO: But is the question whether
17 the documents that are turned over themselves reports or
18 whether they are included in a report? I thought what
19 (e)(4) said was that you -- you determine whether it is
20 in a congressional administrative or accounting office
21 report.

22 So that, suppose the Department of Labor
23 issued what everybody would concede is a report and
24 appended to that certain documents, wouldn't those
25 documents be in the report, even though they are not the

1 report themselves?

2 MR. REISS: Absolutely, Justice Alito.

3 When -- when a FOIA response says, as it did in this
4 case, we didn't -- say it says we didn't find certain
5 documents; we did find certain documents. Here are the
6 documents we found. The attachment of the documents
7 that's found is part of the report, but the report is --
8 is a complete report. We didn't find some things; we
9 found these things, here are the things we found; they
10 meet the description of what you asked for. The
11 documents being attached are clearly part of the report.

12 Now, we think that the position taken by the
13 Government and the Respondent also creates fairly
14 serious dislocations. Under the definition of "report"
15 advanced by Mr. Kirk and the Government, many things
16 that are actually called reports by statute are not
17 reports.

18 The Department of Labor's -- Department of
19 Labor reports that it is required to file detailing its
20 oversight and compliance of VEVRA, the statute at issue
21 here, is called a report under section 1354. The -- the
22 report that every agency must file under the Freedom of
23 Information Act detailing their activities and their
24 compliance with FOIA, itself called a report under the
25 Freedom of Information Act, that is not a report under

1 the definition advanced by the Government and Kirk,
2 because they require some element that appears nowhere
3 in the public disclosure bar. They require an element
4 of some kind of search for wrongdoing or fraud. That
5 definition appears nowhere in the public disclosure bar.

6 JUSTICE GINSBURG: We'll find out from them
7 if that is what they have set their position. I had not
8 read them to say that. I read them to say only -- to
9 challenge your position that every FOIA response is
10 necessarily a report for purposes of the False Claims
11 Act.

12 MR. REISS: Yes, Justice Ginsburg, but their
13 response is that certain FOIA responses will constitute
14 a report or investigation, depending on the underlying
15 documents that are disclosed.

16 JUSTICE GINSBURG: If you request a report,
17 then you get a report.

18 MR. REISS: But -- but their -- their test
19 for the underlying documents is effectively the
20 resurrection of their on-the-trail notion that this
21 Court rejected only last term in the Graham County case.
22 They infused that requirement, the report requirement,
23 with this notion that the government has to be looking
24 for something wrong. And if the report that is
25 disclosed along with, as Justice Alito points out, the

1 FOIA response is a report that indicates the government
2 was looking for something wrong, well, that's a report.
3 If it doesn't indicate that, it doesn't qualify as a
4 report.

5 We think that crabbed definition of report
6 is not the ordinary definition of report, and this Court
7 has said innumerable times, including I've heard even
8 today that the Court looks to the ordinary, regular
9 meaning of terms. The ordinary meaning of "report"
10 clearly encompasses every FOIA response.

11 If there are no further questions, Mr. Chief
12 Justice, I would reserve my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Willens.

15 ORAL ARGUMENT OF JONATHAN A. WILLENS
16 ON BEHALF OF THE RESPONDENT

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

19 Schindler is asking the Court to construe
20 "administrative report" far too broadly. In its view,
21 the public disclosure bar would apply to all FOIA
22 documents, regardless of their content. It would also
23 apply to nearly all other documents created or disclosed
24 by the government. This construction of the bar would
25 seriously undermine the operation of the False Claims

1 Act.

2 Congress amended the Act in 1986 to
3 encourage whistleblowers specifically to use government
4 records in their investigations. This Court recognized
5 that objective in the Hughes Aircraft case.

6 CHIEF JUSTICE ROBERTS: Most of the -- maybe
7 I'm -- maybe this isn't correct, but many FOIA responses
8 include more than just turning over the documents.
9 They've got a privilege log or other things, this
10 exemption applies, here's a document, but these things
11 are blacked out, and they tell you why. Is that a
12 report?

13 MR. WILLENS: No, Your Honor. If it's a
14 FOIA response, it's not a report. The -- the documents
15 here are very, very typical of a low-level FOIA
16 response, and the -- this Court, of course, gets more
17 complicated FOIA cases with our First Amendment issues
18 and national security issues, but this is a very, very
19 standard FOIA response. And the letter, which is in the
20 record, is a very typical FOIA response. It's a form
21 letter with three paragraphs: We got your request;
22 here's what we found, you can appeal if you want to.
23 They're all the same.

24 So for this purpose, it's useful just to
25 look at this one. That -- there's always a possibility

1 that a FOIA officer will uncover something else, a sign
2 of wrongdoing, for example; but that -- at that point,
3 it becomes not a FOIA case anymore, not a FOIA process
4 anymore. FOIA is very limited to just the finding and
5 releasing of documents. And for that reason, we --

6 CHIEF JUSTICE ROBERTS: Well, but it's not
7 really because it does get into the assertion of
8 exemptions and privileges, and --

9 MR. WILLENS: That's true.

10 CHIEF JUSTICE ROBERTS: -- things of that
11 sort. And why isn't that a report of somebody's
12 evaluation of the particular documents that are being
13 released?

14 MR. WILLENS: The -- all the work that Your
15 Honor described goes into whether or not that document
16 should be released; and under the False Claims Act test
17 the release of documents is only the first test in the
18 five-part public disclosure bar test. It -- FOIA just
19 moves the -- the document from the government files into
20 the public and satisfies the first prong of the test.
21 But the Second Circuit said that the second part of the
22 test requires an examination of the individual documents
23 that are being released.

24 JUSTICE ALITO: Well, could we talk about
25 the test that you propose? You say that a report is a

1 usually formal account of the results of an
2 investigation given by a group or person authorized to
3 make it, right?

4 MR. WILLENS: That's right.

5 JUSTICE ALITO: And then an investigation is
6 most reasonably understood as an official probe into
7 fraudulent conduct.

8 MR. WILLENS: That's correct, Your Honor.
9 That --

10 JUSTICE ALITO: So if the report does not
11 investigate fraudulent conduct, then it isn't -- if
12 something does not involve information about fraudulent
13 conduct, it's not a report?

14 MR. WILLENS: We -- we wouldn't take that
15 hard a line, Your Honor. The -- the material you're
16 quoting comes out of the dictionary, and we were looking
17 for a good -- it's based on dictionary definitions, I
18 mean. We were looking for a good, reasonable definition
19 to come out of Webster's Dictionary. We're asking the
20 Court to adopt the Second Circuit's definition, which is
21 broader and doesn't have an explicit requirement of
22 investigation into fraud. And we certainly aren't
23 asking the Court to rule that all the standard
24 administrative reports that agencies issue all the time
25 are not reports.

1 But it's very useful in a close case where
2 the document doesn't say this is the administrative
3 report or the report of staff on a particular issue --
4 it's very helpful in a close case to look at the context
5 of the statute.

6 JUSTICE ALITO: Well, could I ask you about
7 a document to which your adversary referred? The
8 Department of Justice and all of the other departments
9 are required annually to issue what are termed Freedom
10 of Information Act reports. Now, is that a report --

11 MR. WILLENS: Yes.

12 JUSTICE ALITO: -- under the False Claims
13 Act?

14 MR. WILLENS: Yes, it is, Your Honor, and
15 we've argued that because the FOIA uses the word
16 "response" for the documents we're talking about today
17 and uses the word "report" for that document that goes
18 to Congress, it must have understood those words to mean
19 different things.

20 JUSTICE ALITO: But this report is --
21 doesn't seem to involve a process that's any less
22 mechanical than responding to a FOIA report. It's
23 basically a compilation of statistics: how many
24 requests were filed, how long it took to process them,
25 exemptions that were claimed, and so forth. So what's

1 the difference?

2 MR. WILLENS: Well, FOIA is a special case,
3 Your Honor; that's the first difference. It only looks
4 into whether or not documents should move from
5 government files into the public, and we're suggesting
6 that because there's such a strong government purpose in
7 encouraging whistleblowers to bring those documents out,
8 that in order to give meaning to the list of enumerated
9 sources here you have to look at what the documents are
10 there, that are coming out.

11 You can look at this FOIA cover letter, and
12 I think you'll see that it doesn't have any substantive
13 content to it. It just refers to the investigation, or
14 it refers to the FOIA search that was -- that took place
15 here.

16 JUSTICE SCALIA: Well --

17 MR. WILLENS: In a lot of ways -- sorry.

18 JUSTICE SCALIA: Give us -- give us your
19 definition. You say you're not standing by the
20 dictionary definition --

21 MR. WILLENS: Right.

22 JUSTICE SCALIA: -- that was read. You're
23 -- what is your definition? It's not just reports of
24 investigations into fraud. What else is it?

25 MR. WILLENS: On the investigation side,

1 it's a definition -- the definition is a focused and
2 sustained inquiry toward a government end, a substantive
3 government end that would have to do with the policies
4 and practices of the -- of the agency; that is,
5 uncovering noncompliance or assembling information about
6 a policy program or something like that. We're trying
7 to distinguish that from --

8 JUSTICE SCALIA: Do you know any -- any
9 dictionary that gives that definition? I mean, the
10 advantage of -- of the Petitioners' is they use a -- a
11 dictionary definition. It may be a very broad one and
12 you don't like it for that reason, but it is the way the
13 word is sometimes used.

14 MR. WILLENS: It is, Your Honor.

15 JUSTICE SCALIA: I don't know any dictionary
16 that would define the word the way you say it.

17 MR. WILLENS: That's the Second Circuit's
18 holding, Your Honor. That's exactly why we spent a
19 large part of our brief explaining why there's a better
20 dictionary definition than the one that Petitioner uses.
21 One important difference --

22 JUSTICE GINSBURG: Which is -- can you point
23 us to the page so we can see the Second Circuit's
24 definition of report and the Second Circuit's definition
25 of an FCA investigation?

1 MR. WILLENS: I'm not sure that I can do
2 that, Your Honor.

3 JUSTICE GINSBURG: Well, I don't -- I don't
4 want to eat into your time.

5 JUSTICE ALITO: Well, I -- I understood the
6 definition that I read to be the position that you are
7 advocating, not simply some dictionary -- some
8 definition that happens to appear in the dictionary. I
9 understood that to be the test that you were saying we
10 should adopt. Am I wrong? Did I misread your brief?

11 MR. WILLENS: We -- we believe that that's a
12 good definition that could be used, Your Honor, but the
13 trouble is that there's not going to be any dictionary
14 definition that covers all the innumerable ways that
15 "administrative report" can be used. And I wanted to
16 just -- to answer your earlier question to say that, of
17 course, there are standard administrative reports that
18 agencies issue. The -- the courts below have been
19 resolving this kind of issue outside the FOIA context
20 for 25 years since this statute was passed without any
21 serious trouble.

22 JUSTICE ALITO: But if we adopt your
23 definition, isn't it true that a lot of things that are
24 labeled Department of Labor report, Justice Department
25 Freedom of Information Act report, are not reports?

1 MR. WILLENS: Yes, Your Honor, and that's
2 why I told you that the Second Circuit's definition, if
3 you're looking for an overarching definition, is a
4 better one. The trouble there --

5 JUSTICE ALITO: So you're withdrawing from
6 the definition that you proposed in your brief?

7 MR. WILLENS: I -- I believe they are both
8 helpful, Your Honor, and I also believe that the -- the
9 Second Circuit's definition covers all of these kinds of
10 reports, but there's no need for this Court to issue its
11 own definition. There's another way of resolving this
12 case, which is simply to answer the question of whether
13 FOIA responses, which are unique in many respects, and
14 have their own statutory and regulatory structure, are
15 administrative reports or investigations on their own
16 terms. And --

17 JUSTICE SCALIA: Don't we have to say why?
18 Don't we have to say why they are they are that?

19 MR. WILLENS: Of course, you have --

20 JUSTICE SCALIA: And once we have to say
21 why, we're -- we're getting into the need for defining
22 what a report is.

23 MR. WILLENS: Well, I -- it would be
24 possible --

25 JUSTICE SCALIA: We don't usually just say

1 yes, no; you know, we usually give reasons.

2 MR. WILLENS: I agree with that, Your Honor,
3 but point two of our brief is an explanation of why it
4 makes sense not to have a categorical rule that every
5 FOIA response and all of its attachments are always
6 administrative reports and investigations. And I submit
7 you don't have to, to find administrative report an
8 investigation for all purposes in order just to answer
9 that narrow question.

10 For example, the word "investigation" is
11 used in the False Claims Act for a very specific kind of
12 investigation: a law enforcement investigation. And a
13 FOIA search, which is defined in that statute as a
14 review, is not an investigation.

15 JUSTICE SCALIA: Let's talk about the
16 purpose of the statute. Surely, that should bear upon
17 how you read the -- what you read the words to mean. I
18 had thought that the purpose was as -- as Petitioner's
19 counsel said, the purpose was to allow people to bring
20 qui tam actions who have their own information and who
21 are not just relying on information that they -- that is
22 not personal to them. Is that accurate or not?

23 MR. WILLENS: No, Your Honor. The -- the
24 statute has always encouraged both insiders and people
25 who are dealing with secondhand information, what we

1 used to call private attorney generals, to go out and do
2 their own investigation. And Congress amended the
3 statute in 1986 to encourage those people and insiders
4 like Mr. Kirk to get documents out of the government
5 files that they need as evidence to support their case.

6 The case doesn't lack merit simply because
7 the whistleblower needs additional evidence to prove his
8 case in court, and FOIA is a critical aspect of that
9 because relators frequently don't have one piece of
10 information, which is what their corporation said to
11 government contracting officers. That is, Mr. Kirk, for
12 example, knows operationally -- he knows that every
13 contract Schindler had for 15 years was breached because
14 they were not following the key contractual provision to
15 abide by the --

16 JUSTICE SCALIA: He only knows that because
17 of the FOIA response.

18 MR. WILLENS: No, Your Honor.

19 JUSTICE SCALIA: Because -- because the
20 agency said we don't have any reports for those 5 years.
21 Why isn't that information from the agency a report by
22 the agency that we don't have any documents from those 5
23 years, and, therefore, your client says they didn't file
24 documents for those 5 years?

25 MR. WILLENS: There were a few statements

1 wrapped up in that -- in that question, Your Honor. But
2 the point I'm trying to make is that Mr. Kirk has a vast
3 amount of inside knowledge about this breach of contract
4 that was going on for so many years, and it's different
5 from the notification requirement. That's what triggers
6 the False Claims Act liability.

7 But it's different from saying that there
8 was a fraudulent scheme going on for 10 or 15 years that
9 damaged the government, damaged the veterans employed by
10 the company, and -- and undermined the whole purpose of
11 VEVRRRA that requires it to be in these contracts.

12 JUSTICE SOTOMAYOR: Counsel, the -- I think
13 you've just divided up two issues. The first is, the
14 FOIA letter does tell you that there weren't reports for
15 certain years.

16 MR. WILLENS: It said -- the word is that
17 reports were not found.

18 JUSTICE SOTOMAYOR: Found. Now, the issue
19 is different from whether the ones that were found were
20 false or not; is that correct?

21 MR. WILLENS: That's true, and I would say
22 it's also different from the issue of whether they were
23 filed, because the fact that the agency didn't find them
24 during a cursory review of its records, which is -- a
25 reasonable review of the records is all it's required to

1 do. In a compliance investigation, of course, they
2 would go on much further. They would look to see if the
3 documents were filed somewhere else. If they --

4 JUSTICE SCALIA: But your client would
5 search if they weren't filed, and on the basis of no
6 other information except this FOIA response.

7 MR. WILLENS: It's not no other information,
8 Your Honor. It's a pattern of --

9 JUSTICE SCALIA: How else does your client
10 know that there were no reports filed for these years,
11 which is part of the -- part of the claim here?

12 MR. WILLENS: He knows that Schindler did
13 not collect the information that it would have needed in
14 order to file accurate reports.

15 JUSTICE SCALIA: He wasn't there during
16 those years, was he?

17 MR. WILLENS: He was only not there during
18 the very tail end of our period, which runs from 1999 to
19 2005. He was there and he was fired or let go in the
20 middle of 2003, so he has personal knowledge of all of
21 that failure to collect the information. The question,
22 then, is whether Schindler filed false reports or failed
23 to file them at all, and he alleged, without reference
24 to the FOIA response, that it had to be one or the
25 other. And either way, it's going to be a violation,

1 and that's sufficient at this stage of the case.

2 We're the 12(b)(1) motion, Your Honor. I
3 haven't had an opportunity for discovery and we don't
4 know anything else about Schindler's conduct, but
5 it's -- it's not correct to say that -- well, I think
6 I've answered the question.

7 JUSTICE ALITO: Well, may I ask you why a
8 FOIA response doesn't satisfy the Second Circuit's test?
9 An investigation, the Court says, quote, "implies a more
10 focused and sustained inquiry toward a government end."

11 Now, the government end in responding to a
12 FOIA request is compliance with FOIA, and somebody has
13 to search for these records and determine whether any
14 exemptions apply, and that would seem to be focused and
15 sustained. So what element is missing?

16 MR. WILLENS: The -- there's a missing
17 government end here because all that's happening is the
18 transmission of documents from inside the agency to the
19 outside the agency.

20 JUSTICE KENNEDY: But that's the way the
21 Second Circuit defined its own, or limited its own
22 definition. But why isn't it -- why isn't the Ninth
23 Circuit incorrect -- pardon me, the Second Circuit
24 incorrect when it says that this is not a governmental
25 end? It is a governmental end.

1 MR. WILLENS: Obviously, satisfying the
2 requirements of FOIA and its regulations is a government
3 end to that extent, but the Second Circuit was trying to
4 distinguish between the substantive work of an agency
5 and the more ministerial but still important act of
6 taking documents out of files and sending them out to
7 the public. A FOIA officer is -- is separate and apart
8 in most cases from other programmatic officers in an
9 agency, because we want to keep that act of taking
10 documents out of the files and making them public
11 separate from people who might not want those documents
12 to go out into the files into the public.

13 CHIEF JUSTICE ROBERTS: The person is -- the
14 person is separate but is often dealing on a regular
15 basis with people who have line responsibilities and
16 something else.

17 MR. WILLENS: Of course.

18 CHIEF JUSTICE ROBERTS: He sees something --
19 well, that looks like it might be a problem -- he gets
20 on the phone or goes down there and says: Is this
21 covered by the exemption or not?

22 MR. WILLENS: Of course. I didn't mean to
23 say that they don't speak to them. It's just that
24 there's a different line of authority in most cases, and
25 it's a different kind of mission. So I -- I hear the

1 question, and I understand the problem, but at some
2 point you need to distinguish between what FOIA's trying
3 to do, which is to make documents public, and what the
4 government agency's work is, which is to implement its
5 policies, procedures, sign contracts, build roads and
6 whatever else it does.

7 There's such a strong government purpose in
8 getting these documents out to the public, and
9 specifically in this case to relators and whistleblowers
10 that this Court has held, 15 -- has held, almost 15
11 years ago, that that is why Congress amended the statute
12 in 1986, and to tell the Congress now 25 years later
13 that they made a mistake when they used the word
14 "administrative report" and they accidentally covered a
15 vast number of documents, they could have used the word
16 "agency records," which they used in FOIA to cover
17 everything. But instead, Congress chose a very narrow
18 set of enumerated sources, specifically so that other
19 documents would be available to relators.

20 As I tried to say before, getting those FOIA
21 documents out to a relator is particularly important,
22 because it has the correspondence between Schindler or
23 other contractor and the government.

24 JUSTICE ALITO: How do you determine which
25 government ends count and which government ends don't

1 count?

2 MR. WILLENS: My only argument is that FOIA
3 is a different kind of mission.

4 JUSTICE ALITO: That's the only
5 government -- compliance with FOIA is the only
6 government end that doesn't count?

7 MR. WILLENS: I believe FOIA is a special
8 case, Your Honor, and there are many reasons why that --
9 that would be the case. We've argued that the -- the
10 plain language of FOIA indicates that a response is not
11 a report; a search is not an investigation.

12 JUSTICE ALITO: So a report that goes to a
13 department or agency's compliance with some law that is
14 not directly related to the mission of that department,
15 that would qualify as a -- as a government end for these
16 purposes, but FOIA's the only thing that doesn't count?

17 MR. WILLENS: FOIA is the only thing that --
18 that doesn't count. It's like a publishing house or a
19 little clearing house inside each agency whose job is to
20 take manuscripts, or in this case, reports or audits or
21 hearings or whatever, and take them out into the public.
22 I think it's fair to distinguish between that function,
23 the publication function, and the substantive work of
24 the agency. If you don't do that, then you're heading
25 down a slippery slope which Schindler eloquently

1 articulated in its reply brief. You end up at a point
2 where not only FOIA documents are covered, but non-FOIA
3 documents, in one case, even SEC filings, private SEC
4 filings that are automatically posted to the
5 commission's computer, Schindler seems to think that
6 those are administrative reports.

7 And you've, of course, transformed every
8 private document, like these VETS-100 reports, into
9 public documents simply by the process of corporate
10 filing and then release by the government. There's
11 simply no basis for that in the statute, and it would
12 cause enormous harm to the operation of the statute.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

15 Ms. Sherry.

16 ORAL ARGUMENT OF MELISSA ARBUS SHERRY,
17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING RESPONDENT

19 MS. SHERRY: Mr. Chief Justice, and may it
20 please the Court:

21 I want to start with one thing that hasn't
22 yet been brought up this morning, and that is the
23 context. We are not talking about words in isolation.
24 We're not talking about the abstract meaning of the word
25 "report." What we're talking about is public

1 disclosures of allegations or transactions in a
2 congressional, administrative, or GAO report hearing,
3 audit or investigation. And in that context, the word,
4 the phrase "administrative report," the phrase
5 "administrative investigation," has some meaning.

6 When you speak of a congressional
7 investigation, when you speak of a GAO report, and when
8 you speak of an administrative audit, that conjures up a
9 certain image that goes beyond the simple search for
10 responsive records in response to a --

11 JUSTICE ALITO: Your test, am I right --
12 this is page 21 of your brief -- that it has to go to
13 the uncovering of the truth of the matter or inquiring
14 into wrongdoing. Is that your test?

15 MS. SHERRY: I don't think it has to go just
16 to the inquiring into wrongdoing. I think the way to
17 think about it is whether or not the agency or the
18 governmental entity is engaging in a substantive inquiry
19 into and a substantive analysis of information of data,
20 of facts, and that's the distinction between what an
21 agency does in response to FOIA.

22 FOIA is a means of public disclosure. It's
23 a method by which an agency grants the public access to
24 preexisting records that are in its possession. It is
25 essentially the public disclosure component of the

1 public disclosure bar --

2 JUSTICE ALITO: Isn't the test whether --
3 the test is whether there's a substantive analysis of
4 facts?

5 MS. SHERRY: There's a substantive analysis
6 of the facts. For example, in the FOIA context, while
7 the agency is certainly pulling responsive records and
8 is engaging in some sort of inquiry into whether
9 exemptions apply and whether the information can be
10 released or should be released, it's not looking at the
11 data. It's not looking at the information that's in
12 that document for its substantive content.

13 JUSTICE ALITO: So -- but when the -- when
14 the DOJ pulls together at the end of the fiscal year the
15 number of FOIA requests that it received and calculates
16 the length of time they were pending and discloses that
17 in the annual freedom of act -- Freedom of Information
18 Act report, that is a report?

19 MS. SHERRY: I think that would be a report
20 under our definition because the Department of Justice
21 is actually engaging with the data, engaging in the
22 analysis. And if I'm remembering correctly, I think it
23 also requires, for example, the Attorney General to
24 report on how it's encouraging compliance with FOIA by
25 the different agencies.

1 And so I think in most of the circumstances
2 that it would still qualify as a report, and I think
3 FOIA is quite distinct from that.

4 And if you look at the facts of this case in
5 particular, it demonstrates what the substance of the
6 agency's action is in a FOIA case. It's -- again, it's
7 a means of public disclosure. Congress could have
8 enacted a very different public disclosure bar. In 1943
9 to 1986, there was what was called the government
10 knowledge bar.

11 JUSTICE ALITO: Every report is a mean --
12 means of public disclosure. Does -- the Freedom of
13 Information Act report is a means of public disclosure,
14 that's the reason that Congress required it.

15 MS. SHERRY: That's -- that's certainly
16 true, but the public disclosure bar requires more than
17 just the public disclosure. Congress made the extra
18 effort and included only particular enumerated
19 governmental sources. Whatever the line is, we know
20 that it cannot be any dissemination of information from
21 a governmental entity.

22 JUSTICE ALITO: But I'm -- I'm still
23 struggling to find out what the definition is of -- of a
24 report or an investigation. You say it's a substantive
25 analysis of facts. Does not the person who processes a

1 FOIA request have to engage in a substantive analysis of
2 facts to determine whether particular documents fall
3 within the scope of the request, whether certain
4 materials are covered by exemptions?

5 MS. SHERRY: I don't think the -- two
6 answers to that question. One is I don't think the
7 officer engaging in any substantive analysis of the
8 facts that are in the records that it's disclosing, but
9 the second answer to that question is if that's all
10 that's required, then I think we're back to a position
11 where every disclosure of information by the government
12 would qualify as a public disclosure.

13 And we not -- we know that's not the choice
14 that Congress made. It included only specifically
15 enumerated sources, and it chose particular words. It
16 chose report, hearing, audit or investigation. It is
17 hard to think of what other words Congress could have
18 used to describe the type of report we are talking about
19 or the type of investigation besides those words.

20 If Congress had wanted to have a broader
21 meaning, it had a number of other types of words at its
22 disposal. It could have said document, it could have
23 said communication, it could have said record, and then
24 it would map quite well on to what FOIA is, which is the
25 public disclosure of agency records. It didn't do any

1 of that, and so I think we have to give some credence to
2 the choice of words and to the fact that Congress --

3 JUSTICE BREYER: So what -- why -- imagine
4 everything here is the same. That is, what I imagine
5 happened here is that an individual wrote and asked for
6 a FOIA request. Did Schindler Elevator file a certain
7 kind of statement. And you say that's not a report.

8 Now, imagine everything the same except the
9 person who asks is called Joe Smith, fraud officer for
10 the agency. Everything else is the same. Now is it a
11 report?

12 MS. SHERRY: No, and -- I'm sorry. The
13 second circumstance it is, but let me -- I answered that
14 incorrectly. The second circumstance it would be, but
15 let me explain the distinction.

16 JUSTICE BREYER: All right.

17 JUSTICE SCALIA: You don't understand the
18 circumstance.

19 JUSTICE BREYER: That is exactly what
20 happened here.

21 MS. SHERRY: Let me -- that is not -- that's
22 what I want to explain, that's not -- that's not what
23 happened here. If I submitted a FOIA request and said
24 did so-and-so company file a report, I wouldn't get a
25 response, that's not a proper FOIA request.

1 JUSTICE BREYER: No, no, it says, please
2 tell me any documents that they filed that says da, da,
3 da, something like that, okay? Now, we have the same
4 thing, word for word, except the person who makes the
5 request is not Mrs. Mary Jones from the public, the
6 person who makes the request is the fraud officer for
7 the agency that's worried about being defrauded. And
8 all I'm interested in is, are they both not reports? Is
9 one a report and not the other? Or are they both
10 reports?

11 MS. SHERRY: The second one would be a
12 report if there was an investigation going on.

13 JUSTICE BREYER: I'm just telling you the
14 facts. The facts are just what I said.

15 MS. SHERRY: If -- if --

16 JUSTICE BREYER: Everything the same except
17 he signs his name, "fraud officer."

18 MS. SHERRY: Then -- then I misunderstood
19 the hypothetical. No, it doesn't matter who signing the
20 piece of paper. What matters is the substance of the --

21 JUSTICE BREYER: All right. So, then, if a
22 person who is an outside person gets a hold of two
23 documents, one, the request, and two the response, which
24 is to say, yes, I found 15 reports, they're all signed
25 by Mickey Mouse, okay? And he bases a complaint, there

1 is no such person as Mickey Mouse, it's a fraud, okay?
2 Then you go right ahead and bring the qui tam because it
3 wasn't falling within the exception.

4 Is that right, in the Government's view?

5 MS. SHERRY: In the Government's view the
6 fact that the information was obtained through a FOIA
7 request doesn't answer the question as to whether the
8 underlying document is an administrative report or an
9 administrative audit or anything else of the sort. The
10 FOIA -- the agency's response to a FOIA request, again,
11 is nothing more than the first --

12 JUSTICE BREYER: No, no, you're repeating --
13 I'm trying to show you what the problem is in my mind.
14 I -- I can't quite work out the right definition, and
15 that's what I'm trying to get enlightened on.

16 MS. SHERRY: And -- and the definition --
17 and -- and I would be the first to acknowledge that
18 there may be difficult questions at the margin.

19 JUSTICE BREYER: I'm not trying to make a
20 difficult question. All I want is your enlightenment
21 about how when I write these two cases down, should I
22 distinguish them? Should I say they're both the same or
23 what?

24 MS. SHERRY: I think based on your
25 hypothetical in both circumstances, all that is done is

1 the agency has looked in its files to see if it has
2 responsive records and disclose them, then in both
3 circumstances that's not a report and there was no --

4 JUSTICE BREYER: You say in most. In my
5 circumstance --

6 MS. SHERRY: Oh, sorry. In both
7 circumstances.

8 JUSTICE BREYER: In both circumstances.

9 MS. SHERRY: Then it's not -- it's not a
10 report and there's been no investigation. And I think
11 words have meaning, and it's significant that FOIA does
12 not refer to what an agency does as an investigation.
13 It refers to it as a reasonable search for responsive
14 records, and this Court has never referred to it as an
15 investigation, no court ever has. And that's because
16 there's a substantive distinction between an
17 investigation, certainly between a GAO investigation,
18 between a congressional investigation and what an agency
19 does in response to a FOIA request.

20 To give an example, the GAO is not subject
21 to FOIA, but it does in its regulation respond to
22 requests from the public much the same way that an
23 agency does in response to a FOIA request. I think it
24 would be a rather strange use of the language to think
25 of that as a GAO investigation and to think of the

1 response as a GAO report.

2 Another example, and again, we're talking
3 about ordinary usage, not any possible usage.

4 JUSTICE SCALIA: I don't -- I don't want to
5 have to play these games every time there's --
6 there's -- there's one of these qui tam actions. I
7 mean, the advantage of Petitioner's solution is that
8 it -- it's easy -- it's easy to apply. I don't find
9 yours easy to apply at all.

10 MS. SHERRY: It may be easy to apply, but
11 it's easy to apply and it reads out an entire subset
12 enumerated sources that Congress thought important to
13 include.

14 JUSTICE GINSBURG: Did the FCA, the
15 amendments in 2009, which are not retroactive, do they
16 have any bearing on this problem prospectively?

17 MS. SHERRY: On a prospective -- not -- not
18 directly in that the words "report," "hearing," "audit"
19 or "investigation" are still included, but it did
20 narrowly and further define what that means. It added a
21 Federal context, and so this Court had decided in Graham
22 County that there was no Federal nexus required for the
23 second category of documents and going forward with the
24 2010 amendments there now is.

25 And so, on a prospective basis -- may I

1 finish? On a prospective basis, State audits, State
2 reports would not be subject -- would not bar a qui tam
3 case, unless if this Court holds otherwise they're
4 produced in response to a FOIA request.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Reiss, you have 14 minutes remaining.

7 REBUTTAL ARGUMENT OF STEVEN ALAN REISS

8 ON BEHALF OF THE PETITIONER

9 MR. REISS: I don't think I'll use it all,
10 Mr. Chief Justice.

11 Justice Ginsburg, in response to your
12 request, the new version of the False Claims Act lets
13 the government disclaim the public disclosure bar. It
14 now says the bar can apply unless opposed by the
15 government. So the government has an automatic ability
16 to stop the imposition of the public disclosure bar
17 simply by opposing it. So that is a material change in
18 the government's favor that the new False Claims Act has
19 made.

20 Let me just address an underlying premise
21 that we've heard, I think, somewhat repeatedly from the
22 Government and Mr. Kirk, and that is this notion that
23 FOIA is simply an automatic process, that agencies are a
24 publishing house or clearinghouses. That notion is
25 utterly belied by the statute and the process itself,

1 and it's utterly belied by the statistics from the
2 Department of Labor in terms of what their responses are
3 and how they do them.

4 In 2008, which was the last year we were
5 able to find statistics for, the Department of Labor,
6 the department at issue here, processed 17,000 FOIA
7 responses. Only 28 percent were granted in full.
8 Thirty-two percent were denied in full, 10 percent,
9 based on the statutory exemptions, and 22 percent based
10 on other statutes like the Privacy Act, and 40 percent
11 of those 17,000 responses were partial responses. So we
12 can give you some but not all; and in fact the FOIA
13 responses in this very case not only reported that we
14 found some of the VETS-100 reports in some years, we
15 didn't find them in others; but with respect to the
16 VETS-100 reports that were attached, they actually made
17 redactions, because those redactions were compelled
18 according to the Chief of Compliance and Investigations
19 by the Privacy Act.

20 JUSTICE SOTOMAYOR: Mr. Reiss, assuming that
21 the government did all of the steps you took, how does
22 it promote the purposes of FOIA --

23 MR. REISS: Very --

24 JUSTICE SOTOMAYOR: -- to find a document
25 created by a third party, under duty or not, that is

1 submitted and contains false statements. How does it
2 promote the government's interests to bar an individual
3 who has personal knowledge about the falsity from being
4 a qui tam action?

5 MR. REISS: Well --

6 JUSTICE SOTOMAYOR: Doesn't that seem
7 illogical, meaning the -- the report filed by the
8 employer is not screaming out, "I filed a false report."
9 You need some outside knowledge from that statement by
10 the employer to prove the falsity. So how is your rule
11 promoting FOIA's purposes?

12 MR. REISS: Well, Justice Sotomayor, in that
13 hypothetical the relator actually is bringing
14 independent information, and the public disclosure bar
15 would not be invoked -- not because the FOIA response
16 isn't a report; it wouldn't be invoked because the
17 allegations and transactions in the qui tam complaint
18 were not based on; they were not disclosed in the FOIA
19 response.

20 It furthers the purpose of the statute, our
21 interpretation furthers the purpose of the statute
22 because the purpose of the public disclosure bar was to
23 stop qui tam suits from being brought by members of the
24 public based on information equally accessible to anyone
25 in the public.

1 JUSTICE SOTOMAYOR: I'm still not sure I
2 understand. Here the relator is saying, the statement
3 says we complied with the military act, and he says they
4 didn't. I have personal information they didn't because
5 I know they didn't do X, Y, and Z. Why did we even
6 reach the questions we did if what he's claiming is that
7 he was an original -- that he has original knowledge not
8 -- not reflected in the reports?

9 MR. REISS: And what I'm saying, Justice
10 Sotomayor is if that's the case, a court can evaluate --
11 certainly can evaluate whether he is in fact the
12 original source, which would take him out from under the
13 public disclosure bar. The court below, the district
14 court did that, and found that he wasn't. Or even
15 before reaching that inquiry, if a relator can say my
16 qui tam complaint is not based upon the public
17 disclosure of allegations and transactions and reports,
18 the bar doesn't drop.

19 Our position is the appropriate place for
20 the inquiry that you're worried about is in determining
21 whether there is a disclosure of the relator's
22 allegations or transactions. Whether --

23 JUSTICE SOTOMAYOR: I still don't understand
24 how it promotes the purposes of a qui tam action --

25 MR. REISS: Because of --

1 JUSTICE SOTOMAYOR: -- to put any kind of
2 bar on a relator who is challenging the creation of a
3 document that's submitted by an independent party to the
4 government.

5 MR. REISS: Well, one of the purposes of the
6 public disclosure bar was to stop -- and this Court
7 recognized it in Graham County -- parasitic lawsuits by
8 relators with no real significant independent or
9 valuable information to contribute. What we're
10 suggesting, as I understand the question --

11 JUSTICE SOTOMAYOR: In fact that's not true.
12 We have -- that -- because the Government's right;
13 Congress changed the -- the law from anything that was
14 in the government's possession and narrowed the scope of
15 the bar.

16 MR. REISS: Exactly, Justice Sotomayor, but
17 our position does not resurrect the government knowledge
18 standard that Congress changed in 1986, and it doesn't
19 do so for some very good reasons. First of all, the
20 government -- the government knowledge standard that the
21 Court -- that the Congress changed in 1986 didn't allow
22 a relator who is actually the original source of the
23 information to bring suit. That was one of the major
24 things that prompted the congressional change in 1986.

25 Secondly, and it's clear from the

1 legislative history in the Senate report, one of the
2 primary concerns of Congress in enacting the statute in
3 1986 was the fact that there was a sense that government
4 employees themselves who were knowledgeable about
5 potential contracting fraud were not coming forward. In
6 fact, the Senate report cites a 1983 survey in which 73
7 percent of 5,000 government employees responded they
8 would not come forward with evidence of contractor
9 fraud. That was a major concern with Congress under the
10 old government knowledge standard, the pre-1986
11 government knowledge standard. Those -- if those
12 employees came forward, the suit would still be barred
13 because the government by definition would have known
14 about the fraud.

15 Under the new statute, not only do you have
16 the original source exception, but if government
17 employees come forward, they are not barred from
18 bringing those qui tam suits. It's a major change and
19 it's not the resurrection, Justice Sotomayor, of the
20 government knowledge standard.

21 If there are no further questions.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon, at 12:12 p.m., the case in the
25 above-entitled matter was submitted.)

A				B
abide 25:15	32:6 33:2,4,5,8 39:8,9	allegation 9:9	41:9,10,11	back 3:25 36:10
ability 42:15	adopt 18:20	allegations 4:10	42:14	band 7:17
able 43:5	22:10,22	4:17 5:6,14	appropriate	bar 3:13,18,22
above-entitled	advanced 13:15	9:13 33:1 44:17	45:19	4:16 5:3,8,9
1:11 47:25	14:1	45:17,22	ARBUS 1:19 2:9	14:3,5 15:21,24
Absolutely 13:2	advantage 21:10	alleged 4:3 9:7	32:16	17:18 34:1 35:8
abstract 32:24	41:7	27:23	argue 7:2	35:10,16 42:2
accept 10:5	adversary 19:7	allow 24:19	argued 19:15	42:13,14,16
access 33:23	advocating 22:7	46:21	31:9	44:2,14,22
accessible 44:24	agencies 10:4	allows 3:14	argument 1:12	45:13,18 46:2,6
accidentally	18:24 22:18	amended 16:2	2:2,5,8,12 3:3,7	46:15
30:14	34:25 42:23	25:2 30:11	15:15 31:2	barred 47:12,17
account 18:1	agency 6:14,21	Amendment	32:16 42:7	based 4:11,17
accounting 12:20	6:25 7:6,22 8:3	16:17	articulated 32:1	5:6 9:7 18:17
accurate 24:22	8:16,17 10:7,11	amendments	asked 8:1 13:10	39:24 43:9,9
27:14	10:11,13,14,16	41:15,24	37:5	44:18,24 45:16
acknowledge	10:20 11:7,15	amicus 1:21 2:11	asking 8:5 11:2	bases 38:25
39:17	12:10 13:22	32:17	15:19 18:19,23	basically 19:23
act 3:13 6:2	21:4 25:20,21	amount 26:3	asks 37:9	basis 9:12 27:5
13:23,25 14:11	25:22 26:23	analysis 5:10	aspect 25:8	29:15 32:11
16:1,2 17:16	28:18,19 29:4,9	33:19 34:3,5,22	assembling 21:5	41:25 42:1
19:10,13 22:25	30:16 31:19,24	35:25 36:1,7	assertion 17:7	bear 24:16
24:11 26:6 29:5	33:17,21,23	annual 34:17	Assistant 1:19	bearing 41:16
29:9 34:17,18	34:7 36:25	annually 19:9	assuming 43:20	behalf 1:15,17
35:13 42:12,18	37:10 38:7 40:1	answer 22:16	attached 13:11	1:21 2:4,7,10
43:10,19 45:3	40:12,18,23	23:12 24:8 36:9	43:16	2:14 3:8 15:16
action 8:7 35:6	agency's 7:8	39:7	attachment 13:6	32:17 42:8
44:4 45:24	30:4 31:13 35:6	answered 28:6	attachments	belied 42:25 43:1
actions 24:20	39:10	37:13	24:5	believe 22:11
41:6	ago 30:11	answers 36:6	attorney 25:1	23:7,8 31:7
activities 12:10	agree 24:2	antitrust 11:18	34:23	better 21:19 23:4
13:23	ahead 39:2	anymore 17:3,4	audit 33:3,8	beyond 33:9
activity 12:7	Aircraft 16:5	apart 29:7	36:16 39:9	blacked 16:11
added 41:20	ALAN 1:15 2:3	appeal 7:10,10	41:18	breach 26:3
additional 25:7	2:13 3:7 42:7	16:22	audits 31:20 42:1	breached 25:13
address 42:20	Alito 12:16 13:2	appeals 7:10	authority 29:24	BREYER 37:3
administrative	14:25 17:24	appear 22:8	authorized 18:2	37:16,19 38:1
5:18,18 6:1,5,6	18:5,10 19:6,12	APPEARANC...	automatic 42:15	38:13,16,21
6:12,14,18	19:20 22:5,22	1:14	42:23	39:12,19 40:4,8
12:20 15:20	23:5 28:7 30:24	appears 14:2,5	automatically	brief 21:19 22:10
18:24 19:2	31:4,12 33:11	appended 12:24	32:4	23:6 24:3 32:1
22:15,17 23:15	34:2,13 35:11	applies 16:10	available 6:22	33:12
24:6,7 30:14	35:22	apply 15:21,23	10:19 30:19	bring 20:7 24:19
		28:14 34:9 41:8	a.m 1:13 3:2	

<p>39:2 46:23 bringing 44:13 47:18 broad 21:11 broader 18:21 36:20 broadly 15:20 brought 32:22 44:23 build 30:5 building 12:5 button 7:15</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 calculates 34:15 call 25:1 called 13:16,21 13:24 35:9 37:9 case 3:4,11 4:19 5:1,23 6:20 7:4 8:24,25 9:25 10:24 13:4 14:21 16:5 17:3 19:1,4 20:2 23:12 25:5,6,8 28:1 30:9 31:8 31:9,20 32:3 35:4,6 42:3 43:13 45:10 47:23,24 cases 16:17 29:8 29:24 39:21 categorical 24:4 category 41:23 cause 32:12 certain 9:3 12:24 13:4,5 14:13 26:15 33:9 36:3 37:6 certainly 7:18 11:17 18:22 34:7 35:15 40:17 45:11 challenge 14:9</p>	<p>challenging 46:2 change 42:17 46:24 47:18 changed 46:13 46:18,21 chief 3:3,9 7:21 8:2,6,10 9:15 9:18 12:6 15:11 15:13,17 16:6 17:6,10 29:13 29:18 32:14,19 42:5,10 43:18 47:22 choice 36:13 37:2 chose 30:17 36:15,16 Circuit 17:21 28:21,23,23 29:3 Circuits 5:23 Circuit's 18:20 21:17,23,24 23:2,9 28:8 circumstance 37:13,14,18 40:5 circumstances 35:1 39:25 40:3 40:7,8 cites 47:6 claim 4:20 27:11 claimed 19:25 claiming 45:6 claims 3:13 4:20 5:10 14:10 15:25 17:16 19:12 24:11 26:6 42:12,18 clear 6:17 10:16 46:25 clearing 31:19 clearinghouses 42:24</p>	<p>clearly 9:13 12:8 12:9 13:11 15:10 client 25:23 27:4 27:9 close 19:1,4 closer 7:4 collect 27:13,21 come 7:15,22 18:19 47:8,17 comes 7:23 18:16 coming 20:10 47:5 commission 10:3 commission's 32:5 Common 7:20 communicated 9:6 communication 9:10 36:23 company 26:10 37:24 compelled 43:17 compilation 19:23 complaint 4:17 5:5,15 9:7 38:25 44:17 45:16 complete 13:8 completely 12:4 complex 12:11 compliance 12:4 12:7 13:20,24 27:1 28:12 31:5 31:13 34:24 43:18 complicated 16:17 complied 45:3 component 33:25 computer 32:5</p>	<p>concede 12:23 concern 47:9 concerns 47:2 concluded 5:7 conduct 18:7,11 18:13 28:4 confirm 3:25 Congress 16:2 19:18 25:2 30:11,12,17 35:7,14,17 36:14,17,20 37:2 41:12 46:13,18,21 47:2,9 congressional 12:20 33:2,6 40:18 46:24 conjures 33:8 constitute 14:13 constitutes 7:8 12:8 construction 15:24 construe 15:19 contains 44:1 contend 5:11 content 15:22 20:13 34:12 context 19:4 22:19 32:23 33:3 34:6 41:21 contract 25:13 26:3 contracting 25:11 47:5 contractor 30:23 47:8 contracts 26:11 30:5 contractual 25:14 contribute 3:20 46:9</p>	<p>contributed 3:15 corporate 32:9 corporation 1:3 3:4 25:10 correct 16:7 18:8 26:20 28:5 correctly 34:22 correspondence 30:22 counsel 15:13 24:19 26:12 32:14 42:5 47:22 count 30:25 31:1 31:6,16,18 County 14:21 41:22 46:7 course 8:13 16:16 22:17 23:19 27:1 29:17,22 32:7 court 1:1,12 3:10 3:14 4:25 5:1 7:11 14:21 15:6 15:8,18,19 16:4 16:16 18:20,23 23:10 25:8 28:9 30:10 32:20 40:14,15 41:21 42:3 45:10,13 45:14 46:6,21 courts 6:9 7:11 22:18 cover 20:11 30:16 covered 29:21 30:14 32:2 36:4 covers 22:14 23:9 crabbed 15:5 created 15:23 43:25 creates 13:13 creation 46:2</p>
---	---	---	---	---

credence 37:1 critical 3:15,18 5:13 25:8 cry 7:3 8:23 curiae 1:21 2:11 32:17 cursor 26:24	11:21 12:2,22 13:18,18 19:8 22:24,24 31:13 31:14 34:20 43:2,5,6 departments 19:8 dependent 4:21 depending 14:14 describe 36:18 described 17:15 description 13:10 detailed 12:11 detailing 13:19 13:23 determine 11:22 12:19 28:13 30:24 36:2 determining 45:20 dictated 6:13 dictionary 18:16 18:17,19 20:20 21:9,11,15,20 22:7,8,13 difference 10:1 11:3 20:1,3 21:21 different 8:25 10:8 19:19 26:4 26:7,19,22 29:24,25 31:3 34:25 35:8 difficult 39:18,20 digitized 7:13 directly 31:14 41:18 disallow 3:17 disclaim 42:13 disclose 40:2 disclosed 4:9,18 5:6,15 7:6 14:15,25 15:23	44:18 discloses 34:16 disclosing 36:8 disclosure 3:13 3:18,22 4:16 5:3,8,8,9,25 6:3 10:6 14:3,5 15:21 17:18 33:22,25 34:1 35:7,8,12,13 35:16,17 36:11 36:12,25 42:13 42:16 44:14,22 45:13,17,21 46:6 disclosures 4:21 4:22 33:1 discovery 28:3 dislocations 13:14 disposal 36:22 dissemination 35:20 distinct 35:3 distinction 33:20 37:15 40:16 distinguish 21:7 29:4 30:2 31:22 39:22 district 5:1 45:13 divided 26:13 Division 12:3,7 document 11:1 16:10 17:15,19 19:2,7,17 32:8 34:12 36:22 39:8 43:24 46:3 documented 4:3 documents 6:22 7:16,23,25 8:4 8:4,5,11,11,12 8:13 10:18 11:10,20 12:17 12:24,25 13:5,5	13:6,6,11 14:15 14:19 15:22,23 16:8,14 17:5,12 17:17,22 19:16 20:4,7,9 25:4 25:22,24 27:3 28:18 29:6,10 29:11 30:3,8,15 30:19,21 32:2,3 32:9 36:2 38:2 38:23 41:23 DOJ 34:14 drastically 11:18 drop 45:18 due 8:9 duty 43:25 D.C 1:8,20	encouraging 20:7 34:24 ends 30:25,25 enforcement 24:12 engage 36:1 engaging 33:18 34:8,21,21 36:7 enlightened 39:15 enlightenment 39:20 enormous 32:12 entire 41:11 entity 33:18 35:21 enumerated 20:8 30:18 35:18 36:15 41:12 equally 44:24 escape 4:15 ESQ 1:15,17,19 2:3,6,9,13 essentially 33:25 evaluate 45:10 45:11 evaluation 17:12 everybody 12:23 evidence 25:5,7 47:8 ex 1:6 3:5 exactly 11:24 21:18 37:19 46:16 examination 17:22 examine 11:10 example 17:2 24:10 25:12 34:6,23 40:20 41:2 exception 39:3 47:16 exemption 16:10
D				
D 3:1 da 38:2,2,3 damaged 26:9,9 Daniel 1:6 3:5 data 33:19 34:11 34:21 dealing 24:25 29:14 decided 11:22 41:21 define 21:16 41:20 defined 24:13 28:21 defining 23:21 definition 13:14 14:1,5 15:5,6 18:18,20 20:19 20:20,23 21:1,1 21:9,11,20,24 21:24 22:6,8,12 22:14,23 23:2,3 23:6,9,11 28:22 34:20 35:23 39:14,16 47:13 definitions 18:17 defrauded 38:7 degree 11:18 delivered 12:5 demonstrate 4:16 demonstrates 35:5 denied 43:8 department 1:20 6:18 9:11 11:20				
E				
e 2:1 3:1,1 12:19 earlier 22:16 easy 41:8,8,9,10 41:11 eat 22:4 effectively 14:19 effort 35:18 either 27:25 element 5:2 14:2 14:3 28:15 Elevator 1:3 3:4 37:6 eloquently 31:25 employed 26:9 employees 47:4 47:7,12,17 employer 44:8 44:10 enacted 35:8 enacting 47:2 encompasses 15:10 encourage 16:3 25:3 encouraged 24:24				

29:21 exemptions 17:8 19:25 28:14 34:9 36:4 43:9 exercised 7:1 explain 37:15,22 explaining 21:19 explanation 24:3 explicit 18:21 extent 29:3 extra 35:17	37:6,24 filed 9:9 10:5,17 11:4,15,23 19:24 26:23 27:3,5,10,22 38:2 44:7,8 files 6:21 7:13 10:19 17:19 20:5 25:5 29:6 29:10,12 40:1 filing 10:11 32:10 filings 4:3 11:4 32:3,4 fill 3:25 filled 6:10 financial 5:25 6:3 10:6 find 8:20 9:3 13:4 13:5,8 14:6 24:7 26:23 35:23 41:8 43:5 43:15,24 finding 17:4 finish 42:1 fired 27:19 first 5:23 9:1 16:17 17:17,20 20:3 26:13 39:11,17 46:19 fiscal 34:14 five-part 17:18 focused 21:1 28:10,14 FOIA 3:11,24 4:8,10,12,13 4:18,21,22 5:4 5:7,16 6:17 7:5 7:7,7,8 8:24,25 9:1,1,16,19,21 10:18 11:6,25 12:12 13:3,24 14:9,13 15:1,10 15:21 16:7,14 16:15,17,19,20	17:1,3,3,4,18 19:15,22 20:2 20:11,14 22:19 23:13 24:5,13 25:8,17 26:14 27:6,24 28:8,12 28:12 29:2,7 30:16,20 31:2,5 31:7,10,17 32:2 33:21,22 34:6 34:15,24 35:3,6 36:1,24 37:6,23 37:25 39:6,10 39:10 40:11,19 40:21,23 42:4 42:23 43:6,12 43:22 44:15,18 FOIA's 30:2 31:16 44:11 following 8:3 25:14 form 16:20 formal 18:1 forth 19:25 forward 41:23 47:5,8,12,17 found 5:22 13:6,7 13:9,9 16:22 26:17,18,19 38:24 43:14 45:14 fraud 4:1,2 14:4 18:22 20:24 37:9 38:6,17 39:1 47:5,9,14 fraudulent 4:3 18:7,11,12 26:8 freedom 6:2 13:22,25 19:9 22:25 34:17,17 35:12 frequently 25:9 full 43:7,8 function 31:22	31:23 further 15:11 27:2 41:20 47:21 further 44:20 44:21 <hr/> G <hr/> G 3:1 games 41:5 GAO 33:2,7 40:17,20,25 41:1 General 1:20 34:23 generals 25:1 genuinely 3:16 getting 23:21 30:8,20 Ginsburg 3:24 4:6,7,19,24 5:24 6:7 10:1 10:15,23 11:2 11:16 14:6,12 14:16 21:22 22:3 41:14 42:11 give 20:8,18,18 24:1 37:1 40:20 43:12 given 18:2 gives 12:9 21:9 glean 8:7 go 4:13 6:23 8:15 10:19 25:1 27:2 27:19 29:12 33:12,15 39:2 goes 17:15 19:17 29:20 31:12 33:9 going 4:1 5:17 7:24,25 11:7,8 11:9,10 22:13 26:4,8 27:25 38:12 41:23	good 18:17,18 22:12 46:19 government 3:17 4:4 10:2,4 11:5 11:12,14 13:13 13:15 14:1,23 15:1,24 16:3 17:19 20:5,6 21:2,3 25:4,11 26:9 28:10,11 28:17 29:2 30:4 30:7,23,25,25 31:5,6,15 32:10 35:9 36:11 42:13,15,15,22 43:21 46:4,17 46:20,20 47:3,7 47:10,11,13,16 47:20 governmental 28:24,25 33:18 35:19,21 government's 5:12 39:4,5 42:18 44:2 46:12,14 Graham 14:21 41:21 46:7 granted 43:7 grants 33:23 group 18:2 <hr/> H <hr/> hand 11:21 handing 8:10 happen 5:11 happened 37:5 37:20,23 happening 28:17 happens 22:8 hard 11:13 18:15 36:17 harm 32:12 heading 31:24 hear 3:3 29:25
--	--	--	--	---

heard 15:7 42:21	8:16	44:21	job 31:19	7:12 28:20
hearing 33:2	incorrect 5:20	interview 11:9	Joe 37:9	key 9:6 25:14
36:16 41:18	28:23,24	investigate	JONATHAN	kind 11:18 14:4
hearings 31:21	incorrectly 37:14	10:12 11:7,22	1:17 2:6 15:15	22:19 24:11
heavily 4:21	independent	18:11	Jones 38:5	29:25 31:3 37:7
held 6:9 30:10,10	44:14 46:3,8	investigating	Judge 5:2	46:1
helpful 19:4 23:8	indicate 15:3	10:2	judges 5:25	kinds 10:9 23:9
history 47:1	indicates 15:1	investigation	Justice 1:20 3:3	Kirk 1:6 3:5,17
hold 38:22	31:10	3:12 4:14 5:5	3:9,24 4:5,6,7	9:7 12:9 13:15
holding 21:18	individual 17:22	5:16,19,22 6:19	4:19,24 5:24	14:1 25:4,11
holds 42:3	37:5 44:2	9:20 10:21	6:7,20,25 7:12	26:2 42:22
Honor 16:13	information 3:16	11:19 12:3,8,13	7:21 8:2,6,10	Kirk's 5:5,10,13
17:15 18:8,15	3:20,25 4:9 6:2	14:14 18:2,5,22	8:14,19 9:15,18	11:25
19:14 20:3	6:13 7:6 8:6	20:13,25 21:25	10:1,15,23 11:2	know 7:12 21:8
21:14,18 22:2	12:2 13:23,25	24:8,10,12,12	11:16,20 12:16	21:15 24:1
22:12 23:1,8	18:12 19:10	24:14 25:2 27:1	13:2 14:6,12,16	27:10 28:4
24:2,23 25:18	21:5 22:25	28:9 31:11 33:3	14:25 15:12,13	35:19 36:13
26:1 27:8 28:2	24:20,21,25	33:5,7 35:24	15:17 16:6 17:6	45:5
31:8	25:10,21 27:6,7	36:16,19 38:12	17:10,24 18:5	knowledge 26:3
host 3:19	27:13,21 33:19	40:10,12,15,17	18:10 19:6,8,12	27:20 35:10
house 31:18,19	34:9,11,17	40:17,18,25	19:20 20:16,18	44:3,9 45:7
42:24	35:13,20 36:11	41:19	20:22 21:8,15	46:17,20 47:10
Hughes 16:5	39:6 44:14,24	investigations	21:22 22:3,5,22	47:11,20
hypothetical	45:4 46:9,23	11:5,17 12:7,14	22:24 23:5,17	knowledgeable
38:19 39:25	infused 14:22	16:4 20:24	23:20,25 24:15	47:4
44:13	innumerable	23:15 24:6	25:16,19 26:12	known 47:13
	15:7 22:14	43:18	26:18 27:4,9,15	knows 25:12,12
I	input 10:7	investigators	28:7,20 29:13	25:16 27:12
illogical 44:7	inquiries 5:14	11:9	29:18 30:24	
image 33:9	inquiring 33:13	invoked 5:3	31:4,12 32:14	L
imagine 37:3,4,8	33:16	44:15,16	32:19 33:11	labeled 22:24
implement 30:4	inquiry 21:2	involve 18:12	34:2,13,20	Labor 6:18 9:11
implies 28:9	28:10 33:18	19:21	35:11,22 37:3	11:22 12:2,22
important 9:2	34:8 45:15,20	isolation 32:23	37:16,17,19	13:19 22:24
21:21 29:5	inside 26:3 28:18	issue 3:18 8:24	38:1,13,16,21	43:2,5
30:21 41:12	31:19	9:1,8 10:12	39:12,19 40:4,8	Labor's 13:18
imposition 42:16	insiders 24:24	13:20 18:24	41:4,14 42:5,10	lack 25:6
include 16:8	25:3	19:3,9 22:18,19	42:11 43:20,24	language 31:10
41:13	instance 6:12	23:10 26:18,22	44:6,12 45:1,9	40:24
included 12:18	intended 3:22	43:6	45:23 46:1,11	large 21:19
35:18 36:14	interested 38:8	issued 12:23	46:16 47:19,22	law 24:12 31:13
41:19	interesting 6:8	issues 16:17,18		46:13
including 5:4,5	interests 44:2	26:13	K	lawsuits 3:19
15:7	interpretation		keep 29:9	46:7
incorporating		J	Kennedy 6:20,25	lead 3:19

legislative 47:1	33:13 38:19	39:1	obviously 5:22	oversight 13:20
legitimate 4:8	47:25	move 20:4	29:1	
length 34:16	matters 38:20	moves 17:19	office 6:1,5,6	P
letter 16:19,21	mean 10:8 18:18		12:2,20	P 3:1
20:11 26:14	19:18 21:9	N	officer 17:1 29:7	page 2:2 21:23
Let's 10:23	24:17 29:22	N 2:1,1 3:1	36:7 37:9 38:6	33:12
24:15	35:11 41:7	name 38:17	38:17	paper 10:5 38:20
liability 26:6	meaning 3:12	narrow 24:9	officers 25:11	paragraphs
limited 17:4	9:22 12:14 15:9	30:17	29:8	16:21
28:21	15:9 20:8 32:24	narrowed 46:14	official 7:9 18:6	parasitic 46:7
line 18:15 29:15	33:5 36:21	narrowly 41:20	officially 7:19	pardon 28:23
29:24 35:19	40:11 44:7	national 16:18	Oh 40:6	parlance 7:22
list 20:8	meaningful 3:20	natural 10:9	okay 38:3,25	part 4:22 8:17
little 31:19	means 8:14	nearly 15:23	39:1	13:7,11 17:21
located 12:4	33:22 35:7,12	necessarily	old 47:10	21:19 27:11,11
log 16:9	35:13 41:20	14:10	once 23:20	partial 43:11
long 19:24	mechanical 11:6	need 23:10,21	ones 26:19	particular 7:14
look 8:15,23	19:22	25:5 30:2 44:9	on-the-trail	17:12 19:3 35:5
16:25 19:4 20:9	meet 13:10	needed 27:13	14:20	35:18 36:2,15
20:11 27:2 35:4	MELISSA 1:19	needs 25:7	open-door 10:16	particularly
looked 40:1	2:9 32:16	never 5:13 9:9	operation 15:25	30:21
looking 8:20	members 44:23	40:14	32:12	party 4:3 43:25
14:23 15:2	merit 25:6	new 1:15,15,17	operationally	46:3
18:16,18 23:3	met 5:8	1:17 42:12,18	25:12	passed 22:20
34:10,11	method 33:23	47:15	opinion 5:2	pattern 27:8
looks 15:8 20:3	Mickey 38:25	news 9:23	opportunity 28:3	pending 34:16
29:19	39:1	nexus 41:22	opposed 10:3	people 10:6 11:8
lot 20:17 22:23	middle 27:20	Ninth 28:22	42:14	24:19,24 25:3
lower 6:8	military 45:3	noncompliance	opposing 42:17	29:11,15
low-level 16:15	millions 11:19,19	21:5	oral 1:11 2:2,5,8	percent 43:7,8,8
	mind 39:13	nongovernmen...	3:7 15:15 32:16	43:9,10 47:7
M	minimal 4:22	6:11	order 20:8 24:8	period 27:18
major 46:23 47:9	ministerial 29:5	non-FOIA 32:2	27:14	person 6:11 7:23
47:18	minutes 42:6	normal 7:22	ordinary 5:21	10:10 18:2
making 29:10	misread 22:10	notification 7:19	9:22 12:14 15:6	29:13,14 35:25
manuscripts	missing 28:15,16	9:23 26:5	15:8,9 41:3	37:9 38:4,6,22
31:20	mission 29:25	notion 14:20,23	original 45:7,7	38:22 39:1
map 36:24	31:3,14	42:22,24	45:12 46:22	personal 24:22
March 1:9	mistake 30:13	number 30:15	47:16	27:20 44:3 45:4
margin 39:18	misunderstood	34:15 36:21	ought 5:11	personnel 10:12
Mary 38:5	38:18		outside 22:19	Petitioner 1:4,16
material 18:15	morning 32:22	O	28:19 38:22	2:4,14 3:8
42:17	motion 28:2	O 2:1 3:1	44:9	21:20 42:8
materials 36:4	Mouse 38:25	objective 16:5	overarching 23:3	Petitioners 21:10
matter 1:11		obtained 39:6		Petitioner's

<p>24:18 41:7 phone 29:20 phrase 33:4,4 piece 25:9 38:20 pieces 9:2 10:5 place 20:14 45:19 plain 31:10 plainly 5:20 play 41:5 please 3:10 15:18 32:20 38:1 point 17:2 21:22 24:3 26:2 30:2 32:1 points 14:25 policies 21:3 30:5 policy 10:17 21:6 position 3:14,16 5:12,13,22 6:16 9:15,19 13:12 14:7,9 22:6 36:10 45:19 46:17 possession 33:24 46:14 possibility 16:25 possible 23:24 41:3 posted 32:4 potential 47:5 practices 21:4 precisely 3:21 4:24,25 5:10 preexisting 33:24 premise 42:20 press 6:2 prevail 6:16 prevented 5:9 pre-1986 47:10 primary 47:2</p>	<p>Privacy 43:10,19 private 25:1 32:3 32:8 privilege 16:9 privileges 17:8 probe 18:6 problem 29:19 30:1 39:13 41:16 procedures 30:5 process 4:12 17:3 19:21,24 32:9 42:23,25 processed 43:6 processes 35:25 produced 42:4 program 21:6 programmatic 29:8 prohibit 3:22 promote 43:22 44:2 promotes 45:24 promoting 44:11 prompted 46:24 prong 5:7 17:20 proper 37:25 propose 17:25 proposed 23:6 prospective 41:17,25 42:1 prospectively 41:16 prove 25:7 44:10 provision 25:14 public 3:13,17,21 3:22 4:15 5:3,8 5:9 14:3,5 15:21 17:18,20 20:5 29:7,10,12 30:3,8 31:21 32:9,25 33:22 33:23,25 34:1 35:7,8,12,13</p>	<p>35:16,17 36:12 36:25 38:5 40:22 42:13,16 44:14,22,24,25 45:13,16 46:6 publication 31:23 publicly 5:15 10:18 publishing 31:18 42:24 pulling 34:7 pulls 34:14 purpose 16:24 20:6 24:16,18 24:19 26:10 30:7 44:20,21 44:22 purposes 14:10 24:8 31:16 43:22 44:11 45:24 46:5 push 7:14 put 7:1,16 11:8 46:1 puts 10:12 p.m 47:24</p>	<p>quite 35:3 36:24 39:14 quote 28:9 quoting 18:16</p> <hr/> <p>R</p> <hr/> <p>R 3:1 rarely 5:17 raw 11:3 reach 3:14 6:15 45:6 reaching 3:18 45:15 read 14:8,8 20:22 22:6 24:17,17 reading 6:23,23 7:2 reads 41:11 real 46:8 really 17:7 reason 17:5 21:12 35:14 reasonable 18:18 26:25 40:13 reasonably 18:6 reasons 24:1 31:8 46:19 REBUTTAL 2:12 42:7 received 34:15 recognized 16:4 46:7 record 16:20 36:23 records 16:4 26:24,25 28:13 30:16 33:10,24 34:7 36:8,25 40:2,14 redactions 43:17 43:17 refer 40:12 reference 27:23</p>	<p>referred 19:7 40:14 refers 20:13,14 40:13 reflected 45:8 regardless 15:22 regular 15:8 29:14 regulation 40:21 regulations 29:2 regulatory 23:14 Reiss 1:15 2:3 2:13 3:6,7,9 4:5 4:7,24 6:7,25 7:18 8:2,9,18 8:22 9:18 10:15 10:25 11:16 13:2 14:12,18 42:6,7,9 43:20 43:23 44:5,12 45:9,25 46:5,16 rejected 14:21 rel 1:6 3:5 related 31:14 relator 3:15 4:1 4:12,15,16 30:21 44:13 45:2,15 46:2,22 relators 3:20 25:9 30:9,19 46:8 relator's 5:14 45:21 release 17:17 32:10 released 17:13 17:16,23 34:10 34:10 releasing 17:5 relying 24:21 remaining 42:6 remembering 34:22 repeatedly 42:21</p>
---	---	---	---	---

<p>repeating 39:12</p> <p>reply 32:1</p> <p>report 3:12 4:14 5:4,15,18,21 6:4,5,10,10,13 6:19,24 7:3,14 7:15,18,19,25 8:3,8,12,17,22 9:13,14,17,20 9:21,22 10:2,3 10:10,12,21 11:8,11,12,13 11:14 12:9,13 12:18,21,23,25 13:1,7,7,8,11 13:14,21,22,24 13:25 14:10,14 14:16,17,22,24 15:1,2,4,5,6,9 15:20 16:12,14 17:11,25 18:10 18:13 19:3,3,10 19:17,20,22 21:24 22:15,24 22:25 23:22 24:7 25:21 30:14 31:11,12 32:25 33:2,4,7 34:18,18,19,24 35:2,11,13,24 36:16,18 37:7 37:11,24 38:9 38:12 39:8 40:3 40:10 41:1,18 44:7,8,16 47:1 47:6</p> <p>reported 43:13</p> <p>reporting 8:23</p> <p>reports 9:4,10,11 9:14,23,24,24 9:25,25 10:5,14 10:20 11:17,24 12:13,17 13:16 13:17,19 18:24</p>	<p>18:25 19:10 20:23 22:17,25 23:10,15 24:6 25:20 26:14,17 27:10,14,22 31:20 32:6,8 38:8,10,24 42:2 43:14,16 45:8 45:17</p> <p>repositories 10:4</p> <p>request 4:8 6:2 7:8,9 10:18 11:25 12:1,5,12 14:16 16:21 28:12 36:1,3 37:6,23,25 38:5 38:6,23 39:7,10 40:19,23 42:4 42:12</p> <p>requested 8:13</p> <p>requests 19:24 34:15 40:22</p> <p>require 9:20 11:19 14:2,3</p> <p>required 5:3 9:10 13:19 19:9 26:25 35:14 36:10 41:22</p> <p>requirement 14:22,22 18:21 26:5</p> <p>requirements 29:2</p> <p>requires 17:22 26:11 34:23 35:16</p> <p>reserve 15:12</p> <p>resolving 22:19 23:11</p> <p>respect 7:5 8:9 43:15</p> <p>respects 23:13</p> <p>respond 40:21</p> <p>responded 47:7</p>	<p>Respondent 1:18 1:22 2:7,11 13:13 15:16 32:18</p> <p>responding 19:22 28:11</p> <p>response 3:12 4:10,13,18 5:4 5:7,16 6:17 7:7 7:8,9 8:1,10,19 9:16,19,21 10:18,21,22 11:25 12:5,12 13:3 14:9,13 15:1,10 16:14 16:16,19,20 19:16 24:5 25:17 27:6,24 28:8 31:10 33:10,21 37:25 38:23 39:10 40:19,23 41:1 42:4,11 44:15 44:19</p> <p>responses 7:5 8:24,25 9:1,1,6 14:13 16:7 23:13 43:2,7,11 43:11,13</p> <p>responsibilities 29:15</p> <p>responsive 33:10 34:7 40:2,13</p> <p>result 3:21</p> <p>results 12:8 18:1</p> <p>resurrect 46:17</p> <p>resurrection 14:20 47:19</p> <p>retroactive 41:15</p> <p>return 10:6</p> <p>reveals 4:10</p> <p>review 24:14 26:24,25</p>	<p>right 18:3,4 20:21 33:11 37:16 38:21 39:2,4,14 46:12</p> <p>roads 30:5</p> <p>Robert 12:6</p> <p>ROBERTS 3:3 7:21 8:6 9:15 15:13 16:6 17:6 17:10 29:13,18 32:14 42:5 47:22</p> <p>room 6:23,23 7:2 10:17</p> <p>rubber 7:17</p> <p>rule 18:23 24:4 44:10</p> <p>runs 27:18</p> <hr/> <p>S</p> <hr/> <p>S 2:1 3:1</p> <p>sanctioned 7:19</p> <p>satisfies 17:20</p> <p>satisfy 28:8</p> <p>satisfying 29:1</p> <p>saying 8:3,11 11:3,7 22:9 26:7 45:2,9</p> <p>says 7:24 10:22 13:3,4 25:23 28:9,24 29:20 38:1,2 42:14 45:3,3</p> <p>SCALIA 20:16 20:18,22 21:8 21:15 23:17,20 23:25 24:15 25:16,19 27:4,9 27:15 37:17 41:4</p> <p>scheme 26:8</p> <p>Schindler 1:3 3:4 6:16 9:9 11:4 11:14,23 15:19 25:13 27:12,22</p>	<p>30:22 31:25 32:5 37:6</p> <p>Schindler's 28:4</p> <p>scope 36:3 46:14</p> <p>screaming 44:8</p> <p>search 10:19,22 14:4 20:14 24:13 27:5 28:13 31:11 33:9 40:13</p> <p>SEC 32:3,3</p> <p>second 17:21,21 18:20 21:17,23 21:24 23:2,9 28:8,21,23 29:3 36:9 37:13,14 38:11 41:23</p> <p>secondhand 24:25</p> <p>Secondly 46:25</p> <p>section 13:21</p> <p>security 16:18</p> <p>see 6:3 20:12 21:23 27:2 40:1</p> <p>sees 29:18</p> <p>selectivity 7:1</p> <p>Senate 47:1,6</p> <p>sending 29:6</p> <p>sense 8:3,22 24:4 47:3</p> <p>sent 12:3</p> <p>separate 12:4 29:7,11,14</p> <p>serious 13:14 22:21</p> <p>seriously 15:25</p> <p>set 14:7 30:18</p> <p>Sherry 1:19 2:9 32:15,16,19 33:15 34:5,19 35:15 36:5 37:12,21 38:11 38:15,18 39:5 39:16,24 40:6,9</p>
---	--	---	--	---

<p>41:10,17 shipped 7:17 show 39:13 side 20:25 sign 17:1 30:5 signed 38:24 significant 40:11 46:8 signing 38:19 signs 38:17 simple 33:9 simply 10:16,22 11:14 22:7 23:12 25:6 32:9 32:11 42:17,23 site 8:15 slippery 31:25 slope 31:25 Smith 37:9 sole 9:12 Solicitor 1:19 solution 41:7 somebody 28:12 somebody's 17:11 somewhat 42:21 sorry 20:17 37:12 40:6 sort 17:11 34:8 39:9 Sotomayor 8:14 8:19 26:12,18 43:20,24 44:6 44:12 45:1,10 45:23 46:1,11 46:16 47:19 sought 6:13 sound 7:21 source 45:12 46:22 47:16 sources 20:9 30:18 35:19 36:15 41:12 so-and-so 37:24</p>	<p>speak 29:23 33:6 33:7,8 special 20:2 31:7 specific 7:7 24:11 specifically 16:3 30:9,18 36:14 spent 21:18 staff 19:3 stage 28:1 standard 16:19 18:23 22:17 46:18,20 47:10 47:11,20 standing 20:19 start 32:21 started 12:1 State 42:1,1 statement 6:3 37:7 44:9 45:2 statements 6:1 25:25 44:1 States 1:1,6,12 1:21 2:10 3:5 32:17 statistics 19:23 43:1,5 statute 4:14 13:16,20 19:5 22:20 24:13,16 24:24 25:3 30:11 32:11,12 42:25 44:20,21 47:2,15 statutes 43:10 statutory 23:14 43:9 Stein 5:2 steps 43:21 STEVEN 1:15 2:3,13 3:7 42:7 stop 42:16 44:23 46:6 strange 40:24</p>	<p>strong 20:6 30:7 structure 23:14 struggling 35:23 subject 7:9,10 40:20 42:2 submit 24:6 submitted 5:24 37:23 44:1 46:3 47:23,25 subset 41:11 substance 35:5 38:20 substantive 20:12 21:2 29:4 31:23 33:18,19 34:3,5,12 35:24 36:1,7 40:16 sufficient 28:1 suggesting 20:5 46:10 suit 4:11 46:23 47:12 suits 44:23 47:18 support 25:5 supporting 1:22 2:11 32:18 suppose 3:24 6:20 7:14 12:22 Supreme 1:1,12 sure 22:1 45:1 surely 10:8 24:16 survey 47:6 suspects 4:1 sustained 21:2 28:10,15</p> <hr/> <p>T</p> <hr/> <p>T 2:1,1 tail 27:18 take 10:23 11:20 18:14 31:20,21 45:12 taken 3:16 13:12 talk 17:24 24:15 talking 19:16</p>	<p>32:23,24,25 36:18 41:2 tam 4:11 9:7 24:20 39:2 41:6 42:2 44:4,17,23 45:16,24 47:18 tax 10:6 tell 4:20 8:15 16:11 26:14 30:12 38:2 telling 8:20 38:13 term 14:21 termed 19:9 terms 7:1 15:9 23:16 43:2 test 14:18 17:16 17:17,18,20,22 17:25 22:9 28:8 33:11,14 34:2,3 Thank 15:13 32:13,14 42:5 47:22 thing 6:17 11:6 31:16,17 32:21 38:4 things 13:8,9,9 13:15 16:9,10 17:10 19:19 22:23 46:24 think 5:20 6:15 8:10 11:16 13:12 15:5 20:12 26:12 28:5 31:22 32:5 33:15,16,17 34:19,22 35:1,2 36:5,6,10,17 37:1 39:24 40:10,23,24,25 42:9,21 thinks 4:2 third 5:23 7:6 43:25 Thirty-two 43:8</p>	<p>thorough 5:1 thought 12:18 24:18 41:12 three 8:25 16:21 time 15:12 18:24 22:4 34:16 41:5 times 9:17 15:7 today 15:8 19:16 told 23:2 traffic 9:24 transactions 4:10,18 5:6 33:1 44:17 45:17,22 transformed 32:7 transmission 28:18 tried 30:20 triggers 26:5 trouble 22:13,21 23:4 true 17:9 22:23 26:21 35:16 46:11 truth 33:13 trying 21:6 26:2 29:3 30:2 39:13 39:15,19 Tuesday 1:9 turned 12:17 turning 16:8 two 8:4 9:1,2 10:9 24:3 26:13 36:5 38:22,23 39:21 type 36:18,19 types 36:21 typical 16:15,20</p> <hr/> <p>U</p> <hr/> <p>uncover 17:1 uncovering 21:5 33:13 underlying 14:14</p>
---	--	--	---	--

14:19 39:8 42:20 undermine 15:25 undermined 26:10 understand 11:12,13 30:1 37:17 45:2,23 46:10 understanding 7:20 10:10 understood 18:6 19:18 22:5,9 unique 23:13 United 1:1,6,12 1:21 2:10 3:5 32:17 usage 41:3,3 use 4:8,12 16:3 21:10 40:24 42:9 useful 16:24 19:1 uses 5:21 19:15 19:17 21:20 usually 18:1 23:25 24:1 utterly 42:25 43:1	15:20 39:4,5 violation 27:25 <hr/> W <hr/> want 7:13,23 11:3,4,4,5 16:22 22:4 29:9 29:11 32:21 37:22 39:20 41:4 wanted 22:15 36:20 Washington 1:8 1:20 wasn't 27:15 39:3 45:14 way 7:6 21:12,16 23:11 27:25 28:20 33:16 40:22 ways 20:17 22:14 weather 9:23 Web 8:15 Webster's 18:19 went 5:2 12:1 weren't 26:14 27:5 we'll 3:3 6:22 11:10 14:6 we're 11:7,8,9 18:19 19:16 20:5 21:6 23:21 23:21 28:2 32:24,25 36:10 41:2 46:9 we've 19:15 31:9 42:21 whistleblower 25:7 whistleblowers 16:3 20:7 30:9 Willens 1:17 2:6 15:14,15,17 16:13 17:9,14 18:4,8,14 19:11	19:14 20:2,17 20:21,25 21:14 21:17 22:1,11 23:1,7,19,23 24:2,23 25:18 25:25 26:16,21 27:7,12,17 28:16 29:1,17 29:22 31:2,7,17 Wilson 12:6 withdrawing 23:5 witnesses 11:9 word 9:22 19:15 19:17 21:13,16 24:10 26:16 30:13,15 32:24 33:3 38:4,4 words 5:21 12:15 19:18 24:17 32:23 36:15,17 36:19,21 37:2 40:11 41:18 work 17:14 29:4 30:4 31:23 39:14 works 10:3 worried 38:7 45:20 wouldn't 12:24 18:14 37:24 44:16 wrapped 26:1 write 39:21 wrong 14:24 15:2 22:10 wrongdoing 14:4 17:2 33:14,16 wrote 37:5 <hr/> X <hr/> x 1:2,7 8:15 45:5 <hr/> Y <hr/> Y 45:5 year 34:14 43:4	years 9:3,5,8,8 9:12 11:20 22:20 25:13,20 25:23,24 26:4,8 26:15 27:10,16 30:11,12 43:14 York 1:15,15,17 1:17 <hr/> Z <hr/> Z 45:5 <hr/> 1 <hr/> 1 1:9 10 6:21 26:8 43:8 10-188 1:4 3:4 11:20 1:13 3:2 12(b)(1) 28:2 12:12 47:24 1354 13:21 14 42:6 15 2:7 25:13 26:8 30:10,10 38:24 17,000 43:6,11 1943 35:8 1983 47:6 1986 16:2 25:3 30:12 35:9 46:18,21,24 47:3 1999 27:18 <hr/> 2 <hr/> 2003 27:20 2005 27:19 2008 43:4 2009 41:15 2010 41:24 2011 1:9 21 33:12 22 43:9 25 22:20 30:12 28 43:7 <hr/> 3 <hr/>	3 2:4 32 2:11 <hr/> 4 <hr/> 4 11:20 12:19 40 43:10 42 2:14 <hr/> 5 <hr/> 5 25:20,22,24 5,000 47:7 <hr/> 6 <hr/> 6 9:8,8 <hr/> 7 <hr/> 73 47:6 <hr/> 9 <hr/> 9 9:8
--	--	--	---	---