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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 NVIDIA CORPORATION, ET AL.,)
4 Petitioners,)
5 v.) No. 23-970
6 E. ÖHMAN J:OR FONDER AB, ET AL.,)
7 Respondents.)
8 - - - - -

9
10 Washington, D.C.
11 Wednesday, November 13, 2024

12
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 10:04 a.m.

16
17 APPEARANCES:

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19 the Petitioners.

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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 23-970, NVIDIA versus Öhman J:or
5 Fonder AB.

6 Mr. Katyal.

7 ORAL ARGUMENT OF NEAL K. KATYAL

8 ON BEHALF OF THE PETITIONERS

9 MR. KATYAL: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The Reform Act's pleading standards are
12 unique. Congress looked at private securities
13 litigation and saw big fishing expeditions in
14 discovery and extortion at settlements. They knew
15 that for centuries, heightened pleading had been
16 required, but they super-charged it.

17 First, they required plaintiffs to "state
18 with particularity facts giving rise to a strong
19 inference the defendant acted with" scienter, a
20 dramatic break with common law, and, second, they
21 required, for allegations outside of a plaintiff's
22 personal knowledge, plaintiffs to "state with
23 particularity [all] the facts on which [their] ...
24 belief is formed." This double-heightened pleading
25 requirement exists in virtually no other context.

1 Y2K is the lone example, and that is what resolves
2 this case.

3 As our cert petition and the amici explain,
4 the Ninth Circuit's decision creates an easy roadmap
5 for plaintiffs to evade the Reform Act. When a stock
6 drops, all they have to do is find an expert with
7 numbers that contradict a company's public
8 statements, then allege the company keeps records
9 that executives look at, and then argue those records
10 would have matched the hired expert's numbers.
11 That's a recipe for Judge Friendly's warning of fraud
12 by hindsight.

13 This complaint, which alleges that Jensen
14 Huang made false statements, is a good example. It's
15 a grave accusation against a respected CEO. Yet the
16 complaint never shows his scienter to be as cogent
17 and compelling as not. It merely surmises that Huang
18 reviewed internal reports showing a higher quantum of
19 crypto purchases than what he disclosed, yet it never
20 alleges the contents of those reports.

21 And to meet falsity, the complaint relies
22 on an expert opinion with a series of implausible
23 assumptions and inferences, not particularized
24 allegations of fact. Nothing dispels the more
25 compelling explanation that Huang offered at the

1 time. He knew crypto buys were increasing prices,
2 and so introduced a crypto-specific chip and
3 increased the supply of gaming chips with the hopes
4 that prices would fall. The fact this process took
5 longer than anticipated is not securities fraud.

6 The Ninth Circuit slighted the Act's
7 heightened pleading requirements, and this Court
8 should reverse.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: What would this complaint
11 look like if it had complied with the heightened
12 pleading standards?

13 MR. KATYAL: Yeah. So I think it would
14 have had to allege -- this complaint is based on
15 internal documents, and so it would have to allege
16 the contents of those documents, and particularly,
17 Justice Thomas, for example, it would have to answer
18 what specific data did the CEO actually see, how
19 clear was it, when did he see that data. Was the
20 data generated after his public statements or before?
21 How much does that data deviate from the public
22 statements? Where does that data cover? Is it one
23 country? Is it the world? And, you know, when was
24 that data generated? So, you know, what did the CEO
25 know, when did he know it, I think are the most

1 important questions.

2 And, here, when you scratch just below the
3 surface -- and this is what Judge Sanchez's dissent,
4 I think, so powerfully did or the district court
5 did -- by going allegation by allegation, it all
6 dissolves. It's certainly a long complaint. I'll
7 give -- I'll spot them that. But it's a long
8 complaint like cotton candy that dissolves after --
9 it looks like a lot of volume, but it dissolves.

10 JUSTICE JACKSON: Mr. Katyal, I -- I guess
11 my concern is that you appear to be requiring for
12 plaintiffs to actually have the evidence in order to
13 plead their case, and I didn't understand the
14 pleading standards, even with particularity, to
15 require that they have the documents, nor do I
16 understand how they could have the documents when
17 discovery hasn't occurred yet.

18 MR. KATYAL: So -- so, of course, they do
19 have documents. In this very case, Joint Appendix 59
20 to 62 does provide an internal document. It's a
21 document that entirely backfires on them --

22 JUSTICE JACKSON: No, I understand.

23 MR. KATYAL: -- as to the --

24 JUSTICE JACKSON: But -- but the typical
25 plaintiff --

1 MR. KATYAL: Sure.

2 JUSTICE JACKSON: -- in a situation like
3 this --

4 MR. KATYAL: Sure.

5 JUSTICE JACKSON: -- because the company
6 has the documents --

7 MR. KATYAL: Sure. So I just wanted to say
8 factually --

9 JUSTICE JACKSON: Okay.

10 MR. KATYAL: -- and, of course, the SEC had
11 access to all the documents and found -- never found
12 scienter, but --

13 JUSTICE JACKSON: Right, but the SEC is not
14 pleading this case.

15 MR. KATYAL: Of course, of course.

16 JUSTICE JACKSON: We have plaintiffs --

17 MR. KATYAL: Absolutely.

18 JUSTICE JACKSON: -- who are bringing these
19 allegations, and you're right that they reference
20 documents, that documents are important to their
21 claim of scienter. But I guess the standard that I
22 hear you wanting us to require would cause them to
23 have to have such level of detail about the contents
24 of the documents that it would seem that they would
25 need to have the documents, right?

1 MR. KATYAL: So -- so, Justice Jackson, we
2 don't think that's right. That's not our legal
3 standard. Our blue brief at page 40 is express about
4 that. Our point is that the document -- that the
5 contents can be met by someone who has the documents
6 or who has personally reviewed those documents and
7 describes them with particularity. And so we'd say
8 look to, for example, the ABC case from the Fifth
9 Circuit. In that case, it said, look, you don't --
10 there were -- they didn't have the documents, but
11 they had details about the documents.

12 JUSTICE JACKSON: But why are the details
13 necessary in certain cases? I mean, part -- part of
14 my concern is that you seem to be wanting a bright
15 line that says the contents of the documents are
16 necessary, and I can imagine a number of scenarios in
17 which that might not be the case.

18 So we have someone -- for example, many
19 employees who are at a board meeting, many board
20 meetings during the relevant period of time. They
21 say memos were circulated with regularity talking
22 about this kind of thing. We can't remember exactly
23 the data points, but the discrepancy between what
24 was -- the CEO was saying publicly and what was
25 appearing in the documents that we were reviewing was

1 glaring, and we remember that, and we know that.

2 MR. KATYAL: Right.

3 JUSTICE JACKSON: I don't understand why
4 that's not enough --

5 MR. KATYAL: So --

6 JUSTICE JACKSON: -- for the pleading
7 stage.

8 MR. KATYAL: Right. So, Justice Jackson,
9 our point -- our -- our rule is definitely not that
10 you have to have the documents. And some cases won't
11 need documents at all. So, for -- you know, our
12 brief goes through a lot of real-world examples, like
13 the Glazer case, in which the employees say the boss
14 was ordering us to cook the books. Or, if you have a
15 circumstance like Stevelman, in which a boss is
16 handed a report, we don't know what that report says,
17 but right after the handing of the report, the boss
18 goes and sells stock.

19 JUSTICE JACKSON: No, no, no. My
20 hypothetical is we do know what it said. We knew
21 what it said at the time, says the employees.

22 MR. KATYAL: Right.

23 JUSTICE JACKSON: What we don't remember
24 for today in this moment, as we are alleging, exactly
25 what the data points were, but --

1 MR. KATYAL: Yeah.

2 JUSTICE JACKSON: -- we -- we're -- our
3 testimony is that documents that we saw that had the
4 relevant information were given to the CEO during
5 this meeting at the same time that the CEO was saying
6 something else externally.

7 MR. KATYAL: Yeah. And if those
8 documents -- you know, if -- if they --

9 JUSTICE JACKSON: Why -- why do we need the
10 data points, is my question.

11 MR. KATYAL: Well, the data is -- is a
12 requirement of what particularity is.
13 Particularly -- particularity requires some -- you
14 know, at least a good description of the who, what,
15 where, when, and how. That's what Congress required.
16 And, yes, sometimes -- you're absolutely right --

17 JUSTICE SOTOMAYOR: Mr. Katyal --

18 MR. KATYAL: -- that will --

19 JUSTICE SOTOMAYOR: -- could I stop you a
20 moment? Tell me what rule you want us to adopt.

21 MR. KATYAL: Yeah. So, if a plaintiff is
22 relying on an allegation to show an inference of
23 scienter, it has to be particularized enough to know
24 whether it is truly relevant to establishing
25 scienter. So, in a case like this --

1 JUSTICE SOTOMAYOR: Well, you know
2 something, it -- it sounds to me -- and I am
3 concerned about your cert petition because you made
4 two allegations in your cert petition. The first one
5 was similar to this, but you said you wanted a
6 bright-line rule -- rule that you need to have
7 particularized X description of the document. That's
8 what you said in your -- in your cert petition.

9 But Tellabus -- Tellabs, our case, alleged
10 that the CEO knew or should have known that the
11 company's internal sales reports were not consistent
12 with its public statements, but they did not allege
13 the precise contents of those reports. We rejected
14 the petitioner's argument there that the plaintiff
15 failed to describe the documents in enough detail.
16 It's an issue of fact.

17 MR. KATYAL: So --

18 JUSTICE SOTOMAYOR: Is there enough detail?

19 Now you're spotting us that it's a very
20 long complaint. We often don't grant cert to
21 error-correct. Is this entire case just an error
22 correction?

23 MR. KATYAL: Oh --

24 JUSTICE SOTOMAYOR: These particular
25 documents are not precise enough? I'm not actually

1 sure what rule we could articulate that would be
2 clearer than our cases already say.

3 MR. KATYAL: Yeah. So, absolutely, this,
4 we don't think, is. That's, of course, what my
5 friend on the other side tried to argue.

6 JUSTICE SOTOMAYOR: Well, except that I've
7 gone through the complaint, all right, and we have
8 any number of employees, some of them who created the
9 documents, others who were present when the documents
10 were being discussed, others who -- only one who
11 wasn't present during the relevant time but who set
12 up what the creation of the documents showed, and
13 others who were present during the time who said
14 there were many, many crypto sales, many more than
15 the \$150 million that your client claimed, and he
16 kept saying that it was a small part of the business,
17 all right?

18 And yet all of these employees are saying,
19 no, it's not a small part of the business. One of
20 them was familiar with China, and it was a huge part
21 of China's business. And others were familiar with
22 Europe. I -- I -- I guess I'm going back to this is
23 pure error correction that you're asking us to do.

24 MR. KATYAL: So -- so, Justice Sotomayor,
25 there's a lot there, so I have a lot to say in

1 response.

2 So, first of all --

3 JUSTICE SOTOMAYOR: Tell me your rule.

4 MR. KATYAL: So I told you the rule, which
5 is, if they are basing their allegations and
6 inferences of scienter on internal documents, they
7 have to disclose those documents with particularity.

8 Now my friend on the other side in the
9 brief in opposition said that's just fact-bound error
10 correction. This Court granted certiorari over that
11 and I think for good reason. This case is very much
12 like the Twombly case, in which Justice Stevens --

13 JUSTICE SOTOMAYOR: No, it's because you --

14 MR. KATYAL: -- made exactly --

15 JUSTICE SOTOMAYOR: -- because you told us
16 there was a 5-to-2 split. And, in fact, there is no
17 split. None of the cases you cited in the split hold
18 the rule that you're claiming.

19 MR. KATYAL: I think they do, Justice
20 Sotomayor. So, for example --

21 JUSTICE SOTOMAYOR: No. Two of them -- the
22 Second Circuit and the Anderson case, which is the
23 only one in your merits brief that you go through,
24 that case was the court simply saying the witness was
25 talking to us about one thing in the reports but not

1 about the scienter that was necessary for the second
2 thing.

3 MR. KATYAL: If -- if I could contrast
4 what -- the case that I just gave Justice Jackson,
5 the Fifth Circuit decision in ABC, which goes through
6 a long complaint and says at the end of it, a hundred
7 pages, 14 confidential witnesses, all of that
8 together doesn't actually state a claim because it's
9 not particularized, and you match that up against the
10 Ninth Circuit, it is, you know, as clear as day that
11 these are two very different approaches.

12 This Court in Twombly confronted a similar
13 situation, and the district court dismissed a
14 clase -- case for failing to state a claim. The
15 Second Circuit reversed. Justice Stevens made
16 exactly the arguments you are in dissent, and he
17 said, look, you know, the law is as clear as day.
18 But this Court -- didn't just remand, it reversed and
19 said the Second Circuit was wrong, we need to set a
20 standard for the entire country to avoid lawsuits
21 from going on. And I think Twombly is a very good
22 example of how the Court's setting that rule matters.

23 This Court has never defined particularity
24 since the year 1926.

25 JUSTICE SOTOMAYOR: All right, counsel --

1 MR. KATYAL: This case provides a good
2 explanation.

3 JUSTICE SOTOMAYOR: -- one last thing on
4 your expert rule.

5 MR. KATYAL: Yeah.

6 JUSTICE SOTOMAYOR: Your expert rule sounds
7 very much like Justice Alito's concurrence. Is it?

8 MR. KATYAL: No. We -- we don't -- we
9 certainly don't have any objection to Justice Alito's
10 concurrence in Tellabs, but we don't think, as our
11 reply brief says, it matters here.

12 So, Justice Sotomayor, you were talking
13 about all the employees' statements. All the
14 employees' statements taken together never get to
15 where they need to go, which is a strong inference
16 that shows that --

17 JUSTICE SOTOMAYOR: I'm -- I'm -- I'm
18 totally dubious of that, but your other side can get
19 you the factual argument on that because I've read
20 through the allegations, and the employees were
21 talking about constant sales reports that tracked
22 every item that was being sold either to a gamer or
23 to a cryptocurrency marketeer, and they were talking
24 about the -- the exact nature of the documents that
25 were being created and the fact that there were many,

1 many more sales than the 150 million that he was
2 claiming.

3 MR. KATYAL: So -- so, Justice Sotomayor,
4 with all respect, the district court went through
5 allegation by allegation of these former employees
6 and decimated each one, showing none of them were
7 particularized. I understand what they've done is
8 throw a bunch of spaghetti at the wall, and it's very
9 hard for me in a half-hour argument to deal with that
10 kind of shell game.

11 JUSTICE SOTOMAYOR: Could we go to the --

12 CHIEF JUSTICE ROBERTS: Counsel, one thing
13 that concerns me about both sides' presentation, it's
14 a little black and white. I -- I gather you wouldn't
15 be terribly upset about a complaint with a lot of
16 direct evidence and, you know, some expert reports
17 that sort of help shore that up. And I'm assuming
18 the other side would be fine if -- if it -- you know,
19 the balance was -- was the other way.

20 Now, if I think that the positions on both
21 sides are a little too absolute, how do you find sort
22 of the sweet spot in terms of when the PSLRA is
23 satisfied? I mean, it can't be just a little bit of
24 direct evidence because that statute was intended to
25 do something. On the other hand, it seems to me you

1 can't insist on only the direct evidence before a
2 complaint goes forward.

3 So, if -- if I don't think it's black and
4 white, how do -- what -- how do I decide where the
5 balance is?

6 MR. KATYAL: So, Mr. Chief Justice, I think
7 you'd adopt the rule that's in our brief, which is
8 not that you need direct evidence. Circumstantial
9 evidence can do that just as well. It's just got to
10 be particularized, and at the end of the day, it's
11 got to meet that Tellabs holistic inquiry of showing
12 scienter is at least as cogent and compelling as not.
13 So I think, at a minimum, it's going to require what
14 specifically did the CEO know and when did he know
15 it.

16 This case is a perfect illustration. All
17 the evidence Justice Sotomayor is pointing to is from
18 outside the class period, from before the class
19 period. As our brief explains, in May of 2017, which
20 is the beginning of the class period, that's a
21 watershed moment. Why? Because, at that moment, the
22 company introduces a crypto-specific chip, the Crypto
23 SKU.

24 And what their own complaint says -- the
25 only time they allege an internal document is at

1 Joint Appendix 59 to 62, and that document boomerangs
2 on them. It shows, once that new chip was
3 introduced, crypto sales to -- to miners, to GPU
4 sales, dropped dramatically, down to 27 percent from
5 62 percent.

6 So the complaint essentially eats itself.
7 This is why particularity is so important, why
8 Congress insisted on it, that when question, because
9 when they have a bunch of -- a bunch of allegations
10 from before May of 2017, that tells us nothing about
11 after that. It's kind of like looking at BlackBerry
12 sales data before the introduction of the iPhone and
13 saying, look, we can project BlackBerry sales after
14 the iPhone's -- after the iPhone's introduction. Of
15 course not.

16 The whole thing the company was doing here,
17 they were acknowledging that crypto miners were
18 buying their products. They said, look, we couldn't
19 track exactly how much. They introduced a whole
20 product to deal with that. Their allegation is this
21 CEO lied and lied about the dependence on crypto.

22 I mean, it's a really weird way to lie to
23 say we're going to introduce a whole new product to
24 deal specifically --

25 JUSTICE JACKSON: But, Mr. --

1 MR. KATYAL: -- with this market.

2 JUSTICE JACKSON: -- Mr. Katyal, your --
3 your description and your discussion and your
4 argument sounds to me like summary judgment stage
5 kind of discussion. In other words, you seem to be
6 suggesting that this is the evidence that they have
7 related to your, you know, client's misconduct and
8 it's not enough.

9 And I would appreciate that if we were at
10 the summary judgment stage. What I don't understand
11 is, at the pleading stage, the allegations being
12 made, how you are saying what I understood your rule
13 to be as stated in your question presented is there
14 the contents of the documents have to be alleged with
15 particularity. And I'm still stuck on that as a --
16 the only way in which a plaintiff can sufficiently
17 allege scienter in this kind of circumstance. I
18 don't know why that is.

19 MR. KATYAL: Yeah. So, again, it's not the
20 only way. There's lots of ways in which people
21 allege non-document cases. So the executive says
22 cook the books.

23 JUSTICE JACKSON: No, I'm saying in a
24 documents case.

25 MR. KATYAL: In a documents case.

1 JUSTICE JACKSON: In a documents case --
2 MR. KATYAL: Yes.
3 JUSTICE JACKSON: -- you can have a world
4 in which you're not necessarily quoting from --
5 MR. KATYAL: Agreed.
6 JUSTICE JACKSON: -- pointing to the
7 contents.
8 MR. KATYAL: A hundred percent agree.
9 JUSTICE JACKSON: And yet your rule
10 suggests that that case would have to be dismissed --
11 MR. KATYAL: Not at all.
12 JUSTICE JACKSON: -- because it's not
13 particularized.
14 MR. KATYAL: No. You've just got to --
15 JUSTICE JACKSON: So I'm misunderstanding
16 your rule.
17 MR. KATYAL: Right. You've -- you --
18 you -- you certainly don't need to have the document,
19 quote from the document. You do have to disclose the
20 particulars of what that document says.
21 JUSTICE KAGAN: So can I ask you a -- a --
22 give you a couple hypotheticals to test what that
23 means? First hypothetical, you have a complaint that
24 alleges that on Monday, the CEO tells a few
25 subordinates: I just read this -- these internal

1 documents and it looks like sales of our principal
2 product are down. And then, on Tuesday, he goes out
3 and tells the public: Sales of our principal product
4 are up.

5 MR. KATYAL: Yeah.

6 JUSTICE KAGAN: Is that particularized
7 enough?

8 MR. KATYAL: Yes. You don't need to have
9 the report. That's very much like what happened in
10 Tellabs on remand. Absolutely.

11 JUSTICE KAGAN: Okay. So sort of just a
12 statement, you know, it -- you -- I'm not giving you
13 numbers, I'm not giving you a lot of, you know,
14 this -- this product did one thing and this product
15 did one --

16 MR. KATYAL: Right.

17 JUSTICE KAGAN: -- another thing. I'm just
18 saying sales were down, sales were up.

19 MR. KATYAL: I don't think you need
20 quantity. I do think you need to show a deviation, a
21 delta, between the public statements and what the CEO
22 knew, and so --

23 JUSTICE KAGAN: Yeah. Sales were down,
24 then he says sales were up.

25 MR. KATYAL: Yeah. So, I mean, down and

1 up, you know, if it is enough gravity. Yes, that
2 could be -- that could state a claim.

3 JUSTICE KAGAN: Okay. Suppose that the
4 document -- excuse me -- the complaint doesn't have
5 these -- this -- these allegations that he said
6 something about the documents to a bunch of
7 subordinates, but, instead, it's -- it -- it's -- he
8 has makes the same public statement, sales are up,
9 and the plaintiffs come up with -- and -- and -- and
10 the plaintiffs come up with a lot of evidence that
11 shows two things.

12 The first is that he constantly reads
13 documents about sales, all right, and the second is
14 they come up with a lot of sort of outside evidence
15 that sales were, in fact, down. So they don't have
16 him saying "I read the document and the document says
17 X," but there's a lot of evidence that really
18 indicates that the document said X because that's the
19 evidence in the world.

20 MR. KATYAL: Yeah. So, again, I think it's
21 what did the CEO know and when did he know it. In
22 your hypothetical, the when question is answered in a
23 way that it's not at all with all the allegations in
24 this case. So we have no idea when the CEO got that
25 information.

1 In your case, I think it's possible to
2 infer based on everything that the CEO might have had
3 access to that information and did it. Here, you've
4 got a very different circumstance because you've got
5 a product which is just a component in which they
6 can't track end users. The only allegation that --

7 JUSTICE KAGAN: So --

8 MR. KATYAL: -- they tracked end users
9 is -- is --

10 JUSTICE KAGAN: -- as I hear what you're
11 saying, you're not really saying that you have to --
12 I mean, you're -- you know, that you have to have
13 the -- the contents of those documents, as long as
14 what the complaint alleges, you know, and plausibly
15 so, is that he stares at a lot of documents and the
16 evidence suggests that the documents would have said
17 something that's quite different from what he
18 presents to the public.

19 MR. KATYAL: You've got to describe --

20 JUSTICE KAGAN: And so that's not --
21 that -- you know, that's good for you and that's bad
22 for you. That's not a bright-line rule, and that's
23 good for you because we don't like bright-line rules
24 in this context and have said so a thousand times.

25 But it's bad for you because, as the --

1 as -- as what you're saying from the podium in terms
2 of the rule you think we should adopt gets more and
3 more like the sort of thing that we usually ask for,
4 it becomes less and less clear why we took this case,
5 number one, as Justice Sotomayor suggested, and,
6 number two, why you should win it.

7 MR. KATYAL: Right. So our rule has always
8 been the same. We've always said it's not a
9 bright-line rule, that it's a contextual rule,
10 contextualized rule, and one in which you are to ask,
11 you know, have the particulars been disclosed? And
12 what we're basically seeking is a definition of
13 particularity.

14 In this case, that would mean at least
15 answering what that data was that showed a deviation
16 from the CEO's public statements and what he knew.
17 And there's nothing even close. And the complaint at
18 best just eats itself. So you don't need to ask for
19 evidence, as Justice Jackson was saying, or anything
20 else. You just need the complaint itself and -- and
21 then ask was any of the allegations showing enough of
22 a delta, because this is a quantum case. The company
23 is disclosing all over the place they sell to crypto
24 miners. The question is what the extent of that was
25 and was that something that was a deviation. We

1 think this is a --

2 JUSTICE BARRETT: Mr. Katyal, why isn't
3 that error correction, though? I mean, kind of
4 returning to Ms. -- to Justice Sotomayor's point, if
5 we think your bright-line rule fails for the reasons
6 Justice Kagan is suggesting, why isn't your answer
7 that you're giving Justice Kagan simply asking us to
8 go through the complaint and explain why it's not
9 good enough?

10 MR. KATYAL: We -- we think that it's not
11 error correction because the Ninth Circuit's rule was
12 too loosey-goosey and allowed basically a recipe for
13 fraud by hindsight every time this --

14 JUSTICE BARRETT: But it articulated the
15 rule as we said it in Matrixx and Tellabs.

16 MR. KATYAL: No, I -- I think it didn't
17 articulate the -- look, so let me just give you one
18 example. Tellabs says the key inquiry is a
19 comparative one to look at all -- whether or not
20 their story is as cogent and compelling as any
21 competing inferences. Did the big tell here, did the
22 Ninth Circuit ever even bother engaging in that? No,
23 because there weren't the details that they
24 provided --

25 JUSTICE GORSUCH: Well, they did say --

1 MR. KATYAL: -- to do so.

2 JUSTICE GORSUCH: -- they -- they did say
3 that -- I'm -- on that, they did say, Mr. Katyal,
4 that it -- it -- it -- it beggars belief to think
5 that a CEO would not have been aware --

6 MR. KATYAL: Yes.

7 JUSTICE GORSUCH: -- of the source of such
8 a large portion of the company's income --

9 MR. KATYAL: Yes.

10 JUSTICE GORSUCH: -- especially given the
11 evidence here that this CEO was very interested in
12 sales channel data.

13 MR. KATYAL: Yes. So four things --

14 JUSTICE GORSUCH: And so why -- so why --
15 you may disagree with that comparative conclusion,
16 but why isn't that a comparative conclusion?

17 MR. KATYAL: So, Justice Gorsuch, four
18 things. We absolutely agree with you. Petition
19 Appendix 55a, that is what the court says -- the
20 Ninth Circuit says. They say it's reasonable to
21 infer Huang would review the documents because a CEO
22 who does not know the source of 1.2 billion in
23 revenues is unlikely to exist. There are several
24 things about that.

25 Number one, that never even acknowledges

1 our competing story and our competing inference that
2 the company couldn't track those revenues because
3 that data doesn't exist.

4 JUSTICE GORSUCH: Well, but that -- that --
5 that is acknowledged elsewhere in the opinion and it
6 may be not emphasized enough for your taste and --
7 and, therefore, may be wrong as a matter of error
8 correction. But there is a comparative analysis that
9 was performed.

10 MR. KATYAL: And -- and that comparative
11 analysis depends entirely -- that number, 1.2, comes
12 entirely from that expert, Prysm --

13 JUSTICE GORSUCH: Again --

14 MR. KATYAL: -- which had all the problems.

15 JUSTICE GORSUCH: -- might be wrong, but
16 there's a comparative analysis.

17 MR. KATYAL: Comparative analysis,
18 absolutely, but, Justice Gorsuch, it's notable that
19 our brief at pages 45 to 47 describes all of the
20 problems with that report and they don't even bother
21 and the government doesn't even bother trying to
22 defend those assumptions --

23 JUSTICE GORSUCH: Let me ask you a question
24 on --

25 MR. KATYAL: -- or the fact it's required.

1 JUSTICE GORSUCH: -- on that while I've got
2 you and then I'll let you go. I promise.

3 Do you take the position of Professor
4 Grundfest that an expert opinion can never be used to
5 help establish particularized facts?

6 MR. KATYAL: No, no, no. We say that
7 expert opinions can't be used to substitute for those
8 facts, which is the rule of the Second and Fifth
9 Circuits, and we think the Court should embrace that
10 rule.

11 JUSTICE GORSUCH: So it can be used to
12 supplement them --

13 MR. KATYAL: To -- to -- to supplement.

14 JUSTICE GORSUCH: -- like any other
15 circumstantial evidence?

16 MR. KATYAL: Yeah, exactly. Yeah. It can
17 be -- you know, the facts underlying absolutely can
18 be.

19 JUSTICE GORSUCH: Okay.

20 MR. KATYAL: Now, to get back to the --

21 JUSTICE GORSUCH: Thank you.

22 MR. KATYAL: -- point about the comparative
23 inference -- oh.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 I -- I just have one question about an

1 analogy. I -- I -- I -- maybe I -- I don't -- I've
2 never heard the analogy the complaint eats itself.
3 What -- what does that mean?

4 (Laughter.)

5 MR. KATYAL: What I'm trying to say --

6 CHIEF JUSTICE ROBERTS: It's very vivid,
7 but I don't know --

8 MR. KATYAL: I'm trying to basically
9 illustrate to Justice Jackson you don't -- we're
10 not -- our rule is not one about evidence. It's
11 rather read the complaint and ask that Tellabs
12 inquiry: Is it as cogent and compelling as the
13 alternative explanation?

14 Here, the alternative explanation is the
15 company saw crypto price -- the GPU prices were high,
16 and they dealt with it through the introduction of a
17 crypto-specific chip.

18 Prices didn't fall as quickly as they
19 thought. Sometimes that happens in markets where
20 retailers keep prices high. But there's nothing to
21 say that the CEO lied about it.

22 And what I say by "eats its influence" --
23 "eats itself," this is what Justice -- Judge Sanchez
24 said at page 87a in his dissent. He looked at
25 paragraph 121 in the complaint, and paragraph 121

1 shows that watershed moment in May of 2017. When the
2 company introduces that new chip, GPU sales to miners
3 fall dramatically.

4 And so, if you just read the complaint, it
5 doesn't even state a plausible for 12(b)(6) theory,
6 let alone one that meets the Reform Act, because the
7 Reform Act requires so much more: What Mr. Huang
8 knew and when he knew it.

9 CHIEF JUSTICE ROBERTS: Okay. I'm -- I'm
10 not sure how that's eating itself, but I'll take your
11 word.

12 MR. KATYAL: Destroys itself, whatever word
13 you want to use.

14 CHIEF JUSTICE ROBERTS: Justice Thomas?
15 Justice Alito?

16 JUSTICE ALITO: Well, let me go back to the
17 Prysm report. Would you dispute the proposition that
18 if the discrepancy between what Mr. Huang stated and
19 the figures in the Prysm report were true, that the
20 inference drawn by the Ninth Circuit would be a
21 legitimate inference at the 12(b)(6) stage?

22 MR. KATYAL: So, Justice Alito, if the
23 report disclosed the methodology, how it got there,
24 as opposed to relying on "proprietary data" that they
25 never tell us, and was able to surmount all of the

1 problems that -- that -- the big, huge gaps in
2 inference that our brief details, like, for example,
3 it treated every increase in processing power as the
4 result of an NVIDIA new chip, you know, as if there
5 was no delay between sales and adding to the network,
6 if it, you know, didn't treat crypters and -- crypto
7 miners and gamers as different people when they're
8 often the same, if you jumped through all that, yes,
9 we think a report like that could be helpful.

10 But, in this case, it's miles and miles
11 away from that. This is a report that, you know,
12 yes, they went to Harvard, but, beyond that, I don't
13 think it can tell you very much about the state of
14 reality of the world.

15 JUSTICE ALITO: Well, I don't really
16 understand how you and perhaps your -- your friend
17 think that reports like this, opinions by experts on
18 a highly technical subject, are supposed to be
19 handled at the 12(b)(6) stage.

20 The facts that Prysm relied on are set out
21 with some particularity, are they not?

22 MR. KATYAL: So they -- there are some with
23 particular -- some indicia of particularity, but at
24 the end of it, no, because, for example, it relies on
25 a proprietary model they don't even tell us about.

1 Our problem here is not, Justice Alito,
2 that -- we think a -- you know, you can have an
3 expert come in to explain a complicated term or
4 something like that, but this expert was creating an
5 entire economic model to estimate NVIDIA's crypto
6 sales because that data didn't exist anywhere else.

7 JUSTICE ALITO: Yeah. And you --

8 MR. KATYAL: That's what they're paying
9 them for.

10 JUSTICE ALITO: -- and -- and you claim,
11 and you -- maybe you're right, that the model is
12 flawed, the data is not reliable. But this is a
13 highly technical subject, and I just don't understand
14 how a court is supposed to evaluate that at the
15 pleading stage.

16 You talk about Daubert, but Daubert is not
17 a case that sets out a standard to determine whether
18 a complaint -- whether a -- a claim should be
19 dismissed at that -- at that stage.

20 So what -- what is -- what is a court to do
21 at the pleading stage when it is presented with
22 highly technical information that is beyond the
23 capability of a judge to evaluate at that stage?
24 It's different at that stage than at trial, when
25 there -- there's an opportunity to have a

1 cross-examination --

2 MR. KATYAL: So we --

3 JUSTICE ALITO: -- of the expert, qualify
4 the expert, ask the expert questions. It's a
5 puzzling question to me.

6 MR. KATYAL: Yeah. So, Justice Alito, we
7 think the U.S. Government has it right at page 34.
8 The defendants may "challenge an expert's reliance on
9 'conclusory,' ... 'speculative' premises at the
10 pleading stage."

11 Now, in a case like this, in which it's not
12 that type of such difficult thing for a court to
13 analyze by reading the report and seeing all of the
14 gaps and noting, most tellingly, that they can't even
15 bother trying to defend the analysis of the expert --
16 expert, that's an easy case.

17 In your very complicated, you know,
18 technical case in which a court can't evaluate one
19 way or another, you know, we don't have a position on
20 that because that's just miles away from this case.
21 We think you should leave that to one side.

22 JUSTICE ALITO: Okay. Well, one more
23 question along these lines.

24 You draw a distinction between fact and
25 opinion. But isn't it true that it is a fact that

1 Prysm reached certain conclusions? Is that not a
2 particularized fact?

3 MR. KATYAL: No. We don't think that -- at
4 least relevant particularized fact. It's how they
5 got to those conclusions. And their methodology in
6 that report's not disclosed.

7 My friend on the other side says, oh, okay,
8 don't look at Prysm, look at the RBC report, which is
9 one sentence in their complaint.

10 The Ninth Circuit doesn't rely on it.
11 Nobody does because that doesn't disclose the
12 methodology at all. It's literally one sentence.

13 JUSTICE ALITO: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Sotomayor?
15 Justice Kagan?

16 JUSTICE KAGAN: If I understood your
17 answers to Justice Alito, you're not suggesting that
18 there's any special rule relating to expert evidence,
19 expert reports. You're just saying that this was a
20 terribly flawed report, is that correct?

21 MR. KATYAL: Correct. We're saying you
22 adopt the Second and Fifth Circuits' rule that an
23 expert opinion can't itself substitute for
24 particularized allegations of fact.

25 You treat it just like the government does.

1 Pretend that the statement was made by a plaintiff,
2 was made by a plaintiff -- yeah.

3 JUSTICE KAGAN: Yeah, I mean, once again,
4 it just seems to me that you're asking us to engage
5 in a kind of analysis that we are not very good at
6 and weren't expecting to when we took this case, to
7 decide whether this particular report is flawed or
8 not in the way that you suggest.

9 MR. KATYAL: Justice Kagan, I think our
10 position has been exactly the same in the cert
11 petition, and it's -- you know, I think the reason
12 you have to do it and reverse the Ninth Circuit is
13 what -- what Judge Sanchez said in dissent, which is,
14 otherwise, you've given every plaintiff a how-to
15 roadmap: Hire an expert like this, say it's really
16 complicated, along the lines of Justice Alito's
17 questions --

18 JUSTICE KAGAN: Do you think that the Royal
19 Bank of Canada report is flawed in the same way?

20 MR. KATYAL: I have no idea because it's
21 one sentence and doesn't even tell us how it reached
22 anything, as -- as Professor --

23 JUSTICE KAGAN: Well, what do -- what do
24 you -- you -- I mean, presumably, it's out there in
25 the world, right? Presumably, you've read it --

1 MR. KATYAL: The one sentence. Yeah, the
2 one sentence.

3 JUSTICE KAGAN: -- the Royal Bank of Canada
4 report --

5 MR. KATYAL: Yeah.

6 JUSTICE KAGAN: -- which concluded that
7 NVIDIA understated its crypto-related revenues by
8 more than a billion dollars.

9 MR. KATYAL: Yes. So it's one sentence.
10 And, Justice Kagan --

11 JUSTICE KAGAN: The report is not one
12 sentence, is it?

13 MR. KATYAL: The analysis is, yeah.
14 There's nothing there.

15 And as Professor Grundfest says in his
16 brief, it very well may be that the RBC report is
17 relying on the same proprietary data, the Peddie
18 data, as the Prysm report. It might be
19 double-counting the very same report. And this is
20 why, Justice Kagan --

21 JUSTICE KAGAN: But, again, it's -- it's --

22 MR. KATYAL: -- particularity matters.

23 JUSTICE KAGAN: But, again, you're --
24 you're -- you're not saying that it's -- we
25 shouldn't -- it -- it doesn't go into the mix because

1 it's an expert report in any way.

2 MR. KATYAL: No.

3 JUSTICE KAGAN: It's just like: What was
4 that based on? Is that a good report?

5 MR. KATYAL: Correct.

6 JUSTICE KAGAN: Is the -- is the Prysm
7 report a good report? Is any other report that they
8 can come up with a good report?

9 That's what you're asking us to evaluate.

10 MR. KATYAL: So I -- I quite agree, except
11 I wouldn't just say "good." I would say disclose the
12 particulars, how you got there, and -- and make sure
13 that there aren't unwarranted assumptions.

14 The one thing we know --

15 JUSTICE KAGAN: Thank you.

16 MR. KATYAL: -- the Prysm report has lots
17 of -- a series of unfounded assumptions.

18 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

19 JUSTICE GORSUCH: So we've talked about how
20 the case has kind of migrated from the first QP into
21 more fact-intensive questions for us, and I'm
22 wondering whether that's, after your discussion with
23 Justice Kagan, where we are on the second QP, which
24 was whether a plaintiff can satisfy the PSLRA's
25 particularity requirement by relying on an expert

1 report to substitute for particularized allegations
2 of fact.

3 And what I'm hearing today is, well,
4 sometimes an expert report might be able to do that
5 if it itself is particularized. And this one is not.
6 It's not a categorical rule that expert reports are
7 off the table.

8 MR. KATYAL: It's -- it's the same rule,
9 Justice Gorsuch, as in our cert petition, which is
10 that in expert opinions, facts, the underlying facts,
11 can help state a -- can -- can state a claim, but the
12 very credentials and the fact that an expert offers
13 an opinion cannot.

14 The Ninth Circuit at pages 20 to 23 relied
15 on the expert's credentials to jump past all of the
16 problematic assumptions.

17 JUSTICE GORSUCH: I understand --

18 MR. KATYAL: And so --

19 JUSTICE GORSUCH: -- I understand your
20 concerns very well with respect to this report, but
21 it does strike me that there's some delta between
22 what you're asking us to do today and what your QP 2
23 says.

24 MR. KATYAL: No, I think it's the same
25 basic point, which is, you know, expert opinions

1 can't substitute for those underlying facts.

2 And we think it's important the Court reach
3 that for the reason Judge Sanchez said, because,
4 otherwise, this decision is a how-to map: Hire an
5 expert, say that expert's really credentialed, say
6 it's a really complicated issue, and jump past
7 Congress's --

8 JUSTICE GORSUCH: No, no. But, if -- if we
9 had a really robust report here that you really
10 couldn't take issue with that concluded that there
11 were a billion dollars in understated revenues,
12 you're telling us that that report would be okay, and
13 that would be useful for understanding whether --

14 MR. KATYAL: Right. But we're not
15 saying -- we're not saying that you can --

16 JUSTICE GORSUCH: -- the PSLRA -- the PSLRA
17 is met, right?

18 MR. KATYAL: It's -- it's not the details
19 of the report, the fact that it's from an expert.
20 It's the details. And as long as the details --

21 JUSTICE GORSUCH: Yeah, and if the
22 details -- if it all added up.

23 MR. KATYAL: And that's exactly --

24 JUSTICE GORSUCH: If two plus two equaled
25 four all the way through the report and -- and -- and

1 it was -- it -- it -- it was rigorous and robust and
2 disclosed, then we would have a claim?

3 MR. KATYAL: So -- so as long as those
4 allegations were available at the time --

5 JUSTICE GORSUCH: Yeah.

6 MR. KATYAL: -- for example, for the CEO to
7 see.

8 JUSTICE GORSUCH: Right.

9 MR. KATYAL: So, again, that
10 particularity --

11 JUSTICE GORSUCH: Yeah.

12 MR. KATYAL: -- and this Court insisting on
13 the details --

14 JUSTICE GORSUCH: Yeah.

15 MR. KATYAL: -- and what particularity is
16 is so important.

17 JUSTICE GORSUCH: Thank you.

18 MR. KATYAL: That's the legal rule we're
19 asking for.

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

22 JUSTICE KAVANAUGH: So how would you
23 summarize then the analytical or legal mistake that
24 the Ninth Circuit committed that you think would
25 create problems going forward for PSLRA litigation?

1 MR. KATYAL: Yeah. So, with respect to
2 scienter, it blew past the what did the CEO know and
3 when he knew it, and it's illustrated by the timing
4 problems in this case. We think you should write an
5 opinion that says particularity requires answering
6 those things, that a series of maybes is not enough.

7 And with respect to expert opinions, the
8 Ninth Circuit allowed an expert's opinion to
9 substitute for particularized allegations of fact.
10 And the legal rule should be an expert -- an expert's
11 facts can help state a claim, but the fact that
12 something is said by an expert by itself isn't
13 enough. That's what Judge Sanchez isolated in his
14 dissent. That is the two arguments in the cert
15 petition and what all the amici say you should grant
16 on. They say this is a recurring fact pattern.
17 People across the country and particularly now in the
18 Ninth Circuit are using this decision as a roadmap to
19 get around the PLSRA's requirements.

20 And every time a stock price -- a stock
21 drops, you can make the same kinds of allegations,
22 the CEO must have reviewed these reports, hire an
23 expert to say it's a massive dollar figure. That can
24 happen in case after case. Judge Friendly's warning,
25 I think, is prophetic.

1 JUSTICE KAVANAUGH: And you think the Ninth
2 Circuit's different from other circuits if this
3 opinion were to stand on how those kinds of cases are
4 treated?

5 MR. KATYAL: Absolutely. That's what our
6 cert petition says. The Ninth Circuit obviously has
7 an outsized influence on these cases just by dint of
8 its size and where companies are located. It's
9 particularly dangerous to let this rule stand there,
10 but we think, in general, you should issue a rule for
11 the -- for the entire country. It's very much, as I
12 was saying earlier, like Twombly.

13 Look, it sounds -- I understand there's a
14 whole bunch of facts, just like Twombly, pages and
15 pages of discussion about ILECs and this and that.
16 But, at the end of the day, this Court getting into
17 those details and setting a rule for the entire
18 country and giving a concrete example in that case
19 was really important and gave guidance to litigants
20 all across the country.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Barrett?
23 Justice Jackson?

24 JUSTICE JACKSON: So, Mr. Katyal, I -- I am
25 worried about what I see as the delta between what

1 you're asking for here today and what you asked for
2 in your petition and what you argued in your brief,
3 and I'm trying to reconcile the two.

4 So I just heard you say to Justice
5 Kavanaugh that particularity requires answering what
6 the CEO knew and when did he know it. That's the
7 rule that you want us to put forward?

8 MR. KATYAL: Those are the most important
9 aspects, again, in a case in which it's based on
10 those types of allegations. You can have other
11 cases, but --

12 JUSTICE JACKSON: Right, right, right.
13 So -- I -- okay. And then I think, in order to
14 reconcile that with what you have already said in
15 your briefing, you would have to say and the only way
16 to do that in any case of that nature is to allege
17 the contents of the documents, because I don't know
18 that you can get away from having said over and over
19 again, including in your question presented, that the
20 allegation of the contents of the documents is
21 important.

22 MR. KATYAL: Yeah. So you've got to have
23 the details of the documents.

24 JUSTICE JACKSON: So --

25 MR. KATYAL: And that includes, you know,

1 what did -- when I say what did the CEO know --

2 JUSTICE JACKSON: Right.

3 MR. KATYAL: -- the way to answer that is
4 what are the contents of that. You don't need to
5 have the document itself.

6 JUSTICE JACKSON: No, I understand that.
7 But I -- but you don't need to append the document to
8 your complaint.

9 MR. KATYAL: Correct.

10 JUSTICE JACKSON: But you have to allege
11 the contents. I mean, so --

12 MR. KATYAL: Correct.

13 JUSTICE JACKSON: -- your answer to Justice
14 Kagan's hypotheticals, I think, would come out
15 differently because she did not in her hypotheticals
16 talk about allegations that spoke of the content of
17 the documents.

18 MR. KATYAL: Oh, yes, she did. So -- so,
19 remember, the -- her hypothetical as I understood it
20 was a CEO gets documents saying our sales are really
21 low and then goes out publicly and says our sales are
22 very high.

23 JUSTICE JACKSON: That was hypo one.

24 MR. KATYAL: That shows the delta.

25 JUSTICE JACKSON: And then she -- then

1 she -- then she -- didn't she migrate from that to
2 say --

3 MR. KATYAL: And it still had --

4 JUSTICE JACKSON: -- that the employees say
5 these kinds of documents are circulated, we know the
6 CEO looks at these kinds of documents, and his
7 statements were different?

8 MR. KATYAL: And if, you know -- and if
9 there's details about the documents, then, yes, that
10 meets the particularity requirement.

11 JUSTICE JACKSON: So they -- so you have to
12 have the contents of the documents?

13 MR. KATYAL: You have to have the detailed
14 contents or something like the Stevelman case, in
15 which you can infer by the CEO's conduct, like if
16 they go and sell their stock personally or something
17 like that, we know there's a very strong inference as
18 to what the documents say.

19 JUSTICE JACKSON: I know. But your
20 argument doesn't have the "or" in it. Your argument
21 says: "Where, as here," -- and I'm reading from the
22 summary of argument -- "a plaintiff seeks to
23 establish scienter by relying on allegations that
24 internal company documents contradicted public
25 statements, the plaintiff must allege the contents of

1 those documents."

2 MR. KATYAL: Correct.

3 JUSTICE JACKSON: "Otherwise, the
4 allegations are insufficiently particularized,
5 because they do not describe what the documents
6 said."

7 MR. KATYAL: Yes.

8 JUSTICE JACKSON: So I was led to believe
9 from that kind of language that really, your rule is
10 you have to allege --

11 MR. KATYAL: We think that's --

12 JUSTICE JACKSON: -- what the documents
13 say.

14 MR. KATYAL: Yeah. We think that's
15 basically right because that's based on what those
16 documents are. So, if the allegation is, you know,
17 these documents say X, then you've got to have
18 details --

19 JUSTICE JACKSON: And if we disagree with
20 that, you lose, right? Because that's the rule
21 you're asking for.

22 MR. KATYAL: No, I don't think we lose. I
23 mean, it depends on exactly how -- what you
24 disagreed, but if you said, for example, the timing
25 really matters, as it does here, you know, that when

1 question, they lose every day of the week because
2 they can't show any allegations during the class
3 period.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Gupta.

7 ORAL ARGUMENT OF DEEPAK GUPTA

8 ON BEHALF OF THE RESPONDENTS

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

11 The PSLRA demands particularity. Everyone
12 agrees you can't circumvent the statute with
13 conclusory allegations or unsubstantiated expert
14 opinions. But that's not what happened here.

15 On falsity, the court of appeals' holding
16 expressly rested on a combination of facts showing
17 that a substantial part of gaming revenues came from
18 crypto. That mix included former employees' detailed
19 accounts of internal data and meetings, the very
20 similar analysis of the Royal Bank of Canada and
21 Prysm, and Huang's eventual acknowledgment of the
22 crypto hangover, which sent the stock tumbling
23 28 percent.

24 On scienter too, the court of appeals
25 relied on a mix of facts. Executives with direct

1 knowledge of Huang's knowledge attested that the
2 internal data showed 60 to 70 percent of gaming
3 revenues came from crypto, that other internal data
4 corroborated this, and that Huang personally reviewed
5 that data every Sunday.

6 The Court also relied on Huang's public
7 representations about his own knowledge. When
8 analysts repeatedly asked him if crypto was driving
9 gaming sales, he called this wrong, claiming that
10 crypto's effect was "small but not zero." He didn't
11 express uncertainty. He said: We know the market's
12 every move, "we are masters at managing our [own]
13 channel."

14 Under Tellabs and Matrixx, all of these
15 facts must be assessed collectively and in context,
16 not in isolation, and that is exactly what the court
17 below did.

18 Now the Petitioners haven't identified any
19 legal error in that decision. And while the cert
20 petition and the blue brief initially seemed to
21 propose new categorical legal rules, I think the
22 questions from Justice Kagan, Justice Sotomayor,
23 Justice Gorsuch, and Justice Barrett show that they
24 have retreated to nothing more than a fact-bound
25 application of agreed-upon legal principles.

1 There is no need for this Court to sit as a
2 district court and reweigh hundreds of paragraphs
3 anew. If the Court does not DIG, it should instead
4 affirm -- reaffirm Tellabs and Matrixx and affirm.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: I understand your
7 argument, but what does -- what is your definition of
8 particularity and how do you think it plays a role in
9 your complaint?

10 MR. GUPTA: I think -- I think, actually,
11 everyone agrees on the definition of particularity.

12 JUSTICE THOMAS: Well -- well -- well, what
13 is it?

14 MR. GUPTA: Particularity requires detail.
15 And it's the -- it's the definition -- it's the same
16 concept of particularity that's come down from the
17 common law, common formulation in the lower courts,
18 is you've got to have the first paragraph of a
19 newspaper story, the who, what, why, where, when, but
20 we would --

21 JUSTICE THOMAS: So how does that work in
22 the -- what work does it do in your complaint?

23 MR. GUPTA: So, in -- in our complaint, I
24 think it's shot through with detail with respect to
25 falsity, as I just recited, about all of the

1 particular internal information within the company,
2 the market's reaction, why -- why there is good
3 reason to believe that -- that these statements were
4 false.

5 And with respect to scienter, you can
6 think, I think, of the particularized allegations as
7 the input that goes into the question that the
8 statute asks, which is whether there's a strong
9 inference of scienter. And we agree with the -- the
10 Solicitor General and I think Petitioners agree with
11 this, that ultimately, where it cashes out is does
12 the court have enough particularized allegations in
13 order to assess whether the inference of scienter is
14 at least as compelling as any alternative inference.

15 JUSTICE THOMAS: But you don't think you
16 have to go as far as an old fact pleading regime in
17 order to sort of meet this definition of
18 particularity?

19 MR. GUPTA: I think that's right. I think
20 that the Federal Rules of Civil Procedure still
21 apply. I think Tellabs and Matrixx make that clear.

22 This isn't a departure from the Federal
23 Rules, but it is a demanding standard that requires
24 plaintiffs to come forward with detail, detail both
25 with respect to falsity, especially when they're

1 alleging upon information and belief, and then detail
2 that, as I said, allows the court to -- to -- to
3 determine whether or not there's a strong inference
4 of scienter.

5 CHIEF JUSTICE ROBERTS: You say the
6 complaint has to have enough particular allegations.
7 As I was asking Mr. Katyal, I -- I think we shouldn't
8 lose sight of the fact that the PSLRA had very
9 particular objectives in mind.

10 And it seems to me if you're -- if
11 you're -- you're using words like "enough," it's not
12 clear to me that that's going to allow the statute
13 to -- to be very effective.

14 So how am I supposed to handle that
15 conundrum? This -- this statute, as I said, wanted
16 to accomplish some very specific objectives, and if
17 enough is enough to get over it, that doesn't -- it
18 seems to me that might -- that the statute might have
19 had more in mind.

20 MR. GUPTA: Well, I think one way to look
21 at what the statute had in mind is that it drew
22 these -- this phrase "strong inference" of scienter
23 from a set of cases in the Second Circuit that
24 represented a very demanding standard and that said
25 it's not enough to do what you could have done under

1 Rule 9(b). Rule 9(b), of course, said that you
2 could -- you could generally allege the state of
3 mind. And the -- the Second Circuit's standard was
4 the most demanding standard at that time. Congress
5 used the same words. And so that's one guide to
6 what -- what Congress had in mind.

7 Congress was not, however, I think, saying
8 that circumstantial proof goes out the window. All
9 of those cases from the Second Circuit made clear
10 that that kind of proof is -- is appropriate. And
11 Tellabs is such a case.

12 Tellabs is a case, I think, that's -- it's
13 sort of a much closer case than this one, much --
14 sort of on the opposite end of the spectrum, where
15 the -- the defendants were actually able to
16 accurately say there that the plaintiffs hadn't
17 alleged the contents of -- of the sales reports of
18 the internal data, unlike what we have here.

19 And if you look at the Tellabs decision on
20 remand, I think that's a good example of how you
21 apply these demanding pleading standards to a
22 circumstance like that. And there, like in this
23 case, you were talking about demand for the company's
24 flagship product. The CEO was reviewing sales data
25 constantly, even though it wasn't alleged with the

1 kind of particularity it's alleged here, and -- and
2 based on the total mix of allegations, it was enough
3 to support a strong inference of scienter.

4 And, as I said --

5 CHIEF JUSTICE ROBERTS: Thank --

6 MR. GUPTA: -- it ultimately cashes out --

7 CHIEF JUSTICE ROBERTS: No, go ahead.

8 MR. GUPTA: It ultimately cashes out on the
9 inferences. And so I think it's worth talking about
10 those because we struggled in looking at the briefing
11 to determine what are the competing inferences that
12 my friend are -- is putting forward.

13 And I think I can discern three, and I
14 think those competing are different inferences are,
15 first, NVIDIA wasn't tracking crypto sales; second,
16 NVIDIA had inaccurate information or miscalculated;
17 and, third, Huang might not have known what NVIDIA
18 knew.

19 And with respect to the first one, we know
20 that the complaint is shot through with detail about
21 how NVIDIA was tracking crypto sales. They were
22 doing it through multiple internal databases.
23 There's, you know, verbatim information from internal
24 presentations that showed that they were doing that.
25 I think that inference is hard to credit.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 JUSTICE KAGAN: Could I hear about the
3 other two?

4 MR. GUPTA: Sure. The second is I think --
5 and I -- I heard Mr. Katyal say this -- that maybe
6 NVIDIA was trying to track crypto sales, but they
7 hid -- had inaccurate information or miscalculated.
8 But we have specific data from multiple reliable
9 sources within the company showing a consistent
10 pattern.

11 So we have the sales manager in China who
12 reported that 60 to 70 percent of China sales went to
13 miners based on the centralized sales database that
14 Huang reviewed regularly. And that's confirmed by
15 internal records showing over 800,000 GeForce units
16 sold to miners just in the second quarter of 2017
17 alone, which is inconsistent with Huang's public
18 statements.

19 We had a -- a witness in Russia who
20 reported that over half of the crypto sales in Russia
21 went to crypto miners and similar reports from other
22 markets, like India. And these were not rough
23 estimates. They were specific figures for NVIDIA's
24 own tracking systems across multiple markets, which
25 is another way of saying that if you adopted the rule

1 that I urge you not to adopt, we would satisfy it.

2 And then, third, the inference is Huang
3 might not have known what NVIDIA knew. And I think
4 this explanation collapses based on, you know,
5 Huang's own statements about his own knowledge, his
6 direct involvement. He reviewed sales data every
7 week, every month, and in quarterly meetings that one
8 witness described as proctology exams because they
9 were so detailed.

10 The nature of his responses, I think, is
11 critical here. He, as I said earlier, when he was
12 asked by analysts about the crypto demand, he didn't
13 say, you know, we don't know or I don't know. He --
14 he quantified the statements he was making. And he
15 didn't express uncertainty. He gave very specific
16 figures that, again --

17 JUSTICE KAGAN: Thank you.

18 MR. GUPTA: -- contradicted the data.

19 JUSTICE GORSUCH: May I -- may I follow up
20 on that, Mr. Gupta?

21 MR. GUPTA: Yes.

22 JUSTICE GORSUCH: So, if we're going to
23 treat this case as error correction, I've got some
24 error correction kind of questions for you.

25 MR. GUPTA: Sure. I imagined you might

1 have.

2 JUSTICE GORSUCH: The first is your friend
3 on the other side, Mr. Katyal, would say that when it
4 comes to the -- the -- the falsity that you're
5 relying predominantly on two former employees, 1 and
6 2, and 5's kind of the out of the picture after the
7 Ninth Circuit's decision, for example. And 1 is five
8 layers below the CEO and in China. And Number 2 left
9 the company right at the beginning of the class
10 period and, therefore, can't inform what happened
11 thereafter.

12 Would you give me your responses to those?

13 MR. GUPTA: Sure. A -- a few things.

14 I mean, first of all, I think the fact that
15 one of them left doesn't change the fact that his
16 testimony, his -- his statements tell us in granular
17 detail how -- what Huang's practices were for
18 tracking this information and specifically crypto
19 sales data. So the only way in which it would matter
20 that he left would be if you were to draw the
21 inference that suddenly at the moment when the market
22 is most focused on crypto demand and he's being asked
23 about it at every earnings call and in every
24 interview, that he somehow changed his practice and
25 blinded himself to that information.

1 JUSTICE GORSUCH: Got that.

2 MR. GUPTA: So I don't think that really
3 helps.

4 JUSTICE GORSUCH: How about 1?

5 MR. GUPTA: And then, with respect to 1, it
6 is true that he left in December 2017. That's into
7 the class period. And so he was -- I think he was
8 the --

9 JUSTICE GORSUCH: -- five -- five layers
10 below the CEO, they emphasized.

11 MR. GUPTA: Well, they say that. And, you
12 know, that obscures the fact that he was the person
13 in China who had the most knowledge about this issue.
14 He was the person interfacing with the crypto mining
15 enterprises.

16 And we know this because, when headquarters
17 was alarmed about the exploding crypto demand, FE 1
18 is the person they tasked with looking at all of the
19 data and making this presentation that went to
20 headquarters that showed --

21 JUSTICE GORSUCH: So he's the guy who --
22 who knows the data, knows what goes into the sales
23 reports that he sends up the chain. And then you've
24 got the other guy saying and the CEO looked at these
25 sales reports with -- with great interest routinely.

1 MR. GUPTA: Yes.

2 JUSTICE GORSUCH: At least up until the
3 time I left.

4 MR. GUPTA: Yes, that's right.

5 JUSTICE GORSUCH: Okay. All right. Okay.
6 I got it.

7 On -- on the -- on the second question,
8 on -- on -- on the expert report, another fact-bound
9 error correction. Prysm relied on, as -- as we've
10 heard, a proprietary model that was undisclosed. Is
11 that a problem?

12 MR. GUPTA: I think --

13 JUSTICE GORSUCH: Why -- why isn't that a
14 problem.

15 MR. GUPTA: I think that's just an
16 inaccurate characterization of the report, Your
17 Honor. This -- there was no model. This is --
18 basically, what Prysm was doing was math. It was
19 taking publicly available figures and doing some
20 multiplication. And the math, by the way, is the
21 same math that the Royal --

22 JUSTICE GORSUCH: Pretty expensive math I
23 have to guess, but --

24 (Laughter.)

25 MR. GUPTA: Well, you know, it's the same

1 math that the Royal Bank of Canada did. And you
2 heard from my friend that there's nothing about the
3 Royal Bank of Canada's calculations. So I just do
4 want to point out to the Court that the Royal Bank of
5 Canada's report is in the record. It's at Docket
6 124-31. And so you can see that the math there is
7 the same.

8 And this isn't terribly fancy math. It's
9 taking what's called the hashrate, which they haven't
10 contested. That's the -- the measure of the output
11 on these crypto blockchain networks. And they --
12 and -- and Prysm did a very conservative estimate.
13 They only took the three most popular blockchain
14 networks that required GPU processing, and then they
15 applied a market share number. And I think, when he
16 says proprietary model, what he's talking about is
17 one of the three measures of market share that they
18 used, but that was a firm that NVIDIA itself used for
19 market share data.

20 JUSTICE GORSUCH: Right, right.

21 MR. GUPTA: But they also had two other
22 measures of market share data, and -- and one was
23 based on the internal document that FE 1 prepared,
24 that slide.

25 JUSTICE GORSUCH: That 69 percent?

1 MR. GUPTA: Right. Exactly. And so --

2 JUSTICE KAVANAUGH: If -- if you had to --
3 keep going, sorry.

4 JUSTICE GORSUCH: If you want to finish
5 that up, I -- I -- that might turn out to be useful
6 for us, so go ahead.

7 MR. GUPTA: Well, I mean, I think that was
8 the main --

9 JUSTICE GORSUCH: That's it? You got it?

10 MR. GUPTA: -- thing I wanted to say about
11 that.

12 JUSTICE GORSUCH: Okay. Thank you. Thank
13 you.

14 JUSTICE KAVANAUGH: If you had to summarize
15 why you think Judge Sanchez was wrong, how would
16 you -- how would you summarize that?

17 MR. GUPTA: I think that Judge Sanchez,
18 with all respect to Judge Sanchez, just wasn't
19 characterizing the -- the plaintiffs' complaint or
20 actually the majority's opinion fairly because he --
21 he seemed to think that the expert report was the
22 linchpin of everything, and the plaintiffs only put
23 forward the expert report as confirmatory.

24 They were going above and beyond because
25 the PSLRA is demanding and this was sort of belt-and-

1 suspenders, but if you take the expert report out, it
2 doesn't change the picture of -- of falsity in any
3 dramatic way. It's merely confirmatory.

4 And so I -- I understand that the, you
5 know, the Court may have been persuaded to grant
6 certiorari based on that characterization, but I
7 think the characterization just doesn't hold up.

8 JUSTICE ALITO: Well, Judge Sanchez thought
9 that the majority had not paid sufficient attention
10 to opposing inferences. You have laid out the
11 allegations from which you claim one can infer that
12 Huang knew that what he said was false, but under
13 Tellabs, that had to be weighed against competing
14 interests. And Judge -- as I understood Judge
15 Sanchez's opinion, he said that was not done, and he
16 pointed in particular to Figure F.

17 So what is wrong with that?

18 MR. GUPTA: Yeah. I'm -- I'm glad I have
19 the opportunity to address Figure F because this is
20 the -- this is the basis for my friend's statement
21 that the complaint "eats itself." And I think that's
22 just not so. The -- the -- he's referring to the
23 slide that's at page 62 from the internal China
24 presentation, and the data there actually falsifies
25 Mr. Huang's public statements.

1 So the three bars there on the bar chart --
2 and I realize -- I sound like I'm in a district court
3 argument -- but the -- these three bar -- bars are
4 reflecting the sales for the second quarter, the
5 second quarter of the Fiscal Year 2018, but this is
6 in 2017. And it shows that the majority of sales
7 are -- to crypto miners are GeForce GPU units. And
8 it also is inconsistent with the public statement
9 that -- that Mr. Huang made about that quarter, when
10 asked about the second quarter earnings, that the SKU
11 was capturing the majority of the sales. That isn't
12 true.

13 And then immediately after the period of
14 this slide, the public data released by NVIDIA shows
15 that the OEM segment, the crypto SKU segment, dropped
16 dramatically. And so it's not consistent with the
17 idea that there's a trend in -- in -- in that
18 direction. It's not consistent with the statements
19 that Mr. Huang made publicly.

20 So this -- this slide is actually -- this
21 is the thing that they pointed to to help them, but
22 it actually shows in fairly granular detail much more
23 than the PSLRA demands because we don't have to prove
24 our case in a summary judgment-like fashion, but it
25 shows that the statements were false.

1 JUSTICE ALITO: Well, Judge --

2 JUSTICE JACKSON: That's a --

3 JUSTICE ALITO: -- Judge Sanchez said that
4 he thought that the slide showed that the crypto SKU
5 was drawing sales away.

6 MR. GUPTA: Right.

7 JUSTICE ALITO: Among miners, it was
8 drawing sales away from the GeForce GP -- GPU. Is
9 that incorrect?

10 MR. GUPTA: I -- you know, I don't --
11 don't -- don't think it is. And I think this goes to
12 some of the -- what I heard from my friend is
13 addressing a conspiracy theory that we didn't advance
14 and are not advancing.

15 We are not saying that the crypto SKU
16 didn't capture some of the sales to miners, and we're
17 not saying that the company engaged in accounting
18 fraud in misstating those revenues. It stated those
19 revenues.

20 The problem was that it equated crypto
21 demand with the line item regarding the SKU, which
22 led analysts to be misled consistently to think that
23 there wasn't crypto demand that was driving the
24 GeForce sales when, in fact, it was.

25 JUSTICE JACKSON: So I'm focused a little

1 bit on the demands of particularity at this stage.
2 You -- you -- in part of your response to Justice
3 Alito right there, you said we don't have to prove
4 our case in a summary judgment-like fashion.

5 And -- and that's what I thought, but I'm
6 just wondering whether that's actually the case. The
7 Chief Justice asks, well, what was the point of the
8 PR -- P -- PSLRA? And -- and is it possible that the
9 PSLRA was really, with its particularity requirement,
10 demanding that plaintiffs have the kinds of evidence
11 that would be necessary to demonstrate the inferences
12 that they would want the Court to draw?

13 MR. GUPTA: So I think this Court in
14 Tellabs rejected exactly that argument. And I don't
15 understand my friend to be asking you to overrule
16 that portion of Tellabs. So Tellabs holds that we
17 don't have to meet a summary judgment-like standard
18 or present more proof than we would need to present
19 at trial.

20 Now I think, if this were a district court
21 and we were having a summary judgment argument, I'd
22 like our chances because we have quite a lot of
23 evidence.

24 JUSTICE JACKSON: And I appreciate that,
25 but I -- I guess I'm just trying to understand what

1 the standard is. What -- so, if you don't have to
2 demonstrate through the presentation of evidence that
3 your inferences are correct or that you have enough
4 evidence to show a jury that your inferences are
5 correct, then what is the work of particularity?

6 I mean, your -- your -- colleague on the
7 other side suggests that you do have to have enough
8 detail about the contents of the documents in order
9 to do something. But I can't separate that out from
10 saying you have to have the documents themselves --

11 MR. GUPTA: Right.

12 JUSTICE JACKSON: -- in some way.

13 MR. GUPTA: I -- I think this -- this
14 colloquy shows the -- the wisdom of the Court's
15 consistent refusal to adopt bright-line rules. I --
16 I acknowledge that there are going to be some cases
17 where the plaintiffs' failure to allege the contents
18 of documents is going to be fatal. But there are
19 going to be a great many cases in which there's a
20 holistic analysis of all of the -- the mix of facts
21 where that's not necessary, and I think, actually,
22 Tellabs on remand and Matrixx are two such cases.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 If I could just pick up on that point. In
25 requiring particularity, the PSLRA was at least

1 raising the bar when you talk about, you know, you
2 have to have some evidence of this or that. Congress
3 went out and saw a real problem there and wanted to
4 do something about it. So the idea that, oh, you're
5 going to have varying levels of particularity with
6 respect to the evidence is kind of a hard standard to
7 apply.

8 I mean, if it is just, oh, you look -- you
9 know, it's a case-by-case basis, and we're going to
10 have to wait for 25 or however many years until some
11 general rule is distilled, it doesn't seem to me that
12 the statute is doing what they meant it to do.

13 MR. GUPTA: Well, I -- I think the statute
14 is doing what they meant it to do, and I think the
15 proof is in the -- in the lower court jurisprudence.
16 I think, if you look at all of the -- the cases cited
17 in the cert petition, we don't really have any
18 quarrel with those cases. They are engaging in a --
19 a fairly fact-bound analysis in each of those cases
20 about whether the rules of particularity are met.

21 And it's not easy. The standard is not
22 easy to meet. This is -- my friend is right when he
23 said that this is a -- a standard that is different
24 from the -- the typical standard, and that's why you
25 get complaints that take up as much of the Joint

1 Appendix as this complaint does.

2 CHIEF JUSTICE ROBERTS: Well, I'm not sure
3 what they were looking for is verbosity. I mean --
4 (Laughter.)

5 MR. GUPTA: Fair. Fair.

6 CHIEF JUSTICE ROBERTS: -- I hope not
7 anyway.

8 MR. GUPTA: Yes, and, in fact, there are
9 some cases where the courts are saying your complaint
10 is too long.

11 CHIEF JUSTICE ROBERTS: Right.

12 MR. GUPTA: And -- and, you know, so I
13 think it's not just length. It has to be detailed,
14 and it has to be detail that is sufficient, as -- as
15 the Court said in Tellabs, to -- to negate or at
16 least to show that there as -- the inferences are as
17 compelling as any competing inference.

18 CHIEF JUSTICE ROBERTS: Thank -- thank you.

19 Justice Thomas, anything further?

20 Justice Alito?

21 JUSTICE ALITO: Do you think that motive
22 has any role to play in the analysis of scienter? I
23 know you don't have to prove motive. Do you think
24 it's relevant?

25 MR. GUPTA: Yes. I think this Court has

1 said that it's -- it's relevant but not necessary.

2 And --

3 JUSTICE ALITO: So, if the -- I mean, if
4 the real figure is one and a half billion dollars or
5 over a billion dollars and Mr. Huang says no, it's a
6 hundred million --

7 MR. GUPTA: Mm-hmm.

8 JUSTICE ALITO: -- what motive could he
9 have to -- for making a statement that is so far off
10 and that is, if you are correct, if the over a
11 billion dollars figure is correct, is surely going to
12 be -- going to come to light with severe
13 consequences?

14 MR. GUPTA: That's the argument my friends
15 make. And I think you could have made --

16 JUSTICE ALITO: Yeah. Well, what's wrong
17 with it?

18 MR. GUPTA: You could have made exactly the
19 same argument in Tellabs, where it was pretty clear
20 to everyone that nobody wanted this product and the
21 new product wasn't going to suffice. You could have
22 said very much the same thing in Matrixx, where it
23 was clear that this nose spray caused people to lose
24 their sense of smell, and -- and everyone was
25 starting to figure that out.

1 In this case, however, I think that, you
2 know, Huang might have thought what a lot of people
3 think when they're carrying out a fraudulent scheme,
4 in a Ponzi scheme, for example, which is that people
5 might not find out and the reality might not catch up
6 with them.

7 And -- and just imagine that the crypto
8 crash had happened a bit later. NVIDIA is now a
9 company whose sales rely on -- on the need for these
10 chips for artificial intelligence. If that
11 artificial intelligence demand had arrived a little
12 bit earlier and the crypto crash had happened a
13 little bit later, this fraud would not have been
14 recognized and there would not have been the crash,
15 and so he may have been relying on precisely that
16 kind of hypothetical scenario.

17 JUSTICE ALITO: So your -- your -- I was
18 struck by the SG's answer, well, it's like a Ponzi
19 scheme. And -- and you really don't have a better
20 explanation? It's a Ponzi scheme?

21 MR. GUPTA: Well, no. I -- I --

22 JUSTICE ALITO: This --

23 MR. GUPTA: -- I don't think it's like --

24 JUSTICE ALITO: -- gigantic company with
25 highly sophisticated officers is engaging in a Ponzi

1 scheme? All right. Maybe.

2 MR. GUPTA: I don't think it's -- I don't
3 think we're saying that it was a Ponzi scheme, and I
4 don't think that's how I understood the Solicitor
5 General's brief as well.

6 It's that you could say the same thing in a
7 Ponzi schemes case, and you could say the same thing
8 in many securities fraud cases, including the two
9 cases that this Court has had under the PSLRA.

10 JUSTICE ALITO: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Counsel, I see two
13 purposes -- there may be others -- to the PSLRA
14 particularity -- particularity requirement. It has two
15 purposes, I think: to ensure that defendants know
16 exactly what to defend against and to prevent
17 frivolous lawsuits.

18 The allegations in this complaint are
19 pretty clear. They have to defend against whether
20 crypto mining was driving their business during
21 the -- the class period, correct?

22 MR. GUPTA: Correct.

23 JUSTICE SOTOMAYOR: And to defend against
24 it, all they have to do is show the sales records
25 that all of these employees say exist, correct?

1 MR. GUPTA: Correct.

2 JUSTICE SOTOMAYOR: Mr. Katyal seemed to
3 suggest in his responses to one of my questions, I
4 think it was, that the S -- SEC has those records.
5 Are you aware of the SEC -- you don't have them?

6 MR. GUPTA: I don't have them. You know, I
7 think -- I think the S -- it's important to
8 understand that the SEC's enforcement action -- and,
9 you know, the government can speak to this -- was
10 just about -- focused on the -- the disclosures made
11 to the SEC. And that's not uncommon. That's
12 understandable. They were focused on what NVIDIA had
13 told the government. So it wasn't the subject matter
14 of this case, which spans a whole range of statements
15 made over a longer period of time.

16 JUSTICE SOTOMAYOR: What happened to that
17 SEC case?

18 MR. GUPTA: The SEC -- NVIDIA settled with
19 the SEC case. They were fined.

20 JUSTICE SOTOMAYOR: But no admission of
21 liability?

22 MR. GUPTA: They did not admit liability,
23 but I think, you know, attached to the red brief is
24 the -- is the cease-and-desist order from the SEC.

25 JUSTICE SOTOMAYOR: And just to be clear,

1 you don't have whatever records the SEC got? If it
2 got the sales records or not, you don't know?

3 MR. GUPTA: We -- we do not have those. We
4 would need discovery.

5 JUSTICE SOTOMAYOR: The government would
6 probably tell us that. Okay. Thank you.

7 MR. GUPTA: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: If I just could go back to
10 the questions that Justice Alito asked you, because
11 it strikes me that, from your answer, the Ponzi
12 scheme is actually a bad term for what you're
13 suggesting. A Ponzi scheme is like you're --
14 you're -- you're -- you're -- you're never going to
15 get caught up.

16 MR. GUPTA: Right.

17 JUSTICE KAGAN: And it's just dishonesty
18 after dishonesty after dishonesty to try to hide that
19 fact. But you're not suggesting that. You're
20 actually saying that if things had worked out a
21 little bit differently --

22 MR. GUPTA: Yes.

23 JUSTICE KAGAN: -- in the market for crypto
24 and -- and in the -- and in other markets that NVIDIA
25 was involved in, NVIDIA is now the company --

1 MR. GUPTA: Right.

2 JUSTICE KAGAN: -- that's sending the stock
3 market into the stratosphere, we would never have
4 known about this.

5 MR. GUPTA: Yes.

6 JUSTICE KAGAN: You know? So Mr. Huang
7 might have been making a pretty good bet here.

8 MR. GUPTA: Exactly. And -- and your
9 answer is much better than mine was. Right.
10 Exactly.

11 (Laughter.)

12 MR. GUPTA: I -- I think the -- there's a
13 difference between someone who's carrying on a scheme
14 where it's inevitable that they're going to get
15 caught and someone who's rationally calculating that
16 the market might not catch up to what they're saying.

17 CHIEF JUSTICE ROBERTS: I'm sorry, Justice
18 Gorsuch?

19 Justice Kavanaugh?

20 JUSTICE KAVANAUGH: How much money is at
21 stake in this case, in other words, if you were to
22 prevail ultimately in the class?

23 MR. GUPTA: Not as much as it might seem
24 because -- well, I don't want the Court to get the
25 impression that this enormous delta of -- of sales is

1 what's at issue. It -- what would be at issue would
2 be we would have to show lost causation and
3 materiality --

4 JUSTICE KAVANAUGH: What are you seeking?
5 Like, if you ran the table, what -- what are you
6 seeking roughly?

7 MR. GUPTA: Well, I don't know what the
8 numbers are, Your Honor, but I think, you know --

9 JUSTICE KAVANAUGH: Rough?

10 MR. GUPTA: -- people were harmed. If
11 the -- if the -- you know, because they were --
12 imagine somebody whose retirement savings were in
13 NVIDIA and they sold the stock at the time of the
14 crash and they -- you know, they were harmed. Now
15 there would be maybe other people who rode it out and
16 weren't harmed and -- and, you know, don't need --
17 don't need any relief.

18 JUSTICE KAVANAUGH: So you don't have any
19 idea how much you would be seeking?

20 MR. GUPTA: I don't know the answer to
21 that.

22 JUSTICE KAVANAUGH: Okay. And the concern,
23 I think, raised by the amici is the fraud by
24 hindsight that you've heard Mr. Katyal, and I just
25 want to --

1 MR. GUPTA: Right.

2 JUSTICE KAVANAUGH: -- give you a chance to
3 respond. The idea is of the effects on the American
4 economy if businesses -- anytime a stock price falls,
5 you can get an expert and you can get past a motion
6 to dismiss --

7 MR. GUPTA: Right.

8 JUSTICE KAVANAUGH: -- and that has a -- as
9 you read in the amici, you know all this, but has a
10 significant effect on the American economy and that
11 while it's painful for us to get into the facts and
12 have to actually, you know, dig into the facts, the
13 Ninth Circuit opinion, so the amici say, is a
14 blueprint for getting past the motion to dismiss in a
15 way that's contrary to what Congress thought and will
16 have negative effects on the American economy and
17 that it's our role to make sure that we have policed
18 the lines Congress drew so that the economy is not
19 harmed. So --

20 MR. GUPTA: So there are a few questions in
21 there. I think, first of all, with respect to your
22 role, I think the Court's role is -- you know,
23 Congress's role is to balance these competing
24 event -- objectives about needing meritorious suits
25 to -- to discipline capital markets and ensure that

1 there aren't frivolous suits that are a drain on the
2 economy. Congress struck that balance with this
3 statute. They wanted meritorious cases to go forward
4 like this one.

5 They did not want the kind of thing that
6 Judge Friendly was describing -- I think my friend is
7 right about this -- where you had what was called
8 fraud by hindsight, where, you know, a stock goes
9 down, the day later, you know, plaintiffs' lawyers
10 who are not representing institutional investors file
11 a lawsuit without any investigation.

12 Those kinds of cases where, you know,
13 they're looking for a theory of fraud without any
14 information, those kinds of things are the -- are
15 what the PSLRA was intended to root out and
16 appropriately so because Congress did strike a
17 balance. Congress recognized that there is a value
18 to having private securities litigation as a
19 supplement to public enforcement to ensure that our
20 capital markets are the best in the world, that they
21 are efficient, that they are honest, that people can
22 rely on our stock markets.

23 JUSTICE KAVANAUGH: If Judge Sanchez's
24 opinion had been the majority opinion, would you have
25 sought cert?

1 MR. GUPTA: I probably would have been very
2 upset, but I probably would have counseled my clients
3 that this is a fact-bound disagreement --

4 JUSTICE KAVANAUGH: Really?
5 (Laughter.)

6 MR. GUPTA: -- about settled standards.

7 JUSTICE KAVANAUGH: I wouldn't bind
8 yourself like that, but anyway, thank you.

9 CHIEF JUSTICE ROBERTS: Justice Barrett?
10 Justice Jackson?
11 Thank you, counsel.

12 MR. GUPTA: Thank you.

13 CHIEF JUSTICE ROBERTS: Ms. Sinz dak.

14 ORAL ARGUMENT OF COLLEEN R. SINZDAK

15 FOR THE UNITED STATES, AS AMICUS CURIAE,

16 SUPPORTING THE RESPONDENTS

17 MS. SINZDAK: Mr. Chief Justice, and may it
18 please the Court:

19 To resolve this case, the Court does not
20 need to create any new one-size-fits-all rules.
21 Instead, it can simply reiterate a few basic
22 principles that flow from the plain text of the
23 PSLRA, and the good news is I think we're all agreed
24 on those basic legal principles.

25 So, first, as to scienter, the PSLRA

1 requires a plaintiff to plead enough particularized
2 facts to create a strong inference of scienter.
3 Particularity means detail. But the particularity
4 requirement doesn't say anything about what kind of
5 details the plaintiff has to plead. So long as she
6 pleads enough details to make it -- the inference of
7 scienter at least as likely as any competing innocent
8 inference, then she has cleared the PSLRA's bar. And
9 we think that happened here.

10 Second, as to expert reports, the PSLRA
11 does not mention them at all. So they're neither
12 disfavored, nor are they preferred. It's just that
13 the same basic standards apply. So, if a plaintiff
14 is relying on facts drawn from an expert report, they
15 have to be pleaded with particularity. And if the
16 plaintiff is relying on a belief, it's making
17 information and belief pleading, then it needs to
18 plead the particularized facts supporting that --
19 that opinion, that belief.

20 Again, we think that's the standard the
21 Ninth Circuit applied here, and so all the Court
22 needs to do is reiterate these principles and affirm.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: Do you think particularity
25 is used in the same way it's used in Rule 9(b) of the

1 Federal Rules of Civil Procedure?

2 MS. SINZDAK: Yes. I think it looks like
3 it was taken from that, Congress was taking it
4 through -- from that. And I -- I think that's a good
5 point perhaps to what the Chief Justice was asking
6 about before, what did the PSLRA do.

7 The -- Rule -- Rule 9(b) says that you have
8 to plead facts with -- with particularity. It
9 creates an exception for scienter. And then the
10 PSLRA effectively takes that exception away.

11 CHIEF JUSTICE ROBERTS: So I -- I take it
12 you think the PSLRA was intended to do a good bit
13 more than simply keep out frivolous lawsuits?

14 MS. SINZDAK: I -- I think it definitely
15 was intended to keep out frivolous lawsuits. I think
16 there was a -- a competing intent to -- to ensure
17 that -- that meritorious lawsuits would go through.

18 CHIEF JUSTICE ROBERTS: No. But my
19 question was, do you think it was intended to do more
20 than simply keep out frivolous lawsuits?

21 MS. SINZDAK: In -- in -- I -- I think that
22 was the primary purpose, but I may not be
23 understanding your question.

24 CHIEF JUSTICE ROBERTS: Well, you said it
25 was designed to ensure adequate allegation of

1 scienter, that it imposed a -- a heightened
2 particularity standard. All those other things that
3 you listed.

4 MS. SINZDAK: Sure. I think I was thinking
5 of those as means to the end of keeping out frivolous
6 litigation and -- and of raising the pleading
7 standard, but -- but, yes, I certainly think that
8 those were the specific things that Congress did
9 within the PSLRA.

10 CHIEF JUSTICE ROBERTS: Okay.

11 JUSTICE BARRETT: Ms. Sinz dak, so let's say
12 that we don't adopt for scienter this -- this
13 bright-line rule. Mr. Katyal suggested that for the
14 comparative standard at least as cogent and
15 compelling as the alternative, that the Ninth
16 Circuit, while parroting the rule, didn't adequately
17 apply it.

18 It seems to me that if we rejected the
19 bright-line rule, we could either affirm, as you
20 suggest, or perhaps -- I'm not saying we do -- but if
21 we agreed with Mr. Katyal, we could vacate and remand
22 and say you stated the right standard, but you didn't
23 adequately apply it. Does the government really have
24 a dog in that fight and, if so, why?

25 MS. SINZDAK: Not really, except that we --

1 we do think that the Ninth Circuit correctly applied
2 the standard here. And what we wouldn't want is
3 there to be confusion because, if the Court
4 reiterates the standard but then remands, there might
5 be some suggestion that the Ninth Circuit did
6 something wrong, and courts might be a little bit
7 confused about what it is that they did wrong.

8 And, again, we think that if you look at
9 the Ninth Circuit's decision, it really was
10 fulfilling this requirement. And I think, you know,
11 42a is the place where -- where the -- the -- the --
12 the Ninth Circuit sort of talks about all of the
13 different things that it relied on to find scienter
14 here, and I do think it articulates the Tellabs
15 standard --

16 JUSTICE BARRETT: Thank you.

17 MS. SINZDAK: -- and applies it.

18 JUSTICE ALITO: Do you think that the
19 settlement with the SEC has any legal relevance here?

20 MS. SINZDAK: I think only marginally in
21 that the SEC did make findings, including, you know,
22 the find -- this -- this is a finding that -- that
23 NVIDIA had information indicating that crypto mining
24 was a significant factor in the year-over-year growth
25 revenue from the sale of GPUs.

1 So the SEC made that finding, but NVIDIA
2 did not admit that finding. So this isn't in the
3 nature of an acknowledgment. I -- I think, you know,
4 it's one fact that might make it slightly more
5 plausible.

6 JUSTICE ALITO: Well, would it be
7 admissible if the case were tried?

8 MS. SINZDAK: I -- I -- it would not be
9 admissible in terms of any -- it's not a -- it's not
10 the -- pardon me -- it's not acknowledgment as to
11 that issue.

12 JUSTICE ALITO: I just wondered why you
13 mentioned it.

14 MS. SINZDAK: I --

15 JUSTICE ALITO: Just -- just to dirty up
16 NVIDIA?

17 MS. SINZDAK: Oh, in the -- in the -- in
18 our brief?

19 JUSTICE ALITO: In your brief, yeah.

20 MS. SINZDAK: I think primarily because the
21 parties had mentioned it, and we just wanted to be
22 honest about it. But I think you'll note we
23 mentioned it in our statement.

24 JUSTICE ALITO: Thank you.

25 MS. SINZDAK: We didn't talk about it in

1 the argument.

2 JUSTICE SOTOMAYOR: Mr. Katyal then --
3 if -- I -- I may have totally misunderstood him, but
4 I thought he said that whatever he gave to the SEC
5 proved his case and not his opponent's case.

6 MS. SINZDAK: The only publicly available
7 information about the settlement is what we have --
8 what -- what was attached to the red brief and
9 what -- it -- it's in -- in Westlaw. It's cited at
10 page 7 of our brief. What the SEC had in terms of
11 documents is -- is -- is not publicly available.

12 I'm not sure whether Mr. Katyal was -- was
13 talking about what his clients gave them. I -- I
14 just -- I don't know that. It's not publicly
15 available.

16 JUSTICE SOTOMAYOR: But whatever he said
17 the documents showed is not anything that you're
18 prepared to say they showed?

19 MS. SINZDAK: No. What I --

20 JUSTICE SOTOMAYOR: Other than that -- what
21 you read?

22 MS. SINZDAK: Yes, excuse me. I -- I -- I
23 completely agree. So what the SEC's findings are are
24 embodied in this settlement agreement that we can't
25 go beyond --

1 JUSTICE SOTOMAYOR: You answered the Chief
2 by saying there was one purpose, frivolous lawsuits.
3 I thought the -- there was a second purpose, which
4 was to ensure that defendants knew what they were
5 defending against.

6 MS. SINZDAK: That -- that's right. It is
7 also -- so there's -- there's -- I think the --
8 the -- some of the amicus briefs on Respondents' side
9 point out that, in general, particularity
10 requirements are to assist with notice. And so I
11 think that's there.

12 And -- and maybe just, Chief -- Mr. Chief
13 Justice, to return to -- to your question, if what
14 we're talking about is the frivolous, that it's more
15 than -- this is more -- this is doing more than Rule
16 11, I would certainly agree with you there.

17 JUSTICE SOTOMAYOR: Counsel, you've end --
18 you've ended answering me, right?

19 MS. SINZDAK: Oh, sure.

20 JUSTICE SOTOMAYOR: Yeah.

21 JUSTICE KAVANAUGH: If the dissent had been
22 the majority, what problems would have been created
23 going forward from your perspective?

24 MS. SINZDAK: If the dissent had been the
25 majority, I -- I think, honestly, what we have is

1 a -- is a -- a disagreement on the facts that I --
2 I -- I think --

3 JUSTICE KAVANAUGH: So that goes to your
4 answer to Justice Barrett's question it sounds like
5 then?

6 MS. SINZDAK: Yes. I mean, I -- I think
7 that it would have a profound effect on this case,
8 but I'm not sure that it would set bad law going
9 forward.

10 I think that -- just to -- to touch on a
11 few things very briefly that had already come up, in
12 terms of how to handle expert reports, Justice Alito,
13 I think you said that it may be difficult for
14 district courts to know what to do with these very
15 technical sets of facts that you'll find in expert
16 reports. That's going to be the same problem if
17 they're not in expert reports, and they might even be
18 more confusing because I think, if you have
19 plaintiffs' lawyers trying to articulate a bunch of
20 highly technical facts, it might come out a little
21 bit more garbled. So I don't think that's a
22 particular reason to adopt a special -- a special
23 rule, and the PSLRA does not.

24 Justice Kavanaugh, I think you asked about
25 the Ninth Circuit applying different rules, and I

1 really don't think that they are. And the best
2 evidence perhaps of this is that Anderson, the case
3 that Petitioners cite and rely on as doing it right,
4 is repeatedly relying on Ninth Circuit precedent.

5 And I'd also note that the district court
6 decision, which, again, Petitioners are relying on,
7 that also is repeatedly relying on Ninth Circuit
8 decisions. So I don't think this is a case where the
9 court of appeals has gone rogue and is doing anything
10 different than the other -- the other courts of
11 appeals here.

12 And in terms of the slide, the main thing
13 that I want to say there is that the -- the Ninth
14 Circuit did address the slide. I think that, you
15 know, this Court is not a court of -- of -- of
16 factual analysis, but if you're concerned that the
17 Ninth Circuit just wasn't doing things, the --
18 there's many pages of analysis from 48a to 55a
19 explaining that they were examining that. And --
20 and, similarly, there's many pages of analysis
21 examining the detailed factual allegations underlying
22 the expert report. That's 20a to 22a.

23 So unless there are further questions?

24 CHIEF JUSTICE ROBERTS: Anything further?

25 Thank you, counsel.

1 Rebuttal, Mr. Katyal.

2 REBUTTAL ARGUMENT OF NEAL K. KATYAL

3 ON BEHALF OF THE PETITIONERS

4 MR. KATYAL: Thank you, Your Honor. Five
5 points.

6 First, Mr. Gupta said that particularity
7 requires detail. We quite agree. Yet the Ninth
8 Circuit said that this complaint had enough detail.
9 This is why you need to reverse. It's dangerous to
10 say this amount of detail is enough for a complaint.
11 That's not a change in our position. They're the
12 ones -- I'll explain that in a moment -- but they're
13 the ones changing their position. They are running
14 away from the Ninth Circuit.

15 The Ninth Circuit's decision said that the
16 CEO "would have reflected their expert opinion" and
17 does not engage in any sort of comparative analysis.
18 42a is not a comparative analysis. They -- the Ninth
19 Circuit never even bothered answering our competing
20 hypothesis, which was the pricing explanation. You
21 have to reverse that. And as the amici say,
22 otherwise, you're letting circuit courts let
23 decisions -- let litigants provide these cases and
24 state a claim without a comparative inquiry.

25 And you certainly have to reject their new

1 idea that these employees are enough because they
2 don't indicate when the CEO knew something. Was it
3 after or before that watershed SKU event? Nothing
4 said that they -- they do say that the CEO actually
5 saw the data at the time. The best they have is a
6 video that was taken from 2012, well before the class
7 period.

8 And Mr. -- and Judge Sanchez explains at
9 62a why that slide is so devastating. And he also
10 explains at 82a why not a single employee ever said
11 the CEO saw anything damaging during the class
12 period.

13 You can't let this stand for the reasons
14 the amici say. Congress in the Reform Act, as the
15 Chief Justice indicated, wanted to stop lawsuits like
16 this, lawsuits that allow fraud by -- fraud by
17 hindsight.

18 Second, Justice Jackson, our rule is that
19 if they are relying on documents, they then need to
20 allege the contents. If they aren't relying on those
21 documents, they don't have to. And I understood
22 Justice Kagan's second hypothetical to be relying not
23 on internal documents and, if so, they don't need to
24 provide the details.

25 Now our rule has always been the same.

1 It's the rule found, for example, at page 31 of our
2 brief: When a plaintiff omits the most critical
3 aspect of allegations about a company's internal
4 documents, the contents of those documents that
5 support the plaintiff's claim, the allegation cannot
6 be particularized, citing the Fifth Circuit case.
7 The Solicitor General's rule -- rule at page 18 of
8 their brief is very similar. We think both of those
9 would require reversal.

10 Fourth, picking up on the Chief -- or
11 excuse me. Third, picking up on the Chief Justice's
12 point, Congress in the Reform Act said maybe is not
13 good enough, that scienter requires a strong
14 inference. And yet, at the end of the day, all
15 you've heard from my friend on the other side is a
16 series of maybes. Maybe there were documents that
17 contradicted the statements about dependence on -- on
18 crypto. Maybe that Mr. Huang looked at those
19 documents. Maybe he looked at them before his public
20 statements. And maybe he deliberately misstated
21 sales.

22 Each of those is just a percentage chance,
23 and taken together, they don't come close to being
24 the kind of scienter inference that is at least as
25 compel -- compelling as the competing alternative.

1 Judge Sanchez on this point is devastating, as
2 Justice Alito was picking up on. Why would it make
3 any sense for a CEO to act this way?

4 In the context of the Reform Act, maybe
5 doesn't cut it. And that's especially true here when
6 their whole theory about motive makes no sense
7 whatsoever. Mr. Huang is not running a Ponzi scheme.
8 We're talking about one of the most respected CEOs of
9 a dramatically important company. And there is
10 nothing that ever answers why he would act this way
11 when he is saying time and again the pricing data
12 shows that they can't track end users.

13 Finally, this gets a little abstract. Let
14 me make it concrete. You heard today and the red
15 brief at page 13 says Mr. Huang "continuously tracked
16 the inventory in the channel." That statement
17 illustrates why details matter. Consider the who.
18 Mr. Huang never said that statement was made by
19 someone else. Consider the when. It was made in
20 2007, before cryptocurrency was even invented.

21 This is a good illustration of why details
22 matter, why what the district court did here by going
23 allegation by allegation and interrogating it to make
24 sure that the details support the story are there.
25 That's what allows a court to get past the competing

1 inference that Tellabs requires. That's precisely
2 what the Ninth Circuit had missing every day -- on
3 every page of its analysis.

4 Never did they deal with the competing
5 explanation that the company offered that prices were
6 remaining high because of independent actions by
7 retailers. Had they done that, if the complaint had
8 provided that level of detail, that would be one
9 thing. This complaint doesn't. And that's why it's
10 so dangerous, as the amici say, to let a case like
11 this lay and pick -- and allow litigants in the
12 future to pick up and get past state a claim
13 barriers.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 The case is submitted.

16 (Whereupon, at 11:32 a.m., the case was
17 submitted.)

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