

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NVIDIA CORPORATION, ET AL.,)

4 Petitioners,)

5 v.) No. 23-970

6 E. ÖHMAN J:OR FONDER AB, ET AL.,)

7 Respondents.)

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10 Washington, D.C.

11 Wednesday, November 13, 2024

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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:

18 NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf of
19 the Petitioners.

20 DEEPAK GUPTA, ESQUIRE, Washington, D.C.; on behalf of
21 the Respondents.

22 COLLEEN R. SINZDAK, Assistant to the Solicitor General,
23 Department of Justice, Washington, D.C.; for the
24 United States, as amicus curiae, supporting the
25 Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL
ON BEHALF OF THE PETITIONERS

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

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

First, they required plaintiffs to "state with particularity" facts giving rise to a strong inference the defendant acted with scienter, a dramatic break with common law, and, second, they required, for allegations outside of a plaintiff's personal knowledge, plaintiffs to "state with particularity all the facts on which their belief is formed." This double-heightened pleading requirement exists in virtually no other context. Y2K is the

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

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

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

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

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

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

8 I welcome the Court's questions.

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

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

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

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

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

21 JUSTICE JACKSON: No, I understand.

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

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

25 MR. KATYAL: Sure.

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

3 MR. KATYAL: Sure.

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

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

8 JUSTICE JACKSON: Okay.

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

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

14 MR. KATYAL: Of course, of course.

15 JUSTICE JACKSON: We have plaintiffs --

16 MR. KATYAL: Absolutely.

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

25 MR. KATYAL: So, Justice Jackson, we don't

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

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

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

1 MR. KATYAL: Right.

2 JUSTICE JACKSON: I don't understand why
3 that's not enough for the pleading stage.

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

15 JUSTICE JACKSON: No, no, no. My
16 hypothetical is we do know what it said. We knew
17 what it said at the time, says the employees. What
18 we don't remember for today in this moment, as we are
19 alleging, exactly what the data points were, but --

20 MR. KATYAL: Yeah.

21 JUSTICE JACKSON: -- we -- we -- our
22 testimony is that documents that we saw that had the
23 relevant information were given to the CEO during
24 this meeting at the same time that the CEO was saying
25 something else externally.

1 MR. KATYAL: Yeah. And if those
2 documents -- you know, if they --

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

5 MR. KATYAL: Well, the data is -- is a
6 requirement of what particularity is. Particularly
7 -- particularity requires some -- you know, at least
8 a good description of the who, what, where, when, and
9 how. That's what Congress required. And, yes,
10 sometimes -- you're absolutely right --

11 JUSTICE SOTOMAYOR: Mr. Katyal --

12 MR. KATYAL: -- that will --

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

15 MR. KATYAL: Yeah. So, if a plaintiff is
16 relying on an allegation to show an inference of
17 scienter, it has to be particularized enough to know
18 whether it is truly relevant to establishing
19 scienter. So, in a case like this --

20 JUSTICE SOTOMAYOR: Well, you know
21 something, it -- it sounds to me -- and I am
22 concerned about your cert petition because you made
23 two allegations in your cert petition. The first one
24 was similar to this, but you said you wanted a
25 bright-line rule that you need to have particularized

1 X description of the document. That's what you said
2 in your -- in your cert petition.

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

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

15 MR. KATYAL: Oh, absolute --

16 JUSTICE SOTOMAYOR: These particular
17 documents are not precise enough? I'm not actually
18 sure what rule we could articulate that would be
19 clearer than our cases already say.

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

23 JUSTICE SOTOMAYOR: Well, except that I've
24 gone through the complaint, all right, and we have
25 any number of employees, some of them who created the

1 documents, others who were present when the documents
2 were being discussed, others who -- only one who
3 wasn't present during the relevant time but who set
4 up what the creation of the documents showed, and
5 others who were present during the time who said
6 there were many, many crypto sales, many more than
7 the \$150 million that your client claimed, and he
8 kept saying that it was a small part of the business,
9 all right?

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

16 MR. KATYAL: So, Justice Sotomayor, there's
17 a lot there, so I have a lot to say in response.

18 So, first of all --

19 JUSTICE SOTOMAYOR: Tell me your rule.

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

24 Now my friend on the other side in the
25 brief in opposition said that's just fact-bound error

1 correction. This Court granted certiorari over that
2 and I think for good reason. This case is very much
3 like the Twombly case, in which Justice Stevens --

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

5 MR. KATYAL: -- made exactly --

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

10 MR. KATYAL: I think they do, Justice
11 Sotomayor. So, for example --

12 JUSTICE SOTOMAYOR: No. Two of them -- the
13 Second Circuit and the Anderson case, which is the
14 only one in your merits brief that you go through,
15 that case was the court simply saying the witness was
16 talking to us about one thing in the reports but not
17 about the scienter that was necessary for the second
18 thing.

19 MR. KATYAL: If I could contrast what --
20 the case that I just gave Justice Jackson, the Fifth
21 Circuit decision in ABC, which goes through a long
22 complaint and says at the end of it, a hundred pages,
23 14 confidential witnesses, all of that together
24 doesn't actually state a claim because it's not
25 particularized, and you match that up against the

1 Ninth Circuit, it is, you know, as clear as day that
2 these are two very different approaches.

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

14 This Court has never defined particularity
15 since the year 1926.

16 JUSTICE SOTOMAYOR: All right, counsel --

17 MR. KATYAL: This case provides a good
18 explanation.

19 JUSTICE SOTOMAYOR: -- one last thing on
20 your expert rule.

21 MR. KATYAL: Yeah.

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

24 MR. KATYAL: No. We -- we don't -- we
25 certainly don't have any objection to Justice Alito's

1 concurrence in Tellabs, but we don't think, as our
2 reply brief says, it matters here.

3 So, Justice Sotomayor, you were talking
4 about all the employees' statements. All the
5 employees' statements taken together never get to
6 where they need to go, which is a strong inference
7 that shows that --

8 JUSTICE SOTOMAYOR: I'm -- I'm -- I'm
9 totally dubious of that, but your other side can get
10 you the factual argument on that because I've read
11 through the allegations, and the employees were
12 talking about constant sales reports that tracked
13 every item that was being sold either to a gamer or
14 to a cryptocurrency marketeer, and they were talking
15 about the exact nature of the documents that were
16 being created and the fact that there were many, many
17 more sales than the 150 million that he was claiming.

18 MR. KATYAL: So -- so, Justice Sotomayor,
19 with all respect, the district court went through
20 allegation by allegation of these former employees
21 and decimated each one, showing none of them were
22 particularized. I understand what they've done is
23 throw a bunch of spaghetti at the wall, and it's very
24 hard for me in a half-hour argument to deal with that
25 kind of shell game.

1 JUSTICE SOTOMAYOR: Could we go to the --

2 CHIEF JUSTICE ROBERTS: Counsel, one thing
3 that concerns me about both sides' presentation, it's
4 a little black and white. I gather you wouldn't be
5 terribly upset about a complaint with a lot of direct
6 evidence and, you know, some expert reports that sort
7 of help shore that up. And I'm assuming the other
8 side would be fine if -- if it -- you know, the
9 balance was -- was the other way.

10 Now, if I think that the positions on both
11 sides are a little too absolute, how do you find sort
12 of the sweet spot in terms of when the PSLRA is
13 satisfied? I mean, it can't be just a little bit of
14 direct evidence because that statute was intended to
15 do something. On the other hand, it seems to me you
16 can't insist on only the direct evidence before a
17 complaint goes forward.

18 So, if -- if I don't think it's black and
19 white, how do -- what -- how do I decide where the
20 balance is?

21 MR. KATYAL: So, Mr. Chief Justice, you
22 adopt the rule that's in our brief, which is not that
23 you need direct evidence. Circumstantial evidence
24 can do that just as well. It's just got to be
25 particularized, and at the end of the day, it's got

1 to meet that Tellabs holistic inquiry of showing
2 scieneter is at least as cogent and compelling as not.
3 So I think, at a minimum, it's going to require what
4 specifically did the CEO know and when did he know
5 it.

6 This case is a perfect illustration. All
7 the evidence Justice Sotomayor is pointing to is from
8 outside the class period, from before the class
9 period. As our brief explains, in May of 2017, which
10 is the beginning of the class period, that's a
11 watershed moment. Why? Because, at that moment, the
12 company introduces a crypto-specific chip, the Crypto
13 SKU.

14 And what their own complaint says -- the
15 only time they allege an internal document is at
16 Joint Appendix 59 to 62, and that document boomerangs
17 on them. It shows, once that new chip was
18 introduced, crypto sales to -- to miners, to GPU
19 sales, dropped dramatically, down to 27 percent from
20 62 percent.

21 So the complaint essentially eats itself.
22 This is why particularity is so important, why
23 Congress insisted on it, that when question, because
24 when they have a bunch of data -- a bunch of
25 allegations from before May of 2017, that tells us

1 nothing about after that. It's kind of like looking
2 at BlackBerry sales data before the introduction of
3 the iPhone and saying, look, we can project
4 BlackBerry sales after the iPhone's -- after the
5 iPhone's introduction. Of course not.

6 The whole thing the company was doing here,
7 they were acknowledging that crypto miners were
8 buying their products. They said, look, we couldn't
9 track exactly how much. They introduced a whole
10 product to deal with that. Their allegation is this
11 CEO lied and lied about the dependence on crypto.

12 I mean, it's a really weird way to lie to
13 say we're going to introduce a whole new product to
14 deal specifically --

15 JUSTICE JACKSON: But, Mr. --

16 MR. KATYAL: -- with this market.

17 JUSTICE JACKSON: -- Mr. Katyal, your --
18 your description and your discussion and your
19 argument sounds to me like summary judgment stage
20 kind of discussion. In other words, you -- you seem
21 to be suggesting that this is the evidence that they
22 have related to your, you know, client's misconduct
23 and it's not enough.

24 And I would appreciate that if we were at
25 the summary judgment stage. What I don't understand

1 is, at the pleading stage, the allegations being
2 made, how you are saying what I understood your rule
3 to be as stated in your question presented is there
4 the contents of the documents have to be alleged with
5 particularity. And I'm still stuck on that as a --
6 the only way in which a plaintiff can sufficiently
7 allege scienter in this kind of circumstance. I
8 don't know why that is.

9 MR. KATYAL: Yeah. So, again, it's not the
10 only way. There's lots of ways in which people
11 allege non-document cases. So the executive says
12 cook the books.

13 JUSTICE JACKSON: No, I'm saying in a
14 documents case.

15 MR. KATYAL: In a documents case.

16 JUSTICE JACKSON: In a documents case --

17 MR. KATYAL: Yes.

18 JUSTICE JACKSON: -- you can have a world
19 in which you're not necessarily quoting from --

20 MR. KATYAL: Agreed.

21 JUSTICE JACKSON: -- pointing to the
22 contents.

23 MR. KATYAL: A hundred percent agree.

24 JUSTICE JACKSON: And yet your rule
25 suggests that that case would have to be dismissed --

1 MR. KATYAL: Not at all.

2 JUSTICE JACKSON: -- because it's not
3 particularized.

4 MR. KATYAL: No. You've just got to --

5 JUSTICE JACKSON: So I'm misunderstanding
6 your rule.

7 MR. KATYAL: Right. You -- you -- you
8 certainly don't need to have the document, quote from
9 the document. You do have to disclose the
10 particulars of what that document says.

11 JUSTICE KAGAN: So can I ask you a -- give
12 you a couple hypotheticals to test what that means?
13 First hypothetical, you have a complaint that alleges
14 that on Monday, the CEO tells a few subordinates: I
15 just read this -- these internal documents and it
16 looks like sales of our principal product are down.
17 And then, on Tuesday, he goes out and tells the
18 public: Sales of our principal product are up.

19 MR. KATYAL: Yeah.

20 JUSTICE KAGAN: Is that particularized
21 enough?

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

25 JUSTICE KAGAN: Okay. So sort of just a

1 statement, you know, I'm not giving you numbers, I'm
2 not giving you a lot of, you know, this document --
3 this -- this product did one thing and this product
4 did one -- another thing. I'm just saying sales were
5 down, sales were up.

6 MR. KATYAL: I don't think you need
7 quantity. I do think you need to show a deviation, a
8 delta, between the public statements and what the CEO
9 knew, and so --

10 JUSTICE KAGAN: Yeah. Sales were down and
11 sales were up.

12 MR. KATYAL: Yeah. So, I mean, down and
13 up, you know, is enough gravity. Yes, that could be
14 -- that could state a claim.

15 JUSTICE KAGAN: Okay. Suppose that the
16 document -- excuse me -- the complaint doesn't have
17 these -- these allegations that he said something
18 about the documents to a bunch of subordinates, but,
19 instead, it's -- it -- it's -- he has made the same
20 public statement, sales are up, and the plaintiffs
21 come up with a lot -- and -- and -- and the
22 plaintiffs come up with a lot of evidence that shows
23 two things.

24 The first is that he constantly reads
25 documents about sales, all right, and the second is

1 they come up with a lot of sort of outside evidence
2 that sales were, in fact, down. So they don't have
3 him saying "I read the document and the document says
4 X," but there's a lot of evidence that really
5 indicates that the document said X because that's the
6 evidence in the world.

7 MR. KATYAL: Yeah. So, again, I think it's
8 what did the CEO know and when did he know it. In
9 your hypothetical, the when question is answered in a
10 way that it's not at all with all the allegations in
11 this case. So we have no idea when the CEO got that
12 information.

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

19 JUSTICE KAGAN: So --

20 MR. KATYAL: -- they tracked end users is
21 -- is --

22 JUSTICE KAGAN: -- as I hear what you're
23 saying, you're not really saying that you have to --
24 I mean, you're -- you know, that you have to have the
25 -- the contents of those documents, as long as what

1 the complaint alleges, you know, and plausibly so, is
2 that he stares at a lot of documents and the evidence
3 suggests that the documents would have said something
4 that's quite different from what he presents to the
5 public.

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

7 JUSTICE KAGAN: And so that's not -- you
8 know, that's good for you and that's bad for you.
9 That's not a bright-line rule, and that's good for
10 you because we don't like bright-line rules in this
11 context and have said so a thousand times.

12 But it's bad for you because, as the -- as
13 -- as what you're saying from the podium in terms of
14 the rule you think we should adopt gets more and more
15 like the sort of thing that we usually ask for, it
16 becomes less and less clear why we took this case,
17 number one, as Justice Sotomayor suggested, and,
18 number two, why you should win it.

19 MR. KATYAL: Right. So our rule has always
20 been the same. We've always said it's not a
21 bright-line rule, that it's a contextual rule,
22 contextualized rule, and one in which you are to ask,
23 you know, have the particulars been disclosed? And
24 what we're basically seeking is a definition of
25 particularity.

1 In this case, that would mean at least
2 answering what that data was that showed a deviation
3 from the CEO's public statements and what he knew.
4 And there's nothing even close. And the complaint at
5 best just eats itself. So you don't need to ask for
6 evidence, as Justice Jackson was saying, or anything
7 else. You just need the complaint itself and -- and
8 then ask was any of the allegations showing enough of
9 a delta, because this is a quantum case. The company
10 is disclosing all over the place they sell to crypto
11 miners. The question is what the extent of that was
12 and was that something that was a deviation. We
13 think this is a --

14 JUSTICE BARRETT: Mr. Katyal, why isn't
15 that error correction, though? I mean, kind of
16 returning to Ms. -- to Justice Sotomayor's point, if
17 we think your bright-line rule fails for the reasons
18 Justice Kagan is suggesting, why isn't your answer
19 that you're giving Justice Kagan simply asking us to
20 go through the complaint and explain why it's not
21 good enough?

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

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

3 MR. KATYAL: No, I -- I think it didn't
4 articulate the rule. So let me just give you one
5 example. Tellabs says the key inquiry is a
6 comparative one to look at all -- whether or not
7 their story is as cogent and compelling as any
8 competing inferences. Did the big tell here, did the
9 Ninth Circuit ever even bother engaging in that? No,
10 because there weren't the details that they provided
11 --

12 JUSTICE GORSUCH: Well, they did say --

13 MR. KATYAL: -- to do so.

14 JUSTICE GORSUCH: -- they did say that --
15 on that, they did say, Mr. Katyal, that it -- it --
16 it -- it beggars belief to think that a CEO would not
17 have been aware --

18 MR. KATYAL: Yes.

19 JUSTICE GORSUCH: -- of the source of such
20 a large portion of the company's income --

21 MR. KATYAL: Yes.

22 JUSTICE GORSUCH: -- especially given the
23 evidence here that this CEO was very interested in
24 sales channel data.

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

1 JUSTICE GORSUCH: And so why -- so why --
2 you may disagree with that comparative conclusion,
3 but why isn't that a comparative conclusion?

4 MR. KATYAL: So, Justice Gorsuch, four
5 things. We absolutely agree with you. Petition
6 Appendix 55a, that is what the court says -- the
7 Ninth Circuit says. They say it's reasonable to
8 infer Huang would review the documents because a CEO
9 who does not know the source of 1.2 billion in
10 revenues is unlikely to exist. There are several
11 things about that.

12 Number one, that never even acknowledges
13 our competing story and our competing inference that
14 the company couldn't track those revenues because
15 that data doesn't exist.

16 JUSTICE GORSUCH: Well, but that -- that --
17 that is acknowledged elsewhere in the opinion and it
18 may be not emphasized enough for your taste and --
19 and, therefore, may be wrong as a matter of error
20 correction. But there is a comparative analysis that
21 was performed.

22 MR. KATYAL: And -- and that comparative
23 analysis depends entirely -- that number, 1.2, comes
24 entirely from that expert, Prysm --

25 JUSTICE GORSUCH: Again --

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

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

4 MR. KATYAL: Comparative analysis,
5 absolutely, but, Justice Gorsuch, it's notable that
6 our brief at pages 45 to 47 describes all of the
7 problems with that report and they don't even bother
8 and the government doesn't even bother trying to
9 defend those assumptions --

10 JUSTICE GORSUCH: Let me ask you a question
11 on --

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

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

15 Do you take the position of Professor
16 Grundfest that an expert opinion can never be used to
17 help establish particularized facts?

18 MR. KATYAL: No, no, no. We say that
19 expert opinions can't be used to substitute for those
20 facts, which is the rule of the Second and Fifth
21 Circuits, and we think the Court should embrace that
22 rule.

23 JUSTICE GORSUCH: So it can be used to
24 supplement them --

25 MR. KATYAL: To supplement.

1 JUSTICE GORSUCH: -- like any other
2 circumstantial evidence?

3 MR. KATYAL: Yeah, exactly. Yeah. It can
4 be -- you know, the facts underlying absolutely can
5 be.

6 JUSTICE GORSUCH: Okay.

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

8 JUSTICE GORSUCH: Thank you.

9 MR. KATYAL: -- point about the comparative
10 inference -- oh.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 I -- I just have one question about an
13 analogy. I -- I guess maybe I -- I don't -- I've
14 never heard the analogy the complaint eats itself.
15 What -- what does that mean?

16 (Laughter.)

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

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

20 MR. KATYAL: I'm trying to basically
21 illustrate to Justice Jackson you don't -- we're
22 not -- our rule is not one about evidence. It's
23 rather read the complaint and ask that Tellabs
24 inquiry: Is it as cogent and compelling as the
25 alternative explanation?

1 Here, the alternative explanation is the
2 company saw crypto price -- the GPU prices were high,
3 and they dealt with it through the introduction of a
4 crypto-specific chip.

5 Prices didn't fall as quickly as they
6 thought. Sometimes that happens in markets where
7 retailers keep prices high. But there's nothing to
8 say that the CEO lied about it.

9 And what I say by "eats its influence" --
10 "eats itself," this is what Justice -- Judge Sanchez
11 said at page 87a in his dissent. He looked at
12 paragraph 121 in the complaint, and paragraph 121
13 shows that watershed moment in May of 2017. When the
14 company introduces that new chip, GPU sales to miners
15 fall dramatically.

16 And so, if you just read the complaint, it
17 doesn't even state a plausible for a 12(b)(6) theory,
18 let alone one that meets the Reform Act, because the
19 Reform Act requires so much more what Mr. Huang knew
20 and when he knew it.

21 CHIEF JUSTICE ROBERTS: Okay. I'm not sure
22 how that's eating itself, but I'll take your word.

23 MR. KATYAL: Destroys itself, whatever word
24 you want to use.

25 CHIEF JUSTICE ROBERTS: Justice Thomas?

1 Justice Alito?

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

8 MR. KATYAL: So, Justice Alito, if the
9 report disclosed the methodology, how it got there,
10 as opposed to relying on "proprietary data" that they
11 never tell us, and was able to surmount all of the
12 problems that -- that -- the big, huge gaps in
13 inference that our brief details, like, for example,
14 it treated every increase in processing power as the
15 result of an NVIDIA new chip, you know, as if there
16 was no delay between sales and adding to the network,
17 if it, you know, didn't treat crypters and -- crypto
18 miners and gamers as different people when they're
19 often the same, if you jumped through all that, yes,
20 we think a report like that could be helpful.

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

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

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

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

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

18 JUSTICE ALITO: Yeah. And you --

19 MR. KATYAL: That's what they're paying
20 them for.

21 JUSTICE ALITO: -- and -- and you claim,
22 and you -- maybe you're right, that the model is
23 flawed, the data is not reliable. But this is a
24 highly technical subject, and I just don't understand
25 how a court is supposed to evaluate that at the

1 pleading stage.

2 You talk about Daubert, but Daubert is not
3 a case that sets out a standard to determine whether
4 a complaint -- whether a -- a claim should be
5 dismissed at that -- at that stage.

6 So what -- what is -- what is a court to do
7 at the pleading stage when it is presented with
8 highly technical information that is beyond the
9 capability of a judge to evaluate at that stage?
10 It's different at that stage than at trial, when
11 there -- there's an opportunity to have a
12 cross-examination --

13 MR. KATYAL: So we --

14 JUSTICE ALITO: -- of the expert, qualify
15 the expert, ask the expert questions. It's a
16 puzzling question to me.

17 MR. KATYAL: Yeah. So, Justice Alito, we
18 think the U.S. Government has it right at page 34.
19 The defendants may "challenge an expert's reliance on
20 conclusory, speculative premises at the pleading
21 stage."

22 Now, in a case like this, in which it's not
23 that type of such difficult thing for a court to
24 analyze by reading the report and seeing all of the
25 gaps and noting, most tellingly, that they can't even

1 bother trying to defend the analysis of the expert,
2 that's an easy case.

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

8 JUSTICE ALITO: Okay. Well, one more
9 question along these lines.

10 You draw a distinction between fact and
11 opinion. But isn't it true that it is a fact that
12 Prysm reached certain conclusions? Is that not a
13 particularized fact?

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

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

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

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

1 Justice Kagan?

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

7 MR. KATYAL: Correct. We're saying you
8 adopt the Second and Fifth Circuits' rule that an
9 expert opinion can't itself substitute for
10 particularized allegations of fact.

11 You treat it just like the government does.
12 Pretend that the statement was made by a plaintiff,
13 was made by a plaintiff --

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

20 MR. KATYAL: Justice Kagan, I think our
21 position has been exactly the same in the cert
22 petition, and it's -- you know, I think the reason
23 you have to do it and reverse the Ninth Circuit is
24 what -- what Judge Sanchez said in dissent, which is,
25 otherwise, you've given every plaintiff a how-to

1 roadmap: Hire an expert like this, say it's really
2 complicated, along the lines of Justice Alito's
3 questions --

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

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

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

12 MR. KATYAL: The one sentence. Yeah, the
13 one sentence.

14 JUSTICE KAGAN: -- the Royal Bank of Canada
15 report --

16 MR. KATYAL: Yeah.

17 JUSTICE KAGAN: -- which concluded that
18 NVIDIA understated its crypto-related revenues by
19 more than a billion dollars.

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

22 JUSTICE KAGAN: The report is not one
23 sentence, is it?

24 MR. KATYAL: The analysis is, yeah.
25 There's nothing there.

1 And as Professor Grundfest says in his
2 brief, it very well may be that the RBC report is
3 relying on the same proprietary data, the Petty data,
4 as the Prysm report. It might be double-counting the
5 very same report. And this is why, Justice Kagan --

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

7 MR. KATYAL: -- particularity matters.

8 JUSTICE KAGAN: But, again, you're --
9 you're -- you're not saying that it's -- we shouldn't
10 -- it -- it doesn't go into the mix because it's an
11 expert report in any way.

12 MR. KATYAL: No.

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

15 MR. KATYAL: Correct.

16 JUSTICE KAGAN: Is the -- is the Prysm
17 report a good report? Is any other report that they
18 can come up with a good report?

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

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

24 The one thing we know --

25 JUSTICE KAGAN: Thank you.

1 MR. KATYAL: -- the Prysm report has lots
2 of -- a series of unfounded assumptions.

3 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

4 JUSTICE GORSUCH: So we've talked about how
5 the case has kind of migrated from the first QP into
6 more fact-intensive questions for us, and I'm
7 wondering whether that's, after your discussion with
8 Justice Kagan, where we are on the second QP, which
9 was whether a plaintiff can satisfy the PSLRA's
10 particularity requirement by relying on an expert
11 report to substitute for particularized allegations
12 of fact.

13 And what I'm hearing today is, well,
14 sometimes an expert report might be able to do that
15 if it itself is particularized. And this one is not.
16 It's not a categorical rule that expert reports are
17 off the table.

18 MR. KATYAL: It's -- it's the same rule,
19 Justice Gorsuch, as in our cert petition, which is
20 that in expert opinions, facts, the underlying facts,
21 can help state a -- can -- can state a claim, but the
22 very credentials and the fact that an expert offers
23 an opinion cannot.

24 The Ninth Circuit at pages 20 to 23 relied
25 on the expert's credentials to jump past all of the

1 problematic assumptions.

2 JUSTICE GORSUCH: I understand --

3 MR. KATYAL: And so --

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

9 MR. KATYAL: No, I think it's the same
10 basic point, which is, you know, expert opinions
11 can't substitute for those underlying facts.

12 And we think it's important the Court reach
13 that for the reason Judge Sanchez said, because,
14 otherwise, this decision is a how-to map: Hire an
15 expert, say that expert's really credentialed, say
16 it's a really complicated issue, and jump past
17 Congress's --

18 JUSTICE GORSUCH: No, no. But, if -- if we
19 had a really robust report here that you really
20 couldn't take issue with that concluded that there
21 were a billion dollars in understated revenues,
22 you're telling us that that report would be okay, and
23 that would be useful for understanding whether --

24 MR. KATYAL: Right. But we're not
25 saying -- we're not saying that you can --

1 JUSTICE GORSUCH: -- the PSLRA -- the PSLRA
2 is met, right?

3 MR. KATYAL: It's -- it's not the details
4 of the report, the fact that it's from an expert.
5 It's the details. And as long as the details --

6 JUSTICE GORSUCH: Yeah, and if the details
7 -- if it all added up.

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

9 JUSTICE GORSUCH: If two plus two equaled
10 four all the way through the report and -- and -- and
11 it was -- it was rigorous and robust and disclosed,
12 then we would have a claim?

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

15 JUSTICE GORSUCH: Yeah.

16 MR. KATYAL: -- for example, for the CEO to
17 see.

18 JUSTICE GORSUCH: Right.

19 MR. KATYAL: So, again, that particularity
20 --

21 JUSTICE GORSUCH: Yeah.

22 MR. KATYAL: -- and this Court insisting on
23 the details --

24 JUSTICE GORSUCH: Yeah.

25 MR. KATYAL: -- and what particularity is

1 is so important.

2 JUSTICE GORSUCH: Thank you.

3 MR. KATYAL: That's the legal rule we're
4 asking for.

5 JUSTICE GORSUCH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

7 JUSTICE KAVANAUGH: So how would you
8 summarize then the analytical or legal mistake that
9 the Ninth Circuit committed that you think would
10 create problems going forward for PSLRA litigation?

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

17 And with respect to expert opinions, the
18 Ninth Circuit allowed an expert's opinion to
19 substitute for particularized allegations of fact.
20 And the legal rule should be an expert -- an expert's
21 facts can help state a claim, but the fact that
22 something is said by an expert by itself isn't
23 enough. That's what Judge Sanchez isolated in his
24 dissent. That is the two arguments in the cert
25 petition and what all the amici say you should grant

1 on. They say this is a recurring fact pattern.
2 People across the country and particularly now in the
3 Ninth Circuit are using this decision as a roadmap to
4 get around the PLSRA's requirements.

5 And every time a stock price -- a stock
6 drops, you can make the same kinds of allegations,
7 the CEO must have reviewed these reports, hire an
8 expert to say it's a massive dollar figure. That can
9 happen in case after case. Judge Friendly's warning,
10 I think, is prophetic.

11 JUSTICE KAVANAUGH: And you think the Ninth
12 Circuit's different from other circuits if this
13 opinion were to stand on how those kinds of cases are
14 treated?

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

23 Look, it sounds -- I understand there's a
24 whole bunch of facts, just like Twombly, pages and
25 pages of discussion about ILECs and this and that.

1 But, at the end of the day, this Court getting into
2 those details and setting a rule for the entire
3 country and giving a concrete example in that case
4 was really important and gave guidance to litigants
5 all across the country.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Barrett?
8 Justice Jackson?

9 JUSTICE JACKSON: So, Mr. Katyal, I -- I am
10 worried about what I see as the delta between what
11 you're asking for here today and what you asked for
12 in your petition and what you argued in your brief,
13 and I'm trying to reconcile the two.

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

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

22 JUSTICE JACKSON: Right, right, right. So
23 -- okay. And then I think, in order to reconcile
24 that with what you have already said in your
25 briefing, you would have to say and the only way to

1 do that in any case of that nature is to allege the
2 contents of the documents, because I don't know that
3 you can get away from having said over and over
4 again, including in your question presented, that the
5 allegation of the contents of the documents is
6 important.

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

9 JUSTICE JACKSON: So --

10 MR. KATYAL: And that includes, you know,
11 what did -- when I say what did the CEO know --

12 JUSTICE JACKSON: Right.

13 MR. KATYAL: -- the way to answer that is
14 what are the contents of that. You don't need to
15 have the document itself.

16 JUSTICE JACKSON: No, I understand that.
17 But I -- you don't need to append the document to
18 your complaint.

19 MR. KATYAL: Correct.

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

22 MR. KATYAL: Correct.

23 JUSTICE JACKSON: -- your answer to Justice
24 Kagan's hypotheticals, I think, would come out
25 differently because she did not in her hypotheticals

1 talk about allegations that spoke of the content of
2 the documents.

3 MR. KATYAL: Oh, yes, she did. So -- so,
4 remember, her hypothetical as I understood it was a
5 CEO gets documents saying our sales are really low
6 and then goes out publicly and says our sales are
7 very high.

8 JUSTICE JACKSON: That was hypo one.

9 MR. KATYAL: That shows the delta.

10 JUSTICE JACKSON: And then she -- then she
11 -- then she -- didn't she migrate from that to say --

12 MR. KATYAL: And it still had --

13 JUSTICE JACKSON: -- that the employees say
14 these kinds of documents are circulated, we know the
15 CEO looks at these kinds of documents, and his
16 statements were different?

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

20 JUSTICE JACKSON: So they -- so you have to
21 have the contents of the documents?

22 MR. KATYAL: You have to have the contents
23 or something like the Stevelman case, in which you
24 can infer by the CEO's conduct, like if they go and
25 sell their stock personally or something like that,

1 we know there's a very strong inference as to what
2 the documents say.

3 JUSTICE JACKSON: I know. But your
4 argument doesn't have the "or" in it. Your argument
5 says: "Where, as here" -- and I'm reading from the
6 summary of argument -- "a plaintiff seeks to
7 establish scienter by relying on allegations that
8 internal company documents contradicted public
9 statements, the plaintiff must allege the contents of
10 those documents."

11 MR. KATYAL: Correct.

12 JUSTICE JACKSON: "Otherwise, the
13 allegations are insufficiently particularized because
14 they do not describe what the documents said."

15 MR. KATYAL: Yes.

16 JUSTICE JACKSON: So I was led to believe
17 from that kind of language that really, your rule is
18 you have to allege --

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

20 JUSTICE JACKSON: -- what the documents
21 say.

22 MR. KATYAL: Yeah. We think that's
23 basically right because that's based on what those
24 documents are. So, if the allegation is, you know,
25 these documents say X, then you've got to have

1 details --

2 JUSTICE JACKSON: And if we disagree with
3 that, you lose, right? Because that's the rule
4 you're asking for.

5 MR. KATYAL: No, I don't think we lose. I
6 mean, it depends on exactly how -- what you
7 disagreed, but if you said, for example, the timing
8 really matters, as it does here, you know, that when
9 question, they lose every day of the week because
10 they can't show any allegations during the class
11 period.

12 JUSTICE JACKSON: Thank you.

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

15 ORAL ARGUMENT OF DEEPAK GUPTA

16 ON BEHALF OF THE RESPONDENTS

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

19 The PSLRA demands particularity. Everyone
20 agrees you can't circumvent the statute with
21 conclusory allegations or unsubstantiated expert
22 opinions. But that's not what happened here.

23 On falsity, the court of appeals' holding
24 expressly rested on a combination of facts showing
25 that a substantial part of gaming revenues came from

1 crypto. That mix included former employees' detailed
2 accounts of internal data and meetings, the very
3 similar analysis of the Royal Bank of Canada and
4 Prysm, and Huang's eventual acknowledgment of the
5 crypto hangover, which sent the stock tumbling
6 28 percent.

7 On scianter too, the court of appeals
8 relied on a mix of facts. Executives with direct
9 knowledge of Huang's knowledge attested that the
10 internal data showed 60 to 70 percent of gaming
11 revenues came from crypto, that other internal data
12 corroborated this, and that Huang personally reviewed
13 that data every Sunday.

14 The Court also relied on Huang's public
15 representations about his own knowledge. When
16 analysts repeatedly asked him if crypto was driving
17 gaming sales, he called this wrong, claiming that
18 crypto's effect was "small but not zero." He didn't
19 express uncertainty. He said: We know the market's
20 every move, we are masters at managing our own
21 channel.

22 Under Tellabs and Matrixx, all of these
23 facts must be assessed collectively and in context,
24 not in isolation, and that is exactly what the court
25 below did.

1 Now the Petitioners haven't identified any
2 legal error in that decision. And while the cert
3 petition and the blue brief initially seemed to
4 propose new categorical legal rules, I think the
5 questions from Justice Kagan, Justice Sotomayor,
6 Justice Gorsuch, and Justice Barrett show that they
7 have retreated to nothing more than a fact-bound
8 application of agreed-upon legal principles.

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

13 I welcome the Court's questions.

14 JUSTICE THOMAS: I understand your
15 argument, but what does -- what is your definition of
16 particularity and how do you think it plays a role in
17 your complaint?

18 MR. GUPTA: I think particular -- I think,
19 actually, everyone agrees on the definition of
20 particularity.

21 JUSTICE THOMAS: Well -- well, what is it?

22 MR. GUPTA: Particularity requires detail.
23 And it's the -- it's the definition -- it's the same
24 concept of particularity that's come down from the
25 common law, common formulation in the lower courts,

1 is you've got to have the first paragraph of a
2 newspaper story, the who, what, why, where, when, but
3 we would --

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

6 MR. GUPTA: So, in -- in our complaint, I
7 think it's shot through with detail with respect to
8 falsity, as I just recited, about all of the
9 particular internal information within the company,
10 the market's reaction, why -- why there is good
11 reason to believe that -- that these statements were
12 false.

13 And with respect to scienter, you can
14 think, I think, of the particularized allegations as
15 the input that goes into the question that the
16 statute asks, which is whether there's a strong
17 inference of scienter. And we agree with the -- the
18 Solicitor General and I think Petitioners agree with
19 this, that ultimately, where it cashes out is does
20 the court have enough particularized allegations in
21 order to assess whether the inference of scienter is
22 at least as compelling as any alternative inference.

23 JUSTICE THOMAS: But you don't think you
24 have to go as far as an old fact pleading regime in
25 order to sort of meet this definition of

1 particularity?

2 MR. GUPTA: I think that's right. I think
3 that the Federal Rules of Civil Procedure still
4 apply. I think Tellabs and Matrixx make that clear.

5 This isn't a departure from the Federal
6 Rules, but it is a demanding standard that requires
7 plaintiffs to come forward with detail, detail both
8 with respect to falsity, especially when they're
9 alleging upon information and belief, and then detail
10 that, as I said, allows the court to -- to -- to
11 determine whether or not there's a strong inference
12 of scienter.

13 CHIEF JUSTICE ROBERTS: You say the
14 complaint has to have enough particular allegations.
15 As I was asking Mr. Katyal, I think we shouldn't lose
16 sight of the fact that the PSLRA had very particular
17 objectives in mind.

18 And it seems to me if -- if you're --
19 you're using words like "enough," it's not clear to
20 me that that's going to allow the statute to -- to be
21 very effective.

22 So how am I supposed to handle that
23 conundrum? This -- this statute, as I said, wanted
24 to accomplish some very specific objectives, and if
25 enough is enough to get over it, that doesn't -- it

1 seems to me that might -- that the statute might have
2 had more in mind.

3 MR. GUPTA: Well, I think one way to look
4 at what the statute had in mind is that it drew these
5 -- this phrase "strong inference of scienter" from a
6 set of cases in the Second Circuit that represented a
7 very demanding standard and that said it's not enough
8 to do what you could have done under Rule 9(b). Rule
9 9(b), of course, said that you could -- you could
10 generally allege the state of mind. And the -- the
11 Second Circuit's standard was the most demanding
12 standard at that time. Congress used the same words.
13 And so that's one guide to what -- what Congress had
14 in mind.

15 Congress was not, however, I think, saying
16 that circumstantial proof goes out the window. All
17 of those cases from the Second Circuit made clear
18 that that kind of proof is -- is appropriate. And
19 Tellabs is such a case.

20 Tellabs is a case, I think, that it's sort
21 of a much closer case than this one, much -- sort of
22 on the opposite end of the spectrum, where the -- the
23 defendants were actually able to accurately say there
24 that the plaintiffs hadn't alleged the contents of --
25 of the sales reports of the internal data, unlike

1 what we have here.

2 And if you look at the Tellabs decision on
3 remand, I think that's a good example of how you
4 apply these demanding pleading standards to a
5 circumstance like that. And there, like in this
6 case, you were talking about demand for the company's
7 flagship product. The CEO was reviewing sales data
8 constantly, even though it wasn't alleged with the
9 kind of particularity it's alleged here, and -- and
10 based on the total mix of allegations, it was enough
11 to support a strong inference of scienter.

12 And, as I said --

13 CHIEF JUSTICE ROBERTS: Thank --

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

15 CHIEF JUSTICE ROBERTS: No, go ahead.

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

21 And I think I can discern three, and I
22 think those competing inferences are, first, NVIDIA
23 wasn't tracking crypto sales; second, NVIDIA had
24 inaccurate information or miscalculated; and, third,
25 Huang might not have known what NVIDIA knew.

1 And with respect to the first one, we know
2 that the complaint is shot through with detail about
3 how NVIDIA was tracking crypto sales. They were
4 doing it through multiple internal databases.
5 There's, you know, verbatim information from internal
6 presentations that showed that they were doing that.
7 I think that inference is hard to credit.

8 CHIEF JUSTICE ROBERTS: Thank you.

9 JUSTICE KAGAN: Could I hear about the
10 other two?

11 MR. GUPTA: Sure. The second is I think --
12 and I -- I heard Mr. Katyal say this -- that maybe
13 NVIDIA was trying to track crypto sales, but they had
14 inaccurate information or miscalculated. But we have
15 specific data from multiple reliable sources within
16 the company showing a consistent pattern.

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

25 We had a witness in Russia who reported

1 that over half of the crypto sales in Russia went to
2 crypto miners and similar reports from other markets,
3 like India. And these were not rough estimates.
4 They were specific figures for NVIDIA's own tracking
5 systems across multiple markets, which is another way
6 of saying that if you adopted the rule that I urge
7 you not to adopt, we would satisfy it.

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

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

23 JUSTICE KAGAN: Thank you.

24 MR. GUPTA: -- contradicted the data.

25 JUSTICE GORSUCH: May I -- may I follow up

1 on that, Mr. Gupta?

2 MR. GUPTA: Yes.

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

6 MR. GUPTA: Sure. I imagined you might
7 have.

8 JUSTICE GORSUCH: The first is your friend
9 on the other side, Mr. Katyal, would say that when it
10 comes to the falsity that you're relying
11 predominantly on two former employees, 1 and 2, and
12 5's kind of the out of the picture after the Ninth
13 Circuit's decision, for example. And 1 is five
14 layers below the CEO and in China. And Number 2 left
15 the company right at the beginning of the class
16 period and, therefore, can't inform what happened
17 thereafter.

18 Would you give me your responses to those?

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

20 I mean, first of all, I think the fact that
21 one of them left doesn't change the fact that his
22 testimony, his -- his statements tell us in granular
23 detail how -- what Huang's practices were for
24 tracking this information and specifically crypto
25 sales data. So the only way in which it would matter

1 that he left would be if you were to draw the
2 inference that suddenly at the moment when the market
3 is most focused on crypto demand and he's being asked
4 about it at every earnings call and in every
5 interview, that he somehow changed his practice and
6 blinded himself to that information.

7 JUSTICE GORSUCH: Got that.

8 MR. GUPTA: So I don't think that really
9 helps.

10 JUSTICE GORSUCH: How about 1?

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

15 JUSTICE GORSUCH: The five -- five layers
16 below the CEO, they emphasized.

17 MR. GUPTA: Well, they say that. And, you
18 know, that obscures the fact that he was the person
19 in China who had the most knowledge about this issue.
20 He was the person interfacing with the crypto mining
21 enterprises.

22 And we know this because, when headquarters
23 was alarmed about the exploding crypto demand, FE 1
24 is the person they tasked with looking at all of the
25 data and making this presentation that went to

1 headquarters that showed --

2 JUSTICE GORSUCH: Well, he's the guy who --
3 who knows the data, knows what goes into the sales
4 reports that he sends up the chain. And then you've
5 got the other guy saying and the CEO looked at these
6 sales reports with -- with great interest routinely.

7 MR. GUPTA: Yes.

8 JUSTICE GORSUCH: At least up until the
9 time I left.

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

11 JUSTICE GORSUCH: Okay. All right. Okay.
12 I got it.

13 On -- on the -- on the second question, on
14 -- on -- on the expert report, another fact-bound
15 error correction. Prysm relied on, as -- as we've
16 heard, a proprietary model that was undisclosed. Is
17 that a problem? Why -- why isn't that a problem?

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

25 JUSTICE GORSUCH: Pretty expensive math I

1 have to guess, but --

2 (Laughter.)

3 MR. GUPTA: Well, you know, it's the same
4 math that the Royal Bank of Canada did. And you
5 heard from my friend that there's nothing about the
6 Royal Bank of Canada's calculations. So I just do
7 want to point out to the Court that the Royal Bank of
8 Canada's report is in the record. It's at Docket
9 124-31. And so you can see that the math there is
10 the same.

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

23 JUSTICE GORSUCH: Right, right.

24 MR. GUPTA: But they also had two other
25 measures of market share data, and one was based on

1 the internal document that FE 1 prepared, that slide.

2 JUSTICE GORSUCH: That 69 percent?

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

4 JUSTICE KAVANAUGH: If you had to -- keep
5 going, sorry.

6 JUSTICE GORSUCH: If you want to finish
7 that up, that might turn out to be useful for us, so
8 go ahead.

9 MR. GUPTA: Well, I mean, I think that was
10 the main --

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

12 MR. GUPTA: -- thing I wanted to say about
13 that.

14 JUSTICE GORSUCH: Okay. Thank you. Thank
15 you.

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

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

1 They were going above and beyond because
2 the PSLRA is demanding and this was sort of belt-and-
3 suspenders, but if you take the expert report out, it
4 doesn't change the picture of -- of falsity in any
5 dramatic way. It's merely confirmatory.

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

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

19 So what is wrong with that?

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

1 presentation, and the data there actually falsifies
2 Mr. Huang's public statements.

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

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

22 So this -- this slide is actually -- this
23 is the thing that they pointed to to help them, but
24 it actually shows in fairly granular detail much more
25 than the PSLRA demands because we don't have to prove

1 our case in a summary judgment-like fashion, but it
2 shows that the statements were false.

3 JUSTICE ALITO: Well, Judge --

4 JUSTICE JACKSON: That's a --

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

8 MR. GUPTA: Right.

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

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

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

22 The problem was that it equated crypto
23 demand with the line item regarding the SKU, which
24 led analysts to be misled consistently to think that
25 there wasn't crypto demand that was driving the

1 GeForce sales when, in fact, it was.

2 JUSTICE JACKSON: So I'm focused a little
3 bit on the demands of particularity at this stage.
4 You -- you -- in part of your response to Justice
5 Alito right there, you said we don't have to prove
6 our case in a summary judgment-like fashion.

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

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

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

1 JUSTICE JACKSON: And I appreciate that,
2 but I -- I guess I'm just trying to understand what
3 the standard is. What -- so, if you don't have to
4 demonstrate through the presentation of evidence that
5 your inferences are correct or that you have enough
6 evidence to show a jury that your inferences are
7 correct, then what is the work of particularity?

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

13 MR. GUPTA: Right.

14 JUSTICE JACKSON: -- in some way.

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

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 If I could just pick up on that point. In
2 requiring particularity, the PSLRA was at least
3 raising the bar when you talk about, you know, you
4 have to have some evidence of this or that. Congress
5 went out and saw a real problem there and wanted to
6 do something about it. So the idea that, oh, you're
7 going to have varying levels of particularity with
8 respect to the evidence is kind of a hard standard to
9 apply.

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

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

23 And it's not easy. The standard is not
24 easy to meet. This is -- my friend is right when he
25 said that this is a -- a standard that is different

1 from the -- the typical standard, and that's why you
2 get complaints that take up as much of the Joint
3 Appendix as this complaint does.

4 CHIEF JUSTICE ROBERTS: Well, I'm not sure
5 what they were looking for is verbosity. I mean --

6 (Laughter.)

7 MR. GUPTA: Fair. Fair.

8 CHIEF JUSTICE ROBERTS: -- I hope not
9 anyway.

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

13 CHIEF JUSTICE ROBERTS: Right.

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

20 CHIEF JUSTICE ROBERTS: Thank -- thank you.

21 Justice Thomas, anything further?

22 Justice Alito?

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

1 it's relevant?

2 MR. GUPTA: Yes. I think this Court has
3 said that it's -- it's relevant but not necessary.
4 And --

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

9 MR. GUPTA: Mm-hmm.

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

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

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

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

1 starting to figure that out.

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

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

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

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

23 JUSTICE ALITO: This --

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

25 JUSTICE ALITO: -- gigantic company with

1 highly sophisticated officers is engaging in a Ponzi
2 scheme? All right. Maybe.

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

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

11 JUSTICE ALITO: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

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

23 MR. GUPTA: Correct.

24 JUSTICE SOTOMAYOR: And to defend against
25 it, all they have to do is show the sales records

1 that all of these employees say exist, correct?

2 MR. GUPTA: Correct.

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

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

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

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

21 JUSTICE SOTOMAYOR: But no admission of
22 liability?

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

1 JUSTICE SOTOMAYOR: And just to be clear,
2 you don't have whatever records the SEC got? If they
3 got the sales records or not, you don't know?

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

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

8 MR. GUPTA: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

1 sending the stock market into the stratosphere, we
2 would never have known about this.

3 MR. GUPTA: Yes.

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

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

9 (Laughter.)

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

15 CHIEF JUSTICE ROBERTS: I'm sorry, Justice
16 Gorsuch?

17 Justice Kavanaugh?

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

21 MR. GUPTA: Not as much as it might seem
22 because -- well, I don't want the Court to get the
23 impression that this enormous delta of -- of sales is
24 what's at issue. What would be at issue would be we
25 would have to show lost causation and materiality --

1 JUSTICE KAVANAUGH: What are you seeking?
2 Like, if you ran the table, what -- what are you
3 seeking roughly?

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

6 JUSTICE KAVANAUGH: Rough?

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

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

17 MR. GUPTA: I don't know the answer to
18 that.

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

23 MR. GUPTA: Right.

24 JUSTICE KAVANAUGH: -- give you a chance to
25 respond. The idea is of the effects on the American

1 economy if businesses -- anytime a stock price falls,
2 you can get an expert and you can get past a motion
3 to dismiss, and that has a -- as you read in the
4 amici, you know all this, but has a significant
5 effect on the American economy and that while it's
6 painful for us to get into the facts and have to
7 actually, you know, dig into the facts, the Ninth
8 Circuit opinion, so the amici say, is a blueprint for
9 getting past the motion to dismiss in a way that's
10 contrary to what Congress thought and will have
11 negative effects on the American economy and that
12 it's our role to make sure that we have policed the
13 lines Congress drew so that the economy is not
14 harmed. So --

15 MR. GUPTA: So there are a few questions in
16 there. I think, first of all, with respect to your
17 role, I think the Court's role is -- you know,
18 Congress's role is to balance these competing event
19 -- objectives about needing meritorious suits to --
20 to discipline capital markets and ensure that there
21 aren't frivolous suits that are a drain on the
22 economy. Congress struck that balance with this
23 statute. They wanted meritorious cases to go forward
24 like this one.

25 They did not want the kind of thing that

1 Judge Friendly was describing -- I think my friend is
2 right about this -- where you had what was called
3 fraud by hindsight, where, you know, a stock goes
4 down, the day later, you know, plaintiffs' lawyers
5 who are not representing institutional investors file
6 a lawsuit without any investigation.

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

18 JUSTICE KAVANAUGH: If Judge Sanchez's
19 opinion had been the majority opinion, would you have
20 sought cert?

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

24 JUSTICE KAVANAUGH: Really?

25 (Laughter.)

1 MR. GUPTA: -- about settled standards.

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

4 CHIEF JUSTICE ROBERTS: Justice Barrett?
5 Justice Jackson?

6 Thank you, counsel.

7 MR. GUPTA: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. Sinzduk.

9 ORAL ARGUMENT OF COLLEEN R. SINZDUK
10 FOR THE UNITED STATES, AS AMICUS CURIAE,
11 SUPPORTING THE RESPONDENTS

12 MS. SINZDUK: Mr. Chief Justice, and may it
13 please the Court:

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

20 So, first, as to scienter, the PSLRA
21 requires a plaintiff to plead enough particularized
22 facts to create a strong inference of scienter.
23 Particularity means detail. But the particularity
24 requirement doesn't say anything about what kind of
25 details the plaintiff has to plead. So long as she

1 pleads enough details to make the inference of
2 scienter at least as likely as any competing innocent
3 inference, then she has cleared the PSLRA's bar. And
4 we think that happened here.

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

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

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Do you think particularity
20 is used in the same way it's used in Rule 9(b) of the
21 Federal Rules of Civil Procedure?

22 MS. SINZDAK: Yes. I think it looks like
23 it was taken from that, Congress was taking it
24 through -- from that. And I -- I think that's a good
25 point perhaps to what the Chief Justice was asking

1 about before, what did the PSLRA do.

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

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

9 MS. SINZDAK: I -- I think it definitely
10 was intended to keep out frivolous lawsuits. I think
11 there was a -- a competing intent to -- to ensure
12 that -- that meritorious lawsuits would go through.

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

16 MS. SINZDAK: In -- in -- I think that was
17 the primary purpose, but I may not be understanding
18 your question.

19 CHIEF JUSTICE ROBERTS: Well, you said it
20 was designed to ensure adequate allegation of
21 scienter, that it imposed a -- a heightened
22 particularity standard. All those other things that
23 you listed.

24 MS. SINZDAK: Sure. I think I was thinking
25 of those as means to the end of keeping out frivolous

1 litigation and -- and of raising the pleading
2 standard, but -- but, yes, I certainly think that
3 those were the specific things that Congress did
4 within the PSLRA.

5 CHIEF JUSTICE ROBERTS: Okay.

6 JUSTICE BARRETT: Ms. Sinzdak, so let's say
7 that we don't adopt for scienter this -- this
8 bright-line rule. Mr. Katyal suggested that for the
9 comparative standard at least as cogent and
10 compelling as the alternative, that the Ninth
11 Circuit, while parroting the rule, didn't adequately
12 apply it.

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

20 MS. SINZDAK: Not really, except that we --
21 we do think that the Ninth Circuit correctly applied
22 the standard here. And what we wouldn't want is
23 there to be confusion because, if the Court
24 reiterates the standard but then remands, there might
25 be some suggestion that the Ninth Circuit did

1 something wrong, and courts might be a little bit
2 confused about what it is that they did wrong.

3 And, again, we think that if you look at
4 the Ninth Circuit's decision, it really was
5 fulfilling this requirement. And I think, you know,
6 42a is the place where -- where the -- the -- the --
7 the Ninth Circuit sort of talks about all of the
8 different things that it relied on to find scienter
9 here, and I do think it articulates the Tellabs
10 standard --

11 JUSTICE BARRETT: Thank you.

12 MS. SINZDAK: -- and applies it.

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

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

21 So the SEC made that finding, but NVIDIA
22 did not admit that finding. So this isn't in the
23 nature of an acknowledgment. I think, you know, it's
24 one fact that might make it slightly more plausible.

25 JUSTICE ALITO: Well, would it be

1 admissible if the case were tried?

2 MS. SINZDAK: I -- I -- it would not be
3 admissible in terms of any -- it's not a -- it's not
4 the -- pardon me -- it's not acknowledgment as to
5 that issue.

6 JUSTICE ALITO: I just wondered why you
7 mentioned it.

8 MS. SINZDAK: I --

9 JUSTICE ALITO: Just -- just to dirty up
10 NVIDIA?

11 MS. SINZDAK: Oh, in the -- in the -- in
12 our brief?

13 JUSTICE ALITO: In your brief, yeah.

14 MS. SINZDAK: I think primarily because the
15 parties had mentioned it, and we just wanted to be
16 honest about it. But I think you'll note we
17 mentioned it in our statement.

18 JUSTICE ALITO: Thank you.

19 MS. SINZDAK: We didn't talk about it in
20 the argument.

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

25 MS. SINZDAK: The only publicly available

1 information about the settlement is what we have --
2 what was attached to the red brief and what -- it's
3 in Westlaw. It's cited at page 7 of our brief. What
4 the SEC had in terms of documents is -- is -- is not
5 publicly available.

6 I'm not sure whether Mr. Katyal was -- was
7 talking about what his clients gave them. I -- I
8 just -- I don't know that. It's not publicly
9 available.

10 JUSTICE SOTOMAYOR: But whatever he said
11 the documents showed is not anything that you're
12 prepared to say they showed?

13 MS. SINZDAK: No. What I --

14 JUSTICE SOTOMAYOR: Other than that -- what
15 you read?

16 MS. SINZDAK: Yes, excuse me. I -- I -- I
17 completely agree. So what the SEC's findings are are
18 embodied in this settlement agreement that --

19 JUSTICE SOTOMAYOR: You answered the Chief
20 by saying there was one purpose, frivolous lawsuits.
21 I thought the -- there was a second purpose, which
22 was to ensure that defendants knew what they were
23 defending against.

24 MS. SINZDAK: That -- that's right. It is
25 also -- so there's -- there's -- I think the -- the

1 -- some of the amicus briefs on Respondents' side
2 point out that, in general, particularity
3 requirements are to assist with notice. And so I
4 think that's there.

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

10 JUSTICE SOTOMAYOR: Counsel, you've end --
11 you've ended answering me, right?

12 MS. SINZDAK: Oh, sure.

13 JUSTICE SOTOMAYOR: Yeah.

14 JUSTICE KAVANAUGH: If the dissent had been
15 the majority, what problems would have been created
16 going forward from your perspective?

17 MS. SINZDAK: If the dissent had been the
18 majority, I -- I think, honestly, what we have is a
19 -- is a disagreement on the facts that I -- I -- I
20 think --

21 JUSTICE KAVANAUGH: So that goes to your
22 answer to Justice Barrett's question it sounds like
23 then?

24 MS. SINZDAK: Yes. I mean, I -- I -- I
25 think that it would have a profound effect on this

1 case, but I'm not sure that it would set bad law
2 going forward.

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

17 Justice Kavanaugh, I think you asked about
18 the Ninth Circuit applying different rules, and I
19 really don't think that they are. And the best
20 evidence perhaps of this is that Anderson, the case
21 that Petitioners cite and rely on as doing it right,
22 is repeatedly relying on Ninth Circuit precedent.

23 And I'd also note that the district court
24 decision, which, again, Petitioners are relying on,
25 that also is repeatedly relying on Ninth Circuit

1 decisions. So I don't think this is a case where the
2 court of appeals has gone rogue and is doing anything
3 different than the other -- the other courts of
4 appeals here.

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

16 So unless there are further questions?

17 CHIEF JUSTICE ROBERTS: Anything further?

18 Thank you, counsel.

19 Rebuttal, Mr. Katyal.

20 REBUTTAL ARGUMENT OF NEAL K. KATYAL

21 ON BEHALF OF THE PETITIONERS

22 MR. KATYAL: Thank you, Your Honor. Five
23 points.

24 First, Mr. Gupta said that particularity
25 requires detail. We quite agree. Yet the Ninth

1 Circuit said that this complaint had enough detail.
2 This is why you need to reverse. It's dangerous to
3 say this amount of detail is enough for a complaint.
4 That's not a change in our position. They're the
5 ones -- I'll explain that in a moment -- but they're
6 the ones changing their position. They are running
7 away from the Ninth Circuit.

8 The Ninth Circuit's decision said that the
9 CEO "would have reflected their expert opinion" and
10 does not engage in any sort of comparative analysis.
11 42a is not a comparative analysis. They -- the Ninth
12 Circuit never even bothered answering our competing
13 hypothesis, which was the pricing explanation. You
14 have to reverse that. And as the amici say,
15 otherwise, you're letting circuit courts let
16 decisions -- let litigants provide these cases and
17 state a claim without a comparative inquiry.

18 And you certainly have to reject their new
19 idea that these employees are enough because they
20 don't indicate when the CEO knew something. Was it
21 after or before that watershed SKU event? Nothing
22 said that they -- they do say that the CEO actually
23 saw the data at the time. The best they have is a
24 video that was taken from 2012, well before the class
25 period.

1 And Mr. -- and Judge Sanchez explains at
2 62a why that slide is so devastating. And he also
3 explains at 82a why not a single employee ever said
4 the CEO saw anything damaging during the class
5 period.

6 You can't let this stand for the reasons
7 the amici say. Congress in the Reform Act, as the
8 Chief Justice indicated, wanted to stop lawsuits like
9 this, lawsuits that allow fraud by -- fraud by
10 hindsight.

11 Second, Justice Jackson, our rule is that
12 if they are relying on documents, they then need to
13 allege the contents. If they aren't relying on those
14 documents, they don't have to. And I understood
15 Justice Kagan's second hypothetical to be relying not
16 on internal documents and, if so, they don't need to
17 provide the details.

18 Now our rule has always been the same.
19 It's the rule found, for example, at page 31 of our
20 brief: When a plaintiff omits the most critical
21 aspect of allegations about a company's internal
22 documents, the contents of those documents that
23 support the plaintiff's claim, the allegation cannot
24 be particularized, citing the Fifth Circuit case.
25 The Solicitor General's rule -- rule at page 18 of

1 their brief is very similar. We think both of those
2 would require reversal.

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

14 Each of those is just a percentage chance,
15 and taken together, they don't come close to being
16 the kind of scienter inference that is at least as
17 compel -- compelling as the competing alternative.
18 Judge Sanchez on this point is devastating, as
19 Justice Alito was picking up on. Why would it make
20 any sense for a CEO to act this way?

21 In the context of the Reform Act, maybe
22 doesn't cut it. And that's especially true here when
23 their whole theory about motive makes no sense
24 whatsoever. Mr. Huang is not running a Ponzi scheme.
25 We're talking about one of the most respected CEOs of

1 a dramatically important company. And there is
2 nothing that ever answers why he would act this way
3 when he is saying time and again the pricing data
4 shows that they can't track end users.

5 Finally, this gets a little abstract. Let
6 me make it concrete. You heard today and the red
7 brief at page 13 says Mr. Huang "continuously tracked
8 the inventory in the channel." That statement
9 illustrates why details matter. Consider the who.
10 Mr. Huang never said that statement was made by
11 someone else. Consider the when. It was made in
12 2007, before cryptocurrency was even invented.

13 This is a good illustration of why details
14 matter, why what the district court did here by going
15 allegation by allegation and interrogating it to make
16 sure that the details support the story are there.
17 That's what allows a court to get past the competing
18 inference that Tellabs requires. That's precisely
19 what the Ninth Circuit had missing every day -- on
20 every page of its analysis.

21 Never did they deal with the competing
22 explanation that the company offered that prices were
23 remaining high because of independent actions by
24 retailers. Had they done that, if the complaint had
25 provided that level of detail, that would be one

1 thing. This complaint doesn't. And that's why it's
2 so dangerous, as the amici say, to let a case like
3 this lay and pick -- and allow litigants in the
4 future to pick up and get past state a claim
5 barriers.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 11:32 a.m., the case was
9 submitted.)

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